



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 84 OF 2018

MELISA AWOUR ODERA.....PLAINTIFF

-VERSUS-

KERINGET ESTATES LIMITED.....DEFENDANT

JUDGMENT

(Suit by plaintiff seeking orders against forfeiture of lease and to restrain the defendant from interfering with her lease; defendant filing defence and counterclaim inter alia seeking orders of forfeiture of the lease; defendant being head lessor and subleasing the suit premises to the plaintiff and her husband; parties also having an agreement that the defendant would construct the premises with the lessees providing the finances; plaintiff and her husband divorcing and the property transferred to the plaintiff following the divorce settlement before the house could be completed; plaintiff now being sole proprietor of the sublease; defendant contending that the transfer of the half share was unlawful for want of consent; defendant sending notices to the plaintiff to pay service charge which were ignored; defendant issuing notice of forfeiture of lease; defendant also claiming payments for construction and contractor fees; plaintiff justifying non-payment of service charge on grounds inter alia that she is not in possession and not receiving services since the house is incomplete; service charge being declared in the contract and thus plaintiff liable to pay; remedy of forfeiture available for non-payment of service charge; ambiguous however whether defendant forfeited the lease; court making orders on the forfeiture; plaintiff's suit dismissed; judgment entered for the defendant for accrued service charge and other accrued charges on the lease; costs to be paid by plaintiff)

A. Introduction and Pleadings

1. This suit was commenced through a plaint filed on 12 April 2018. The defendant is the head lessee from the Government of Kenya, of a 99 year old lease, from 1 March 1996, over the land parcel Kwale/Tiwi Beach/338 which land measures 12.5 acres. Through an agreement dated 3 May 2011 and registered on 27 May 2011, the defendant sub-leased to the plaintiff and her then husband, one Dr. Harald Gaeckle, a portion measuring approximately 4,046 square meters of the land (about one acre), for the unexpired residue of the term less the last 7 days thereof. In her plaint, the plaintiff has pleaded that the consideration was Kshs. 15 million. It was a term of the purchase that the purchasers would construct a dwelling house on the property. So that there may be a house constructed, the purchasers entered into another agreement with the defendant, where the defendant was to construct a house for the purchasers at a consideration of Kshs. 15 million. The purchasers were to make periodic payments till payment in full and the construction began in the year 2011. Between 2012 and 2013, the marriage of the purchasers hit the rocks, ultimately leading to a divorce in the year 2015 or thereabout. Part of the terms of the divorce settlement was that the plaintiff would keep the suit premises and to give effect to this, Dr. Gaeckle, through a transfer registered on 25 May 2016, transferred to the plaintiff his half undivided share in the sub-lease, meaning that the plaintiff now became the sole proprietor of the interest in the sub-lease. Before that, on 6 July 2014 and 18 September 2014, the plaintiff and Dr. Gaeckle had received demands from the defendant, respectively for payment of 50% of the amounts outstanding and demand for service charge. There was 30 days given to remedy the default or else the sublease would be forfeited. It is the plaintiff's contention that the notice of forfeiture of lease is illegal for the following reasons :-

- (a) Failure to give accounts of any payments due;
- (b) Failure to give accounts of the pro-rata payments of all lessees;
- (c) Failure to issue or give demand notices of the shared expenses between the lessees;
- (d) Unfairly demanding a service charge for non service;
- (e) Equating service charge to rent payments;
- (f) Unlawfully demanding for service charge when the plaintiff had not occupied the property.

2. The plaintiff believes that it is the desire of the defendant that she is disenfranchised from the suit property and has threatened to auction it to recover its alleged charges. She has pleaded that she has refused to pay the outstanding charges to the defendant for reason that :-

(i) The defendant has not provided evidence of services offered;

(ii) The defendant has not provided expenses receipts and/or payments rendered to the expenses simply known as service charge;

(iii) The defendant has not completed construction of the house and therefore no services can be offered.

3. The plaintiff decries that the defendant has undervalued the premises for purposes of auction, giving a value of Kshs. 16 million, Kshs 5 million being cost of the land and the rest as the costs of development. She contests this valuation for reason that the property was purchased at Kshs. 15 million, and there was Kshs. 15 million to develop it, and in her eyes it should at least be valued at Kshs. 30 million. She avers that she attempted to have her own valuer assess the property but the defendant has denied her access. She contends that the act of the defendant denying her access is illegal for reason that :-

(i) By purchasing the remainder of the lease term, the plaintiff and the defendant were equal proprietors of the property;

(ii) That the defendant had no greater right than the plaintiff in relation to the property;

(iii) That upon purchase of the property and payment in full of the purchase price, the purchaser has an indefeasible title to the land.

4. She contends that if the charges claimed by the defendant are recoverable, then they ought to be recovered through ordinary civil proceedings, as a debt, and not in forfeiture or cancellation of the lease.

5. In this suit, the plaintiff seeks the following orders :-

(a) A declaration that the plaintiff is the legal, beneficial and/or registered owner of 1 acre of Kwale/Tiwi Beach Block/338;

(b) A declaration that the plaintiff's right to property is unequivocal and inalienable;

(c) An injunction restraining the defendant from stopping the ingress and egress of the plaintiff and her agents from the property Kwale/Tiwi Beach Block/338;

(d) Mesne profits from 1 October 2017 at Kshs. 50,000/= per month;

(e) Costs of this suit and interest at court rate from the date of filing suit till payment in full;

(f) Any other order that the court may deem fit to issue.

6. The defendant entered appearance and filed defence and counterclaim which was later amended, with the amended defence and counterclaim being filed on 19 June 2018. In the defence, the defendant pleaded inter alia that the suit property was purchased by Dr. Gaeckle about the year 2010 at Kshs. 15 million and a sublease was granted jointly to Dr. Gaeckle and the plaintiff. It is pleaded that it was Dr. Gaeckle who instructed the defendant to construct a maisonette on the property and partly paid for the construction. He stopped remitting funds for construction when he started having marital problems with the plaintiff and it is averred that the plaintiff made no payments towards the construction. The defendant has contended that it was a term of the sublease (Clause 3 (e) thereof) that the lessees shall not transfer or part with possession of the suit property without prior written consent of the lessor and that there was breach of this clause when Dr. Gaeckle transferred his share of the property to the plaintiff as the defendant's consent was not sought. The defendant admitted sending the demands for payment to the plaintiff and also sending an email dated 28 October 2014 declaring that the sublease has been forfeited. On the particulars of irregularity pleaded by the plaintiff, the defendant pleaded that :-

(i) The accounts were supplied to the plaintiff vide, inter alia, an email dated 6 July 2014 and the defendant's advocate's letter dated 20 July 2016;

(ii) No payment was received from the plaintiff at all hence there was no need of giving account of pro-rata payments;

(iii) Demand notice was given and several letters and emails written demanding payments;

(iv) Service charge was payable on account of services rendered such as security to the building materials and proportionate expenses towards the maintenance of common parts of the Estate. In any event, and without prejudice, payment of service charge was contractual and was agreed upon in the sublease and the plaintiff was bound to pay the same.

