Thara & another v Actae Development Limited & another (Environment & Land Case 196 of 2015) [2022] KEELC 3382 (KLR) (26 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3382 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 196 OF 2015

NA MATHEKA, J

JULY 26, 2022

BETWEEN

MOSES NJOROGE THARA ..... 1ST PLAINTIFF

WINIFRED MWENDIA ..... 2ND PLAINTIFF

AND

ACTAE DEVELOPMENT LIMITED ..... 1ST DEFENDANT

SIX SIXTY ONE GALU BEACH MANAGEMENT LTD ..... 2ND DEFENDANT

JUDGMENT

1 By an Agreement of Lease dated 2nd June 2010 entered into by the 1st Defendant as Vendor and the Plaintiffs as purchasers, the 1st Defendant agreed to grant a sub-lease to the Plaintiffs upon terms and conditions set out in the said agreement for a sub-lease in respect of Villa No. 10 comprised in the Executive Residential Development at Lantana Galu Beach situated on plot number Kwale/ Galu/ Kinondo/661 for a consideration of Kshs. 33, 654,364. Under the terms of the said agreement it was provided that the 1st Defendant would procure the formation of the 2nd Defendant by incorporation under the *Companies Act*, Chapter 486 of the Laws of Kenya under the name of Six Sixty One Galu Beach Management Ltd with a nominal share capital of Kshs. 48,000/= divided into 48 shares of Kshs. 1,000/= each. The said agreement also provided that simultaneously upon the grant of a lease to the Plaintiffs and other purchasers as lessees in respect of all the houses comprised in the development, each of the lessees would be granted one share in the capital of the said company. It was further agreed that upon conclusion of the grant and registration of leases in respect of the houses comprised in the development the reversionary interest of the 1st Defendant in the subject property would within 60 days thereof be transferred at nominal consideration to the 2nd Defendant. Pursuant to the terms contained in the Agreement for Lease dated 2nd June, 2010, the 1st Defendant as the Lessor and the 2nd Defendant as the Management Company entered into a sublease in respect of Villa No. 10 in the

executive residential development known as Lantana Galu Beach situate in Kwale/Galu Kinondo/661 with the Plaintiffs as Lessees.

2. In a cover letter dated 12th August, 2010 by the Defendants' Advocates forwarding the sub-lease to the Plaintiffs' lawyers, the 1st Defendant advised that the form of lease in respect of the units in the development would be substantially standard for all the units in the development to ensure uniformity, save for changes necessitated by the differences between apartments and penthouses on the one hand and bungalows and villas on the other hand. The terms of the subject sublease were set out in the instrument creating the sub-lease and the following were inter alia some of the material terms of the sub-lease :-

    a. Each and every one of the Lessees' covenants in the sub-lease would remain in force both at law and at equity notwithstanding that the Lessor shall have waived or released in any way whatsoever the similar covenant or similar covenants affecting other lessees of the houses (over than the premises).

    b. No provision of the lease was to be waived or varied by either party except by agreement in writing which agreement would be duly registered in the Kwale District Registry at the sole cost and expense of the party seeking the waiver or variation.

    c. If any provision of the lease would be inconsistent with any provision contained in the Agreement of Lease dated 2nd June 2010 the relevant provision of the lease would prevail and such inconsistent provision of the Agreement for Lease would be construed and read as subject to the relevant provision of the Lease.

    d. The Lease contained the entire agreement and understanding between the parties and superseded all prior discussions and agreements concerning the subject matter. The Lessee acknowledged that the Lease had not been entered into in reliance solely or partly on any statement or representation made by or on behalf of the Lessor or the Management Company expect such statements or representations that were expressly set out in the Lease.

    e. The right (in common with all other persons entitled to the like right) to utilize the common part for such activities which in the reasonable opinion of the Management Company (which opinion would be final and conclusive) would not become or cause nuisance, annoyance, disturbance, injury or damage to the Lessee, the Management Company or the Lessees or visitors or other occupiers of the houses such use to be subject to such terms and conditions the said management company may from time to time impose.

