



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 289 OF 2016**

**MWEKANGI HOLDINGS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**WOBURN ESTATE LIMITED.....1<sup>ST</sup> DEFENDANT**

**WOBURN MANAGEMENT LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Plaint dated and filed herein on 27<sup>th</sup> October 2016, Mwekangi Holdings Ltd (the Plaintiff) prays for Judgment against the two Defendants –Woburn Estate Ltd and Woburn Management Ltd, jointly and severally for:-

- a) A declaration that the Service Charge payable by the Plaintiff (as) per the Lease Agreement is Kshs 10,000/- per month;***
- b) An order restraining the Defendants from charging over the above the Service Charge at the rate of Kshs 10,000/- and an order restraining the Defendants from issuing or raising any other invoices apart from the Kshs 10,000/- Service Charge fees;***
- c) A permanent injunction restraining the Defendants from interfering in any manner whatsoever with the Plaintiff's occupation (and) possession of the suit property known as Apartment 5B (situated) at the 'Woburn Resident Club';***
- d) An order of taking of accounts for all Service Charge paid by the Plaintiff since 19<sup>th</sup> April 2015 to date; and***
- e) Costs of the suit and interest thereon.***

2. Those prayers arise from the Plaintiff's contention that he is a lessee of the said apartment having acquired the same through an auction conducted by the Kenya Commercial Bank on 19<sup>th</sup> April 2015 in the exercise of the Bank's Statutory Power of sale. It is the Plaintiff's case that the previous owner of the premises had executed a Lease Agreement on 4<sup>th</sup> February 2010 with the two Defendants being respectively the Lessor and the Management Company running the properties collectively known as Woburn Residence Club in Malindi.

3. The Plaintiff asserts that the Lease Agreement dated 4<sup>th</sup> February 2010 expressly provided that the Service Charge was fixed at Kshs 10,000/- and that the same could only be revised after the two Defendants supplied proper accounts of the management and upon the said accounts being ratified by the Plaintiff. It is the Plaintiff's case that in total breach of the said Agreement, the Defendants have raised the Service Charge way above what was agreed and levying of additional charges not provided for and hence this suit.

4. On or about 8<sup>th</sup> November 2016, the two Defendants filed a joint Statement of Defence and Counterclaim wherein they denied the Plaintiff's assertions and stated by way of Counterclaim that the Plaintiff was in arrears of Service Charge in the tune of Kshs 302,000/- calculated at the rate of Kshs 42,340/- inclusive of VAT.

5. Subsequently by a Notice of Preliminary Objection dated 10<sup>th</sup> January 2019 and filed herein on 15<sup>th</sup> January 2019, the Defendant raised an objection to the entire suit on the following grounds:-

***1. That this Honourable Court has got no jurisdiction to hear and entertain this suit in view(of) Clause 2.2 (a) of Part B of the Fourth Schedule of the Lease Agreement.***

***2. That on 11<sup>th</sup> September 2012, the 2<sup>nd</sup> Defendant wrote to the Chairman of the Institute of Surveyors Kenya in accordance with***

*the Fourth Schedule, Part B Clause 2.5 of the Lease Agreement herein.*

**3. That on the 20<sup>th</sup> day of September 2012 the Chairman of the Institute of Surveyors Kenya appointed an independent Valuer by the names Paul Wambua who was to audit Service Charge account of Woburn Management Ltd Condominium.**

**4. That Paul Wambua did a report which was supplied to all apartment owners including the Plaintiff herein.**

**5. That (the) Wambua report is final and binding upon all parties herein under Clause 2.5 B of the Fourth Schedule of the Lease Agreement.**

**6. That the Court of Appeal has already ruled in Civil Appeal No. 20 of 2018 that the Court has no jurisdiction upon Wambua report being issued in accordance with Clause 2.5 Part B of the Fourth Schedule and that Paul Wambua lacks the mandate to withdraw the report; and**

**7. That the Wambua report has been declared final and binding upon all parties herein.**

6. The Plaintiff proceeded on 6<sup>th</sup> February 2019 to file Grounds of Opposition to the Defendants' Objection after which the parties filed written submissions herein.

7. I have considered the Notice of Preliminary Objection and the Written Submissions filed before me by the Learned Advocates for the parties.

8. The locus classicus on what constitutes a Preliminary Objection has been the decision in *Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd(1969) EA 696*, where Law JA stated:-

***“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

9. Thus for a Preliminary Objection to succeed a number of conditions ought to be satisfied. Firstly, it should raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct, and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.

10. In the matter before me, the Defendants have raised seven (7) grounds in objection to the suit some three (3) years after the suit was filed and they themselves filed a Statement of Defence and raised a Counterclaim to the Plaintiff's suit.

11. Grounds 2 to 7 of the objection which are aimed at illuminating their contention that this Court has no jurisdiction to hear and determine this matter constitute Statements of facts in reference to one Valuer by the name Paul Wambua who is said to have prepared a certain report which is said to have been binding on all parties herein.

12. In my view, the only way the Defendants can demonstrate that the said Paul Wambua prepared the alleged report and that it was binding and conclusive of the dispute herein is by calling witnesses to produce the said Report and to have it tested by way of cross-examination.

13. It is therefore clear to me that the Objection does not raise any pure point of law capable of being determined without calling further evidence in support thereof.

14. Accordingly I find no merit in the Preliminary Objection. The same is dismissed with costs to the Plaintiff.

**Dated, signed and delivered at Malindi this 23<sup>rd</sup> day of January, 2020.**

**J.O. OLOLA**

**JUDGE**