



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 721 OF 2012

TAJ MILLENIUM MANAGEMENT LIMITED.....PLAINTIFF

VERSUS

TAJ MALL LIMITED.....DEFENDANT

JUDGMENT

By a Plaint dated 17th October, 2012 the Plaintiff prays for judgement against the Defendant for:

- a. A declaration that the Defendant has breached the Lease Agreement dated 27th September, 2001.*
- b. A Permanent Injunction be issued restraining the Defendant either by itself, its agents, servants and/or its officials from disposing off, charging, transferring or in any other manner dealing with the suit property LR No.209/14036.*
- c. A Permanent Injunction restraining the Defendant either by itself, its agents, servants and/or its officials from any further works of bringing down the gymnasium.*
- d. A Mandatory Injunction be issued to compel the Defendant by itself, its servants and/or its officials to transfer the reversionary interest to the Plaintiff.*
- e. A Mandatory Injunction be issued to compel the Defendant to hand over the following documents to the Plaintiff;-*
 - i) The original Certificate of incorporation of the Plaintiff*
 - ii) Memorandum and articles of association relating to the Plaintiff.*
 - iii) Company seal belonging to the Plaintiff.*
 - iv) Original certificate of title relating LR No. 209/14036*
 - v) Original building plans and;*
 - vi) Originals of all the thirty (30) share certificates relating to the apartments on the suit property.*
- f. A Mandatory Injunction be issued to compel the Defendant either by itself, its agents, servants and/or officials to reinstate the gymnasium to its previous state.*
- g. An order be issued to compel the Defendant to account to the Plaintiff for funds received from charges levied on the apartment owners as well as outsiders for use of the gymnasium.*
- h. Interest on (f) at court rates.*
- i. Costs of the suit.*

The Defendant was duly served and filed a Defence in 2012 which was later amended to include a Counter-claim on 16th January, 2020. In the said Defence, it denied the averments in the Plaint except the descriptive and insisted that it was not required to construct a gym under the Lease Agreement. It contended that it has sold the two flats D1 and D2 for Kshs. 15,000,000/= and has since obtained Kshs. 5,000,000/=

from the sale of each unit. Further, it has been unable to complete the repair works on the two units due to the Plaintiff's actions that have halted further renovations. It claims it has suffered loss and damage. In the counter-claim, it prayed for judgement against the Plaintiff for:

- 1) Interest on Kshs. 20,000,000/= the balance of the purchase price from the date of filing of the suit to date.*
- 2) Mesne Profits totaling Kshs. 13, 492, 500/= as at February, 2020.*
- 3) Costs of this suit together with interest thereon at court rates.*
- 4) Any further or other relief as this Honourable Court may deem fit and just to grant in the circumstances.*

The matter proceeded for hearing where the Plaintiff called two witnesses while the Defendant had one witness.

Evidence of the Plaintiff

PW1 Samuel Ouko Mbori, who is a retired banker stated that he is one of the shareholders to the Plaintiff. He testified that he purchased a residential house in Taj Millennium Apartments from the Defendant being, house number B5. He confirmed he was the Manager for the Plaintiff until 2015. It was his testimony that when they purchased the apartment there were amenities that formed part of the Agreement which included: Health Club, Parking, Swimming Pool and Children's Playground. He referred to the contents of the Agreement dated the 10th July, 2000 and insisted the property he purchased was as described in the Sale Agreement. He testified that there were 30 units and at the time of purchase, he inspected the premises which included fully equipped showroom, fully equipped health club, operational swimming pool, parking pending completion and children's playground. He further testified that the reversionary interest to the title was held by the Defendant who is yet to transfer it to the Plaintiff.

In cross-examination, he confirmed that at the time of purchasing his apartment, the gymnasium was operational and there was also a health club. He explained that there are four blocks of apartments on the suit property and proceeded to describe them. It was his testimony that in construction, D1 and D2 were different as they had their own building plans. He averred that the Plaintiff company has thirty (30) shareholders. Further, that they were informed at the point of purchase that once the thirty (30) units were sold, the reversionary interest would be transferred to the Plaintiff. He contended that at the time of registering the company, two units had not been sold and were being held by the Defendant. He clarified that they were made to believe that after reversionary interest has been transferred to the Plaintiff, the two shares held by the Defendant were to be surrendered to the Plaintiff. He insisted that the Plaintiff company was incorporated for managing and holding the reversionary interest of the said properties. He reaffirmed that the health club was a common area being shared by all the residents. Further, that service charge for health club was paid by the owners. He confirmed that the health club was run by the Defendant who had not handed it over and it was being run at a fee with members charged a discounted rate as compared non- residents.

In re-examination, he clarified that during purchase and when he took possession of his apartment, he was made to understand D1 and D2 were space for health club and were utilized for the same. He reiterated that the Defendant did not hold a share in the Plaintiff and has not transferred reversionary interest.

PW2 Michael Joseph Achola Abiero confirmed he is a member of the Plaintiff and he purchased one unit from the Defendant being no. C2. It was his testimony that he applied for a loan in 2015 for Kshs. 13 million, and sought to use his unit as security but the Defendant who held reversionary interest declined to sign the Charge documents to enable him get the said loan. He claims to have suffered since the Defendant declined to sign the loan forms.

In cross-examination, he confirmed his Lease was registered on 10th May, 2001 and he took possession of his property. He clarified that when he took possession of his property, the health club was being run by the Defendant who was charging a fee. He stated that the Defendant's representative declined to sign his loan forms unless he convinced the other owners to withdraw the case against it.

The Plaintiff produced the following documents as exhibits: Agreement for sale dated 10th July, 2000; Lease Agreement on L.R. No. 209/14036 Flat No. 8A dated 16th July, 2001; Certified copy of Lease dated 24th July, 2001; Lease Agreement on L.R. No. 209/14036 Flat No. 3A dated 24th May, 2001; Undated Agreement for Sale; Copies of the architectural plan and design of the mall; Letter dated 22nd November, 2000 annexed with an undated Sale Agreement; Letter dated 11th July, 2000 annexed with the architectural plan and design together with a financial information of the flats; Lease Agreement on L.R. No. 209/14036 on Flat No. 5B dated 8th May, 2001; Lease Agreement on L.R. No. 209/14036 on Flat No. 2B dated 12th March, 2002; Copies of the architectural plan and design of the mall together with financial information; KRA PIN Certificate of Jackson Kilonzo Mbatha; Copy of Identification card of Jackson Kilonzo Mbatha ; KRA PIN Certificate of Maina Margaret Wanjeri; Copy of Identification card of Maina Margaret Wanjeri; KRA PIN Certificate of Joseph Kagia Njihia; and Copy of Identification card of Joseph Kagia Njihia.

Evidence of the Defendant

DW1, Ramesh Chandra Govind Gorasia stated that the health club which included gymnasium had not been operational since 2009. It was his testimony that in 2008 there were tenants running the gymnasium who refused to pay the rent forcing them to stop operating it. He claims in 2012 they requested the Management (Plaintiff) that they intended to convert the gymnasium to an apartment. It was his testimony that they found a buyer and sold the two units to Kalyan Ravji and Ravji Santenben for Kshs.15 million each, in which they were paid Kshs. 5 million for each apartment. He insisted they had sale agreements to that effect which they entered into in September 2012 while this suit was filed in 8th October, 2012 by which time they were on the ground undertaking alterations. He explained that they also filed a case vide Milimani HCCC No. 676 of 2012 where they sought injunctive reliefs against the Plaintiff. Further, the Plaintiff thereafter sued them vide Milimani HCCC No.721 of 2012 and obtained injunctive reliefs but did not serve the Defendant. It was DW1's testimony that they registered the building plan for LR 209/14036, which was approved and contained apartments D1 and D2. Further, they also for sought approval for the

conversion of the gymnasium to apartments. He stated that he did not have an issue in transferring the reversionary interest to the Plaintiff. The Defendant produced the following documents as exhibits: Grant No. 83448 in respect to LR No. 209/14036; Draft Lease for Unit No. 1D and 2D on LR No. 209/14036; Agreements for Sale for Unit No. 1D and 2D on LR No. 209/14036; Annual Returns and Replying Affidavit.

Plaintiff's Submissions

The Plaintiff in its submissions stated that all witnesses admitted that block D, ground floor was planned to have D1 and D2 as gymnasium or health club. Further, the same was constructed as a gymnasium to serve the residents of the development but outsiders were also allowed to use it. The Plaintiff submitted that construction documents were legally binding on the owner, contractor and purchasers of the final product. Further, that the end user would be shown the construction documents and would buy the end products once satisfied that they met the legal requirements. It was the Plaintiff's submission that the executory contract is a contract for the performance of a future activity. Further, both parties assumed obligations where the purchaser invests in the project under construction or yet to be constructed and relies on the development plans, building plans and floor plans as well as the sale terms to enter into an agreement, which terms bind both parties. On whether the health club D1 and D2 formed part of the estate, the Plaintiff submitted that the Defendant sought to deviate from and change the narrative that it intended to sell thirty two (32) instead of thirty (30) units yet they failed to demonstrate that there were such written documents indicating that they had agreed to change the units from thirty (30) to thirty two (32) while the health club was being removed altogether. It submitted that the Defendant was in breach of the Lease Agreement and the Plaintiff was entitled to all the remedies as prayed since it had demonstrated that it had all the legal rights to administer the estate as described in the Sale and Lease Agreements, while the actions of the Defendant of demolishing the health club was not only a breach of contract but also misconstrued. The Plaintiff reiterated that there is no doubt that a constructive trust arose as between the Defendant and itself including the members. Further, that a trust would automatically arise in favour of the person who advances the purchase money; and it was a finding of fact that the purchase price for the estate was advanced by the Purchasers who became members of the Plaintiff and the Defendant had continued to hold onto the estate when the actual utility of the Health Club was for its benefit. The Plaintiff contended that when the Defendant purported to construct the additional units, all existing thirty (30) units had already been purchased and the Defendant failed to obtain the requisite approvals and/or permissions from relevant authorities contrary to Section 57 of the Physical Land Use Planning Act. It averred that the purported approval obtained and which the Defendant relied upon was for a different property being L.R No. 209/14026 and not LR No.209/14036, which is the suit property herein. On reversionary interest, it submitted that where housing units in a gated community are developed by a single developer on a title held on leasehold basis, often the practice has been that the reversionary interest in the 'mother title' is transferred to the Management Company upon sale of all the units, with the management company ultimately becoming the lessor. Each owner of a unit is a shareholder in the management company by virtue of the unit owned. The share certificate becomes part of the title to the unit. The Plaintiff insisted that the Defendant was not entitled to the Prayers in the counter-claim more so *mesne profits* which relate to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. It pointed out that at no particular point has the Plaintiff been in wrongful possession of the Defendant's property, hence it cannot seek to be granted a remedy that does not exist in the present. Further, the Sale Agreement dated 14th September, 2012 was inadmissible for lack of stamping. It also submitted that the statements relied upon were computer generated documents without certification and therefore inadmissible in evidence. It concluded that the Defendant had denied, breached and infringed on its right to peaceful and quiet enjoyment of the estate. To buttress its averments, it relied on a myriad of decisions including: **Security Products Limited v Gabriel Teo Kian Chong & another (2020)**; **Charles Kangaiya v Alfred Musavi (2019) eKLR**; **Shainaz Jamal & 8 others v Abdulrasul Manji & another (2017) eKLR**; **Taj Mall Limited v Mohit Dhawan & 6 others (2018) eKLR**; **Karanja Mbugua & Another V Marybin Holding Co. Ltd (2014) eKLR**; **Attorney General V Halal Meat Products Limited (2016) eKLR**; **Peter Mwangi Mbuthia & Another V Samow Edin Osman (2014) eKLR**; **Invergue Investments V Hacketh (1995) 3 All ER 842**; **Francis Mwangi Mugo V David Kamau Gachago (2017) eKLR**; **Republic V Mark Lloyd Stevenson (2016) eKLR**; **Republic V Barisa Wavu Matriguda (2011) eKLR**; **Samwel Kazungu Kambi V Nelly Ilongo & 2 Others (2017) eKLR**; **Peter Ngethe Ngari t/a PNN Funeral Services V Standard Group Limited PLC & Another (2020) eKLR**; and **William Odhiambo Oduol V Independent Electoral & Boundaries Commission & Others (2003) eKLR**.

Defendant's Submissions

The Defendant in its submissions stated that it was only under an obligation to transfer the reversionary interest to the Plaintiff after disposing of the thirty two (32) apartments to the buyers. It contended that there was a board meeting of the Plaintiff's company on 15th September, 2009 where the Defendant sought the Plaintiff's consent to convert the gymnasium back to their original state and to effectively sell the two apartments D1 and D2 that were housing it. It insisted that it managed to obtain the Plaintiff's consent which was granted on condition that the existing service charge arrears were to be paid up first. It submitted that it attempted to ensure that the gymnasium was functional by advertising the same in the daily papers as well as incurring costs on the maintenance and upkeep of the same, in futility. Further, that the impracticability of running of the gymnasium became apparent when the Defendant realized that it could not manage the same on its own and needed a fitness as well as a health Manager Company to effectively do so; which posted a great challenge as most manager companies weren't willing to do so due to low returns against their investment margin. It reiterated that the Plaintiff waived the application of the term as to transfer of the reversionary interest after the sale of thirty (30) apartments through its conduct and acquiescence when it gave a nod to the Defendant to sell apartments D1 and D2. Further, that the reversionary interest was therefore to be transferred upon the completion of the sale of thirty-two (32) apartments. It insisted that the contract between the Plaintiff and itself was frustrated due to the impracticality of managing the gymnasium. To buttress its averments, it relied on the following decisions: **Mamta Peesh Mahajan Vs Yashwant Kumari Mahajan, Civil Suit No. 571 of 2015**; **Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) eKLR**; **748 Air Services Limited V Theuri Munyi Civil Appeal No, 310 of 2014 as cited in Globe Motors Inc & others v TRW Lucas Electric Steering Ltd & Others**; **Five Forty Aviation Limited V Erwan Lanoe (2019) eKLR**; and **Sita Steel Rolling Mills Limited Vs Jubilee Insurance Company Limited (2007) eKLR**.

Analysis and Determination

Upon consideration of the Plaintiff's Statement of Defence including Counterclaim, Testimonies of the Witnesses, Exhibits and rivaling submissions, the following are the issues for determination:

- Whether the Defendant is entitled to transfer of the reversionary interest to the Plaintiff.

- Whether the health club including gymnasium formed part of the estate and if the Defendant had a legal right to convert them into apartments.
- Whether the Plaintiff is entitled to orders sought in the Plaintiff
- Whether the Defendant is entitled to orders sought in the counterclaim
- Who should bear the costs of the suit.

As to whether the Defendant is entitled to transfer of the reversionary interest to the Plaintiff. It is not in dispute that the Defendant is the registered owner of LR. No. 209/14036. It is further not in dispute that the Plaintiff is a management company which was incorporated on 2nd March, 2001 to manage the development in LR. No. 209/14036. Further, that the said development contained residential apartments. From evidence, it emerged that the Defendant designed similar Letters of Offer, Sale Agreement and Lease including marketing tools to attract members of public to purchase the apartments on the suit property. Further, the only changes to the said documents were identification of the purchasers, purchase price, terms of payment and unit being purchased. It further emerged that most of the units were sold to members of the Plaintiff on off plan basis and only building plans were used. It was the Plaintiff's contention that its members entered into Lease Agreements with the Defendant yet it declined to transfer the reversionary interest to it, after all the thirty (30) apartments had been sold out. In that regard, I wish to make reference to the Recital Clause E of one of the Lease dated 24th July, 2001 which is a replica of most of the Lease Agreements except for identity of owner and date, that provided as follows:

“Upon payment of full membership fees of Kshs 50,000 by each of the lessees, the Lessor will transfer the reversionary interest in the lessor to the management company and each Lessee will pay Kshs. 50,000 being membership fees for membership in the Manager and their portion of the Reversionary Interest.”

Further, as per Clause 'F' in one of the Sale Agreements, it states thus: ***‘The vendor has agreed that after the sale of ‘the estate’ will, within reasonable time transfer the Reversionary Interest in the said Land to the Manager.’***

Section 6(1) of the Sectional Properties Act No. 21 of 2020 provides that: ***‘(1) The Registrar shall, on opening a register for a unit under section 5(1), include in that register the share in the common property apportioned to the owner of that unit under subsection (2) of this section, and shall include that share in the common property on a title deed for sectional property issued in respect of the unit under section 5(1) (c).***

In the cases of **Shainaz Jamal & 8 others v Abdulrasul Manji & another (2017) eKLR; and Taj Mall Limited v Mohit Dhawan & 6 others (2018) eKLR**, the Learned Judges while dealing with disputes in respect to reversionary interest held that Applicants therein were entitled to the same after paying the membership fees.

PW1 confirmed that all the thirty (30) apartments had been sold and each of the lessees had paid the sum of Kshs 50,000/- as required in the above clauses. He further confirmed that the Defendant does not have any other interest in the suit property. In the circumstances, I opine that there is no valid reason provided, why the Defendant should continue to hold onto the reversionary interest in the suit property. It is against the foregoing while associating myself with the decisions cited above as well as the quoted legal provisions that I find the Plaintiff is entitled to the reversionary interest and the Defendant is obligated to transfer the same to it forthwith.

As to whether the health club including gymnasium formed part of the estate and if the Defendant had a legal right to convert them into apartments.

The Plaintiff contended that when its members purchased their respective units, the health club including gymnasium formed part of the estate as indicated in the Sale and Lease Agreements, which fact the Defendant disputed. The Defendant insisted that the gymnasium and health club did not form part of the common areas and that is the reason the residents had to pay for its use. Further, it settled their utility bills separately. However, PW1 contended that the water bill for the said gymnasium and health club were paid from the service charges. In that regard, I wish to make reference to the description of the estate as contained in the Sale and Lease Agreements. At Clause B of the Lease, the estate is described as follows: ***‘The Lessor has caused to be erected on the said piece of land certain buildings consisting of Thirty residential flats, Health Club, Swimming Pool, Parking Place and developed gardens thereon (all of which premises are hereinafter referred to as the ‘estate’).***

While in the Sale Agreement at Clause B, it states thus: ***‘The vendor is in the process of erecting on the said land certain buildings consisting of a total of 30 Nos. 3 – Bedroomed residential flats, Health Club, Swimming Pool and Parking Place (hereinafter called ‘the Estate’) and the same are particularly delineated on a building plan registered at the Registry of Documents.’***

From the description of the estate as cited above, there is no ambiguity as to what constituted an estate, which members of the Plaintiff acquired at the point of purchase. However, the Defendant disputes this and insists the number of units on the suit property were not thirty (30) but thirty two (32). The Defendant insists the gymnasium and health club were not part of the estate and hence the Plaintiff was not entitled to the same. The Defendant commenced converting the gymnasium and health club into two units which DW1 confirmed were sold to two other persons. It was PW1's testimony that the Defendant had previously run and maintained the gymnasium on behalf of the residents, before it decided to convert the same into residential properties. DW1 in his testimony contended that it decided to convert the gymnasium into residential properties due to financial constraints that came with the cost of running the facility.

Section 13 (1) of the Sectional Properties Act No. 21 of 2020 on conversion of units provides that:

“(1) If a building contains premises that are—

(a) rented for residential or commercial purposes to a tenant who is not a party to a purchase agreement; and

(b) not included in a sectional plan, the owner of the premises or a person acting on his behalf shall not sell those premises as a residential or commercial unit until the sectional plan that includes those premises is registered at a registry.

(2) All long term sub-leases that are intended to confer ownership of an apartment, flat, maisonette, town house or an office that were registered before the commencement of this Act shall be reviewed to conform to section 54 (5) of the Land Registration Act 2012 within a period of two years of the commencement of this Act.’

While Section 57q(1) of the Physical Planning and Land Use Act stipulates that a party cannot undertake development without being granted permission from the relevant county executive.

From the evidence as presented, the Defendant has failed to provide proof as to whether it registered a different sectional plan to allow it to convert the said apartments D1 and D2 for residential use. The Defendant insisted that it got consent from the Plaintiff to convert the gymnasium and health club into two units but this was denied by the representatives of the Plaintiff. The Defendant insists the Plaintiff is estopped from restraining it from converting and selling the two units. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009)**, 1WLR 1980 at page 1993, citing Lord Person in **Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973)** 1 WLR 601 at 609, it was held that: “*The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.*”

To my mind, it seems the Defendant sought to rewrite the terms of the contract by denying the members of the Plaintiff what they rightfully purchased and I opine that this won’t do as *equity demands that he comes to must come with clean hands*. The Defendant insists the Plaintiff waived its rights as it allowed it to convert the said gymnasium and health club into units. It further relied on various authorities to support this averment. I wish to distinguish some of the decisions cited by the Defendant and hold that there was no proof that the Plaintiff’s had waived their rights hence the said quoted decisions to prove estoppel as well as waiver cannot stand in this instance.

Based on the facts as presented while associating myself with the decisions cited above as well as relying on the quoted legal provisions, I find that the conversion and/or sale of the two units was therefore null and void as well as contrary to the description of the estate as contained in the Sale and Lease Agreements. I further find that by converting the gymnasium and health club into units, the Defendant actually breached the terms of Lease Agreement dated 27th September, 2001. It is my considered view that once the Defendant received the purchase price from the purchasers who are shareholders in the Plaintiff, it sought to unjustly enrich itself by seeking to sell off the gymnasium and health club as two units which formed part of the estate, but this cannot stand. I hold that the Defendant has not come to court with clean hands and perhaps that is why the plan it presented showing that it obtained approval to convert gymnasium and health club into two units did not match with the reference number for the suit property as it indicated LR No. 209/3283 including LR No. 209/3284/2 and not L.R. No. 209/14036.

From my analysis and findings above, I find that the Plaintiff is indeed entitled to the orders sought in the Plaintiff.

As to whether the Defendant is entitled to the orders sought in the counter-claim. The Defendant sought for various prayers as enumerated above. On the prayer for interest on the purchase price, since I have already held that the Defendant did not have the legal mandate to convert the gymnasium and health club into units and sell off to third parties, I find that they are not entitled to this prayer. As for the prayer for mesne profits, I will refer to Section 2 of the Civil Procedure Act which defines the same as follows: “*mesne profits*”, *in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;*’

While Order 21 Rule 13 of the Civil Procedure Rules provides that:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of such suit until— (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or (iii) the expiration of three years from the date of the decree, whichever event first occurs. (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

In the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman (2014) eKLR**, the Court of Appeal while dealing with the issue of mesne profits held as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

Based on the evidence placed before me while associating myself with the legal provisions and decisions cited above, I find that the Defendant has failed to discharge its burden of proof in respect to entitlement to mesne profits as there was no evidence presented to prove that the Plaintiff’s members were occupying their respective units including using the health club including gymnasium illegally. Further, the Defendant has not proved that it was legally entitled to convert the gymnasium and health club into units so as to sell them off. If the Defendant did so as claimed, then it will have to refund the buyers, the monies it received. In the circumstance, I find that the Defendant is

not entitled to orders sought in the counterclaim.

As to who should bear the costs of the suit.

Since the Plaintiff is the inconvenienced party, I find it is entitled to costs.

It is against the foregoing that I find the Plaintiff has proved its case on a balance of probability and will allow it. I will proceed to dismiss the counterclaim and make the following final orders:

- a) A declaration be and is hereby issued that the Defendant has breached the Lease Agreement dated 27th September, 2001.
- b) A Permanent Injunction be and is hereby issued restraining the Defendant either by itself, its agents, servants and/or its officials from disposing off, charging, transferring or in any other manner dealing with the suit property LR No.209/14036.
- c) A Permanent Injunction be and is hereby issued restraining the Defendant either by itself, its agents, servants and/or its officials from any further works of bringing down the gymnasium.
- d) A Mandatory Injunction be and is issued compelling the Defendant by itself, its servants and/or its officials to transfer the reversionary interest to the Plaintiff within sixty (60) days from the date hereof.
- e) A Mandatory Injunction be and is hereby issued compelling the Defendant to hand over the following documents to the Plaintiff:-
 - i) The original Certificate of incorporation of the Plaintiff
 - ii) Memorandum and articles of association relating to the Plaintiff.
 - iii) Company seal belonging to the Plaintiff.
 - iv) Original certificate of title relating LR No. 209/14036
 - v) Original building plans and;
 - vi) Originals of all the thirty (30) share certificates relating to the apartments on the suit property.
- f) A Mandatory Injunction be and is hereby issued compelling the Defendant either by itself, its agents, servants and/or officials to reinstate the gymnasium to its previous state within sixty (60) days from the date hereof.
- g) An order be and is hereby issued compelling the Defendant to account to the Plaintiff for funds received from charges levied on the apartment owners as well as outsiders for use of the gymnasium, within sixty (60) days from the date hereof.
- h) Costs of the suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE