



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 156 OF 2018

DUCI ANNALISA & 32 OTHERS.....PLAINTIFFS

VERSUS

ZUBEDI BEACH PROPERTIES LIMITED.....1ST DEFENDANT

SOUTH PORT PROPERTIES LIMITED.....2ND DEFENDANT

JUDGMENT

1. By their Plaint dated 6th August 2018, the 33 Plaintiffs pray for Judgment against the two Defendants jointly and severally for: -

a. The sum of Kshs 347,633- as against the 1st Defendant;

b. The sum of Kshs 3,093,749.19 as against the 2nd Defendant and any outstanding year service charge at the time of conclusion of this suit and execution or payment in full;

c. An order of injunction restraining the Defendants whether by themselves, their servants, agents or representatives from selling, alienation, transfer, pledging as security or in any manner dealing with all those properties (Villas) registered and known as Cottages Nos. 14 on Land Portion No. 9699 (Original No. 1863/1) Malindi, Grant No. CR 28254/1 and all those Villas known as Villas No. 11, 16 and 17 existing on Land Portion No. 9699 (Original No. 1863/1) Malindi, CR Nos 31530 and 31532 pending the hearing and determination of an arbitration between the Plaintiffs and the Defendants;

d. Costs of the suit and interest.

2. Those prayers are premised on the Plaintiffs contention that they are the owners of various Villas and/or Apartments situated at Harbour Key Cottages in Malindi which Villas and/or apartments are erected on the said Land Portion No. 9699 Malindi owned by Zubedi Beach Properties Ltd (the 1st Defendant herein).

3. It is the Plaintiffs' case that pursuant to various sub-leases between themselves and the 1st Defendant, the 1st to 18th Plaintiffs are registered as proprietors as sub-lessees of certain villas and/or apartments. The provisions and conditions of the said sub-leases are similar save for the terms or durations granted thereby. As at the time of the purchase of the leaseholds interests, the 1st Defendant had developed upon the suit premises a hotel and residential complex comprising of a hotel block, reception and club house buildings, residential apartments and villas, gardens, swimming pools, paths driveways, parkings areas and other amenities associated therewith.

4. It is further the Plaintiff's case that the sub-leases granted them rights of services, access, entry, enjoyment and use of the common areas and facilities. The Plaintiffs state that for an initial period of three years the 1st Defendant had appointed Messrs Oaks Management Ltd to manage the cottages and that for that reason, all sub-lessees were required to remit service charge payments to the said company. The said Oaks Management Ltd however ceased operations in February 2015 and all the sub-lessees were thereby forced to independently manage the situation upon which they incorporated Messrs Harbour Key Cottages Management Ltd (the 33rd Plaintiff) to manage the operations on their behalf.

5. The Plaintiffs accuse the 1st Defendant which also owns cottage No. 14 within the premises as well as Messrs South Port Properties Ltd (the 2nd Defendant) which owns Villas Nos 12, 13 and 25 as well as Cottage Nos. 11, 16 and 17 of failing to remit service and other charges as required to the management Company and hence the prayers sought herein.

6. The two Defendants did not however enter appearance and or file any response to the Plaintiffs' claim and this matter therefore proceeded by way of formal proof. The Plaintiff called a single witness in support of their case at the trial.
7. PW1- Valentina Bertocelli is a director of Global Services Management Ltd which company is currently in charge of management of the Harbour Key Cottages. PW1 told the Court that the 1st Defendant is the proprietor of Land Portion No. 9699 upon which the Harbour Key Cottages are erected and that the 1st Defendant had leased out the villas and cottages thereon to various people including the Plaintiffs herein.
8. PW1 further testified that for an initial period of three years, the 1st Defendant had appointed an entity known as Oaks Management Ltd to manage the cottages and that for that reason, all the sub-lessees remitted payments for service charges to the said company. Their contract however expired on 30th June 2014 and the company formally ceased to manage the cottages in February 2015.
9. PW1 further told the Court that in such a situation, the 1st Defendant was required to either take back the management of the suit premises or to appoint a new management company but it failed to do so. In the circumstances, the sub-lessees formed their own management company known as Harbour Key Cottage Management Ltd.
10. PW1 told the Court that the 1st Defendant apart from being the lessor, also owned cottage No. 14 but had refused to pay service charge therefor since the year 2015. Similarly, the 2nd Defendant which owned Cottage Nos. 12, 13 and 25 until 28th February 2018 and still owns Cottages No. 11, 16 and 17 to-date equally failed to pay service charge since the year 2015. As at the time of filing the suit, the 1st Defendant had failed to remit the sum of Kshs 347,633/- while the 2nd Defendant had failed to remit the sum of Kshs 3,093,749.19 as service charge.
11. I have perused and considered the Plaintiffs pleadings, the oral testimony of the Plaintiffs' sole witness as well as the evidence adduced at the trial. I have similarly perused the submissions placed before me by Ms Chepkwony, Learned Counsel for the Plaintiffs.
12. The Plaintiffs herein are the owners of what are variously described as villas, cottages and/or apartments situated at Harbour Key Cottages in Coral Key, Malindi. They have brought this suit against the two Defendant Companies seeking payment of various amounts of money said to be due as service charge for the management of the said Harbour Key Cottages. The Plaintiffs also crave an order of injunction restraining the Defendants from selling, alienating, transferring, charging or in any manner whatsoever dealing with all those villas/cottages Nos. 11, 14, 16 and 17 as erected on Land Portion No. 9699, Malindi pending the hearing and determination of arbitration proceedings between themselves and the Defendants.
13. It is the Plaintiff's case that the 1st Defendant is registered as proprietor or Lessee of all that parcel of land known as Portion No. 9699 (Original No. 1863/1) Malindi being the land comprised in the Certificate of Title registered in the Land Titles Registry at Mombasa as CR 28254/1. Pursuant to a sub-Lease dated 24th September 1998, the 2nd Defendant is also registered as proprietor of Sub-Leasee from the 1st Defendant of all those Villas Nos. 11, 12, 13, 16, 17 and 25 erected upon the suitland.
14. Like the 2nd Defendant, the Plaintiffs are holders of various sub-leases entitling them to ownership of a number of separate and distinct villas erected on the parcel of land owned by the 1st Defendant. From the material placed before me, it was apparent that as at the time of the Plaintiffs taking up their respective sub-leases, it was agreed that, among other things, the 1st Defendant would provide a number of services such as provision of security, cleaning and garbage collection as well as taking out insurance for the suit premises. Despite the Plaintiffs honouring their obligations under the sub-leases, the 1st Defendant had failed and/or refused to honour its part of the bargain as a result whereof the Plaintiffs told the Court they had suffered loss.
15. Having filed this case and consequent upon their failure to locate the two Defendants herein for service, the Plaintiffs filed an application dated 22nd August 2019 seeking leave of this Court to serve Summons upon the Defendants by way of substituted service through an advertisement in a local newspaper. Leave was subsequently granted and by an advertisement carried out in the Daily Nation newspaper of 12th November 2019, the Defendants were duly served and required to enter appearance within 21 days. Both Defendants however neither entered appearance nor filed any response to the Plaintiffs' claim.
16. At the trial herein, the Plaintiffs sole witness- Valentina Bertocelli (PW1) told the Court that the 1st Defendant is the registered proprietor of Land Portion No. 9699 Malindi upon which it has erected a number of cottages. Those cottages were leased to the Plaintiffs and the 2nd Defendant on certain agreed conditions. While the 2nd Defendant owned cottages Nos 11, 12, 13, 16, 17 and 25 on different periods during the material time, the 1st Defendant as the lessor had retained ownership of Cottage No. 14 within the premises known as the Harbour Key Cottages. The Plaintiffs told the Court that all the Cottages shared certain utility charges inclusive of power, water and garbage collection bills.
17. PW1 told the Court that it was a term of the sub lease agreement that the 1st Defendant would either provide the management services itself and/or hire another company to manage the premises. PW1 further told the Court that for some three years the 1st Defendant had engaged the said Oaks Management Ltd to manage the Harbour Key Cottages. During this period, all the Plaintiffs were required to remit payments for the agreed services to the said Oaks Management Ltd.
18. PW1 further testified that sometime in June 2014, the 1st Defendant's contract with the said Oaks Management Ltd expired and in the absence of a new contract, they effectively ceased to manage the Harbour Key Cottages in February 2015. Contrary to the Plaintiffs expectations, the 1st Defendant neither appointed a new manager nor did it take up the responsibility itself. Fearing that things would get worse, the Plaintiffs teamed up and incorporated their own management company by the name Harbour Key Cottages Management Ltd to take care of their concerns and interests. That company subsequently appointed another company by the name Global Services & Management Ltd.

19. PW1 who runs the said Global Services & Management Ltd told the Court that following the failure of the 1st Defendant to continue with the management of the premises, there was a requirement for all the sub-lessees within the premises to pay service charge for the year 2015 and the subsequent years. The monies required were to enable the management to take care of all expenses needed to run the common areas and utilities like security, power and water.

20. While all the cottages at the premises were supposed to pay for these charges, the two Defendants have not been paying anything since PW1 took over management in February 2015. By coming to Court the Plaintiffs were seeking to recover the amount of money paid on behalf of the Defendants on the utilities and management services.

21. A perusal of a copy of the Sub-Lease between the 1st Defendant and one of the Plaintiffs dated 16th December 1996 annexed to the Plaintiffs' List of Documents reveals that the Plaintiffs were required to pay what was described as Service Rent. The said Rent was calculated on the basis of a "Portion of the Costs, expenses outgoings and matters mentioned in Part 1 of the Fourth Schedule to the Sub-Lease (referred to as "service expenses") as the area of the leased premises have to the total build up area of buildings already erected or to be erected in future from time to time". The said Service expenses were to be estimated by the 1st Defendant itself in the absence of such an agent at the beginning of every year. The actual amounts payable were to be determined after the 1st Defendant or its managing agent had ascertained the correct amounts payable from the responsible authorities upon which a reconciliation of the accounts would be done.

22. Part 1 of the said Fourth Schedule to the Sub-Lease indicates that the service expenses included expenses of maintaining, repairing, redecorating and renewing:

- a. The roofs, main structure, gutters and rain water pipes of the common parts of the premises.
- b. The water pipes, drains and electric cables and wires serving the premises; and
- c. All common parts including the swimming pool, the pool house and the entrances to the suit premises.

23. In addition, the expenses included those of lighting and cleaning all the common parts of the premises as well as land rent, rates and taxes, insurance costs and other outgoings payable in respect of the premises. The fees and disbursements paid to the managing agents who was to be appointed by the 1st Defendant also formed part of the expenses.

24. Evidently the Sub-Leases envisaged that the Harbour Key Cottages would require certain shared services especially in the areas referred to therein as the "Common areas". It would appear to me from the wording of the Sub-Leases and the testimony of the sole witness herein that these services were necessary for the proper running of the cottages. Indeed, the 1st Defendant was cognizant of this fact and hence its appointment of the said Oaks Management Ltd to perform the functions stipulated.

25. The failure by the 1st Defendant to appoint a new managing agent and/or to take over the responsibility itself was therefore a major drawback on the performance of the contract as executed between the Plaintiffs and the 1st Defendant. A perusal of Clause 6 of the Sub-Lease on the 1st Defendant's covenant with the Plaintiffs reveals that the 1st Defendant was required to ensure that the Plaintiffs "peaceably and quietly hold and enjoy the leased premises...without any interruption or disturbance from the 1st Defendant or any person or persons rightfully claiming under or in trust for the 1st Defendant" as long as the Plaintiffs honoured their part of the obligations.

26. In addition, it was the business of the 1st Defendant to ensure under Clause 6 (b) of the contract that every person to whom a cottage was leased would be bound by similar terms as the Plaintiffs and that such a person would observe the covenants thereunder. Clause 6 (d) placed an obligation on the 1st Defendant to ensure and keep insured the Swimming Pool and all common parts while Clause 6(e) required them so far as practicable to provide for the lighting of and to keep the common parts of the cottages and the Swimming Pool in good condition and order.

27. Accordingly, it was clear to me that the 1st Defendant's covenants under the lease were critical to the Plaintiffs' peaceful and dignified enjoyment of the leased cottages. It was equally clear to me that all occupants and/or owners of the cottages were bound to pay for the costs, expenses and other outgoings required to maintain the common areas of the Harbour Key Cottages. The Plaintiffs had been compelled to make payments which included those for the portions occupied by both the 1st and 2nd Defendants. In the absence of the 1st and 2nd Defendants and their neglect to pay dues for the cottages under their control, the Plaintiffs were forced to chip-in to avoid a situation where various utility providers would disconnect services such as power and water thereby causing hardships to all the occupants.

28. In their List of Documents, the Plaintiffs have annexed various receipts from payments made for land rent, electricity, insurance and other utilities after the same were demanded for by the various responsible authorities. In addition, they have attached a tabulation as to how the various sums due were apportioned to all the cottages comprised in the Harbour Key Cottages.

29. In the circumstances I am satisfied and I hereby find that the Plaintiffs had a duty to mitigate their losses after the two Defendants abdicated their respective responsibilities under the lease. The Plaintiffs were justified to make payments for these utilities as failure to do so would have led to their losing out on their investments. Having made the payments, the Plaintiffs are in my view perfectly in order to demand reimbursements therefor from the Defendants.

30. In the premises, Judgment is hereby entered for the Plaintiffs against the Defendants jointly and severally as prayed in the Plaint.

31. The Plaintiffs shall have the costs of this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021

J.O. OLOLA

JUDGE