**Rehman v Luhar (Environment & Land Case 10 of 2016)**
**[2022] KEELC 13714 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13714 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 10 OF 2016**

**M SILA, J**

**SEPTEMBER 28, 2022**

**BETWEEN**

**KHALID HUSSEIN REHMAN ..... PLAINTIFF**

**AND**

**AHMED JAN MOHAMED SULEIMAN LUHAR ..... DEFENDANT**

## JUDGMENT

(Defendant having developed apartments and sold some to the plaintiff and other parties; defendant now constructing an additional unit above one of the existing apartment blocks; plaintiff filing suit to stop the said development citing lack of consent and failure by defendant to conduct an EIA; defendant asserting that the only interest of the plaintiff is in the units that he purchased and cannot therefore stop him from further development; court holding that to allow the new development would be going against the spirit of the *Sectional Properties Act* for the development was not contemplated when the existing units were sold; defendant also not having an EIA licence to develop; suit by plaintiff successful)

1. This suit was commenced through a plaint which was filed on February 2, 2016. The defendant is owner of the land parcel sub-division number 13400 (original number 13380/21) section I, mainland north, situated in Nyali, Mombasa county (hereinafter described as the suit property). On the suit property, the defendant constructed nine apartments in three blocks, being blocks A, B and C. The plaintiff purchased three of the nine apartments, one in block A and the other two in block C. It is pleaded in the plaint that the defendant retained two apartments and sold one, the first floor in block A, to a third party. The plaintiff thus contends that the defendant's interest is only in the two apartments that he retained and like all the other lessees, the defendant is deemed to be a communal owner in so far as the roof area, the fence, gate, driveway and other communal aspects of the property are concerned. The complaint of the plaintiff is that the defendant commenced construction of another apartment on the rooftop of block B. He has pleaded that the defendant does not have the requisite approvals from the Mombasa county government or the National Environment Management Authority (NEMA).

He further pleads that if there is any such approval, it must have been obtained through corruption, fraud, or concealment of material facts, and that he was never consulted. He pleaded that he wrote to the defendant a letter dated August 25, 2014 seeking to be supplied with documentary evidence of the approvals but none were supplied. In this suit, the plaintiff seeks the following orders :-

a. A declaration that the ongoing construction by the defendant on the roof top of block B of the suit property is unlawful and illegal and the same should stop immediately.

b. Permanent injunction to restrain the defendant from interfering, constructing, alienating or dealing adversely in any manner whatsoever with the suit property.

c. An order that the defendant, at his own cost, removes the structure so constructed on the roof top of the suit property.

d. General damages.

e. Costs of this suit.

f. Interest on (d) above.

2. The defendant filed a statement of defence where he contended that the plaintiff's ownership of apartments does not relate to ownership of the entire plot. He asserted that he not only has proprietary interest in the two apartments that he retained for himself but also in the whole plot as there is no management company. He pleaded that he is the sole owner of the land. He added that it is only the plaintiff who has raised issue on the construction of the additional apartment. He elaborated that the additional apartment is only in block B and does not destroy the structure of the entire apartment complex. He pleaded that he has an agreement with the plaintiff for apartments in block A and C and not block B where the proposed development is to be made. He denied receiving any request from the plaintiff to be supplied with the construction plans for the complex and pleaded that he has obtained the necessary approvals.

3. I need to mention that with the plaint, the plaintiff filed an application for injunction which was allowed on September 29, 2017. The construction of the additional apartment therefore stalled pending determination of the dispute. The hearing of the matter took place on October 6, 2021 when both plaintiff and defendant testified.

4. The plaintiff's evidence was given by Afzal Hussein Rahman, who holds a power of attorney from the plaintiff. It was stated that the plaintiff resides in Toronto, Canada. His evidence is more or less a reflection of what is pleaded in the plaint. He testified that if anyone wishes to undertake construction, then they expect that he consults with the other owners as they are all shareholders. He testified that the defendant never availed any approvals for the development and they were never consulted. He referred to documents displayed by the defendant claiming that he had obtained development approval from the county government, and testified that he was not aware of the same, as they were never consulted before its issuance. He testified that the defendant has no NEMA nor National Construction Authority (NCA) approval. He testified that the roof top is used for hanging clothes and sightseeing as there is a good view from there. He added that all apartment owners are entitled to the roof top communally. He stated that construction ceased when the court issued an injunction and all that is there is a wall which he asked that it be removed. He did not wish to pursue the prayer for general damages. Cross-examined, he testified that despite not owning an apartment in block B, the plaintiff has an interest since the whole area is owned communally. He did not have the sale agreement for the apartments and could not recall if there was any clause restricting further development. Re-examined, he testified that their understanding was that the property would be restricted to three blocks of three apartments each.

5. On his part, the defendant testified that the plaintiff purchased one apartment in block A and two in block C and has none in block B. He himself has one apartment in block A and one in block B; the others are sold to other persons. He elaborated that the additional construction is in block B of which he argued the plaintiff has no interest. What he wants to put up is a two-bedroomed pent house. He stated that he got development approval from the county government. Cross-examined, he testified that what he sold was only the apartments. He conceded that common areas are for all who own apartments including the roof top, the parking area, and the staircases. He testified that he got development approval from the county government of Mombasa. He conceded that he got it after he had already commenced development. He did not get any from NEMA nor the NCA. He was questioned on whether there is a management company for the apartments and he stated that there is none. He asserted that the property belongs to him and what the apartment owners have is a sublease. He stated that when he registers the management company the apartment owners will pay service charge. Re-examined, he stated that he had a NEMA licence which expired and he lodged a new application. He stated that the pent-house will have a roof-top and nobody will be excluded from it. He mentioned that at the moment, service charge is paid to a sister of one Afzal. He added that everyone has their own parking. With the above evidence, the defendant closed his case.

6. I invited counsel to file submissions and I have taken note of the same. In his submissions, Mr Gikandi, learned counsel for the plaintiff, *inter alia* submitted that the new construction is a violation of the plaintiff's right to property under article 40 of the *Constitution*. He submitted that construction without obtaining approval is illegal and he referred me to section 57 and 58 of the *Physical and Land Use Planning Act*. He also referred me to section 58 of the *Environmental Management and Coordination Act* (EMCA) on the need to have an EIA licence before commencing development. He submitted that the defendant commenced development without first obtaining the requisite licences. He pressed that even at the time the matter was being heard, the defendant had no EIA licence. He submitted that anything done on the suit property that has the effect of changing or interfering with the image of the suit property must be done with the approval and consent of all the apartment owners. He referred to clause C of the sublease agreement and clause 2 (h) of the main lease which requires consent of the lessor. He relied on the case of *Mistry Amar Singh v Serwano Wofunira Kulubya* (1963) EA 408 and *Sosplashed Limited & Another v Pwani Maoni Limited & 3 others* (2021) eKLR, and the ruling of this court on the application for injunction.

7. For the defendant, Mrs Kyalo, learned counsel, submitted that when dealing with the application for injunction, Omollo J, found that the plaintiff did not make any specific reference to any clause in his lease that would bar the defendant from carrying out construction on the premises. She submitted that the court granted the defendant leave to apply for NEMA approval and was not informed of the nature of approval to be obtained from NCA. Counsel submitted that the plaintiff's suit is unmerited as his interest is in the apartments which he owns and the same are not related to block B where the construction is located.

8. I asked for additional submissions on whether the suit property is captured by the *Sectional Properties Act*. On his part, Mr Gikandi submitted generally on the concept of sectional ownership and referred me to section 13 (2) of the *Sectional Properties Act*, Act No 21 of 2020. He submitted that the same stipulates that all long term sub-leases registered before the commencement of the statute are to be reviewed within a period of two years which will expire on December 28, 2022. He also referred me to the Sectional Properties Regulations, 2021, which he submitted were enacted to simplify the procedure of conversion of long term leases. He submitted that the purpose of the statute was to cure the mischief of developers retaining control over common facilities. On her part, Mrs Kyalo submitted that the suit land is still registered under the *Registration of Titles Act* and that its register is yet to be closed, and

following section 5 of the *Sectional Properties Act*, the suit property does not fall under the *Sectional Properties Act*.

9. I have considered all the above. The facts are largely not in dispute. The defendant is the leasehold owner of the land where the development is located. This is the land parcel subdivision No 13400 (original number 13380/2) section I, mainland north, measuring 0.1 Ha. The defendant holds this land under a leasehold tenure of 99 years from May 1, 1987. On this land, there are already nine constructed apartments in three blocks being blocks A, B and C, each block holding three apartments. These apartments are registered as sub-leases on the property section of the lease that the defendant holds. The plaintiff owns apartments in block A and C, specifically, one in block A, and two in block C, thus three apartments in total. His interest is registered as a sub-lease drawn in the following fashion : "sub-lease to Khalid Hussein Rehman. term : 99 years : from May 1, 1987 (now past). rent : A peppercorn (if demanded). Flat on block A, 2nd floor". The same nature of entry is repeated for the other apartments, which somehow are both identified as "flat on block C, first floor." There is clearly an error here, for there cannot be two apartments on block C, first floor. It is common ground that the other apartments are also sold to other persons save for two which the defendant retained, one in block A, and the other in block B. The defendant wishes to develop an additional apartment on top of what is already existing in block B. That would be adding a third floor to the apartment complex and add a unit to the already existing 9 units. It will certainly alter the character of the apartment complex and add another person who will also need to utilize the already existing common area. The plaintiff's case is that the new addition is illegal, as firstly, it needs consent of all the owners of the subleases and secondly, it does not have the requisite approvals. The argument of the defendant is that the plaintiff's ownership is restricted to the three apartments that he has and that he has no right to question the additional unit that the defendant wants to put up.

10. This dispute needs to be looked at in light of the *Sectional Properties Act*, Act No 21 of 1987 (the original statute) and the *Sectional Properties Act*, Act No 21 of 2020 which repealed the original statute. Under the original statute, it was not a must for one to register his/her property under the *Sectional Properties Act*, despite being a property with sectional units. As a result, there evolved a practice that when sectional properties were being sold, what would be registered was a sublease that would go together with the reversionary interest in the leasehold interest held by the developer. There was little or no mention of the manner in which common areas would be held or whether the developer had a right to make additional units in the areas not already covered by the existing development. As a result, it was felt that the purpose of the *Sectional Properties Act*, 1987 was not being effectuated and that developers were circumventing the same. This is what led to the repeal of the original 1987 statute by the *Sectional Properties Act* of 2020.

11. The intention of the new statute is to bring under the *Sectional Properties Act* all sectional properties for which units were sold to persons with the intention of having them own these units. This is brought out in section 13 (2) of the new Act which provides as follows :-

> 13. Conversion to units
>
> (1) If a building contains premises that are—
>
> a. rented for residential or commercial purposes to a tenant who is not a party to a purchase agreement; and
>
> b. not included in a sectional plan, the owner of the premises or a person acting on his behalf shall not sell those premises as a residential or commercial unit until the sectional plan that includes those premises is registered at a registry.

(2) All long term sub-leases that are intended to confer ownership of an apartment, flat, maisonette, town house or an office that were registered before the commencement of this act shall be reviewed to conform to section 54 (5) of the *Land Registration Act*, 2012 (No 3 of 2012) within a period of two years of the commencement to this Act.

(3) An owner who had already paid stamp duty for a sub-lease shall not be required to pay stamp duty during its revision under subsection (2).

(4) A developer, a management company or an owner of a unit may initiate the conversion required under subsection (2).

(5) The registrar shall dispense with the production of the original title pursuant to section 31 of the *Land Registration Act*, 2012 (No 3 of 2012) if the developer is not willing or is unavailable to surrender the title to the parcel for the purposes of conversion.

(6) The registrar shall register a restriction against the title of the parcel to prevent any further dealings on it if a proprietor or developer fails to comply with this section.

12. It will be seen from the above, particularly section 13 (2) that the long term sub-leases intended to confer ownership of apartments, maisonettes or offices, registered under the original statute, are to be reviewed so as to conform to section 54 (5) of the *Land Registration Act*. It is useful to understand the context of section 54 (5) by setting out section 54 of the *Land Registration Act*. It provides as follows :-

54. Registration of leases.

(1) Upon the registration of a lease containing an agreement, express or implied, by the lessee that the lessee shall not transfer, sub-let, charge or part with possession of any of the leased land without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with this Act has been produced to the registrar.

(2) The registrar, upon receipt of adequate proof, may dispense with the consent of the lessor—

(a) where satisfactory evidence is given to the registrar and the registrar is satisfied that the lessor is dead and that there is no personal representative of the lessor; or

(b) if the registrar considers that the consent of the lessor or the personal representative, as the case may be, cannot be obtained or that it can only be obtained with difficulty or at an unreasonable expense and shall, after making such enquiries as the Registrar may consider necessary in the circumstances, record on the document his or her reasons for dispensing with the consent and note as such in the register.

(c) on any of the grounds set out under section 39(4).

(3) The registration of interests in land under the law relating to sectional properties shall be carried out in the manner prescribed under that Act.

(4) The land register maintained under section 7 of this Act shall be deemed to be the land register for purposes of the *Sectional Properties Act*, No 21 of 1987.

(5) The registrar shall register long-term leases and issue certificates of lease over apartments, flats, maisonettes, townhouses or offices having the effect of conferring ownership, if the property comprised is properly geo-referenced and approved by the statutory body responsible for the survey of land.

(6) The cabinet secretary may prescribe regulations for the registration of long termleases.

13 It will be observed, that under subsection 5, long term leases which have the effect of conferring ownership are to be registered subject to the property being geo-referenced and approved. This would mean that an individual apartment owner gets a title document that is registered and is transferrable. Under subsection 6, the cabinet secretary is to prescribe regulations for the registration of these long term leases. The regulations were made under the *Sectional Properties Act* of 2020 and they are referred to as the Sectional Properties Regulations, 2021. I need not go into detail into them, but they do echo the point about conversion of sectional units so that they may be registered under the Act.

14. The whole idea about sectional ownership is that a person may own an individual unit within a building without necessarily owning the land upon which the development is located. Indeed, in modern structures, one does not need to own the land upon which a development is sited because ownership of the individual unit is sufficient for purposes of having shelter. What is purchased is of course a unit, but such unit cannot be used without the purchaser also having access and rights to the common areas. For example, the purchaser will have to enter through a gate but he does not own that gate. He must however have a right to access that gate otherwise he will not be able to enjoy the single unit that he purchased. This goes for parking areas (unless specifically assigned) and all other common areas such as lifts and stairways. It goes without saying that owners of individual units must therefore have rights over common areas which must be considered as communally owned. That is why under the *Sectional Properties Act*, you have provision for common areas to be owned by a management company which management company is in turn owned by all the owners of the individual sectional units (see section 17 of the current Act). A developer cannot therefore be heard to say that the interest of a purchaser of a sectional unit is only restricted to the particular unit and not to the common areas.

15. When a person is purchasing an individual unit, he/she is expected to be made aware of the plan that was approved, the particular unit within the approved plan that is being sold, and what would constitute the common areas. Indeed, it is explicitly provided under section 43 of the *Sectional Properties Act*, that when selling a unit, the developer must inter alia deliver to the purchaser a copy of the sectional plan or proposed sectional plan. This was also the law under section 46 of the repealed statute. The delivery of the sectional plan to a purchaser is important, as the nature of the plan may impact on whether or not the potential buyer will make the purchase. In other words, when a purchaser is making that decision to purchase, he/she is aware of the particulars of the development that he is purchasing into. Unless explicitly informed, it would be unfair, and indeed a steal on the purchaser, for the developer to now develop something else other than what he held out as being the development that will be put up, or after completing the development according to the plan, he now proceeds to change it to the detriment of the purchasers. This can occur in different forms, including failure to develop some aspects of the plan (such as failure to develop a swimming pool) or compromising common areas by making additional developments in them which were not in the approved plan and were not expressed to the purchasers such that the purchaser did not contemplate them when making the decision to purchase.