(v) The defendant did not and has never equated service charge to rent payment. Rent payment was payable to the relevant authorities which in any event the plaintiff also defaulted in paying.

(vi) Service charge was not pegged on the plaintiff's occupation of the premises.

7. The defendant has denied that it wishes to disenfranchise the plaintiff from the suit property and averred that they have a contractual

relationship governed by the sublease. She denied wishing to auction the property and pleaded that the valuation was done for purposes of ongoing “without prejudice” negotiations, and with the knowledge and approval of the plaintiff. She denied that the property was undervalued and pleaded that her valuers, Burn and Fawcett, are reputable and that their valuation was credible. She pleaded that the value was pegged on the prevailing market conditions and not the purchase price or the derelict incomplete house on it, and that the South Coast had suffered a slump in the property market due to negative factors such as terrorism and the elections. On the claim of failure to allow the plaintiff access, the defendant pleaded that the plaintiff was given numerous appointments by the defendant to visit the suit property but she did not honour the appointments, but nevertheless, the defendant still accommodated her and allowed her, her agents and valuers, access to the property.

8. In the counterclaim, it is pleaded that Dr. Gaeckle paid the defendant Kshs. 15 million towards construction of the maisonette and the defendant embarked on the construction but the same could not be completed because Dr. Gaeckle stopped remitting funds. It is averred that pursuant to clause 2 of the sublease, the defendant was under obligation to pay service charge of Kshs. 23,000/= per month as well as pay all charges relating to water, electricity, ground rents and rates. She pleaded that according to Clause 5 (e) of the sublease, if any payment due by the lessee was unpaid for 30 days, the lessor was to give the lessee notice in writing to remedy the breach in 30 days, and in default, the lessor would enter the premises, repossess and enjoy the same as in its former state. The defendant pleaded that there was default in payment of service charge and also payment of construction costs. It pleaded that on 18 September 2014, pursuant to Clause 5 (e) she issued a notice to the plaintiff and her husband demanding that they remedy the breaches but they did not comply leading to the defendant serving the forfeiture notice dated 28 September 2014. The notice was followed by an affirmation of forfeiture through letter dated 28 October 2014. Pursuant to the forfeiture, it is averred that the defendant took physical possession. It is pleaded that as at the date of forfeiture, given as 28 October 2014, the plaintiff owed the defendant Kshs. 2.5 million, comprising of accumulated unpaid service charge of Kshs. 943,000/= , Euro 9,000 being the agreed building contractor’s fee, and Kshs 841,153/= as outstanding building costs. It is reiterated that the transfer to the plaintiff, of the half share of Dr. Gaeckle’s interest, was in breach of the sublease as no prior consent was obtained from the defendant. It is further pleaded that upon execution of the sublease, the plaintiff and Dr. Gaeckle were assigned 4,000 ordinary “B” shares in the defendant company through a share purchase agreement dated 3 May 2011. It is explained that these were acquired to represent their interest in the larger parcel of the undivided land. It is sought that the shares do revert back to the defendant’s original shareholders following the forfeiture of the sublease. In the counterclaim, the defendant has asked for the following prayers :-

- (i) Kshs. 2,500,000/= (comprising unpaid service charge, contractor’s fee and building costs incurred by the defendant);*
- (ii) An order of forfeiture of the sublease dated 3 May 2011 over the property Kwale/Tiwi Beach Block/338 with effect from 28 October 2014;*
- (iii) An order directed at the plaintiff to re-transfer to Michael Calnan and Sabine Funk (directors of the defendant) jointly 4,000 ordinary “B” shares in the defendant company within 14 days of this order in default of which the Deputy Registrar to execute the relevant documents for the re-transfer of the shares;*
- (iv) Interest on (i) above at court rates from the date of filing till payment in full;*
- (v) Costs of the counterclaim;*
- (vi) Any other relief deemed fit by the Court.*

9. In the alternative, the defendant has asked for judgment as follows :-

- (i) A declaration that the plaintiff is entitled to and has forfeited the sublease dated 3 May 2011, over the property Kwale/Tiwi Beach Block/388;*
- (ii) An order directed at the plaintiff to retransfer to Michael Calnan and Sabine Funk jointly 4,000 ordinary “B” shares in the defendant company within 14 days of the order and in default the Deputy Registrar to execute the relevant documents for the retransfer of the same;*
- (iii) Kshs. 2,773,153 (being Kshs. 1, 932,000/= on account of unpaid service charge from the month of May 2011 to the month of May 2018 and Kshs. 841,153.00 on account of unpaid building costs);*
- (iv) Service charge at the rate of Kshs. 23,000/= per month from the month of June 2018 to the date of judgment;*
- (v) Euros 9,000;*
- (vi) Interest on (iii), (iv) and (v) above at court rates from the date of filing to the date of judgment;*
- (vii) Costs of the counterclaim;*
- (viii) Any other relief deemed fit by the court.*

10. The plaintiff filed a reply to the amended defence and defence to counterclaim. She more or less joined issue with the defendant. She reiterated that if the defendant was offended by non-payment of service charge, the remedy lay in alternative proceedings and not forfeiture. Curiously, she also pleaded that the sub-lease being relied on by the defendant is void ab initio as it was founded on illegality, fraud, and deceit and thus incapable of being enforced. She pleaded that at the time of execution, they were only given the execution pages to sign and not the entire sub-lease to read and internalize. She denied being obligated to pay Kshs. 23,000/= per month as service charge. She also

averred that they were never aware of the service charge and that the construction cost was paid in full. I am not sure if it is poor drafting, for she admitted paragraph 38 of the amended defence and counterclaim, which sought the order for the shares held by the plaintiff in the defendant company to be reinstated back to the defendant.

11. I had sincerely hoped that this matter could be settled, for within the documents provided by both plaintiff and defendant, there were various emails and letters, exchanged prior to the filing of this suit, where the parties were negotiating this dispute. I indeed placed the file aside several times, even in the middle of the hearing of the case, so as to facilitate negotiations. The parties unfortunately could not agree.

