



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 527 of 2003

GIFTS AND TOYS CENTRE LTD & 15 OTHERS.....PLAINTIFFS

VERSUS

ANGLO AFRICAN PROPERTY HOLDINGS LTD.....DEFENDANT

RULING

The applicants are tenants of the respondent at the suit premise LR NO. 1870/IX/166. The lease agreement stipulated that the tenants could contribute towards service charges payable to the defendant to meet the expenses of rendering services in respect to cleaning, security maintenance, water, electricity, lifts, rates, taxes land rent and advertisements and publicity and promotion expenses of the mall.

The applicants contend that in breach of the agreement above the defendant had applied the contributions for services for unauthorized functions namely: Salary and wages, insurance, postage and telephone, general expenses, stationary and printing. They filed this suit seeking judgment against the defendant for:

- (a) A declaration that the items enumerated above do not comprise service charges, were unauthorized and unlawful.
- (b) A permanent injunction restraining the defendant from applying monies deposited by way of service charges to uses except to meet reasonable costs of those services agreed upon.
- (c) A declaration that the defendant by imposing on the plaintiffs varying rates of service charges per square foot was arbitrary and capricious.
- (d) An order that the defendant has rendered services at exorbitant and unreasonable costs in the circumstances.
- (e) An order that the defendant do forthwith refund, with interest all contributions received on account of service charge but applied to functions outside those agreed upon.
- (f) An order that the defendant do forthwith refund with interest all monies found to be over and above the reasonable cost of rendering services agreed upon.
- (g) Damages.
- (h) Costs of the suit.

Simultaneously with the plaint the plaintiff brought this Chamber Summons under Order XIX rules 1 and

2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders.

(1) That the defendant do within 14 days of the order render to the plaintiffs a proper and full account of monies paid to court by way of service charges from 1998 to date including:-

- (a) The exact amount of money collected by way of service charge.
 - (b) The services rendered to which money collected as service charges was applied.
 - (c) The exact amount incurred in rendering the service.
- (2) The court to make necessary inquiries and directions.
- (3) The defendant to pay the costs of this application.

The application is based on the following grounds:

- (a) That the defendant has failed to account for the monies collected by it on account of service charges.
- (b) That the actual share of service charge can only be established from the account held by the defendant.
- (c) That the sums charged by the defendant are exaggerated.
- (d) That the applicants are afraid that the defendant has spent service charges on other purposes other than for which the money was paid.

The application is also supported by an affidavit sworn by Vijay Saderani in which he avers on similar facts as those contained in the plaint.

On 19th May 2004 the parties recorded a consent order in the following terms:

- (1) That the defendant do within 30 days of service of this order render to the plaintiffs a proper and full account of monies paid to it by way of service charges from 1998 to date including:
- (a) the exact amount of money collected by way of service charge.
 - (b) Services rendered to which the money collected as service charges was applied.
 - (c) The exact amount incurred in rendering each service
 - (d) The names of persons who were paid for rendering services.
- (2) That the parties do return to this Honourable court for further directions.

On 22nd December 2005 the applicants brought another Chamber Summons under Order XXVII Rules 11, 12 and 20 Order XIX Rules, and 2 of the Civil Procedure Rules and pursuant to the consent order recorded on 19th May 2004 for orders:-

- (1) That a Referee be appointed to examine and report his opinion and findings on the service charge account pertaining to service charge in respect of the Mall Westlands as set out in the consent order of 19th May 2004.
- (2) That the defendant do within a period to be stated by this Honourable court deliver to the Referee all entries or records relating to service charges expended on The Mall Westlands for the period

contemplated by the consent order of 19th May 2004.

(3) That the Referee be empowered to demand and receive such documents as in his opinion are necessary for the ascertainment of the nature and cost of the expenses.

(4) That the defendant do pay the costs of the Referee.

(5) That pending the enquiry and examination of the said accounts each of the plaintiffs do pay and deposit their contributions of service charge into an account opened in the joint names of the Advocates for the parties.

(6) That the Honourable court do issue such directions or orders as may be necessary to give effect to the enquiry.

The application is based on the ground that the defendant having failed refused to provide accounts, it is only proper and just that a referee be appointed and that a fair trial of the case is not possible without settling accounts and the defendant's action is intended to bar the plaintiff from getting hold of vital information and documents solely in possession of the defendant.

The application is opposed by the respondent who has filed a replying affidavit sworn by E.W. Dougherty in which he avers that he has supplied and complied with the terms of the consent order of 19th May 2004; that they have supplied the applicants with the audited accounts.

Mr. Ahmed for the respondent submitted that the issues raised in this application could be argued in the main suit and that granting the orders sought could amount to double trial.

With due respect to counsel, What is sought in this application could be obtained by invoking the provisions of Order VI of the Civil Procedure Rules by seeking further and better particulars or through discovery under Order X of the Civil Procedure Rules after making discovery.

For the reasons stated above the plaintiff's Chamber Summons dated 22nd December 2005 is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 23rd day of February 2007.

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J.L.A. OSIEMO

JUDGE