16. In our case, what was sold was not a 5 year, or other short or medium term lease. This was a sublease that was to run together with the main leasehold interest allotted to the defendant. There was therefore clear intention to sell the individual units to the purchasers and the purchasers are to hold the same

for as long as the main lease runs. The new proposed development of the defendant entails an addition of a unit which was not part of the plan that was approved when the apartment units were sold to the purchasers and particularly to the plaintiff. In essence, when the plaintiff and the other purchasers made a decision to purchase, they did so in the knowledge that there would not be an additional unit made to the existing development. I do not see how the defendant can attempt to take advantage of the fact that the initial plan was not registered under the *Sectional Properties Act, 1987* so as to have this additional unit allowed. To permit the defendant to proceed and commence a development which the purchasers did not contemplate, and which is a development that is to their detriment, would be to go against the spirit of the *Sectional Properties Act*. It will be allowing a developer to cheat purchasers to purchase and once "in the box" proceed to alter the development so as to enrich himself to the prejudice of the purchaser/s. I am persuaded to find that in order to alter the initially approved development, the defendant needed the consensus of the owners of the sold units since he had not put in place a management company which would have taken up dealings over common areas as envisaged under section 22 of both the repealed and current *Sectional Properties Act*.

17. It was argued that nowhere in the lease is there a clause stopping the defendant from making additional developments. That may be so, but on the other hand, nowhere in the lease is the defendant permitted to undertake additional developments. The defendant cannot therefore point at the lease to give him protection. As I have mentioned, the law contemplates that there be a management company which would be in charge of all areas not covered by the individual units but the defendant cannot be allowed to take advantage of that lapse so as to prejudice the purchasers of the existing units. If he is to make any alteration to the original plan, then the consensus of the purchasers would be needed as they stand to be directly affected. This was not done. I am therefore persuaded to find that it was wrong for the defendant to pursue development permission without the consent and/or input of the owners of the units within the building.

18. It is correct that the defendant had development permission from the county government of Mombasa for the additional unit, but this, and it was confirmed by the defendant himself, was obtained after the development had already commenced and once complaints started streaming in. This was a development that was obviously going to contradict an earlier approved plan and was going to have an impact on the contiguous owners who owned the already sold apartments. Such approval in my opinion went against the spirit of section 41 (3) of the *Physical Planning Act, 1986* (then in operation but now repealed by the *Physical and Land Use Planning Act*, 2019), which required the application for the development plan to be served on such interested persons. It provided as follows :-

> (3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.

19. There is no evidence that the plaintiff or any of the other apartment owners were consulted nor was their opinion sought by the county government of Mombasa before giving the approval.

20. In addition, no environmental impact assessment (EIA) licence was ever obtained before the defendant commenced his development. Even at the time the case was being heard, the defendant did not have an EIA licence. It was wrong and contrary to the provisions of section 58 of EMCA for the defendant to start making the impugned development without first applying for an obtaining an EIA licence.

21. Whichever way you look at it, the proposed additional development by the defendant cannot be allowed to stand. I am persuaded that the plaintiff has made out a case for a declaration that the proposed construction by the defendant is unlawful and illegal. The plaintiff is also entitled to an order of permanent injunction to stop the defendant from undertaking the development unless and until he complies with the mandatory provisions of the *Sectional Properties Act*, which requires conversion of the building to the *Sectional Properties Act* regime, and thereafter complying with the legal requirements regarding establishment of a management company which will then make decisions regarding common areas as envisaged under the Act. I am further persuaded to issue an order of mandatory injunction, directing the defendant to remove, at his own costs, the additional development that he had commenced and have the property restored to the state that it was, before the impugned construction. The plaintiff had sought general damages but at the hearing, this was abandoned. I will therefore not make any orders in respect of general damages. The only issue left is costs and these will follow the event. The defendant will bear the costs of this suit.

22. Judgment accordingly.

**DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**