B. Evidence of the Parties

12. The plaintiff relied on a previously written witness statement and also gave oral evidence in court. In her written statement, she acknowledged that the defendant is the lease holder of the land parcel Kwale/Tiwi Beach/338. She stated that in the year 2009, she and her ex-husband, purchased a portion of 0.4098 Ha for a consideration of Kshs. 15,000,000/=. Since the amount was colossal, they paid in instalments and finalized payments in early 2011 after which they executed the sub-lease on 3 May 2011. The same was registered on 3 May 2011 and a certificate of lease was issued in the joint names of herself and her ex-husband. She averred that it was a term of the lease that they would construct a home and they engaged the defendant to construct it. Again, it was a costly affair, and they agreed to pay in instalments. So far, she stated that Kshs. 15, 000,840/= has been paid to the defendant for construction. In July 2014, they received an email demanding Kshs. 432,000/= as service charge arrears as at 31 December 2013. She avers that they were totally unaware of this item. They engaged the defendant on it, and they were informed that the item is contained in the sublease agreement. She states that they were shocked as they were never informed of this particular term of the lease. They felt that the service charge was unnecessarily high, and worse, they had not taken possession of the property and there was no other lessee on the property. In their view, there were no expenses being incurred to demand service charge for. This was the start of a frosty relationship between them and the defendant. At around the same time, she and her husband grew apart, and regrettably had to go through a divorce. Due to the emotional and stressful nature of the proceedings, they did not take up the issue any further. The result of the divorce proceedings is that she was awarded the suit property wholly; this was in the year 2015. She was resident in Germany, and to find closure, she decided to sell the property. That is when she received a notice of forfeiture of the sublease from the defendant. Various correspondences were exchanged. She stated that among the issues was a demand from her for a statement of accounts and expenditure receipts to justify the service charge and explain how it was arrived at. The retort from the defendant was that the service charge was in the sublease agreement. She stated that the defendant threatened to sell the property and this led to some valuation reports being prepared, and at some point, they had agreed that the property could be sold. However, when she turned up at the property, the defendant denied her access telling her that the sublease had been forfeited. On 1 October 2017, she visited the property with a man of Somali origin and she was denied entry and further that the man was labelled as being one of no means. She mentioned that the defendant attempted to purchase the suit property from her and also offered an exchange with another property. She rejected the proposals, because according to her, the defendant was intent on defrauding her of her property. She contended to have an inalienable right to property as guaranteed by the Constitution, and that even if she did not pay service charge, the option is not to lose her property but the same can be recovered as a civil debt. She wondered why she is being kept from the property yet the defendant had received from them the amount of Kshs. 30 million.

13. In her oral evidence, she added that she lives in Germany, though she is Kenyan. She was previously married to Dr. Gaeckle who is German. At the time of purchase, the marriage was subsisting. She testified that despite demanding for the service charge invoices, she was never given. She acknowledged that the service charge was in the sublease agreement and it was a minimum of Kshs. 23,000/= per month, where the number of units (houses in the larger land parcel) did not exceed three. She also acknowledged that the service charge and money spent by the defendant for building was demanded for. She testified that through a letter dated 18 September 2014, the defendant, through its then advocates, M/s Anjarwalla & Khanna Advocates, sent a letter giving a notice for forfeiture. This was followed by another letter dated 28 October 2014 stating that the lease is now forfeited. She was shocked. She engaged the law firm of M/s Wamae & Allen Advocates, to handle the matter. Her lawyers inter alia demanded for a statement of accounts. She testified that service charge was for water, electricity, security, cleaning, refuse collection, consumed or rendered in relation to the common areas. She stated that to date, she has not been issued with the invoices, despite the sublease agreement stating that the same should be in writing. She alleged that the defendant was on the side of her husband as they are of the same race. She testified that Dr. Gaeckle transferred to her his 50% share in the property. She was subsequently issued with a title in her sole name, though she pointed out that the Land Registrar, transferred the whole of the land, not only the one acre that she purchased. She mentioned that this was a mistake. She testified that if she had been given access, she would have finished construction. She asked for mesne profits of Kshs. 50,000/= per month. She had no problem forfeiting her shares in the defendant company if she is paid what she has invested. She also stated that she is ready to pay service charge if they are invoiced but not ready to pay the demanded Kshs. 841,153/= as building costs as she is not aware of it. She stated that she has not seen any receipts and did not know how the claim for Euro 9000 was arrived at. She contended that there was an email dated 6 July 2014, where they demanded 50% of the service charge and she reasoned that her ex-husband must have paid the other 50%.

14. Cross-examined, she testified that she did not pay service charge because she was not invoiced and because her house was not complete. She insisted that the demand had to be in writing. Her understanding was that service charge would be payable after the construction of the house was completed, because that is when she could be liable to pay for garbage or electricity. She could not however see any clause in their agreement stating that service charge would be payable after completion of the house. She acknowledged receiving emails demanding service charge. She conceded that this was in writing. She also conceded that she did receive an email dated 6 July 2014 giving a statement of accounts. She never lived on the land. She testified that she needed access to finish the property and bring potential buyers. She agreed that they had engaged the defendant to develop the house. They were dealing with Sabine, a director of the defendant, who spoke the same language with her ex-husband. They however did not have a written contract on the construction. Sabine did write to her asking for money to continue with the construction. She stated that she lives in Frankfurt and before the advent of Covid-19, would visit Kenya about 4 times a year. She would need to arrange with the defendant's directors, Sabine and Michael, to access the property. She stated that she now needed their permission to access the property, but before the divorce, they could go at any time. They would even hold parties together, but after the divorce, things changed. On the transfer of the half share of her ex-husband to herself, she did not think that the consent of the defendant was needed and she did not ask for the defendant's consent. She was aware that the sublease agreement required one to give a 30 days notice to correct breaches. She did receive a 30 day notice through the letter dated 18 September 2014. She did not comply with the notice. She was then given the forfeiture notice of 28 October 2014. She was questioned on her demand for Kshs. 50,000/= mesne profits which she said is out of her research but could not explain its basis.

15. With the above evidence, the plaintiff closed her case.

16. DW-1 was Sabine Elizabeth Ingeborg Funk (Sabine). She is a director and shareholder of the defendant. She similarly adopted a witness statement that she had written to be her evidence. In it, she stated that she was personally involved in the sale of the suit property. The property was sold at Kshs. 15 million and not Kshs. 3,300,000/= as shown in the sublease. She stated that it was Dr. Gaeckle who paid the money. After the purchase, Dr. Gaeckle approached her and they agreed that the defendant would build a maisonette on the property. Dr. Gaeckle paid Kshs. 15 million for this over a period of approximately 3 ½ years and the defendant embarked on the construction. She mentioned that the plaintiff did not pay the construction costs. She explained that their arrangement was that Dr. Gaeckle would open an account at Imperial Bank in Diani, where she had authority to make withdrawals, at any time she required money for construction. She stated that the construction could not be completed because Dr. Gaeckle stopped remitting funds into the account and only added Kshs. 120,000/= which was deposited on 2 June 2014. At this time, the construction was only halfway and still needed a further Kshs. 15 – 20 million to complete. No more money was forthcoming. She averred that in the sublease there was a clause 2 which obligated the plaintiff and her ex-husband to pay service charge of Kshs. 23,000/= per month. She stated that the plaintiff was joint lessee hence equally liable with her ex-husband to settle this amount. On 6 July 2014, the defendant wrote to the plaintiff informing her to settle the service charge and additional construction costs of Kshs. 841, 153.00/= , plus 9,000 Euros building contractor's fees, and this was accompanied by a statement of account. On 18 September 2014 a 30 day notice to correct the breach was issued and this was followed by a letter dated 28 October 2014 where a declaration of forfeiture of the sublease was made. Several emails were then exchanged with the lawyers on this issue. She denied that the plaintiff has been locked out of the premises and mentioned that in November 2017 the plaintiff obtained an appointment with her to view the suit property which she granted. She also added that in March 2018, counsel for the plaintiff was allowed to visit the property.

17. In her oral evidence, she elaborated how the transaction with the plaintiff and her husband came about. The couple had a house in Diani which they asked Sabine to furnish. They eventually did not like the house and just about that time, she (and her husband) had just purchased the land parcel Kwale/Tiwi/388 measuring 12.5 acres which they registered in the name of the defendant. The plaintiff and her ex-husband developed interest to purchase and they sold to them one acre. When service charge was not paid, they had an oral engagement with Dr. Gaeckle who said that he could not pay since he was in the middle of a divorce case and wanted to see how it would go. The plaintiff on her part stated that it was the responsibility of Dr. Gaeckle to pay. The service charge was eventually never paid. That is what led to the notices of forfeiture of the lease. She stated that service charge was in the sub-lease and no invoices needed to be sent. Nevertheless, they did avail a statement of accounts on 6 July 2014, after demand by the plaintiff's lawyers. On the transfer of the sublease to the plaintiff, she testified that she was not aware and that the defendant did not give its consent to the transfer. On denying the plaintiff access, she explained that the gate was not permanently manned, thus the plaintiff needed to call her so that she can have someone at the gate to open for her. On the building costs, she stated that no agreement on the costs was made, as it would depend on several things. On her charges, she stated that she was to be paid 30,000 Euros. The building was to be done in one year but since the money came in bits and pieces, it had not been completed 3 ½ years later. She claimed 9000 Euros for her work in the building site. The claim of Kshs 841, 153/= was for her money that she personally spent on the building. She denied selling the property to Dr. Gaeckle because he was German and stated that she had no problem with the plaintiff.

18. Cross-examined, she stated that upon purchasing the suit property, the plaintiff and Dr. Gaeckle became shareholders of the defendant company. Despite being shareholders, they had nothing to do with the running and management of the company. There was rent to be paid on the sublease and also the service charge. The service charge was to pay part of the cost of managing the property. She elaborated that the property is at a cliff top (by the ocean) and that it is very expensive to manage such a property especially security. She did not know if there was a board resolution for the forfeiture of lease. She stated that the claim of 9000 Euros was to the company and not herself. She had not thought of bringing receipts for these amounts of Kshs. 841,153/= and 9000 Euros. She did not apportion money withdrawn from the building account to service charge, though she may have paid one or two months for service charge. Her reasoning was that it would have been best to first finish the house so that it may be put on "Air BnB" to earn some money which could then be used to pay for service charge. The plaintiff and Dr. Gaeckle had their bank account and could check the withdrawals that she has made and she used to send accounts every month. She insisted that their consent was needed before Dr. Gaeckle could transfer his share to the plaintiff. She explained that this was a gated community and she needed to be called to send someone to open the gate. Questioned by the court, she elaborated that their plan was to have a gated community for 9 houses. So far, two have been completed, the third (the plaintiff's) is half done, and there is also developed a luxury tented camp. The two completed houses and the tented camp are owned by the defendant.

19. DW- 2 was Michael John Calnan. He is a director of the defendant. He also adopted his witness statement, which more or less repeats the evidence of DW-1. He stated in his oral evidence that it was mostly DW-1 who dealt with the office work while he dealt with marketing. He affirmed that the emails written by them, though bearing their personal names, were written on behalf of the defendant company.

20. With the above evidence, the defendant closed its case. I invited counsel to file their submissions and they did. I have taken note of these submissions before arriving at my decision. I take the following view of the matter.

C. Analysis and Decision

21. The germane facts are actually not in dispute. The plaintiff and Dr. Gaeckle did purchase one acre out of the 12.5 acres of the land parcel Kwale/Tiwi Beach Block/338 belonging to the defendant. What they purchased was the residue of the leasehold title held by the defendant less the last 7 days. Flowing from the agreement, a sublease in favour of the plaintiff and Dr. Gaeckle was executed on 3 May 2011 and registered on 27 May 2011. The relationship between the plaintiff and the defendant is therefore that of lessor/lessee, although this is a long term lease for which a title for the sublease can issue. This lessor/lessee relationship is governed by the terms of the sublease agreement. It is therefore an agreement partly governed by contract and partly by the law of the land regarding leases such as this. Within the agreement, the parties had rights and duties. I will address the issues which I believe arise.

(i) Duty to pay service charge

22. One of the fundamental obligations that the defendant claims that the plaintiff has breached is the obligation to pay service charge. The issue of service charge is expressly captured in Clause 2 of the sublease agreement. It is drawn as follows :-

2. The lessee to the intent that the obligations hereinafter set out may continue throughout the continuance of the term hereby

created covenants and agrees with the Lessor to pay and indemnify the Lessor by way of service charge all costs and charges for electricity water security cleaning and refuse collection and other services and outgoings consumed used or rendered at or in relation to the common areas of the Land from time to time stipulated by the Lessor to the Lessee in writing (hereinafter referred to as the "Service Expenses") provided always that the Lessee shall pay a minimum service charge of Kenya Shillings twenty three thousand (K.Shs.23,000/=) per month in respect of the Service Expenses to the Lessor where the number of private residential units on the Land does not exceed three (3).

23. In her evidence, the plaintiff questioned this service charge and was adamant that she needed to be invoiced in writing so that she can pay it. Her position, as I understand it, is that since nothing was invoiced to her, disclosing the particulars of services rendered, then there cannot be a duty placed upon her to pay service charge. I am afraid that this interpretation by the plaintiff is wrong. My interpretation of Clause 2 is that so long as the private residential units did not exceed three, within the gated community being created by the defendant, then there would be a minimum charge of Kshs. 23,000/=. This was a minimum, meaning that the amount could go higher. It was only where the amount was going to be higher than Kshs. 23,000/= that there would be need to provide in writing, the particulars thereof. So long as what was claimed was the minimum Kshs. 23,000/= per month, while the units remained at less than 3 for private residences, then automatically, this service charge was payable. There was in fact no duty to avail any invoice for this amount of Kshs. 23,000/= because it was already stipulated in the sublease agreement as payable. Neither was it necessary to particularize it or give a breakdown of it. The plaintiff cannot therefore be heard to argue that there was no invoice and that she was not given its particulars and that this was good reason for her not paying the service charge.

24. In his submissions, Mr. Matheka, learned counsel for the plaintiff, also pressed the argument that it was necessary for the plaintiff to be invoiced. He faulted the agreement for stipulating that the minimum charge was Kshs. 23,000/=. He argued that this was unfair and goes against the doctrine of equity and fair practice and the law of contract on consideration. Counsel also thought that the drafter of the sublease intended that this charge be the rent. That cannot be the correct interpretation of the agreement. Clause 2 itself is categorical that this is service expenses and not rent. If it was rent, there would be nothing to stop the parties from stipulating as much. I have in fact seen from the sublease title that the rent is Kshs. 15,700/= per year, but even I ignore this sum, service expenses will still remain at Kshs. 23,000/= minimum so long as the private houses are not more than 3. This is in the agreement and was payable without being invoiced or particularised. The plaintiff's allegation that she never saw it in the sublease agreement cannot be believed. She herself signed the agreement.

25. But even then, the defendant did actually advise the plaintiff about this payment in writing. The defendant did so in the email of 6 July 2014 written by DW-2 to both the plaintiff and Dr. Gaeckle. There is a heading in that email which states, "*Dr. Gaeckle accounts up to 31.12.2013,*" and inclusive therein is recurring service charge from June 2012 at Kshs. 23,000/= per month. When the plaintiff's then advocates wrote letters and emails demanding accounts, the defendant yet again provided this breakdown of accounts, through the letter dated 1 December 2014 written by its then advocates, M/s Anjarwalla & Khanna. The plaintiff in her evidence did acknowledge that she received this communication which was in writing. So if it is writing that she desired in order to pay, there it was. In all these correspondences, it was explained to the plaintiff that the service charge was in the contract and needed no breakdown, which as I have held is the correct interpretation of the sublease agreement.

26. And NO ! this service charge did not kick in only after the plaintiff had finalized constructing the house. Nowhere in this sublease agreement does it stipulate that service expenses would only be payable after the completion of the house that the plaintiff and Dr. Gaeckle had commenced development.

27. I am afraid that I am unable to buy the reasoning of the plaintiff. How did the plaintiff expect the premises to be kept secure, and the common areas to be taken care of ? She was developing and had building materials on site. Did she just expect to stay away and for the defendant to take care of all these, including the common areas, without her paying a single cent ? Did she expect to reside in Germany while the defendant's directors, living in Kenya, worry about her property and its security without paying anything ? That is completely unreasonable on the part of the plaintiff. It was indeed explained that the property is on a cliff bordering the ocean, and I have no doubt in my mind that securing it requires massive resources. Even without the contract, one cannot fault the defendant for charging the plaintiff the service expenses. This was a gated community where services were shared. It behoved every member of this community to chip in on the payment of any services being rendered. It was disclosed in the sublease agreement that so long as the houses are three or less, the service charge would be a minimum of Kshs. 23,000/=. I would expect that with more houses, service charge per house would be less, due to economies of scale. My holding therefore is that the plaintiff and Dr. Gaeckle, while the latter was still a joint holder of the sublease, had an obligation to pay Kshs. 23,000/= per month from the date that the sublease was executed. Before Dr. Gaeckle transferred his share to the plaintiff, the lease was joint, meaning that the obligation to pay fell jointly to both the plaintiff and Dr. Gaeckle. Thus, even if one paid 50% of it, he/she would still be liable to the balance of 50%. The plaintiff is thus liable to pay service charge at the rate of Kshs. 23,000/= per month from May 2011 to the date of this judgment, and thereafter for the duration that she will still hold the sublease. This amount will attract interest at court rates from the time that this suit was filed till payment in full.

(ii) Whether the transfer of the lease to the plaintiff was illegal

28. It is not in contention that Dr. Gaeckle transferred his interest in the suit property to the plaintiff so that the plaintiff now became the sole proprietor of the sublease. The defendant claims that this was a breach of the sublease and has cited Clause 3 (e) thereof. It states as follows :-

3. The lessee hereby covenants with the Lessor as follows :-

(e) not without the prior written consent of the Lessor which consent shall not be unreasonably withheld and of any charge having security over the Land first having been obtained to transfer assign sublet charge part with possession of or grant a licence in respect of the Demised Premises and it is hereby expressly agreed and declared that upon any breach by the Lessee of the provisions of this sub-clause 3(e) it shall be lawful for the Lessor to re-enter upon the Demised Premises without notice and thereupon this Lease shall determine absolutely. If the Lessor shall give its consent to any transfer or assignment of the Demised Premises, the Lessee shall not transfer or assign the Demised Premises unless the Lessee simultaneously transfers or assigns the Demised Premises together with all the shares held by the Lessee in the Lessor (to the same person);

29. Mr. Oluga, learned counsel for the defendant, in his submissions, also referred me to the provisions of Section 55 of the Land Registration Act, Act No. 3 of 2012, which is drawn as follows :-

55. *Lessor's consent to dealing with leases.*

If a lease contains a condition, express or implied, by the lessor that the lessor shall not transfer, sub-let, charge or charge or part with the possession of the land leased or any part of it without the written consent of the lessor, and the dealings with the lease shall not be registered unless—

(a) the consent of the lessor has been produced to, and authenticated to the satisfaction of the Registrar and the Registrar shall not register any instrument purporting to transfer or create any interest in that land, and

(b) a land rent clearance certificate and the consent to the lease, certifying that no rent is owing to the Commission in respect of the land, or that the land is freehold, has been produced to the Registrar.

30. He also relied on my decision in the case of *Wakf Commissioners of Kenya vs Farida Almasi Mukira & 2 Others (2020) eKLR*. In that case, the plaintiff had leased property to the 1st and 2nd defendants. The 1st and 2nd defendants then transferred that lease to the 3rd defendant without the consent of the plaintiff. I held that this transfer was improper and nullified the transfer as the consent of the lessor was not given.

31. I appreciate the right of a lessor to give consent to any transfer of the lease and I indeed appreciate the import of Section 55 of the Land Registration Act. But I think I am dealing with a scenario that is distinguishable here. The transfer of the share of Dr. Gaeckle was pursuant to a court order upon divorce, it was not your classical transfer of the lease, where one party sells to the other the remainder of the term. I think the order of court must override any terms of the lease. I am certainly rolling in my mind whether the transfer by one joint owner to the other needs consent of the lessor, given that a joint holding is “one and all” at the same time, and no new proprietor is being introduced. It is a fine point of law, but I don't think I need to decide that question in this proceeding, as it wouldn't matter either way, for this was not a voluntary transfer from one joint owner to the other, for the other to hold exclusively, but it was an act in obedience to a court order. As I have mentioned, I think the court order must be given effect as it was issued, and the lessor cannot be allowed to veto what a court has ordered. If the lessor was aggrieved by the order of the court, then the lessor needed to go to that court and ask for a reversal of the order.

32. The defendant, as lessor, was certainly aware of this court order, for in a letter dated 1 March 2016 written by its lawyers, M/s Anjarwalla & Khanna Advocates, the advocates stated inter alia that “...we understand that the Divorce Court in Germany has awarded her (meaning the plaintiff) the derelict Building which is situated on the above plot (the plot in dispute) under a sublease which has since been forfeited by our client.” This letter did not threaten any action on the award in the divorce case and neither did it state that consent of the Lessor would be required so as to give effect to the court order. I believe the Lessor, at this point in time, did acknowledge that its hands were tied, given that this was a directive of a court. I therefore do not think that anything arises out of the contention of the Lessor that there was a breach by the transfer of Dr. Gaeckle's interest to the plaintiff. The defendant cannot rely on that to allege a breach of the sublease or seek a forfeiture of the lease.

(iii) Whether the lessor had a right of forfeiture and whether the sublease was actually forfeited and what orders to issue in light of the remedy of forfeiture

33. The defendant has been consistent that it did exercise its right of forfeiture of the lease. Its basis is the letters dated 18 September 2014 and 28 October 2014. The letter of 18 September 2014 specifies some clauses in the sublease agreement that the defendant thought the lessees had breached. These were clause 2 on payment of service charge; clause 3 (d) on the covenant to pay proportionate ground rent, municipal rates and other taxes; and clause 3(h) on the covenant to construct a dwelling house. In this letter the defendant gave a 30 days notice to the lessees to remedy these breaches in accordance with Clause 5 (a) of the sublease agreement, and warned that failure to remedy shall lead to forfeiture of the sublease. There was no reply to this letter, though the plaintiff acknowledges its receipt, and there was certainly no attempt to correct the alleged breaches. After lapse of the 30 days, the defendant did issue the notice in the letter of 28 October 2014, stating that the lease is now forfeited “with immediate effect” since there was no compliance with the 30 days notice.

34. I think it would be prudent, at this juncture, to set out clause 5 (a) of the sublease since the defendant heavily relies on it. It provides as follows :-

(a) If the rent or any other payment due by the Lessee hereunder or any part thereof is unpaid for thirty (30) days after it becoming due (whether demanded or not) or if there is any breach or non-performance or non-observance (whether or not material) by the Lessee of any of the covenants and agreements herein and on the part of the Lessee to be performed and observed or if the Lessee enters into any agreement or makes any agreement with or for the benefit of his creditor or if an encumbrancer takes possession or exercises or attempts to exercise any power of sale over the property or assets of the Lessee or a receiver is appointed of the whole or any part of the property assets or revenues of the Lessee or if any judgment or order is made against the Lessee and not complied with within seven (7) days or if any execution or sequestration is levied or enforced against any property or assets of the Lessee then and upon the occurrence of any such event it shall be lawful for the Lessor to serve upon the Lessee a notice in writing specifying such non-payment or breach as aforesaid and requiring the Lessee forthwith to remedy the same and if the Lessee shall not within thirty (30) days comply with such notice then the Lessor may at any time thereafter enter upon the Demised Premises and repossess the Demised Premises and enjoy the same as in its former state anything herein contained to the contrary in anywise notwithstanding and without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any covenant or agreement by the Lessee.

35. In his submissions, Mr. Matheka, submitted that there was no right of forfeiture because the sublease at Clause 7 provided that Sections 53 to 56 (both inclusive) of the Registered Land Act (RLA) (repealed in 2012) , shall not apply to the sublease. He also submitted that forfeiture must be done or crystallised by the Land Registrar and not through letter, and that it could only issue from the defendant and not through its advocates. On his part, Mr. Oluga submitted that the lease was determined by re-entry and possession pursuant to Clause 5 (a) of

the sublease. Counsel submitted that the defendant did not act pursuant to Section 56 of the Registered Land Act, but pursuant to Clause 5 (a) of the sublease and it was therefore immaterial that Section 56 was excluded as the agreement had a self-executing clause. He referred me to the case of *National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Limited & Another (2002) EA 503* where the Court emphasised that a court cannot rewrite the contract of the parties.

36. I first need to explain Sections 53 to 56 of the Registered Land Act (repealed) which were excluded by Clause 7 of the sublease. Section 53 implied covenants on the part of a lessor; Section 54 implied covenants on the part of the lessee; Section 55 defined the word “repair” in leases; and Section 56 provided for the Lessor’s right of forfeiture and I think its important that I set it out in full. It was drawn as follows :-

56. (1) Subject to the provisions of section 59 and to any provisions to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee -

(a) commits any breach of, or omits to perform, any agreement or condition on his part expressed or implied in the lease; or

(b) is adjudicated bankrupt; or

(c) being a company, goes into liquidation.

(2) The right of forfeiture may be -

(a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or

(b) enforced by action in the court.

(3) The right of forfeiture shall be taken to have been waived if -

(a) the lessor accepts rent which has become due since the breach of agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting; and

(b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach:

Provided that the acceptance of rent after the lessor has commenced an action in the court under subsection (2) shall not operate as a waiver.

37. Sections 53, 54, 55, and 56 of the RLA (repealed) only applied if there was no contrary provision in the lease and therefore parties were at liberty to opt out of these provisions of the law in their contract. The contract herein did provide that these sections will not apply. It follows therefore that the right of forfeiture could not be exercised under Section 56 of the Registered Land Act. But the fact that Section 56 was excluded does not mean that the contract could not provide for such right or could not provide for an action that was equivalent to forfeiture. Clause 5 (a) existed and could therefore be exercised within the parameters defined therein. What clause 5 (a) provided is that if there were unremedied breaches, the Lessor could “*enter upon the demised premises and repossess the demised premises and enjoy the same as in its former state.*” This appears to me to be an exercise of the right of forfeiture though the clause itself is not explicit that this is the right of forfeiture and that this right “to enter and repossess” would also lead to termination of the sublease (for the effect of forfeiture is to terminate a lease). It is indeed not very clear whether this entry and repossession was an act determining the lease.

38. Section 64 of the Registered Land Act, did provide for determination of leases and it was drawn as follows :-

64. (1) Where -

a) the period of a lease has expired; or

b) an event upon which a lease is expressed to determine has happened; or

c) a lessor has lawfully re-entered and recovered possession of the land leased; or

d) a notice duly given to determine the lease has expired, the lease and every other interest appearing on the register relating to the lease shall thereupon determine, and if the lease is registered the lessor may apply in writing to the Registrar to cancel its registration.

(2) An application under this section shall be supported by such evidence of the matters giving rise to the determination and the recovery of possession by the lessor as the Registrar may require, and the Registrar on being satisfied of the matters set forth in the application shall cancel the registration of the lease.

39. It will be noted from the above, that under the RLA regime a lawful re-entry and recovery of possession was one of the provided events that determined a lease. Upon determination of a lease, and this would include a sublease, the lessor could apply to the Land Registrar for registration for cancellation of the lease or sublease as the case may be. I have however not seen an equivalent provision requiring registration of the determination in the Land Act or Land Registration Act, which are now the statutes in operation, but I would think that if a registered lease is forfeited, meaning that it has determined, then it would be prudent also to register that determination of the lease.

40. Anyway, going back to the issue at hand, I am not too sure if ever there was a forfeiture of the lease. As I have mentioned, forfeiture leads to a determination of the lease, and the lessor takes possession of the demised premises. Yes, the notice of forfeiture was issued, but I have no evidence that the lessor took actual possession of the premises in a manner to suggest that there has been a determination of the lease and that the plaintiff is not welcome back. There was no positive action taken such as completing the house or doing other things on the land to demonstrate an actual take over of the premises. There was also no denial of access to the plaintiff and in fact, the defendant has been very quick to state that they never denied access to the premises to the plaintiff. Now, why would they be allowing access to the plaintiff if they have already determined the lease and have taken it over? In addition, there was no registration of any determination of the lease.

41. I think by excluding Section 56 of the Registered Land Act, the parties exposed themselves to the ambiguity of when foreclosure would be considered a remedy, how to go about it, and what reliefs could be available if the right was to be exercised. The parties did exclude Section 56 but they did not make elaborate substitution of the provisions thereof in the sublease agreement, leaving very grey areas as I have pointed out.

42. One can of course argue that now that the Registered Land Act has been repealed, the applicable law would be the Land Act, 2012 and the Land Registration Act, 2012, and indeed, it appears as if the issues herein took place in the year 2014 onwards after the repeal of the Registered Land Act in the year 2012. To me it doesn't matter which law applies, for both the RLA and the Land Act do give the Lessor the right of forfeiture and also allow for a Lessee to apply for relief against forfeiture. This is in Section 59 of the RLA and Section 76 of the Land Act. Section 76 of the latter statute provides as follows :-

76. Relief against forfeiture

(1) A lessee upon whom a notice has been served under section 75, or against whom the lessor is proceeding, by action or re-entry, to enforce his right of forfeiture, may apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit, and, if it grants relief, may grant it on such terms as it thinks fit.

(2) The court, on application by any person claiming as sublessee or chargee any interest in the property or part of the property comprised in the lease forfeited or sought to be forfeited, may make an order vesting the property or such part in such sublessee or chargee for the whole period of the lease or any less period, upon such conditions as the court in the circumstances of the case thinks fit:

Provided that nothing in this subsection shall apply in the case of a forfeiture arising from a breach to which the sublessee is a party, or from the breach of an express agreement or condition against subleasing, parting with the possession of or disposing of the property leased.

(3) This section shall have effect notwithstanding any stipulation or agreement to the contrary and whether the lease is registered or not.

43. It appears to me that the court has wide discretion and can allow the lessor to forfeit the lease or give relief to the lessee against the forfeiture. There are no guiding principles laid down and I think the court must therefore look at all surrounding circumstances to see what the best order to give would be.

44. In the case at hand, it is apparent that the plaintiff has made a heavy investment on the suit property. But is also apparent that she is not paying service charge and has also breached the clauses in the agreement requiring her to develop the property. I don't think it is fair that she continues burdening the defendant with expenses which she is not making good and it is also critical that the development be completed so that the gated community can be given effect. I personally have little sympathy for persons who consume communal services but do not wish to pull their weight in ensuring that the expenses thereof are adequately covered. And I do not agree with Mr. Matheka's position that the only remedy where service charge is not payable is an action for its recovery as a debt. The right of foreclosure also exists in law and can be used where the lessee is in breach of the conditions of the lease or sublease.

45. Having assessed all the circumstances of the case it is my opinion that the fairness of the case falls upon the following orders :-

46. To avoid foreclosure, the plaintiff must do the following :-

(i) pay the service charge accrued, plus any proportion of rent/charges or such other expenses, within the next 90 days. For the avoidance of any doubt, the service charge is a minimum of Kshs. 23,000/= per month for the moment, since the private dwelling houses do not exceed three; and

(ii) thereafter after payment of the arrears specified in (i) above, continue to pay service charge at the minimum amount of Kshs. 23,000/= per month unless circumstances change so that the service charge reduces; and

(iii) embark on completion of the house and I give a reasonable completion period of 12 months.

47. In default of either one of the above, then the defendant be at liberty to exercise its right of forfeiture, determine the lease, and take possession of the premises. In the event that this occurs, then I make the following orders :-

(i) the defendant do pay to the plaintiff, at least the forced sale value of the premises;

(ii) the value and the forced sale value of the premises to be assessed by a valuer to be agreed by the parties within 30 of the

occurring of the event permitting the defendant to take over the premises, and if they cannot agree, then this be conducted the Government Valuer within Kwale County. The costs of the valuation be shouldered by the plaintiff, and if the defendant is forced to pay for the same in order for the valuation to be conducted, the plaintiff to reimburse the defendant this expense, and in default, the defendant be at liberty to deduct it from the amount to be paid to the plaintiff for the take over of the premises.

(iii) If the defendant cannot make good at least the forced sale value of the premises within 6 months of the valuation, then the defendant be at liberty to sell it to its preferred purchaser, within the next 6 months, at the forced sale value or higher;

(iv) If no purchaser can be found by the defendant, the property be sold in a public auction, with the forced sale value as the reserve price, and in the event of failure to sell in two auctions at the forced sale value, then the property be sold to the highest bidder at the third auction;

(v) The defendant will have a right to participate and bid in any of the above auctions;

(vi) The parties to agree on the auctioneer and if they cannot then the Deputy Registrar, at his/her discretion, to appoint any authorised auctioneer that he/she deems fit.

(vii) The costs of any such auction to be deducted from the purchase price.

(viii) That the purchase price after deduction of expenses be paid to the plaintiff.

iv. Other Claimed reliefs and Supplementary Orders

48. I think I have actually settled the dispute in terms that I consider reasonable and ideally this should be the end of the matter for it is not necessary for me to deal with the issue of the lessor denying the plaintiff access. There is however the prayer for mesne profits by the plaintiff. I don't know on what basis the plaintiff is asking for mesne profits. She never completed the house and the defendant never stopped her from completing it. I dismiss this prayer. I also do not think that the plaintiff is entitled to the other declarations that she has sought in her plaint or at the very least they have been subsumed by the orders that I have made above.

49. There is also the issue of forfeiture of the shares in the defendant company. In the event that the plaintiff does not perform the duties that I have set out above, then she will have to forfeit her shares in the company. Indeed, it should be considered that the shares of Dr. Gaeckle have been transferred to her. She will need to execute a share transfer and if she does not do so then the Deputy Registrar to execute it to the defendant if the defendant purchases or to the buyer of the premises.

50. There is the counterclaim where the defendant has asked for Euros 9000 as money due to the defendant as contractor and Kshs. 841,153/= as building costs that they incurred on account of the plaintiff and Dr. Gaeckle. This, I am afraid I am unable to enter judgment for. The alleged building contract was said to be oral. I have nothing to refer to for its terms and conditions. I have no proof that the sum of Euros 9000 was agreed as contractor fees and no proof that the sum of Kshs. 841,153/= was spent by the defendant on behalf of the plaintiff. It is of course not the case that all contracts must be in writing to be enforceable - see the Court of Appeal decision in the case of *Abdulkarim Shariff Abdirahim & Another v Awo Shariff Mohammed T/A A.S Mohammed Investments (2014) eKLR* - but I think the evidence here is too thin to enable me enter judgment for the defendant for these claimed sums of money. If there was a good account presented then you would expect the defendant to demonstrate how the sum of Kshs. 841,153/= was arrived at but I have nothing before me. If the defendant was a registered contractor I would probably be moved to award her some fees depending on the rate that contractors charge out of business practice, or regulated fees, whatever the case may be. But the defendant does not pretend to be a registered contractor and it was not mentioned to me that building and construction was among the core businesses of the defendant. Either way, it was not shown to me that out of business practice, a contractor engaging in a development such as the one in issue would be paid Euros 9000. I am thus not persuaded that the claim for 9000 Euros and Kshs. 841, 153/= have been proved and I am not moved to award them. This claim is dismissed.

51. I have not forgotten a submission by Mr. Matheka that the defendant's claim is incompetent because there is no authority under seal displayed by Sabine and Michael. I will not take this seriously because both Sabine and Michael are directors of the defendant company and companies generally act through its directors. No one has brought evidence that the defendant is aggrieved and does not sanction the suit herein or the actions of Sabine and Michael. Nothing arises out of that argument.

52. I would have ordinarily stop here, but one or two issues have emerged in this case which I am unable to wish away. Firstly, the amount in the sublease was understated. The true contract sum was Kshs. 15,000,000/= and not Kshs. 3,300,000/=. No explanation was given as to why there was such a whopping understatement in the sublease. The only conclusion I can arrive at is that the parties were trying to understate the amount in order to avoid paying the correct stamp duty. I cannot close my eyes to this. The correct stamp duty must be paid and it must be paid on the sum of Kshs. 15,000,000/= including any penalties and/or interest that may be payable. The obligation to pay stamp duty was on the purchaser following the provisions of Clause 3 (m) of the sublease. The plaintiff, as purchaser, needs to pay this amount forthwith. I do order that a restriction be entered in the register of the sublease indicating that there is liability to pay stamp duty. Assuming that the property goes through a sale either to the defendant or other person, and since the new lessee will need to pay this stamp duty, the same may be deductible from the amount due to the plaintiff. Otherwise if the plaintiff retains the property, the restriction to remain in place and the stamp duty be recoverable against the plaintiff in the manner provided under the Stamp Duty Act or any other law.

53. Finally, it emerged that the plaintiff acquired a title for the whole of the 12.5 acres of land. She herself admitted that this was a mistake. It must be corrected. She needs to surrender this erroneous title that she holds. In fact, I think that the entire registration of the sublease was not done properly. The sublease could not retain the same description as the head lease without distinguishing that the sublease was only for a portion of the land. The Land Registrar needs to find a way of distinguishing the sublease from the head lease so that they do not bear the same description otherwise they will be considered as the same land when they are actually not.

54. I think I have dealt with all issues save for costs. In my view, the plaintiff was the author of her misfortune. The genesis was her refusal to pay service charge, which as I have demonstrated, she was liable to pay. If she had paid service charge, we would probably not have had any litigation here. I have already demonstrated that there was no basis in refusing to pay service charge. I have also seen many overtures in writing from the defendant where the defendant sought to provide relief to the plaintiff, including offering the plaintiff two other plots at the back (I am assuming at the back would mean a little further away from the seaside or maybe abutting the suit land). If the plaintiff had taken this offer, service charge would have been waived and she would have two vacant plots to do whatever she wished with them. I will thus order the plaintiff to pay the costs of the main suit and of the counterclaim. In the event that the plaintiff does not settle the costs upon taxation, and does not redeem the property, then the costs can be set off against any amounts that will be due to the plaintiff upon a repurchase by the defendant, or sale to any third party, without prejudice to the right of recovery by any other lawful means.

55. Judgment accordingly.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA