REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO E047 OF 2021

DIPAN MEDIRATTA.....1st PLAINTIFF

RAAKHE MEDIRATTA.....2nd PLAINTIFF

HOSEAH MUTHOGA.....3rd PLAINTIFF

DAMYSYL INVESTMENT LIMITED..... 4th PLAINTIFF

JUDY KARORI ..... 5th PLAINTIFF

HITESH MEDIRATTA.....6th PLAINTIFF

SHALINA MEDIRATTA.....7th PLAINTIFF

JEMIMAH MUTII..... 8th PLAINTIFF

GEORGE OMBIS.....9th PLAINTIFF

LEAH OMBIS..... 10th PLAINTIFF

LYMA MEADOWS LIMITED.....11th PLAINTIFF

NISHIT MEDIRATTA.....12th PLAINTIFF

RAKHE MEDIRATTA..... 13th PLAINTIFF

PETER MAINA KAHUTHIA.....14th PLAINTIFF

SAMUEL MBURU KAMAU..... 15th PLAINTIFF

SAHARA CAPITAL VENTURES.....16th PLAINTIFF

MBATIA KIMANI.....17th PLAINTIFF

JANE NYAGATURI MBATIA.....18th PLAINTIFF

VERSUS

KAREN HILLS LIMITED.....1st DEFENDANT

LORDSHIP AFRICA FUND MANAGEMENT LIMITED.....2nd DEFENDANT

KAREN HILLS MANAGEMENT COMPANY LIMITED.....3rd DEFENDANT

RULING

1. Before this Court for determination are two Applications dated 1st February, 2021 and 21st September, 2021 both of them filed by the Plaintiffs. The Application dated 1st February, 2021 seeks the following orders;

a) That this Honourable Court do issue a temporary injunction restraining the Defendants whether by themselves, their servants, agents, employees or in any way howsoever from charging and collecting service charge from the Plaintiffs until the Defendants furnish the Plaintiffs with audited accounts for the financial years 2013-2019 and copies of all the service contracts and receipts for the expenses incurred in respect of services for Karen Hills Estate.

b) That pending the hearing and determination of this suit, a mandatory injunction do issue compelling the 1st and 2nd Defendants whether by themselves, through their directors and/or shareholders to forthwith include five representatives or such other number as the court will direct into the board of management of the 3rd Defendant.

c) That this Honourable Court be pleased to appoint a reputable firm of accountants to take accounts of all the service charge paid by the Plaintiffs and other property owners in Karen Hills Estate Limited from 2011 to date to confirm the expenses incurred and the service charge collected by the Defendants.

d) That pending the hearing and determination of the suit, a mandatory injunction do issue compelling the 1st, 2nd and 3rd Defendants, jointly and severally to undertake the following forthwith at Karen Hills Estate and file a report in court;

i. Exterminate rodents from all common areas in Karen Hills Estate;

ii. Repair, clean and maintain the borehole at Karen Hills Estate;

iii. Maintain the grounds of all the underdeveloped and unoccupied units at Karen Hills Estate including snakes which are a significant danger to the residents

e) That pending the hearing and determination of this suit, the court to permit the Plaintiffs to pay the sum of Kshs 10,000/= towards the service charge and the same be deposited in court or in a joint account to be managed by the Plaintiffs and the 3rd Defendant for payment of all costs to be incurred until accounts are taken or further orders of this Honourable Court.

2. The Application is supported by Affidavit of the 1st Plaintiff who deponed that the 1st Defendant is the registered proprietor of the property known as L.R No 195/228 situate at Nairobi; that by the lease dated 31st August, 2012, the 2nd Defendant was registered as lessee of the property aforesaid and caused it to be demarcated into sixty units for sale by way of sub-leases; that the 1st and 2nd Defendants as the owner and master developer of the suit property respectively and that the Plaintiffs are plot owners having purchased a number of units in the Estate.

3. According to the 1st Plaintiff, it was a term of the Agreements for Lease signed by the Plaintiffs and the 1st and 2nd Defendants that the Defendants should transfer to the Plaintiffs one ordinary share in the 3rd Defendant after completion of the sale transactions; that pursuant to clause 7.2 aforesaid, the board of the management company is to at all times be comprised of owners of units in the Estate and that in breach of the foregoing, the 1st and 2nd Defendants have excluded the Plaintiffs from the 3rd Defendant's board of management.

4. It was deposed that pursuant to the Agreement for lease, the Plaintiffs were to pay an initial sum of Kshs 30,000 as service charges being an estimate and the actual fee payable was to be ascertained at the end of each financial year with reference to a certificate containing a fair summary of the costs and expenditure and which certificate was to be supplied to the Plaintiffs; that the 1st and 2nd Defendants have failed/refused to disclose audited accounts and issue the duly signed certificates for the last six financial years and that the Plaintiffs have been unable to ascertain the actual costs incurred by the 3rd Defendant.

5. According to the 1st Plaintiff, despite the Plaintiffs paying for service charge, the Defendants have failed to provide amenities referred to in the Leases and Home Owner's Manual which include security access cards and intercom systems; that the Defendants have further failed to exterminated rodents, maintain, repair and renew the borehole forcing the Plaintiffs to source water from external vendors and that they have also failed to maintain the grounds of the underdeveloped and unoccupied units posing a security and health threat.

6. It is the Plaintiff's case that vide a meeting held on 12th October, 2018 between the Plaintiffs and the 1st and 2nd Defendants, it was agreed *inter alia* that the Plaintiffs would be incorporated into the board of management of the 3rd Defendant to enable them participate in decision making; that a property manager was to be appointed to deal with the service charge disputes and an accounts update provided to the Plaintiffs and that none of the aforementioned have been implemented.

7. The 1st Plaintiff deponed that the Defendants sunk a borehole in the Estate from where they have been supplying water to the Plaintiffs and that whereas initially they paid Kshs. 500 per month for water, the bills have since inflated and the Plaintiffs are paying an average of Ksh 7,500 per month which is grossly exaggerated.

8. In response to the Application, the Defendants, through their Director, filed a Replying affidavit. The Defendant's director deponed that

the 1st Defendant is the registered proprietor of the property known as Land Reference No 195/228 situate in Nairobi which it caused to be sub-divided into sixty units on which it has constructed the Estate; that the 1st Defendant granted the 2nd Defendant sixty sub-leases for consideration and that the 2nd Defendant in turn offered sixty plots for sale to the Plaintiffs among others.

9. According to the Defendants' director, pursuant to the Lease, the one ordinary share in the management company can only be transferred to the Plaintiffs upon completion of the sale of all the units on the suit property and the registration of all the Leases in respect thereof; that currently, only 34 out of 60 plots have been sold and that the Defendants will issue the shares once all the units have been sold and all the leases in respect thereof registered.

10. With respect to the issuance of the certificates, the Defendant's director deponed that they were unable to timeously issue the same due to an advertent mistake by the 3rd Defendant coupled with the covid-19 pandemic which resulted in their director of Finance and senior accounting officers leaving their employment; that they have replaced the accounting officers and are willing to issue backdated certificates; that in any event, issuance of auditors certificates is not a condition precedent to the payment of service charge and that in the absence of the certificate, the service charge ought to be an increase of not less than ten(10%) of the service charge payable in the previous year.

11. It is the Defendants' case that the Defendants have at all times provided the necessary amenities for the use and enjoyment by the Plaintiffs whom despite being beneficiaries of such services continue to be in breach of the Lease and the Homeowners Manual by failing to pay service charge.

12. It was deponed that the 3rd Defendant has sunk a borehole at the Estate and charges water at Kshs 55 per unit pursuant to **Clause 1.3.2** of the Homeowners Manual; that the 3rd Defendant carries out monthly bill readings and a check meter has been installed to ensure accountability; that at no instance has the 3rd Defendant inflated or exaggerated the figures and that the Arbitration clause and dispute resolution mechanisms provided for in the Lease are binding on the Plaintiffs and do not violate the provisions of **Section 42(5)** of the **Land Act.**

13. In response to the Defendants' Replying Affidavit, the Plaintiffs filed a Further Affidavit dated 24th September, 2021. The Affidavit was deposed by the 10th Plaintiff on behalf of the other Plaintiffs, in which she deponed that the Plaintiffs are not tenants of the 1st and 2nd Defendants but plot owners and that all the terms set out in the Lease are to be understood within the context of ownership; that the dispute resolution mechanisms set out in the Lease are not applicable in the circumstances of this case and that in any event, the Defendants waived their right to the same when they filed their Statement of Defence.

14. The 10th Plaintiff deponed that the Defendants cannot purport to charge interest when they have not accounted for the service charges that the Plaintiffs have been paying; that the Defendants cannot use covid-19 as an excuse for the inordinate delay in auditing accounts and cannot use their default as aforesaid to justify a 10% yearly increase of the service charge and that the water bills issued by the 3rd Defendant don't justify or reflect the actual consumption.

15. In response to the Further Affidavit, the Defendants through their director filed a Supplementary Affidavit in which he deponed that it is only upon transfer of the last unit that purchasers acquire shares in the management company; that as at 30th September, 2021, the Defendants had sold out 38 out of 60 units; that pursuant to the 3rd Defendants' Memorandum and Articles of Association, board membership is restricted to shareholders and that despite the timely provision of services by the 3rd Defendant, some of the Plaintiffs have failed to pay service charge.

16. The Deponent averred that although the Lease provides for an initial service charge of Kshs 30,000 per month with a 10% annual increment, the Defendants have maintained the service charge at below the allowed rate; that the interest charged on unpaid arrears is in line with clause 3.11.2 of the lease; that there is an ongoing audit by PKF Kenya which is at an advanced stage and will be shared to all the parties once completed and that none of the water bills have been inflated.

17. The 3rd -18th Plaintiffs filed submissions on 27th September, 2021. Counsel submitted that contrary to the Lease, the Defendants have not accounted for the service charges paid by the Plaintiffs since 2011; that the court has jurisdiction to make an order appointing an independent firm of auditors and that the Defendants conceded to being contractually obligated to appoint the Plaintiffs to the 3rd Defendants board.

18. It was submitted that contractually, the right to shareholding accrued immediately upon payment of the purchase price to the Defendants and the Defendants are bound to comply with the same; that service charge should be deposited in a joint account pending finalization of the audit process; that the 3rd Defendant will suffer no prejudice as the advocates will be fully accountable for the deposited service charge and that unless the court grants the interlocutory injunction sought, the Plaintiffs stand to suffer irreparably as the Defendants will continue collecting service charge without accounting for the same.

19. Counsel submitted that they have met the threshold for the grant of temporary injunction as set out in the case of ***Giella vs Cassman Brown & Co Ltd[1973]EA 358*** and the Court of Appeal case of ***Mrao Limited vs First American Bank Limited [2003] KLR 125;*** that the Plaintiffs have demonstrated on a prima facie case that the Defendants are in breach of their contractual obligations and that the Plaintiffs as purchasers stand to suffer irreparable harm as there is imminent danger that the Defendants will discontinue the services offered to the property owners.

20. The Defendant's counsel submitted that this suit is about enforcement of various agreements relating to the purchase and occupation of the suit property and the alleged breach of contract and that the Plaintiffs are attempting to have the court re-write their contracts in that regard contrary to the principle that a *court of law cannot re-write a contract as affirmed by the case of* ***National Bank (K) Ltd & Another[2001]KLR 112 at 18*****.**

21. According to counsel, this Application does not fit within the parameters of **Order 40 Rule 1** of the **Civil Procedure Rules** and the court has no jurisdiction in this respect; that **section 3A** of the **Civil Procedure Rules** is not applicable where there is an express provision of the law conferring jurisdiction on another body as affirmed by the court in ***Apa Insurance Company vs Vincent Nthuka[2018]eKLR*** and that prayer six of the Application is an interim declaration, a creature unknown in law.

22. Counsel submitted that whereas the parties agreed to an initial estimated service charge of Kshs 30,000 to be ascertained annually by reference to a certificate, the said certificate was not a pre-condition to the payment of service charge; that the Defendants have been charging below the stipulated amounts; that there is no evidence of mismanagement of the Estate by the Defendants and that the Plaintiffs are in continual breach of the lease by failing to pay the service charges.

23. It was submitted for the Defendants that pursuant to the Agreement for Lease, the Plaintiffs are entitled to representation in the board of management only after the sale of all the units in the estate and the registration of all the accompanying assignments of the lease and that in the event the court finds that the Plaintiffs are entitled to representation to the board of management, they would only be entitled to a maximum of 3 seats pursuant to the 3rd Defendants Articles of Association.

24. Counsel submitted that the Plaintiffs have failed to meet the threshold for grant of a temporary injunction as set out in the ***Giella case*** as they have no viable claim against the Defendants having failed to show how the Defendants were in breach of their contractual relationship; that the Plaintiffs have not alleged nor indeed proven that they will suffer irreparable loss; that the balance of convenience tilts in favour of the Defendants and that the Defendants have failed to show the extraordinary circumstances warranting the grant of mandatory temporary injunction.

25. In the application dated 21st September, 2021, the 1st and 2nd Plaintiffs have prayed for the following orders.

> **a) That pending the hearing and determination of this suit, this Honourable Court do order that the monthly service charge be deposited into a joint bank account to be opened and managed by the Plaintiffs and the 3rd Defendant or the parties advocates herein from where all the costs for provision of service in Karen Hills Estate will be defrayed pending the reconstitution of the board of the 3rd Defendant or until further orders of this Honourable Court.**
>
> **b) That pending the hearing and determination of this suit, this Honourable court do issue a temporary injunction restraining the Defendants whether by themselves, their servants, agents, employees or in any way howsoever from disrupting the services rendered in Karen Hills Estate.**
>
> **c) That pending the hearing and determination of this suit, this Honourable court do issue a temporary injunction restraining the Defendants whether by themselves, their servants, agents, employees or in any way howsoever from charging any interest on the disputed and/or contested service charge.**
>
> **d) That costs of this Application be provided for.**

26. The Application is based on the grounds on its face thereof and supported by the Affidavit of the 1st Plaintiff dated the 21st September, 2021 on behalf of himself and the 1st -10th Plaintiffs. The grounds in support of the motion are similar to those set out in the Application dated 1st February, 2021.

27. According to the 1stPlaintiff's deposition, the Defendants are in breach of the Agreement for lease by virtue of failing to provide the Plaintiffs with audited accounts and duly signed certificates for six (6) financial years; that the Defendants have failed to incorporate the Plaintiffs into the 3rd Defendants management board and that despite paying the service charges, the Defendants have failed to provide corresponding services.

28. In opposition to the Application dated 21st September, 2021, the Defendants filed a Preliminary Objection and a Replying Affidavit both dated 29th October, 2021. The Preliminary objection was based on the grounds that; the 1st and 2nd Plaintiffs have improperly appointed counsel to act for them independently of the rest of the Plaintiffs and that there cannot be multiple independent representation of joint Plaintiffs without first seeking and obtaining leave from this court.

29. According to the Defendants, the Application dated 21st September, 2021 is an abuse of the process of this Honourable Court as there is already a pending similar, undetermined application dated 1st February, 2021.

30. In the Replying Affidavit, the Defendants' director deponed that the majority of the Plaintiffs are in default in the payment of service charge severely affecting the 3rd Defendants' operations; that pursuant to the statement of accounts, the default by some of the Plaintiffs is to the tune of approximately Kshs 8,000,000; that the Defendants have informed the Plaintiffs of possible halt of services until due payment of service charge and that the Defendants have engaged the firm of PKF Kenya and an audit is ongoing. The Applicants' and the Respondents' counsel filed submissions in respect to the second application which I have considered.

Analysis and Determination

31. Having considered the pleadings and submissions, the issues that arises for determination are:

i. *Whether the Preliminary Objection in respect of the Application of 21st September, 2021 is merited?*

ii. Whether the Application of 1st February, 2021 is fatally defective?

iii. Whether the Plaintiffs have met the threshold to warrant the grant of the temporary injunctive orders sought?

iv. Whether the Plaintiffs have met the threshold to warrant the grant of the mandatory injunctive orders sought.

32. The Defendants objected to the Application of 21st September, 2021. Their objection is twofold. First, that there cannot be multiple independent representation of joint Plaintiffs without leave of court and secondly, that the Application filed on behalf of the 1st and 2nd Plaintiffs is incompetent and an abuse of the process of this court as there is already a pending application dated 1st February, 2021.

33. It is trite that a Preliminary Objection may only be raised on a "pure question of law." To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. [see ***Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700]*** **[*Supreme Court-Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR].***

34. It is not contested that the 1st and 2nd Plaintiffs, having initially instituted the suit jointly with the rest of the Plaintiffs have now appointed a separate counsel. Indeed, when the 1st and 2nd Plaintiffs instructed a different counsel to file the application dated 21st September, 2021, there was already a pending similar application dated 1st February, 2021.

35. The right to a legal representative of one's choice is one of the most treasured constitutional rights available to a litigant. In ***William Audi Odode & Another vs John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04*)**, O'Kubasu, JA stated as follows:

> ***"Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel."***

36. More recently, in dealing with a scenario where one of the co-plaintiffs sought to independently represent herself, the High Court in ***Harpal Singh Semhi & 4 others vs Zehrabanu Janmohammed & 3 others; Sports Registrar & 9 others [2020] eKLR*** persuasively posited thus;

> ***"Upon consideration of the conflicting positions taken by the relevant parties on this issue, I note that there is no strict law or legal provision which precludes different advocates from appearing on behalf of different Plaintiffs. This position was succinctly stated by the court in the case of Grace Samba and 27 others v Christine Nyamalwa [2015] eKLR with the court further rendering that the importance of having the same advocate(s) lies in ensuring the efficiency in litigation and to prevent the confusion that comes with parties taking different positions in a matter, particularly where the plaintiffs share a common interest."***

37. Although the importance of having the same advocate(s) lies in ensuring the efficiency in litigation and to prevent the confusion that comes with parties taking different positions in a matter, particularly where the plaintiffs share a common interest, there is nothing wrong with Plaintiffs having different advocates, and filing separate applications in a matter.

38. The requisite essentials for the grant of a temporary injunction were set out in the celebrated case of ***Giella vs Cassman Brown (1973) EA 358*** thus:

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

39. The Plaintiffs in this case are expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in ***Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR*** where the Court stated thus;

> ***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-***
>
> ***(a) Establish his case only at a prima facie level,***
>
> ***(b) Demonstrate irreparable injury if a temporary injunction is not granted, and***
>
> ***(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.***
>
> ***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86) If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory***

order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

40. As correctly cited by the parties, the Court of Appeal in ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR*** defined *prima facie* case as follows:

"….So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly 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."

41. More recently, the Court of Appeal in the case of ***Nguruman Limited vs Jan Bonde Nielsen & 2 others(supra)*** while agreeing with the definition of a *prima facie* case in the ***Mrao Case (supra)*** went ahead to further expound as follows;

"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

42. The nature of this dispute is contractual in nature. It revolves around the interpretation of certain clauses in the Lease, the Agreement for Lease and the Home Owner's Manual, and whether or not the parties are in breach thereof. In this respect, and noting that this is an interlocutory application, the court is alive to the fact that it needs to take caution and avoid making definitive or conclusive pronouncements on the substantive questions or issues in the main suit.

43. It is not contested that the 1st, 2nd and 3rd Defendants are the registered proprietor, master developer and management company respectively of the property known as L.R No 195/228 upon which lies Karen Hills Estate.

44. According to the Plaintiffs, subject to the lease dated 31st August, 2012 signed by the Defendants, service charges were to be ascertained at the end of each financial year with reference to a certificate containing a fair summary of the costs and expenditure and which certificate was to be supplied to the Plaintiffs; that the 1st and 2nd Defendants have failed/refused to disclose audited accounts and issue the duly signed certificates for the last six financial years and that the Plaintiffs have been unable to ascertain the actual costs incurred by the 3rd Defendant.

45. The Defendants have on their part admitted to being in breach of their obligations in respect to the issuance of the certificates. They however maintain that payment of the service charge was not dependent on the issuance of the certificate.

46. The court has perused the Lease Agreement Clause 3.11 thereof provides as follows:

"a)The amount of service charge shall be ascertained annually by reference to a certificate (hereinafter called the certificate) signed by or on behalf of the management company's auditor as soon as may be practicable after the expiration of each financial year and which shall relate to such financial year and shall in any case be one 1/60th of the costs of the management company for providing the services referred to in the third schedule for the relevant financial year and in the event no such certificate is available then the service charge shall be an increase of not less than 10 percent over the service charge amount payable in the previous year.

b) The Certificate shall contain a fair summary of the costs and expenditure incurred by the management company in complying with its obligations set out in the Third Schedule during the Financial year to which it relates."

47. It would seem from the foregoing that whereas indeed, the service charges were to be ascertained in reference to the certificate, the aforestated clause envisaged a situation where the certificate was not available and set out the formula for calculating service charge in that instance. According to the Lease, the increased payable service charge in the absence of a certificate shall not be less than 10 percent over the service charge amount payable in the previous year

48. The above notwithstanding, it is inconceivable that for more than six years, the Defendants would fail to issue the certificates setting out the summary of costs and expenditure pursuant to Clause 3.11(b) to enable the parties ascertain the payable service charge. This has the effect of the Defendants increasing the service charge every year without considering the costs and expenditure incurred by the management company which may be prejudicial to the Plaintiffs, a situation that the Lease sought to cure.

49. According to the Plaintiffs, as a consequence of the breach aforesaid, they stand to suffer irreparable harm as the Defendants continue receiving the service charges without accounting for the same, a contention that this court, prima facie, agrees with. Indeed, there is no evidence to show that the Defendants have accounted for the service charges paid since 2011 in breach of clause 3.11 of the Lease.

50. Other than the admitted failure by the Defendants to issue certificates pursuant to the Lease and the lack of accounts thereof, no evidence has been adduced with respect to the allegations by the Plaintiffs that the Defendants have been lax in maintaining the premises or indeed allegations of mismanagement of funds in that respect.

51. The duty of the 3rd Defendant to manage the property and an order for deposit of funds into a joint account at this stage will create a scenario where the Plaintiffs will attempt to co-manage with the 3rd Defendant the Estate. Consequently, the court finds that the status quo with respect to payment of the service charge should prevail until such a time that the audited accounts have been availed to the parties.

52. The Plaintiffs contend that as the service charge is undisputed, the Defendants should be restrained from charging any interest on the same. On their part, the Defendants contend that the interest charged on unpaid arrears is in line with clause 3.11.2 of the lease. Clause 3.11.2 (d) states as follows:

> ***"In the event of the service charge or any part thereof or any monies payable under this Lease being in arrears or unpaid for any period exceeding 14 days after the same become due:***
>
> **…….**
>
> ***d)All money unpaid or in arrears shall be charged at the interest rate as herein defined calculated on a day to day basis from the date of the same becoming due(whether demanded or not)and for the period of notice in Clause 3.11.2(a) and (c) above from the time the same becomes payable to the date of actual payment(both days inclusive).***

53. It is clear from the foregoing that the Defendants are well within their rights to charge interest on unpaid arrears. Consequently, the Plaintiffs have not made out a *prima facie* case in this respect. In any event, the courts have declared on several occasions that a dispute as to accounts cannot form the basis for the grant of an injunction. This was the position in the case of ***Jane Wanja Miriti vs Fina Bank Limited & Another [2012] eKLR*** where the court stated thus;

> ***"As regards the issue of proper accounts, from the pleadings it is clear that the Plaintiff is aware that she was indebted to the 1st defendant. Nevertheless, the issue of dispute as to accounts is not one that can found a basis for grant of injunction orders as was pointed out in the case of Mrao Limited VS. First American Bank of Kenya Limited & 2 Others [2003] KLE 125…"***

54. Further, no irreparable damage will be suffered by the Plaintiffs if the interest is charged on the defaulted sums. The question of the chargeable interest rate on service charge revolves around money which is easily ascertainable and can be refunded to the Plaintiffs at trial.

55. The Plaintiffs have sought to have the Defendants restrained from halting services offered by the 3rd Defendant. The Defendants on the other hand aver that the Plaintiffs are in default of the service charge and that they have been forced to seek loans to maintain their services; that the loans are not sustainable and that they may consequently have to stop offering services to the Plaintiffs. The Defendants have adduced statements showing the number of Plaintiffs who are in default.

56. It is trite that injunctive orders are equitable reliefs and he who comes to equity must come with clean hands. Considering that there is no dispute that some of the Plaintiffs have not been paying the service charges, they cannot be seen to approach the court seeking to stop the Defendants from offering services which they are not paying for.

57. With respect to the question of appointment of Independent Auditors, whereas indeed the Plaintiffs have, *prima facie* made out a case for the need for accounts, the Defendants have informed the court that audits are ongoing. The Defendants have adduced correspondence with the firm of PKF Kenya auditors indicating that an audit is ongoing. In view of this, it would be superfluous and an expense to both parties for this court to order for the appointment of another firm of auditors. What this court can do in the circumstances is to give impetus to the conclusion of the said audit report by giving timelines.

58. The Plaintiffs have sought for mandatory orders of injunction compelling the Defendants to undertake certain tasks, including extermination of rodents in all common areas, repairing, cleaning and maintaining the borehole and maintaining the ground of all undeveloped and unoccupied units.

59. The Plaintiffs have also sought for a mandatory injunctive orders compelling the 1st and 2nd Defendants to include five representatives or such other number as the court will direct into the board of management of the 3rd Defendant and to compel the Defendants to undertake works at the Estate.

60. In the case of ***Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR,*** the Court of Appeal stated as follows on mandatory interlocutory injunctions.

> ***"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:***
>
> > ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff … a mandatory injunction will be granted on an interlocutory application".***

Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- "A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

61. More recently, the Court of Appeal in the case of ***Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR***, said:

"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances…A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

62. The above cited cases lay down the principles of law to be considered in an application for mandatory injunction at an interlocutory stage and one of the condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction.

63. It is the Plaintiffs case that pursuant to clause 7 of the Agreement for lease, the board of management of the 3rd Defendant should be comprised of Plaintiffs who are owners of units purchased at the Estate. On their part, the Defendants contend that the one ordinary share in the management company can only be transferred to the Plaintiffs on completion of the sale of all the units and the registration of all the Leases in respect thereof; and that currently, only 34 out of 60 units have been sold.

64. Each of the parties are seeking to rely on different clauses in the Agreement of Lease to advance their position with respect to whether the incorporation of the Plaintiffs into the 3rd Defendant's board is automatic upon purchase of the unit or is dependent on the sale of all the units in the estate and the registration of the sub-leases. This context removes the issue of whether the Plaintiffs should be incorporated in the management company from the ambit of a mandatory interlocutory injunction as the question is neither clear nor straightforward. That question can only be dealt with finality after trial.

65. With respect to the prayer seeking to compel the Defendants, to exterminate rodents from all common areas in Karen Hills Estate, repair, clean and maintain the borehole at Karen Hills Estate and maintain the grounds of all the underdeveloped and unoccupied units at Karen Hills Estate, no evidence has been presented to the court indicating that the Defendants are in breach of their obligations. Indeed, the Plaintiffs did not annex photographs to show that the Estate is in such a state of disrepair to warrant the grant of the said order.

66. For those reasons, the applications dated 1st February, 2021 and 21st September, 2021 partly succeed as follows: -

a. An order be and is hereby issued directing the Defendants to furnish the Plaintiffs audited accounts in respect of service charge received from all the property owners within Karen Hills Estate and the expenses incurred from the years 2011 to date within the next 30 days.

b. Parties are at liberty to apply upon receipt of the said audited accounts.

c. Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF MARCH, 2022.

O. A. ANGOTE

JUDGE

IN THE PRESENCE OF;

MR. ISSA FOR 3RD – 18TH PLAINTIFFS

MS MUTUNGI H/B FOR AMOKO FOR THE DEFENDANT

MS. CHERONO FOR NYAMODI FOR 1ST AND 2ND PLAINTIFFS

COURT ASSISTANT - OKUMU