



Five Breweries Limited v Fortis Tower Management Limited (Environment & Land Case 1167 of 2016) [2025] KEELC 3594 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1167 OF 2016**

**EM WASHE, J
MAY 8, 2025**

BETWEEN

FIVE BREWERIES LIMITED PLAINTIFF

AND

FORTIS TOWER MANAGEMENT LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff herein filed a Complaint dated 23.09.2016 against the Defendant seeking for the following Orders;-
 - a. A declaration that the rules and regulations made by the Defendant in September 2016 in relation to the use of the service lift at Fortis Towers are unlawful and in contravention of the Plaintiff's rights and obligations under the Sub-Lease and the easements, rights and privileges included in the demised suit premises belonging to the Plaintiff.
 - b. A Prohibitory injunction restraining the Defendant from implementing regulations published on 21st September 2016 or any other regulations regarding the use of the service lift at Fortis Towers.
 - c. A Prohibitory Injunction restraining the Defendant from denying the Plaintiff the use of the service lift installed at Fortis Tower during the term of the Plaintiff's Sub-Lease dated 29th October 2014 except in accordance with regulations on the usage of the said lifts which were in place prior to 1st September 2016 or in accordance with such other regulations as may be mutually agreed between the Plaintiff and the Defendant.
 - d. A Prohibitory Injunction restraining the Defendant from denying the Plaintiff the easement, rights and privileges included in the demise of the suit property to the Plaintiff under the Sub-Lease dated 29th October 2016.



- e. Costs of this suit.
 - f. Any other or further relief that this Honourable Court may deem fit to grant.
2. The facts in support of the prayers hereinabove were as follows;-
- i. Pursuant to an Agreement For Sale dated 14.03.2014 and a subsequent Sub-Lease 29.10.2014 between Heather Properties Limited and the Plaintiff herein, the Plaintiff acquired proprietary ownership of the Rooftop Terrace and a portion of the Basement in the Building known as Fortis Towers erected on LR.NO.1870/IX/50 in the City of Nairobi.
 - ii. According to the Agreement For Sale dated 14.03.2014 and the Sub-Lease dated 29.10.2014, upon completion of the development known as Fortis Towers erected on LR.NO.1870/IX/50 in the City of Nairobi, the Developer Heather Properties Limited would hand over the said development to the Defendant who would remain as the management Company.
 - iii. Similarly, the Plaintiff herein being an owner of a portion of the development known as Fortis Towers erected on LR.NO.1870/IX/50 was recognised as a Shareholder of the Defendant which was the management Company through the Sub-Lease dated 29.10.2014.
 - iv. Upon the Development known as Fortis Towers being complete and handed over to the Defendant in the year 2015, the Defendant issued out various regulations on the use and management of the said development which included the time permitted for the usage of the service lift to the occupants which was before 8.00 am, between 9.00 am and 11.00 am, between 2.00 pm and 4.00pm and after 7.00pm.
 - v. However, on or about September 2016, the Defendant unilaterally and without any participation of the Plaintiff herein altered and/or changed the regulations including the time permitted for the usage of the service lift to before 7.00am, between 1.00pm and 1.30pm and after 7.00pm.
 - vi. The Plaintiff's position is that the revised timings for the usage of the service lift were detrimental and/or caused difficulties in the operations of its business keeping in mind that it operates an entertain establishment and the food and alcohol supplies would then be left exposed for a long period of time thereby resulting to risks of contamination and/or other risks thereof.
 - vii. The Plaintiff pleaded that it made efforts to seek a review from the Defendant on the timing relating to the usage of the service lift but the Defendants declined to make any changes thereby exposing the Plaintiff's business to the risk of closure.
 - viii. In conclusion therefore, the Plaintiff sought this Court to grant the prayers sought in the present suit as well as costs of the proceedings.
3. The Plaintiff herein was served on the Defendant who opposed the same by filing a Defence and Counter-Claim dated 30.01.2017.
4. According to the Defence filed by the Defendant, the Plaintiff herein was opposed on the following facts;-
- i. To begin with, the Defendant denied that the Plaintiff herein had any lawful and/or legal ownership of any portion of the development known as Fortis Towers erected on the property known as LR.NO.1870/IX/50 within the City of Nairobi.



- ii. The Defendant pleaded that the portion of space allegedly purchased by the Defendant which is described as Floor No. 11 on the development known as Fortis Towers did not exist and the Directors the Developer Heather Properties Limited who had entered into an Agreement For Sale and a Sub-Lease of the said space acted unlawfully, illegally and fraudulently.
 - iii. In essence therefore, the Plaintiff herein had no legal rights and/or permission to either operate and/or carry out any business on the development known as Fortis Towers hence not entitled to the usage of either the basement storage area or the service lift in the said building.
 - iv. Further to that, Defendant pleaded that it had the mandate and authority to make regulations on the usage and management of the development known as Fortis Towers.
 - v. Based on this authority, the Defendant stated that the usage of the service lift was subject to its consent and/or authority which had not been granted to the Plaintiff herein.
 - vi. The Defendant further stated that the usage and/or consent granted to the Plaintiff to use the service lift was issued by the former directors of the Defendant without the participation and/or notification of the other shareholders therein.
 - vii. Consequently therefore, such authority to use the service lift issued to the Plaintiff was unlawful, illegal and fraudulent.
 - viii. In conclusion, the Defendant sought this Court to dismiss the Plaintiff herein with costs.
5. Further to the Statement of Defence, the Defendant (now Plaintiff in the Counter-Claim) filed a Counter-Claim dated 30.01.2017 against the Plaintiff (now the 1st Defendant in the Counter-Claim) the Developer of Fortis Towers Heather Properties Limited (now the 2nd Defendant in the Counter-claim) and its two Directors (now the 3rd and 4th Defendants in the Counter-claim).
 6. In the Counter-Claim, the Plaintiff admitted that the development known as Fortis Towers erected on LR.NO.1870/IX/50 was developed by 2nd Defendant.
 7. According to the Plaintiff, the development known as Fortis Towers was comprised of ground floor and 10 floors above it which were the lawful lettable areas.
 8. However, the 2nd Defendant proceeded to let the open space above the 10th Floor to the 1st Defendant which was unlawful, illegal and fraudulent as no such lettable space was permissible under the Master Plan of the development.
 9. As such, the purported space described as 11th Floor within the development known as Fortis Towers was not approved by the County Council of Nairobi and therefore not lettable to the 1st Defendant herein.
 10. The Plaintiff then proceeded to outline the Particulars of Fraud undertaken by the 1st and 2nd Defendants in Paragraph 16 of the Counter-Claim therein.
 11. In conclusion thereof, the Plaintiff sought the following Orders against the 1st to 4th Defendants in the Counter-Claim; -
 - A. A temporary injunction do issue to restrain the 2nd Defendant (by counter-claim) whether by itself, its servants, agents or employees from operating or carrying on any activity on the roof over the 10th Floor of Fortis Towers pending the hearing and determination of this suit.



- B. The Sub-Lease dated 29th October 2014 issued by the 1st Defendant (by Counter-claim) by the 2nd, 3rd and 4th Defendant (by Counter-Claim) is respect of the roof over the 10th Floor of Fortis Towers be cancelled and declared illegal, null and void.
 - C. The 2nd Defendant (by Counter-Claim) do yield up vacant possession of the roof over the 10th floor for Fortis Towers to the Plaintiff.
 - D. General damages for trespass.
 - E. Costs of and incidental to this suit.
 - F. Any other relief or remedy that this Honourable Court may deem fit to grant.
12. The Defence and Counter-Claim dated 30.01.2017 was served on the 1st to 4th Defendants therein and the 1st Defendant filed a Reply to Defence and Defence to Counter-Claim dated 17.11.2023.
13. In the Reply to Defence, the Plaintiff in the main suit reiterated the facts pleaded in its Plaint in toto.
14. In the Defence to the Counter-Claim, the 1st Defendant in the Counter-Claim opposed the same on the following grounds; -
- i. The 1st Defendant denied any knowledge of the allegations made by the Plaintiff in Clause 5, 6 and 7 of the Counter-claim.
 - ii. The 1st Defendant pleaded that it was given an Offer by the 2nd Defendant through the Letter of Offer dated 07.06.2013 for the three portions of space namely the rooftop with balcony, the Basement Storage Area and Four Parking Spaces within the development known as Fortis Towers erected on LR.NO.1870/IX/50 within the City of Nairobi.
 - iii. Based on the above Letter of Offer dated 07.06.2013, an Agreement For Sale dated 14.03.2014 and a Sub-Lease dated 19.10.2014 were duly executed and registered by the 2nd Defendant in favour of the 1st Defendant.
 - iv. Consequently, the 1st Defendant took possession of the Leased portions of the development known as Fortis Towers to which it developed and opened its business enterprise.
 - v. In essence, the Plaintiff herein was not privy to the contract between the 1st Defendant and the 2nd Defendant and cannot interfere with terms and conditions contained in their Agreement For Sale and/or Sub-Lease lawfully binding between them.
 - vi. In addition to the above, the 1st Defendant stated that it had obtained all the relevant approvals to use the portion known as 11th floor on the development known as Fortis Towers from the City County of Nairobi, and therefore its operations were lawful and legitimate.
 - vii. In conclusion, the 1st Defendant denied the particulars of fraud outlined in the counterclaim and sought to have the entire counterclaim dismissed with costs.
15. The Reply to defence and Defence to Counterclaim by the 1st Defendant was duly served on the Plaintiff and pleadings closed thereafter.

Plaintiff's Case

16. The hearing of the Plaintiff's case commenced on 4th December, 2024 with the testimony of one Mr. ALEEM LADAK who was marked as PW1.



17. PW1 introduced himself as a Director of the Plaintiff Company with the authority and consent to execute the Pleadings before court and testify on its behalf.
18. PW1 informed the court that he had prepared, executed and filed a detailed witness statement dated 23rd September 2015 of which he adopted as his evidence in chief.
19. In support of the facts pleaded in the witness statement, PW1 also produced the following documents
PW1 Exhibit 1 – A copy of a letter of offer dated 7th of June, 2013 from the developer to the Plaintiff company.
PW1 Exhibit 2 – a copy of a letter of approval of the architectural designs dated 27th January, 2014 from the Defendant Company to the Plaintiff Company
PW1 Exhibit 3- A copy of The Agreement for Sale dated 14th March, 2014 between the Developer and the Plaintiff Company over portions of the Development Known as Fortis Towers.
PW1 Exhibit 4 – a copy of the sub-lease over portions of the Development known as Fortis Tower dated 29th October 2014 between the Developer and the Plaintiff Company.
PW1 Exhibit 5 – a copy of the letter of approval dated 30th March, 2015 from Nairobi City County to the Plaintiff over the renovation of the suit property on 11th floor within the Development known as Fortis Towers.
PW1 Exhibit 6 – a copy of the renewal permit by the Nairobi City County dated 6th of August, 2015 in favour of the Plaintiff over the business undertaking on 11th floor of the development known as Fortis Towers.
PW1 Exhibit 7 – a copy of the letter of approval dated 26th August, 2013 from Nairobi City County issued in favour of the Plaintiff for the renovation of the 11th floor on Fortis Towers.
PW1 Exhibit 8 - is a copy of a letter of approval dated 8th of September, 2015 from Innovative Planning & Design Consultants giving consent to the Plaintiff for the internal fit outs of the 11th floor within Fortis Towers.
20. PW1 therefore sought this court to grant the prayers contained in the Plaint dated 23rd September, 2016.
21. In concluding his evidence in chief, PW1 also stated that before the change of management within the Defendant Company from the original directors to the current directors, there was no difficulty in accessing the usage lifts.
22. The Defendant having been duly served but not attended court, there was no cross-examination of PW1 on behalf of the Defendant.
23. On cross-examination by the 2nd-4th Defendants in the counterclaim, PW1 stated that the letter of offer dated 7th of June, 2013 was made by a company known as AMS which was the authorised agent of the Developer who is the 2nd Defendant.
24. According to PW1, there is no dispute between the 1st Defendant in the counterclaim and the 2nd, 3rd and 4th Defendants in the counterclaim.
25. PW1 clarified that the Plaintiff in the counterclaim was merely a management company to take care of the development known as Fortis Towers of which the Plaintiff was a shareholder.



26. PW1 informed the court that before the development known as Fortis Towers was complete and the directorship of the 2nd Defendant revised, the original directors of the 2nd Defendant were the 3rd and 4th Defendant in the Counterclaim and their mandate ended in June, 2016.
27. PW1 averred that after the 3rd and 4th Defendants ceased to be directors of the 2nd Defendant in June, 2016 the new directors of the 2nd Defendant unilaterally changed the management policies and regulations that were in place.
28. PW1 lamented that the Directors of the 2nd Defendant through their new policies and regulations made in September, 2016 hindered the smooth operations of the 1st Defendant in the Counterclaim by exposing its food and drinks supplies to contamination and other risks through denying them access to the service lift as had initially been agreed.
29. It is on this basis that the 1st Defendant in the counterclaim, who is the Plaintiff in the main suit filed the Complaint dated 23rd September, 2016.
30. At the end of this cross-examination by the 2nd – 4th Defendant on the counterclaim, there was no re-examination of PW1 and the Plaintiffs closed their case.

Defence Case

31. The Defendant not being in court despite service of the hearing notice being effected on their offices, the court closed the Defendant's case forthwith.

Counterclaim

32. As to the counterclaim dated 30th January, 2017 filed by the Defendants, the Plaintiff was not present and neither was there any witness present to testify in support.
33. Consequently, the court dismissed the same for want of prosecution.
34. Based on the above pleadings, testimony of the witness and the documents produced before court, the issues for determination are as follows:

Issue No. 1: Is The Plaintiff Herein The Lawful Owner Of The Property Described As 11th Floor On Fortis Towers?

Issue No. 2: Is The Plaintiff Entitled To Use Of The Lifts Within Fortis Towers?

Issue No. 3: Was The Alteration Of The Permitted Time Lines For The Use Of The Service Lift Lawfully Done?

Issue No. 4: Are The Prayers In The Complaint Dated 23rd September, 2016 Merited?

Issue No. 5: Who Bears The Costs Of This Suit?
35. Having identified the above issues for determination, the same will now be discussed herein below.

Issue No. 1: Is The Plaintiff Herein The Lawful Owner Of The Property Described As 11th Floor On Fortis Towers?

36. The Plaintiff has pleaded in the Complaint dated 23rd September, 2016 that it purchased the rooftop portion of the development known as Fortis Towers erected on LR No. 1870/IX/50 located in Westlands area within the City County of Nairobi.



37. In support of this allegation, the Plaintiff has produced its letter of offer dated 7th June, 2013, the agreement for sale dated 14th March, 2014 and the sub-lease dated 29th October, 2014.
38. To confirm that the space or portion purchased is legitimate, the Plaintiff produced a letter of approval of the structural designs of the Development known as Fortis Towers dated 27th January, 2014.
39. Going back to the Agreement for Sale dated 14th March, 2014 as read with the sub-lease dated 29th October 2014, it is clear that the Plaintiff herein purchased the 11th Floor on the development known as Fortis Towers.
40. Looking at the sub-lease dated 29th October, 20014 in particular, the space which was purchased by the Plaintiff was clearly demarcated and registered to be the leased portion on the 15th December, 2014 by the Registrar of Titles.
41. In other words, this court is satisfied that the Plaintiff herein is the lawful and legitimate owner of the rooftop space within Fortis Towers erected on LR No. 1870/IX/50 as per the sub-lease dated 29th October, 2014 and registered 15th December, 2014.

Issue No. 2: Is The Plaintiff Entitled To Use Of The Lifts Within Fortis Towers?

42. The second issue is whether the Plaintiff as the owner of the rooftop space within Fortis Tower had a right to use the service lift provided for in the building.
43. Looking at the Sub-leased dated 29th October, 2014 and in particular the 6th Schedule Part 2 Clause 30 which contains covenants enforceable by the Lessor, the use of lifts and electrical installations and service installations are provided.
44. Clause 30.1 - 30.5 gives permission on all the owners of Fortis Towers to use the lifts in the building for carrying goods, packages merchandise or furniture to their leased premises.
45. However, the management of the lifts has been left to the Defendant who are tasked to issue the appropriate consents and which consent cannot be unreasonably withheld.
46. In essence, the Plaintiff herein has a right as one of the Lessees to use the lifts in Fortis Tower as a matter of right subject to the consent of the Management Company.

Issue No. 3: Was The Alteration Of The Permitted Time Lines For The Use Of The Service Lift Lawfully Done?

47. The 3rd issue is one whether or not the Defendant's decision made in September, 2016 to reduce the hours of use relating to the service lift was done lawfully or not.
48. According to the Plaintiff, the permitted time to use the service lifts was before 8.00am. Between 9.00am and 11.00am, between 2.00pm and 4.00pm, and after 7.00pm.
49. However, on 1st of September, 2016 the Defendant altered the permitted usage of the service lift to be before 7.00am, between 1.00pm and 1.30pm, and after 7.00pm.
50. Thereafter, the Defendant once again on the 14th of September, changed the usage time of the service lift to before 7.00am, between 1.00pm and 2.00pm, and after 7.00pm.
51. The Plaintiff in their testimony did not produce before the court any written communication by the Defendant on the acceptable time for the usage of the Service lifts.



52. The Defendants similarly, in their defence did not address the issue of what time was permitted to use the service lifts.
53. Instead, the Defendants in their Defence and counterclaim decided to directly attack the legality of the rooftop space as a leased portion and the legality of the agreement for sale and sub-lease between the Plaintiff and the Developer.
54. A perusal of the sub-lease dated 29th October, 2014 shows that the permissible hours for the use of the service lift was not specifically provided and was left for the management company to make the regulations.
55. Unfortunately, the regulations made by the Defendants were never produced by the Plaintiff and/or the Defendant.
56. As such, this court has no evidence to support the timings that have been pleaded by the Plaintiff for the use of the service lifts.
57. Similarly, the court has no evidence that the original timings pleaded by the Plaintiff as to be before 8.00am, between 9.00am and 11.00am, between 2.00pm and 4.00pm and after 7.00pm which were alleged to be the permitted time before June, 2015 were altered to before 7.00am, between 1.00pm and 2.00pm and after 7.00pm by the Defendant on the 14th of September, 2015 is actually true.
58. This being the scenario, this court does not have any evidence to show that the timings which were provided for in the use of the service lifts before June 2015 were indeed altered by the Defendant either through the regulations issued on 1st September, 2015 or 14th September, 2016.
59. Consequently, in the absence of the regulations issued by the Defendant on the use of the service lift within the development known as Fortis Towers, the only finding that this court can make is that the Plaintiff is entitled to use the service lift at any given time of the day or night.
60. It is until that time that the Defendant will prepare proper regulations, circulate the same to all lawful lessees, engage in public participation and obtain the consent of the majority of the lessees is when such regulations will be binding on the lessees within the development known as Fortis Towers.
61. In conclusion, the Plaintiff herein in the absence of properly ratified regulations has access and use of the service lifts within the Development known as Fortis towers.

Issue No. 4: Are The Prayers In The Plaint Dated 23Rd September, 2016 Merited?

62. The Plaintiff in the Plaint dated 23rd September, 2016 is seeking to quash the Defendants regulations issued on 1st September, 2014, 14th September, 2014 and published on 21st September, 2016.
63. As held in issue No. 3 hereinabove, none of the parties produced the alleged regulations which the court has been requested to quash.
64. The court cannot quash a document that it is doubt exists.
65. In essence therefore, the prayer for a declaration that the regulations published on 21st September, 2016 be declared unlawful and in contravention of the Plaintiffs rights and obligations under the lease cannot be granted.
66. Similarly, the order of prohibition sought against the Defendant from implementing the regulations published on 21st September, 2016 regarding the use of the service lifts cannot be granted.



67. Thirdly, on the issue of whether a prohibitory injunction can be issued against the Defendant from implementing the regulations published on 21st September, 2016 on the use of the service lifts within Fortis tower cannot be granted.
68. As to the prohibitory injunction restraining the Plaintiffs rights, easements and privileges provided in the sublease of 29th October, 2014 this prayer is allowed by virtue of the determination of issue No. 1.

Issue No. 5: Who Bears The Costs Of This Suit

69. It is settled law that costs follow the course.
70. In this matter, the main cause of action was whether or not the Defendants had unilaterally, unfairly and unlawfully altered the permitted time for the use of the service lift.
71. Unfortunately, in the absence of the regulations that existed before June, 2016 and the subsequent alleged regulations published on 21st September, 2016 the Plaintiff herein did not prove the alleged interference of the permitted hours of use for the service lifts.
72. The only prayer that the Plaintiff has succeeded is the preservation of its rights as a lessee under the sublease dated 29th October, 2014 together with the easements, rights and privileges contained therein.
73. As such, the court is of the considered view that each party should bear its own costs in this suit.
74. As regards the counterclaim which was dismissed for want of prosecution, the Plaintiff is entitled to costs on the same.
75. In conclusion, this court makes the following orders in determination of the Plaintiff dated 23rd September, 2016:
 - A. The Plaintiff's Sublease Dated 29th October, 2014 Be And Is Hereby Deemed Lawful, Legal And Legitimate In Terms Of The Portions Purchased Therein Within The Development Known As Fortis Towers Erected On Lr No. 1870/ix/50.
 - B. The Plaintiff Herein Is Entitled To The Described Leased Spaces Contained In The Sublease Dated 29th October, 2014 Together With All The Easements, Privileges And/or Rights Contained Therein As A Lawful Lessee Of The Development Known As Fortis Towers Erected On Lr No. 1870/ix/50.
 - C. The Plaintiff Is Entitled To The Use Of The Service Lift Provided For In The Development Known As Fortis Towers Erected On Lr No. 1870/ix/50 At All Times Unless Otherwise Directed By Approved Regulations By The A Majority Of The Shareholders Of The Defendant Management Company Within The Development Known As Fortis Towers Erected On Lr No. 1870/ix/50.
 - D. Each Party Will Bear Its Own Costs As Regards The Plaintiff Dated 23rd September, 2016.
 - E. As Regards The Counterclaim, The 1st Defendant Is Awarded Costs On The Same.

DATED, SIGNED & DELIVERED Virtually at ELDORET ELC this 8TH DAY OF MAY 2025.

EMMANUEL.M. WASHE

JUDGE

In The Presence Of:

Court Assistant: Brian



Plaintiff: Mr. Angwenyi holding brief Mr. Wetangula

Defendant: No appearance

