



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 207 OF 2017

NASSAU LIMITED.....PLAINTIFF

VERSUS

HILLINGDON LIMITED.....DEFENDANT

JUDGMENT

1. By its Plaintiff dated 12th October 2017 as filed herein on 19th October 2017, Nassau Ltd (the Plaintiff) prays for Judgment against the Defendant for:-

a) A declaration that the Defendant is in breach of the Sub-Lease Agreement for non-payment of the Service Charges amounting to Kshs 2,071,090.00/- in respect of Apartments F1, F2, F3, F4 and F5 in Block F and Apartments E5, E6, E14, E15, E20, E21 in Block E all situate on the residential premises known as Blue Marlin Resort situate on land Portion No. 603 (Original No. M6/22) Malindi and that under clause 5.1 of the Agreement dated 14th October 2014, the sub-lease in respect of the said apartments has been determined and that the Plaintiff is entitled to re-enter and take possession absolutely of the said apartments;

b) An order directing the Defendant to surrender to the Plaintiff all the Apartments situate on the residential premises known as Blue Marlin Resort situate on land Portion No. 603(Original No. M6/22) Malindi and more particularly delineated on a building plan and marked as Apartment F1, F2, F3, F4 and F5 in Block F; and Apartments E5, E6, E14, E15, E20, E21 in Block E;

c) Costs of this suit and interest thereon at Court rates.

2. Subsequent to the institution of the suit, the Plaintiff sought by a Notice of Motion application dated and filed herein on 31st October 2017 to serve the Defendant-Hillingdon Ltd by way of substituted service through an advertisement in a newspaper with a national circulation. The said application was allowed on 6th December 2017. Accordingly by a notice placed in the Standard Newspaper of Monday 18th December 2017, the Defendants were notified of the institution of this suit and were required thereby to enter appearance within 30 days of the publication. The Defendant has however neither entered appearance nor filed a defence and this matter accordingly proceeded by way of formal proof.

3. The Plaintiff called one witness in support of its case.

4. PW1-Ruggero Sciommeri is a Director of the Plaintiff. He adopted his statement dated 12th October 2017 as filed herein on 19th October 2017. In the said Statement, PW1 states that the Plaintiff is the registered lessee of the suit property measuring approximately 2.5 Ha.

5. PW1 told the Court that the Plaintiff has developed on the suit property a hotel and residential premises known as Blue Marlin Resort containing apartments, the reception offices, a bar and restaurant, gym, swimming pools, gardens, paths, parking bays, servant quarters and other usual amenities serving the same.

6. PW1 further stated that on 14th October 2010 the Plaintiff and the Defendant entered into a Sub-Lease Agreement wherein 13 of the said Apartments were leased to the Defendant effective 1st October 2008 at a consideration of Euros 100,000/-. The said Agreement required the Defendant to pay all outstanding Service Charges accrued on each of its apartments as computed annually by the Plaintiff's auditors. The Agreement further allowed the Plaintiff to re-enter the leased premises on a Court order and to proceed thereafter to determine the Sub-Lease Agreement where the Defendant defaulted in making any payments for 30 days after being given notice to remedy such default.

7. PW1 testified that in breach of the said Agreement, the Defendant has neglected, refused and/or failed to clear arrears of service charges

amounting to Kshs 2,071,090.00/- outstanding from 31st October 2014 to 27th April 2017 in respect to the 13 leased Apartments. Despite being notified severally to pay or clear the outstanding charges, the Defendant had failed to clear the same thereby necessitating the institution of this suit and the prayers listed in the Plaintiff.

8. I have considered the pleadings herein filed, the testimony of the Plaintiff's sole witness and the evidence placed before me. I have equally considered the submissions as filed herein by Mr. Maurice Kilonzo, Learned Advocate for the Plaintiff and the authorities in support of the Plaintiff's case.

9. From the material placed before me, it is evident that the parties herein entered into a Sub-Lease Agreement dated 14th October 2010(Pexh. 2). Under the said Agreement, the Plaintiff agreed to sublet 13 Apartments situated in its premises known as the Blue Marlin Resort to the Defendant.

10. The Agreement required the Defendant to pay all outstanding Service Charges accrued on each of the apartments as would be computed annually by the auditors for the time being retained by the Plaintiffs. It was the Plaintiffs testimony that between 31st October 2014 and 27th April 2017, the Defendant failed to remit arrears of Service Charge amounting to Kshs 2,071,090.00/-. In support of this position, the Plaintiff produced a bundle of invoices and statements (Pexh 3) showing the outstanding amounts with respect to Service Charge owed by the Defendant.

11. As it were, the Defendant despite being served neither entered appearance nor filed any defence herein. As a result, the averments made by the Plaintiff were neither contradicted nor challenged.

12. In the circumstances of this case and given that the Plaintiff's pleadings, testimony and submissions herein remain uncontroverted, and in light of the evidence placed before me, I am satisfied that the Plaintiff has proved its case on a balance of probability as required under Section 107 of the Evidence Act.

13. Accordingly, I hereby enter Judgment for the Plaintiff as against the Defendant as prayed in the Plaintiff.

14. The Plaintiff will also have the costs of this suit.

Dated, signed and delivered at Malindi this 11th day of July, 2019.

J.O. OLOLA

JUDGE