3. Under the sub-lease, the premises were not to be used for any purpose other than for the permitted user which was defined to be the use of the premises as a residential home for the Lessee, his/her immediate family and occasional house guests provided that at no time would more than such number as may be reasonably specified by the Management Company be entitled to occupy the premises. In breach of the terms of the Agreement of Lease and the terms of the Sub-lease, the Defendants have unilaterally and without complying with the agreement, concurrence or approval of the Plaintiffs converted the permitted user of the executive residential development from the executive residential apartments that was contracted for by the parties, to hotel type apartments, villas and bungalows. The conversion of the permitted user of the subject property from residential to hotel type apartments, villas and bungalow is not only a breach of the terms agreed upon by the parties, but also a breach of the regulatory approvals upon which the development of the project was authorized. Consequent upon the said unlawful conversion and without getting the requisite regulatory approval or concurrence and approval of the Plaintiffs, the Defendants have as a consequence curtailed the Plaintiffs' enjoyment of the property as had been anticipated by the said Plaintiffs at the time of entering into the Agreement

for Lease and the subsequent Sub-lease. The Plaintiffs have on numerous occasions raised the issue of the fundamental breach of the provisions of the Sub-lease by the Defendants and the Defendants have consistently ignored and defiantly brushed aside the Plaintiffs concerns. As a consequence of the breach of the terms of the Sub-lease by the Defendants, the Plaintiffs have been denied use and enjoyment of their investment and have consequently suffered damage for which they claim damages from the Defendants. The Plaintiffs have been paying a service charge of Kshs. 136,595 quarterly from 4th March, 2011. Despite payment of the said sums, the Defendants have deliberately changed the residential user stipulated in the sub- lease to hotel type commercial user which action has caused us inconvenience, general disturbance annoyance and fear of insecurity. The above irregular and illegal change of user was done without the Plaintiffs' consent and has denied them the continued peaceful and quiet use of their residential home and communal facilities which was the reason they bought the residential home in the first place. They used to visit and stay in the suit property for a minimum of ten days in a month. Further and in the premises, the Plaintiffs seek an order of permanent injunction against the Defendants, their servants and agents from breaching the terms of the sub-lease dated 4th March, 2011 and more particularly from breaching the covenant respecting the permitted user of the development situate on all that piece of land comprised in the certificate of lease in respect of plot number Kwale/ Galu/Kinondo/661. The Plaintiffs seek the following prayers from this Court as against the Defendants jointly and severally:

a. An order of permanent injunction against the Defendants, their servants and agents restraining them from breaching the terms of the sub-lease dated 4th March, 2011 entered into by the Plaintiffs as Lessees, the 1st Defendant as Lessor and the 2nd Defendant as the Management Company and more particularly from breaching the covenant respecting the permitted user of units constructed in the development situate on all that piece of land comprised in the certificate of lease in respect of plot number Kwale/Galu Kinondo/661.

b. General damages for loss of use and quiet enjoyment by the Plaintiffs of Villa 10 situated in plot number Kwale/Galu Kinondo/661.

c. Special damages as pleaded in paragraph 16 above.

d. Interest on (a) and (b) above.

e. Costs of this suit.

f. Any further relief that the Court may deem just and fit to grant in the

4. The Defendants stated that the 1st Defendant is the developer of Lantana Galu Beach which comprises of villas, bungalows, apartments and penthouses with amenities including a restaurant, bar, cafe, spa, gym, swimming pools, convenience shop, management offices, linen and general stores (Development) and is also the registered proprietor of the leasehold interest in Kwale/Galu Kinondo/561 on which the Development is situated. The 2nd Defendant is the management company incorporated by the 1st Defendant to manage the Development and also to hold the reversionary interest in the land presently held by the 1st Defendant. As at the date of this Statement of Defence 31 out of 47 units in the Development have been sold with a share in the 2nd Defendant however, the reversionary interest continues to be held by the 1st Defendant. Once all units in the Development are sold, the buyers will be shareholders in the 2nd Defendant which will have the reversionary interest in the land. That the 1st Defendant acquired freehold interest in the land on which the Development is situates by a Transfer of Land dated 19th

5. November 2007 with the view to erect the Development. In order to comply with regulations of the County Council of Kwale (Council), the 1st Defendant obtained the conversion of the use of the land

from agricultural to residential cum commercial on 2nd October 2008 on condition that the interest in the land would be converted from freehold to leasehold. The Council issued a Certificate of Lease to the 1st Defendant effective 1 August 2009. Special Condition 3 on the Certificate of Lease is that the land "shall only be used for commercial cum residential purposes". The 1st Defendant marketed the Development in its brochure, (which the Plaintiffs relied on), as beach front holiday homes. The concept of the management and maintenance of the facilities are set out in the brochure.

6. Through a letter of offer dated 28th April 2010 the Plaintiffs expressed interest in acquiring a villa in the Development, on the basis of the description in the brochure referred to above. At clause 3.4 of the lease agreement, the villa was sold subject to restrictions which were defined at clause 1.1.16 as meaning all notices, orders, resolutions, demands, proposals, requirements, regulations, restrictions, agreements, directions or other matters affecting the land, buildings etc. At clause 8.3 the Plaintiffs acknowledged that they had inspected the approved documents and the drawings and confirmed that they were entering into the Agreement on the basis that they had inspected the documents and not on the reliance of any statements made by the 1st Defendant. The Agreement was explicit at clause 11 that it was to operate as an executory agreement not to be construed as a lease over the villa and this Agreement was superseded by the Sub Lease dated 4th March 2011 (Lease) which incorporated the obligation on the 1st Defendant to transfer to the 2nd Defendant the reversionary interest over the land on which the Development is situated after the sale of all units. To ensure that the Development was understood clearly, in a letter dated 13th July 2010 the 1st Defendant explained to all buyers at the time, including the Plaintiffs, what the Rental Scheme was and how it would operate. The 1st Defendant in an email dated 14th July 2010 to the 1st Plaintiff (which was acknowledged), attached a Rental Scheme Report which it had commissioned and which formed the basis of how the scheme adopted would be operated.

7. The 1st Defendant states that by a letter dated 12th August 2010 the Defendants' Advocates wrote to the Plaintiffs' Advocates forwarding: Sub Contractual and Facilities Management Agreement dated 1st November 2011, Hotel Type Agreement, Deed of Adherence and Sub Lease. The nature and function of each document was explained in the letter from the Defendants' Advocates. In particular, that the Plaintiffs would be required, as a condition precedent, to sign the Deed of Adherence accepting the terms contained in the Sub Contractual and Facilities Management Agreement between the Defendants and Synad Properties Limited. The Sub-contractual and Facilities Management Agreement was entered into on the basis that the 2nd Defendant was obligated under the 9th Schedule of each Lease to manage and maintain the Development but was also entitled to transfer and/or sub contract the said obligations.

8. Consequently, Synad was subcontracted by the 2nd Defendant to provide for and on behalf of the 2nd Defendant, the core services of managing and maintaining the Development which services are set out in Part 3 of the 8th Schedule of the Lease and these include but are not limited to: maintenance, repair, cleaning, alteration, rebuilding, renewing and reinstating the Retained Parts, which Retained Parts are defined in Clause 1.1.22.1 of the Lease; maintenance and renewal of fire alarms, equipment and ancilliary apparatus; supply, provision, maintenance, repair and servicing of water meters, tanks, electrical fittings, light bulbs, bins and all other appliances and materials in the Retained Parts which the 2nd Defendant deems desirable for the upkeep or cleanliness of the Development; and providing security for the Retained Parts in so far as possible on a 24 hour basis. Synad was sub-contracted by the 2nd Defendant to provide additional services to the buyers who opted into the Rental Scheme. These services are set out in the 4th Schedule of the Sub-contractual and Facilities Management Agreement which include but are not limited to, Rental reservation services; Check-in and check - out services; Provision of amenities such as toiletries; House-keeping and laundry services; and Concierge services

Synad was subcontracted by the 2nd Defendant to provide, at its discretion and at a fee, the following recreational services set out in the 5th Schedule of the Sub- contractual and Facilities Management Agreement, Shuttle services (transport to and from the Ukunda Airstrip and the local shopping centres); Grocery concierge services; Beauty shop; and Such other additional services that Synad decides to provide. These services are enjoyed by buyers whether or not they were part of the Rental Scheme. Synad was also subcontracted by the 2nd Defendant to provide, at a fee, the following additional services set out in the 6th Schedule of the Sub-contractual and Facilities Management Agreement, Rental of staff quarters; Business centre; Mini Shop; and Restaurant, bar and coffee shop. These services are enjoyed by buyers whether or not they were part of the Rental Scheme.

9. That each buyer had the choice to opt into the Rental Scheme by signing the Hotel Type Agreement and in the Plaintiffs', case they did not opt into the Rental Scheme however they signed the Deed of Adherence by which they accepted the terms of the Sub Contractual and Facilities Management Agreement. In the months of October, November and December 2010 there were written and oral questions from the Plaintiffs to the Defendants regarding the sub-contracting of services by the 2nd Defendant to another entity, Synad Properties Limited, computation of service charge and common areas which were responded to before the signing of the Sub Lease on 4th March 2011. That the Plaintiffs are estopped from denying knowledge of the use to which the Development would be put because the Plaintiffs signed the Deed of Adherence and with full knowledge of the terms of the Sub Contractual and Facilities Agreement. Since the Plaintiffs took possession of the villa in November 2011, they have enjoyed use of their villa regularly and used the facilities arranged for and provided by the 2nd Defendant such as the restaurant which forms part of the common area. The Plaintiffs have been active participants at meetings convened by the 2nd Defendant since they acquired their villa. In October 2013 the Plaintiffs visited their villa and it is during that visit that they raised complaints that some of the units which are part of the Rental Scheme had unsuitable and unauthorized occupants. The 2nd Defendant investigated the allegation by the Plaintiffs and established that the occupants were authorized to be at the Development and use the common areas: the walkways, the restaurant, the lawn in front of the villa they occupied, the beach etc. These findings were communicated to the Plaintiffs nevertheless the Plaintiffs remained adamant refusing to accept the findings of the 2nd Defendant.

10. Under the provisions of the Lease, all the lessees are required to pay service charge as computed by the 2nd Defendant. While it is true that the Plaintiffs have been paying the service charge of Kshs 136,595.67 quarterly this was the estimate from the Tamarind Report for the year 2010 and was referred to in the Lease at the Seventh Schedule's clause 1.1.6 as the "Initial Provisional Service Charge" set at The Tenth Schedule clause 5as Kshs 45,531.89 per month. The Lease at The Seventh Schedule clause 2.2.3 provides that the service charge would be computed on the basis of periodical expenditure incurred by the 2nd Defendant in providing the Plaintiffs with the services listed at Part Three of the Schedule. It is on this basis that the 2nd Defendant computes and revises the service charge based on the actual periodical expenditure and informs the lessees of the sums that they are expected to pay as service charge. The Plaintiffs have been notified of the revised rates but have refused to pay any of the revised sums insisting on paying the service charge computed in 2010. Revisions to the provisional quarterly estimated service charge were made for the years 2013, 2014 and 2015 following detailed analysis of the audited accounts for the years 2012, 2013 and 2014. Statements of account were sent to each of the owners, including the Plaintiffs, quarterly showing how much they each owe. As at 1st October 2015 the Plaintiffs are in arrears of service charge in the sum of Kshs 1,357,542.00 which amount will continue to increase as long as the Plaintiffs decline to pay the correct amount of service charge. The Plaintiffs have refused to pay the service charge demanded despite notice to do so. The 2nd Defendant therefore prays for judgment against the Plaintiffs jointly and severally for:

a. Kshs 1,357,542.00 as at 1st October 2015 and such charges as may be properly levied between 1st October 2015 and the conclusion of this suit together with interest thereon from the date the sums accrue until the date of payment.

b. A declaration that the 2nd Defendant has the right to withhold the services provided at Part Three of The Seventh Schedule to the Plaintiffs until full payment is received.

c. Costs of the counterclaim.

11. This court has considered the evidence and submissions therein. The letter from Oraro & Company dated 16th December 2010, on 2nd Defendant's List of Documents Page 104, states that the Plaintiffs have signed the; Sublease, Deed of Adherence in respect of the Sub-contractual and facilities Management Agreement and the Sub-contractual and facilities Management Agreement. The Sublease is dated 4th March 2011 and registered on 15th March 2011, is between Actae Development Limited (the lessor), Six Sixty-One Galu Beach Management Limited (Management Company) and Moses Njoroge Thara and Winifred Mwendia (lessee). The sublease in respect of Villa No. 10 in the Executive Residential Development in Lantana Galu Beach in Kwale/Galu Kinondo/661. Clause 6.2 provides that the lessor and management company (Defendants) have negotiated a management contract with a third party, a copy which has been provided to the lessee. The contract forms part of a condition for the lessor to grant the lease, upon which the lessee undertakes to execute a deed of adherence to the said management contract in the form provided by the lessor. The clause further stated that the failure of the lessee to execute the deed of adherence shall not in any way prejudice of affect the validity of the management contract. The lessee despite not executing the management contract shall be treated as part to the contract, so long as they become enter into this lease, will be bound by the terms of the management contract.

12. Clause 31.1 is to the effect that the management company has the powers to impose and levy costs and charges for the use of the common parts of the suit property on occupants who are not lessees of the houses.

13. The 7th Schedule, 1.1.8 provides that when it comes to buildings (which by definition means; buildings, outbuildings, amenities, facilities and all other structures erected by the lessor on the land); that a charge shall be imposed on the lessee depending on a reasonable proportion of such expenditure as is reasonably attributable to the lessee. Further 2.2.3, a lessee is expected to pay for the next and each subsequent financial period a provisional sum calculated by the management by quarterly installments in advance.

14. Clause 2.5 of the 7th Schedule, provides for where the lessee objects to any item of the service charge as being unreasonable. The procedure is for the dispute to be determined by a person appointed by the Chairman of the Institute of Surveyors of Kenya, to make a determination as an expert and his decision shall be final and binding on the parties. The objection shall not affect the obligation of the lessee to pay the management company the service charge as per the lease.

15. Clause 2.6 of the 7th schedule provides that where the lessee fails to pay the charge in full, the management company has the discretion of withholding the provision of all or any of the services.

16. Clause 4.1 of the 7th Schedule, provides that there are additional items that can form part of the service charge payable by the lessee which include, caretakers, security arrangements, employees of the management company, land rent and charges imposed by the county government, maintenance of structures used by the occupants of the suit property.

17. The 2nd agreement binding the Plaintiffs in the Sub-contractual and Facilities Management Agreement dated 1st November 2010 between the Defendants (lessor and house owner company) and Synad Properties Limited (manager), refer to page 67 of the 2nd Defendant's list of documents. This agreement provides that an individual lessee may execute the Hotel-Type agreement and join the Hotel-Type scheme and be provided with Hotel-Type services. Where the lessee shall be entitled to share in the Hotel-Type revenue. The Plaintiffs cannot deny being aware of its terms and conditions and being fully bound by them prior to executing the sublease agreement. In particular, the Plaintiffs cannot deny the following;

    a. Clause 4.1, which provides that any lessee may execute a hotel-type agreement and join the hotel-type scheme.

    b. Clause 4.3.1 the provision of recreational services by the manager with the sole intention of receiving revenue.

    c. Clause 4.3.2 the right of the manager to enter into the land and make use of the common parts to better provide the hotel-type services and to facilitate the provision of the recreational services.

    d. Clause 5.1 that, prior to entering into any lease, each lessee shall execute the Deed of Adherence, (as provided for in the 7th schedule) with full acknowledgment that the failure by a lessee to execute a deed of adherence shall not in any way prejudice or affect the validity of the agreement. It was clearly stated that each lessee shall upon entry into a lease be treated as a party to the agreement and bound by its terms.

    e. Clause 10.2 on termination of the agreement states that, if the agreement is terminated for whatever reason the lessee shall immediately pay all amounts due to the manager under the agreement, and the hotel-type agreement.

    f. Clause 16.2 stated that any dispute relating to the agreement shall be referred to arbitration and the determination of the arbitrator shall be final and binding upon the parties, and so far as the law permits not subject to appeal.

18. The Court of Appeal in Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited [2017] eKLR, held that;

> " JIWAJI v JIWAJI [1968] E.A. 547, the predecessor of this Court held that "where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties." We respectfully agree with that summation of the law. In view of the foregoing, we find that there was a binding contract between the appellant and the respondent that incorporated the 1999 Agreement. Consequently, any dispute between the parties ought to have been referred to arbitration. That is what the impugned judgment directed."

19. Be that as it may, the 3rd agreement that binds the Plaintiffs is the Deed of Adherence, which was executed on 10th May 2011 between the Defendants (lessor and house owners' company) and Synad Properties Limited (manager) on one side and the Plaintiffs on another, refer to Plaintiffs supplementary list of documents page 82. The deed provides the following;

    a. That it's required to be executed simultaneously with the lease to confirm the lessee's acceptance of the terms of the agreement and to make the lessee party to the agreement.

    b. The lessee is bound by all the terms and conditions of the agreement, with effect from the date of the lease.

20. The Plaintiffs cannot now claim not to be aware that the Defendants were developing and creating a mixed development of residential and hotel type villas as well as denying the additional service charge levied on them for the following reasons in the sublease. I find that the Plaintiff as the lessee cannot claim to have been side lined on the change of permitted user for the following reasons that the Plaintiffs were provided with relevant information during the negotiation process of the sublease to make an informed decision. The Defendants provided them with information on the hotel type scheme that was envisioned for Lantana Galu Beach. The 1st Defendant sent a letter dated 13th July 2010, to the Plaintiffs setting out in details the Lantana Galu Rental Scheme to be managed by Actae Development Limited and also issued them with the Rental Scheme Report from Tamarind Hospitality Consulting, June 2010. Which brought out the following issues;

    a. The scheme would allow the unit owners to rent out their holiday homes for short term holiday to guests who expect services found in a hotel/resort, with its own separate management fees, independent of the management of communal services funded by the service charge levied on all unit owners.

    b. The rental scheme services include services open to the public like restaurant and bar, business center, gym, coffee shop among others. The scheme would run as a hotel seeking licenses such as restaurant, liquor and food handling licenses.

    c. The initial term of the scheme is 7 years renewable with contractual arrangements that all parties were expected to confirm this commitment and its terms. The Actae Development Limited committed to provide management services to all the unit owners in relation to the common structures and levy a service charge and a rental scheme services to participant in the rental scheme.

    d. The scheme is optional and does not affect the entitlement of the common services. Any unit owner willing to join will have a separate contract between the 1st Defendant and the unit owner. For those who opt out, the unit owner and their guests will not be entitled to the hospitality service under the Rental Scheme Services.

21. Parties to a contract that they have entered into voluntarily are bound by its terms and conditions. In the case of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another (2001) eKLR, the Court held that;

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported): "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

22. The Plaintiffs are bound by the provisions of the Sublease dated 4th March 2011, Deed of Adherence in respect of the Sub-contractual and facilities Management Agreement dated 10th May 2011 and the Sub-contractual and facilities Management Agreement dated 1st November 2010. The Plaintiffs cannot turn around and claim that the manner in which the suit property is being used is not in line with the permitted user requirement under the sublease which amounts to a material change of use. In the case

of *Trollope Colls Ltd vs North West Metropolitan Regional Hospital Board (1973) 1 WLR 601* at 609 the court held that;

> " The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

23. It is clear from the documentary evidence produced that the Defendants informed the Plaintiffs before execution of the sublease of the existence of a hotel type scheme that they are required to be bound by. This is a clear case in which the Plaintiffs entered into a sublease agreement with a lessor who was looking to make revenue from the villas of other lessees under the Hotel-type scheme. The Plaintiffs have enjoyed the social and recreational amenities that come with the suit premises and they cannot escape liability. By their virtue of staying in their villa, they made use of these amenities since 2011 and they are obligated to pay service charge over their usage. Consequently, the Plaintiffs have failed in their claim and their suit must fail. I find no merit in the Plaint dated 26th August 2015 the same is dismissed with costs to the Defendants. In the same breath, I find merit in the Defendants' counterclaim dated 5th October 2015 and I grant the following orders;

    1. The Plaintiffs to pay Kshs 1,357,542.00 as at 1st October 2015 and such charges as may be properly levied between 1st October 2015 and the conclusion of this suit together with interest thereon from the date the sums accrue until the date of payment.

    2. The Plaintiffs to pay costs of the counterclaim.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE