



REPUBLIC OF KENYA



**Mahican Investments Limited v Liliana (Civil Suit 88 of 2010)  
[2022] KEELC 3149 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3149 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL SUIT 88 OF 2010  
MAO ODENY, J  
JUNE 10, 2022**

**BETWEEN**

**MAHICAN INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**NEGRONI LILIANA ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 31<sup>st</sup> October 2012, the plaintiff herein sued the defendant seeking the following orders:
  - a. Possession of the suit premises
  - b. Damages for breach of covenant
  - c. Euro 7,870.04
  - d. Interest on (c) above until possession is delivered to the plaintiff
  - e. Costs incidental to the suit
  - f. Any other relief that this honourable court may deem fit

**Plaintiff's Case**

2. PW1- Gancafflo Ferrarir a businessman living in Malindi adopted his witness statement dated 4<sup>th</sup> October 2019 and stated that he has sued the Defendant who had a house at Karibuni Villas.
3. PW1 further stated that by a deed the Plaintiff let the Defendant a house and premises known as Chalet No. 31 for a term of nine hundred and ninety years (999) from the 10<sup>th</sup> September, 1997 at a value of Kshs 200,000/-. That the Defendant entered into an agreement with the Plaintiff by virtue of clause 1 (u) of the said deed, to perform a management and maintenance agreement in relation to the common



areas with the Plaintiff or with any person designated by the Plaintiff of which the Defendant breached by non-performance of the management maintenance agreement.

4. PW1 stated that Caluwa Ltd sold the investment to Mahican Investment Ltd.
5. On cross examination by Ms. Meme PW1 stated that he did not give money to the Defendant as per clause 3 (a) and further that he did not refer the matter for arbitration as per clause B.

### **Defendant's Case**

6. DW1- Liliana Negroni a business lady living in Italy, adopted her witness statement dated 26<sup>th</sup> July 2019 and stated that she bought Chalet No. 31 from Caluwa Ltd in 1997 vide a Sale Agreement in Italian titled "Compromesso Di Vendita Immobiliare (Monolocali)" dated 8<sup>th</sup> August, 1997 for a consideration of sum of 35 million Lira and simultaneously leased the same to Caluwa Limited by way of a lease dated 8<sup>th</sup> August, 1997 in Italia titled "Contratto Di Locazione".
7. DW1 also stated that there is no privity of contract between her and the Plaintiff since she has never entered into a contract with the Plaintiff hence does not owe the Plaintiff any money.
8. DW1 testified that her duties were to pay management fees to Karibuni Villas and that she was supposed to be paid two million Italian Lira per year by Caluwa investments Ltd which remains unpaid to date.
9. It was her testimony that in 1998 she went to Karibuni Villas to finalize the agreement with one Mr. Estoni of Caluwa Ltd who did not show up but would later inform her that Caluwa Ltd was transferred to Mahican Investments Ltd.
10. On cross examination by Mr. Gumbo, she stated that she had voluntarily signed the agreement dated 4<sup>th</sup> October 1999 and that she did not know the terms of the agreement as she thought that it was the same as the one that was written in Italian. She also stated that the condominium fees were to be deducted from the rent from the house/villa.
11. DW1 also stated that Caluwa Ltd was supposed to inform her every year how much she owed but they never did so and that the 1999 contract did not supersede the 1997 one.

### **Plaintiff's Submissions**

12. Counsel for the Plaintiff listed three issues for determination as follows: -
  - a. Whether there exists an agreement between the Plaintiff and Defendant?
  - b. Whether there was a breach of covenant by the Defendant?
  - c. Whether the Plaintiff is entitled to the prayers sought in the suit"
13. Counsel submitted that there is no dispute that on the existence and validity of the agreements dated 10<sup>th</sup> day of September 1997 and 4<sup>th</sup> day of October, 1999 between the Defendant and Caluwa Limited hence the parties are bound by the terms of the agreement.

Counsel cited clause 1(u), the said agreement which states that: -

“The lessee hereby covenants with the Company as follows; -

To enter into and duly perform a management and maintenance agreement, respecting the common parts, with Caluwa Limited or with any such person, as shall have been designated by the latter.”



Further under Clause 3 (d) (a) of the Lease it is stated that: -

“The expressions “the Company” and “the lessee” shall include any persons deriving title under or through the company and the Lessee, respectively.”

14. Mr. Gambo therefore submitted that the Plaintiff herein acted under the instruction and/or authority of Caluwa Limited thus the same binds the Defendant since she not only signed the latter agreement but also confirmed in cross examination that she voluntarily executed it with the intention of being bound by its terms and conditions.
15. Further that the Defendant stated in her examination in chief that she had been informed that Caluwa Ltd had been sold to Mahican Investments Limited the Plaintiff herein.
16. Counsel relied on the cases of *W J Blakeman Ltd vs Associated Hotel Management Services Ltd* [1986] KLR and *Souza Figueiredo v Moorings Hotel Co. Ltd* [1960] EA cited with approval in *Chon Jeuk Suk Kim and Kim Jong Kyu Vs E.J. Austin And Others* in Civil Appeal No. 265 of 2010 at The Court of Appeal at Mombasa where the court held that unregistered document operates as a contract.
17. On the second issue as to whether the Defendant breached the covenant contained in the agreement, counsel submitted that the Defendant failed to honour clause 1(u) of the agreement by non-performance of the management and maintenance agreement which resulted to her owing the sum of Euro 7,870.04 to the Plaintiff. That clause 3(a) stated as follows: -

“If the rent or any other payments provided for under 1(u) hereinabove or payable hereunder or any part thereof shall at any time be unpaid for thirty days after becoming payable or if any of the obligations on the part of the Lessee or his successors or assigns contained herein shall not be performed, then it shall be lawful for the company to serve upon the Lessee a notice in writing specifying the said failure to pay or breach as aforesaid and requesting the Lessee forthwith to remedy the same; if the Lessee shall not, within thirty days, comply with said notice, then the Lessee shall pay a 15% yearly interest on the sum owing.

If the Lessee shall not comply with such request, the company may, one year from the date of the said request, re-enter, at any time thereafter, upon the said premises or any part thereof in the name of the whole and thereupon this lease shall be deemed to have been terminated, but without prejudice to the right of action of the Company in respect of any antecedent breach, on the side of the Lessee, of any of the covenants herein contained. However, the company shall refund to the Lessee the amounts deriving from any lease of the Chalet thereafter granted to third parties, after past-due expenses, and such sums, as shall accrue to the company by reason of the default on the side of the Lessee being deducted.”

18. Counsel submitted that the failure of the Defendant to comply with the terms of the agreement the Plaintiff wrote various letters demanding payment which the Defendant did not honour.
19. Mr. Gambo submitted that the court cannot rewrite a contract between parties unless coercion, fraud or undue influence are pleaded and proved as was decided in the cases of *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another* (2001) eKLR, *Securicor Courier (K) Ltd vs. Benson David Onyango & Another* (2008) vs. *Samuel Kamau Macharia vs. Daima Bank Ltd* (2008) eKLR, *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited* (2014) eKLR.
20. That a court can only may interfere with a contract between parties when there is evidence that the contract is illegal, void, voidable or unconscionable as was held in the case of *Stanley Kamere & 26 Others vs. National Housing Corporation & 2 Others* (2015) eKLR.



21. Counsel therefore submitted that the Plaintiff has proved its case that the Defendant breached the terms of the agreement hence judgment should be entered as prayed in the plaint with costs.

### **Defendant's Submissions**

22. Counsel submitted that the two issues for determination are as to whether the Plaintiff had authority to act and whether there was a valid contract.
23. On the first issue counsel submitted that the Plaintiff filed this suit without due authority from the Plaintiff company as there was neither a valid resolution from the Plaintiff company approving the institution of the suit nor authority for the director so swear the verifying affidavit and relied on the case of *Kenya Commercial Bank Limited vs Stage Coach Management* (2014) eKLR Honourable J.B Havelock referred to the case of *Bugerere Coffee Growers Limited Vs Sebaduka and Another*.
24. Counsel further submitted that the 1999 contract is voidable as there was a fraudulent misrepresentation as the Defendant was under the impression that the 1999 agreement was similar to the 1997 agreement. That the 1999 agreement was in English yet the Defendant did not understand English.
25. Counsel therefore urged the court to dismiss the Plaintiff's case with costs.

### **Analysis And Determination.**

26. The issues for determination is whether there was a valid contract between the plaintiff and the defendant and whether the defendant breached the terms of the contract
27. On the first issue whether there was a valid contract between the Plaintiff and the Defendant, it is not in dispute that the Plaintiff and the Defendant entered into a lease agreement for management services which was in writing.
28. The essential components of a contract as was observed by *Harris JA in Garvey v Richards* [2011] JMCA 16 ought to ordinarily reflect the following principles: -

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

29. The Defendant admitted that she voluntarily signed an agreement in 1997 and another dated 4<sup>th</sup> October 1999 however she stated that she did not know the terms of the agreement because it was in English and thought it was the Italian version which she had earlier signed. The Defendant also confirmed that the 1999 agreement did not supersede the 1997 agreement and that the condominium fees was supposed to be deducted from the rental income from the Villa.
30. The Defendant having signed the agreement voluntarily without coercion, she should not be heard to say that she did not understand the terms of the agreement. She was under no duty to sign what she did not understand. She should have sought for clarification on what she was getting into by signing hence the fact that she signed willingly binds her to the agreement.



31. The court cannot come to the aid of the Defendant to rewrite the terms of the contract for the parties. There was no allegation of coercion or fraud by the Defendant and if so then the Defendant would have raised that in her pleadings which require allegations of fraud to be specifically pleaded and proved. This was not the case. Counsel just submitted that the Defendant was not aware of the terms of the contract.
32. When the Plaintiff and the Defendant entered into the contract they had intentions of the terms on the contract binding them. In the case of *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G.* [2010] UKSC 14 it was held that:
- “The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”
33. I find that the parties entered into a valid agreement and is therefore enforceable. No coercion or fraud has been proved to invalidate the agreement. The Defendant also admitted that she did not pay any amounts to the Plaintiff. On the issue whether the Plaintiff is entitled to damages, the Plaintiff did not state if they had received any rental income for the Villas therefore the court will not award the damages.
34. I therefore enter judgment for the Plaintiff in the following terms: -
- a. Possession of the suit premises.
  - b. Payment of Euro 7,870.04.
  - c. Interest on (b) above until possession is delivered to the Plaintiff
  - d. Costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF JUNE, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgmentg has been delivered online to the last known email address thereby waiving Order 21 [1] of the [Civil Procedure Rules](#).

