



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KWALE

ELC NO.60 OF 2021

(FORMERLY ELC AT MOMBASA NO. 83 OF 2021)

CHRISTINA CRONCHEY A.K.A

CHRISTINE CRONCHEY.....1ST PLAINTIFF

CRISTOPHER JOHN TAYLOR.....2ND PLAINTIFF

CHRISTIAN THEODOR FRIEDRICH BEZNER3RD PLAINTIFF

BRIAN CAPEL.....4TH PLAINTIFF

IAN NELSON NJAGE.....5TH PLAINTIFF

GRAEME WILLIAMSON.....6TH PLAINTIFF

VERSUS

OCEAN ESTATES LIMITED.....1ST DEFENDANT

YATCHING SAFARIS LIMITED.....2ND DEFENDANT

RULING

1 To put things into perspective, the Plaintiffs are apartment owners on Kwale/Diani Beach Block/547 and hold leasehold interest thereof through leasehold agreements entered individually with the Defendants. The defendants are the head lessors and developers of the properties on the suit properties as well as the property Manager. The plaintiffs filed this suit against the Defendants and seek for judgement compelling the defendants- to demolish structures they had commenced construction on the said block A of the suit property; to allot shares in the Management Company to the Plaintiffs, transfer the reversionary interest in the suit property to the Management Company and hand over the Management of the property to the Management Company. Further a declaration that all common areas in the suit property are for use by all the Plaintiffs and the other lessees and to initiate the conversion of the property into sectional units. The final reliefs sought speak for itself on the nature of this dispute.

2 The Plaintiffs also filed with the suit under certificate urgency a Notice of Motion application dated 30th April 2021. On 5th day of May, 2021 the court issued prohibitory orders restraining the Defendants from constructing additional apartments and or units on the 3rd floor of Block A or any other construction on block B,C and D whatsoever pending the hearing of this application inter-parties. This application was compromised by the parties.

3 The 2nd Defendants then filed the Notice of Motion application dated 6th October 2021. It is the subject of this ruling and seeks for the following orders; -

a) SPENT

b) The Plaintiffs to make payment in respect of service charge of the suit property in accordance with the provisions of their respective lease agreements as in the following sums pending the hearing and determination of this application inter- parties.

- 2nd Plaintiff - Christopher John Taylor **Kshs.75,394.00**
- 3rd Plaintiff - Christian Theodor Friedrich Bezner **Kshs.63,378.44**
- 4th Plaintiff - Brian Capel **Kshs.268,389.03**
- 5th Plaintiff - Ian Nelson Njage **Kshs. 45,559.09**
- 6th Plaintiff - Graeme Williamson **Kshs. 13,963.00**

c) The Plaintiffs do make payment in respect of service charge of the suit property in accordance with the provisions of their respective lease agreements and as will be computed by the 2nd Defendant/Applicant, pending the hearing and determination of the suit herein.

4 The application was premised on the grounds stated thereof and attendant certificate of urgency and the supporting affidavit of Elmar Kuhlow Director of the 2nd Defendant and further affidavit sworn on 5th November 2021. The 2nd Defendant allege that the Plaintiffs had since commencement of these proceedings unilaterally decided to make monthly payment of service charge against the express provisions of the respective lease agreements with the 2nd Defendant. As a result, the 2nd Defendant had to bear the costs of key services at the suit property. The Plaintiffs action was hampering service delivery which could lead to waste and diminished value of the suit property which is visited by both domestic and international tourists.

5 The application is opposed by the Plaintiffs while the 1st Defendant supports the application. The Plaintiffs filed their replying affidavit sworn on 25th October 2021 by the 1st Plaintiff on behalf of the Plaintiffs. The 1st Defendant filed Supporting affidavit sworn by Elmar Kuhlow Director of the 1st and 2nd Defendant on 9th November, 2021.

SUBMISSIONS

6 This court on 12/10/21 directed that the application be disposed of by way of written submissions. The Applicant filed submissions dated 5th November, 2021. The Plaintiffs on 17th November 2021 dated same date.

2nd Defendant/Applicant submissions

7 Ms. Akwama Counsel for the Applicant identified two issues for determination 1) Whether the Applicant has established the principles for grant of the mandatory injunction and 2) Whether the Respondents can unilaterally re-write the terms of their respective lease agreements and submitted on the same as follows;

Whether the Applicant has established the principles for grant of the mandatory injunction

8 Counsel listed 4 principles to be satisfied for grant of a mandatory interlocutory injunction. These were 1) The applicant to establish a prima facie case with a probability of success 2) Whether the Plaintiff will suffer loss which cannot be compensated by way of damages if orders sought are not granted upon the full hearing of the case 3) If the court is in doubt of the first two, in whose favor the balance of convenience lie and 4) existence of special circumstances and in a clear case.

9 Counsel urged that the Applicants had demonstrated that the Plaintiffs were all apartment owners in the Applicants development, they executed lease agreements with the Applicant, the leases provided for payment of service charge bi-annually and some of them had unilaterally decided to pay the same monthly instead of bi-annually. It is contended that it is not disputed by the Plaintiffs that the amounts computed as prayed were due. That the Plaintiffs had not placed any material before court to show that the accounts summary have been ambiguous and any efforts to seek clarification of the same. That service charge is not among the issues raised in the main suit or in the application that was compromised herein. That the court was likely after the hearing find that the service charge is payable as computed since the Court cannot re-write the leases and that none of the parties thereto can rewrite the lease unilaterally – the cases of Court of Appeal in **National Bank of Kenya Limited Vs Pipelastik Samkolit (K) Ltd (2001) eKLR** and **Fina Bank Limited Vs. Spares and Industries (Civil Appeal No. 51 of 2000)** unreported was relied upon in this regard. Furthermore, the Respondents had not pleaded coercion or fraud in executing the leases. It is contended therefore that from the Respondents own express and implied conduct, a prima facie case with a probability of success had been established.

10 On whether irreparable loss would be suffered by the Applicant if the orders were not granted it was submitted on behalf of the Applicant that the environment of the apartments maintained over the 25 years of existence was the reason that the apartments were preferred by guests on short stay basis. This maintenance was dependent on the service charges payable bi-annually since most expenses are not incurred on monthly services. With the coming of the holiday season the Applicant would have to incur expenses in uplifting the ambience of the apartments to attract guest occupancy. It was intended to maximize earnings from the holidays following the lifting of the travel bans that had been necessitated by the Covid 19 Pandemic which had presented a huge opportunity. Not only would the opportunity be missed but also loss of credibility and future business arising from the tag of unkept apartments, which cannot be compensated by way of damages.

11 It was further submitted that based on 10(above) the balance of convenience rested with the Applicants. The Plaintiffs had not demonstrated any prejudice to be suffered were the service charge to be paid as stipulated under the leases. That the upcoming holidays were the special circumstances that necessitate the grant of the mandatory orders. The prospects for the year 2022 would be diminished because of the anticipated general elections.

12 Counsel relied on the Court of Appeal cases of **Shariff Abdi Hassan Vs. Nadhif Jama Adan (2006) eKLR**, **Joseph Kaloki T/A Royal Family Assembly Vs. Nancy Atieno Ouma (2020) eKLR** to buttress their grounds for granting a mandatory injunction herein. Counsel urged this court to allow the application.

Plaintiffs/Respondents submissions

13 The Plaintiffs in addition to the principles for granting mandatory injunctions as pointed by the Applicants herein included two principles more issues Whether the Defendants have approached the court with clean hands and whether the circumstances of this case warrant lifting of the corporate veil. The Plaintiff submitted on each of these. It is the Plaintiffs case that the Defendants were in breach of the lease agreements for failing to incorporate a management company, allot shares to owners of the apartments and transfer the Management services to the Management Company. That while the Plaintiffs had failed to pay the service charge as required, the defendants had also failed to furnish to the Plaintiffs certified accounts and actual expenditure of the service charge collected as required under articles 8.2 and 8.4 of the fourth schedule of the leases. Further that the forecasted accounts exhibited were shrouded with ambiguity and lack of transparency. It was not clear if the directors and shareholders of the Defendants who were also apartment owners were complying with the obligations on service charge. Consequently, being in breach, the Applicants could not obtain an injunction to restrain a breach by the Plaintiffs as was held by the Court of Appeal in **Kenya Breweries Ltd Vs. Okeyo (2002) EA** cited with approval in **Caliph properties Limited Vs. Barbel Sharma & Another (2015) eKLR**. Further that the Defendants had failed to come to equity with clean hands, had not done equity and should not benefit from the equitable remedy of injunction as was held in Patrick **Waweru Mwangi & Another Vs Housing Finance Co. of Kenya Ltd (2013) eKLR**.

14 It was further urged that in view of the concerns raised on directorship and shareholding of the Defendants against performance of their obligations as apartment owners, as well as likelihood of intercompany transactions to the detriment of the Plaintiffs, it was necessary that the veil of incorporation should be lifted. Reliance was placed on the case of **Stephen Njoroge Gikera & Another Vs. Econite Mining Company Ltd & 7 Others (2018) eKLR** where the court addressed itself on the question of a director using the company to avoid legal obligations.

15 With regard to whether the Applicants had demonstrated a prima facie case with a likelihood of success, Counsel contended that this test had not been achieved. Citing the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** counsel urged that with unclean hands there was no genuine and arguable case for the reason that the Applicants had failed to meet their obligations under the contract.

16 Relying on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** which dealt with the principle of irreparable harm, the Applicants emphasized that the alleged financial burden occasioned to the Defendants, that is, payment from the pocket for the provision of services is not an irreparable harm. Moreover, it was not in dispute that the service charge was being paid monthly. Further those salaries are never paid in advance but in arrears. Irreparable injury was injury that could never be adequately remedied or atoned for damages see Halsbury's laws of England cited with approval in **Paul Gitonga Wanjau Vs Gathuti Tea Factory Company Ltd & Two Others (2016) eKLR**.

17 Counsel urged in view of 16 above, on a balance of convenience the Plaintiffs had a stronger case and relied on the case of **China Wu-Yi Company Limited Vs. Suraya Property Group Limited & 2 Others (2020) eKLR**.

18 On whether there were special circumstances to warrant the grant of the mandatory injunction counsel urged that since there were doubts as to the accuracy of the accounts and failure by the Applicants to fulfil their obligations the orders should not be granted. Counsel relied on the cases of **Nation Media Group & 2 Others Vs. John Harun Mwau (2014) eKLR** and **Shepherd Homes Ltd Vs. Shadahu (1971)** cited with approval in **Mary Kathambi Vs. Julius K. Ithai & Another (2020) eKLR** where the court held that since a mandatory injunction was likely to be more drastic in its effects, there must be unusually strong and clear case even if the injunction is sought to enforce a contractual obligation.

19 Counsel urged that the Applicants application be dismissed with costs to the Plaintiff.

20 In further response to the Plaintiffs Replying Affidavit Counsel for the defendant contended that the Plaintiffs had not filed anything before court to prove unclean hands on the part of the applicants, the allotment of shares was not a condition precedent to the payment of service charges. Further that the mandatory orders were not being sought on the basis of equity but on enforcement of the parties' contractual obligations. That the authority of **Kenya Breweries Limited Vs. Okeyo** addresses the failure of one party to meet its contractual obligations while seeking an injunction against another contracting party. That the Plaintiffs have used the same accounts that it has allegedly not been supplied in its response herein. That lifting of the corporate veil would not change the fact that the Plaintiffs were in arrears of service charge. In addition, the Plaintiffs had not denied the existence of the special circumstances.

The 1st Defendants case

21 The 1st Defendant supported the application and submitted that there was no dispute as to the correctness or the validity of the leases. That the purpose of the bi annual payment of the service charge was to provide certainty, enable future planning such as hiring/firing, staff pension, long term repairs and provide high quality services to all the lessees. That it was a requirement of the lease that a dispute arising from schedule 4 of the lease should be referred to arbitration and in the intervening period of the arbitration the defendant was to seek from the arbitrator interim relief for maintenance of the properties pending determination of the dispute. Moreover, the Plaintiffs had never officially complained to the Defendants about the concerns raised herein. In addition, other lessees had dully paid the service charge and the Plaintiffs were unfairly living off these contributions.

ANALYSIS AND DETERMINATION

22 I have considered the application, supporting affidavits, the responses in opposition to the application, all attached exhibits, submissions of the parties and the authorities cited. The Application is anchored under Order 40 Rule (1)(a), Rule 10(1)(a) and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A,1B and 3A of the Civil Procedure Act and Section 13(7)(a) and (c) of the Environment and Land Court Act.

23 Order 40 provides for circumstances under which the court may grant an order of injunction if it is proved that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree. In the instant application wastage has been emphasized. The court may if satisfied by the material placed before it by way of affidavit grant a temporary injunction to restrain the act wasting the property or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as it thinks fit until the disposal of the suit or until further orders. The reliefs sought are also in the nature of a mandatory injunction.

24 In my view the issue that arises is whether the orders sought should be granted and in determining this the court has to be guided by the principles laid out for the grant of these orders. The principles have already been identified by the parties drawing from the case of **Giella Vs. Cassman Brown** and further elaboration in the cases of **Mrao Ltd v.First American Bank of Kenya Ltd & 2 Others** and **Nguruman Limited v Jan Bonde Nielsen & 2 others (supra)**. An additional principle or test has been introduced and rightly so since the relief being sought is in the nature of a mandatory injunction. This is the principle of existence of special circumstances as guided by precedent see Court of Appeal **Nation Media Group & 2 Others Vs. John Harun Mwau (2014) eKLR**.

The courts discretion has therefore to be guided by these principles which I will proceed to analyse and determine if they have been satisfied.

The applicant must establish a prima facie case with a probability of success

25 The key contention on the requirement whether a prima facie case has been established by the Applicant to warrant the grant of the interlocutory orders sought, is that the Applicants case is not genuine and arguable for the reason that the Applicants had failed to meet their obligations under the contract by providing accounts alongside the invoices for payment of service charge and had also approached the court with tainted hands. From the Applicants case the application has been necessitated by the fact that the Plaintiffs are not adhering to the terms of the lease with regard to service charge. According to the leases the same is to be paid bi annually that is to say after 6 months. This condition is not in dispute and the Plaintiffs have also not denied the fact that they are paying service charge monthly instead of biannually as required under the lease. In the case of **Mrao Ltd v.First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, the court's holding was that *'a prima facie case is a case in which on the material presented to court directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'*

26 Based on the above definition it is prima facie that indeed rent is not being paid in accordance with the lease. It is trite that the court is not required and should not dig into the merits of the case. At this point the court is limited to the affidavits and material placed before it. Issues of genuineness of the party can only become clearer at the full trial and so are the issues of whether the accounts are proper for purposes of the leases since they would have to be interrogated and tested in evidence. I find that the Applicant has established a prima facie case on a balance of probabilities.

Whether the Applicant will suffer irreparable damage

27 On whether irreparable loss would be suffered by the Applicant if the orders were not granted it was submitted that the apartments environment and ambience maintained over the last 25 years was what was at risk of being lost. If this was lost then the apartments would lose its attractiveness as a preferred destination of choice and therefore loss of business. The loss of business was in two limbs present targeting the holidays after lifting of travel restrictions and future. It is argued that sustenance of such ambience is dependent upon payment of the service charge as stipulated in the lease. In my view the anticipated loss are capable of being compensated by analysis of the business trends, before Covid, during Covid and post Covid if at all we get there. There is nothing in business that cannot be projected this includes future business. Maybe only the reputational loss could be clouded. I have some doubts in this regard.

28 Conversely, I'm inclined to look at loss from the perspective of both the Applicants and the apartment owners the Plaintiffs included. Even assuming the Applicants were not apartment owners, the business and profit would accrue to both sides of the divide and so would the losses. The questions to ask is even if the losses were quantifiable who would compensate the loss suffered? What about the apartments owners who are complying with the lease terms as to payment of service charge? Clearly there is a problem in this regard. This therefore takes me to the question where does the balance of convenience lie, the Applicants or the Plaintiffs?

Balance of convenience

29 Both parties have stood the ground that the balance of convenience tilts in their favor. In view of this court's observations in paragraph 28 above I need not belabor this point. The balance of convenience lies in preserving the wasting of the property and by association the business. In arriving at this finding, I'm guided by the court's observation in **Shivabhai Nathabhai Patel v Manibhai Hathibhai Patel (1959) E.A 907** where the court states thus; -

"it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. (emphasis Mine)

I'm further guided by the provisions of Order 40 of the Civil Procedure Rules to the effect that *'the court may if satisfied by the material placed before it by way of affidavit grant a temporary injunction to restrain the act wasting the property or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as it thinks fit until the disposal of the suit or until further orders.'* This is a case fit to balance the convenience and for this court to exercise this power to stop the act of failure by the Applicants to pay service charge in accordance to the provisions of the lease as they await the determination of this case.

Let the property be maintained as envisaged by the Defendants in the meantime.

Special circumstances

30 The special circumstances alleged by the Applicants were that a great window of opportunity had arisen for the Applicants to maximize the business following the lifting of travel restrictions that had been imposed following the outbreak of the Covid 19. Further the bleak business anticipated as the country goes into the 2022 general election period. This has not been controverted by the Plaintiffs. I also take judicial notice of the facts and agree with the Plaintiff. I however note the opportunity has been overtaken by events and if it is still available then the orders I’m inclined to grant will suffice.

31 The upshot of the foregoing is that this court finds that the Notice of Motion application dated 6th October 2021 has merit. The following orders hereby issue.

1) The Plaintiffs to make payment in respect of service charge of the suit property in accordance with the provisions of their respective lease agreements as in the following sums; -

- 1st Plaintiff - Christina Cronchey A.k.a Christine Cronchey **Kshs.292,301.11**
- 2nd Plaintiff - Cristopher John Taylor **Kshs.75,394.00**
- 3rd Plaintiff - Christian Theodor Friedrich Bezner **Kshs.63,378.44**
- 4th Plaintiff - Brian Capel **Kshs.268,389.03**
- 5th Plaintiff - Ian Nelson Njage **Kshs. 45,559.09**
- 6th Plaintiff - Graeme Williamson **Kshs. 13,963.00**

2) The Plaintiffs do make payment in respect of service charge of the suit property in accordance with the provisions of their respective lease agreements and as will be computed by the 2nd Defendant/Applicant, pending the hearing and determination of the suit herein.

3) Costs shall be in the course.

DELIVERED AND DATED AT KWALE THIS 7TH DAY OF FEBRUARY, 2022.

A.E. DENA

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

MS AKWAMA.....FOR THE APPLICANT/2ND DEFENDANT

**MS WAITHAKA HOLDING BRIEF FOR MR. ODERA.....FOR THE
PLAINTIFFS /RESPONDENTS**

MS AKWAMA HOLDING BRIEF FOR MR. BRAYAT.....FOR THE 1ST DEFENDANT/RESPONDENT

MR. DENIS MWAKINA..... COURT ASSISTANT.