



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 84 OF 2019**

**HIGHWAY DYNAMICS LIMITED .....PLAINTIFF**

**VERSUS**

**DELAMERE FLATS LIMITED.....DEFENDANT**

**RULING**

1. The defendant company, Delamere Flats Limited, was incorporated in 1948. Its main objective is spelt out in Article 24 of its Articles of Association as follows:

*“ 24 The Company has been formed for the main purpose of construction and maintaining blocks of residential flats on a plot at the junction of Kenyatta Avenue and State House Avenue, Nairobi, in the Republic of Kenya which has been granted to the Company for a term of 99 years from the 25th January 1949 such flats to be of three classes of different values to be known as “A” Flats, “B” Flats and “C” Flats, the intention being that any person or any company or corporation may subscribe for a certain number of shares in the capital of the Company and by such subscription, shall be entitled to the right to the exclusive occupation and use of one of such flats and accordingly the following provisions shall have effect namely:*

- a) “Any such person or company who has subscribed for shares in the company equal in nominal value to the cost of an “A” Flat shall be entitled to an “A” Flat for all the unexpired residue of the said term of 99 years less the last day thereof*
- b) Any such person or company who has subscribed for shares in the company equal in nominal value to the cost of a “B” Flat shall be entitled to a “B” Flat for all the unexpired residue of the said term of 99 years less the last day thereof*
- c) Any such person or company who has subscribed for shares in the company equal in nominal value to the cost of a “C” Flat shall be entitled to a “C” Flat for all the unexpired residue of the said term of 99 years less the last day thereof.....”*

2. The plaintiff brought this suit on 6/3/2019 contending that it owned and was entitled to exclusive occupation and use of Flat Number J21 in the defendant’s flats within Delamere Estates within the above framework. It was the plaintiff’s case that the defendant had on 8/6/2015 demanded from the plaintiff a sum of Kshs 2,116,229 as accrued service charge. The plaintiff added that on 16/6/2017, the defendant wrote to the plaintiff demanding the sum of Kshs 1, 352,927.40 as service charge. Despite the plaintiff’s request for clear and specific indication on how the figures had been arrived at, the defendant failed to furnish the particulars and instead wrote to the plaintiff on 6/2/2019 stating that the defendant had transferred the plaintiff’s shares to itself. The plaintiff contended that the defendant had no power under the Articles of Association and or any other law to transfer to itself the ownership of the Flat without following the due process. It added that there was no provision in the Articles of Association that gave the defendant power to summarily acquire the plaintiff’s Flat.

3. Consequently, the plaintiff sought the following orders against the defendant:

- a) An order of injunction do issue prohibiting the defendant whether by itself or through its servants, agents or otherwise from interfering with the plaintiff’s ownership of Flat No J21 and his access to or occupation of the said premises.*
- b) An order of injunction do issue restraining the defendant whether by itself, or through its employees, servants and/or agents or whatsoever from transferring, for sale or in any manner interfering with the plaintiff’s ownerships of Flat No J21.*
- c) An order do issue to the defendant to provide specific and audited service charge accounts on Flat No J21 in the Delamere Estate.*
- d) Costs of the suit.*
- e) Such further and other orders and this court be deemed proper to grant in the circumstances of the case (sic)*

4. Together with the plaint, the plaintiff brought a notice of motion dated 5/3/2019 seeking interlocutory orders restraining the defendant against interfering with the plaintiff's ownership of the Flat or disposing the Flat. That application is the subject of this ruling.
5. The application was supported by an affidavit sworn on 5/3/2019 by Charles Munge. In summary, Mr Munge's depositions in the affidavit summarize the plaintiff's case as outlined above. He exhibited 9 documents, among them, the defendant's Memorandum and Articles of Association.
6. On 30/4/2019, the defendant filed a statement of defence dated 29/4/2019 in which it averred that the transfer of the shares was done legally with the full knowledge of the plaintiff, upon sufficient notice, and within the framework of Articles 13, 14 and 25 of the defendant's Memorandum and Articles of Association. The defendant added that the defendant had *lien* over the shares and where the service charge remained unpaid, the defendant was entitled to transfer the shares to itself or to a third party after 14 days' notice. It was the defendant's case that the plaintiff had failed/ neglected to pay service charge for a period of three years despite demand and notice. It urged the court to dismiss the plaintiff's suit.
7. The defendant further filed a replying affidavit sworn on 12/4/2019 by James Kingara. Mr Kingara made depositions outlining the defendant's case as set out above. He did not, however, annex any exhibit to the affidavit. He urged the court to dismiss the plaintiff's application dated 5/3/2019.
8. In written submissions dated 26/9/219, Purity Makori, counsel for the applicant, submitted that the applicant's right to own the suit property was protected by Article 40 of the Constitution. She argued that the letter of 6/2/2019 was arbitrary and the defendant's actions were against the framework in Articles 40 and 47 of the Constitution. Counsel further argued that the use of the defendant's Articles of Association to acquire the plaintiff's property did not meet the constitutional threshold. Counsel added that loss of the plaintiff's shares would occasion great loss and cannot be compensated by way of damages. She urged the court to grant the injunctive orders.
9. Counsel for the respondent filed written submissions dated 3/12/2019. He submitted that the Articles of Association operate as a contract among the parties involved and the plaintiff having breached the Articles of Association by failing to pay service charge, the defendant was entitled to invoke Articles 13, 14 and 25 of the Articles of Association. He added that the defendant having exercised the right to *lien* over the plaintiff's shares, and the defendant having transferred the shares to itself, the contract between the parties had already been terminated hence no rights capable of protection existed. Counsel contended that the applicant had failed to establish a *prima facie* case to warrant the grant of injunctive orders. It was further submitted that the applicant had failed to demonstrate that it stood to suffer irreparable damage. Lastly, counsel for the defendant submitted that the applicant had failed to demonstrate that the inconvenience caused to it would be greater than that which may be caused to the defendant if the injunctive orders were not granted. He urged the court to dismiss the application.
10. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence. The single issue falling for determination in this application is whether the applicant has satisfied the criteria upon which the courts exercise the discretionary jurisdiction to grant interlocutory injunctive orders.
11. The criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. In summary, the plaintiff must establish that he has a *prima facie* case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and if the court is in doubt, the application is to be determined on a balance of convenience.
12. A *prima facie* case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

***“ A case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”***
13. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a *prima facie* case as follows:

***“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”***
14. At this interlocutory stage, the court does not make definitive findings or pronouncements on any of the issues. What the court seeks to establish is whether a *prima facie* case has been demonstrated and whether the requisite criteria has been satisfied.
15. It is not in contest that the plaintiff acquired and was at all material times entitled to the right to the exclusive occupation and use of Flat Number J21 for the residue of the unexpired term of 99 years, provided that the plaintiff met its obligations under the defendant's Articles of Association. As an intergral part of the plaintiff's instruments of ownership of the Flat, the plaintiff was allocated shares and was entitled to the material shares, provided again, the plaintiff met its obligations under the defendant's Articles of Association.

16. The key dispute giving rise to this suit relates to how the defendant arrived at a figure of Kshs 1,352,927.40 which it demanded from the plaintiff as service charge. From the materials placed before court by the plaintiff, it is apparent that the plaintiff sought to be furnished with details of the service charge and the authorising instruments. It is contended that the defendant first demanded Kshs 2,116,229 in relation to Flat Nos J21, H14 and J31. At this point, it is not clear how the ultimate figure of Kshs 1,352,927 was arrived at.

17. Secondly, the defendant filed a replying affidavit that is bare; it does not contain any annexure. There is therefore no evidence at this point to controvert the plaintiff's case by demonstrating that the requirements of Article 47 were satisfied before the defendant purported to deprive the plaintiff its property. It is not lost to this court that the Articles of Association which the defendant is relying on predate and are subject to the framework in the Constitution of Kenya 2010. At this point, it is not clear if their application in the material dispute was aligned to the requirements of the Constitution of Kenya 2010. The applicant contends that there was no compliance with the Constitution of Kenya 2010. The defendant filed a bare affidavit that does not controvert that contention. In the circumstances, the court is satisfied that the plaintiff has demonstrated that its right and entitlement to Flat J21 is threatened by the defendant's actions. I am therefore satisfied that the plaintiff has demonstrated a *prima facie* case with a probability of success.

18. Our courts have umpteen times emphasized the centrality of land in Kenya's socio-economic fabric. Because of the unique value which the Kenyan population attaches to land, I cannot say that the alleged dispossession of the plaintiff of its Flat is a transgression that should be casually regarded as one that can be adequately remedied through an award of damages.

19. Lastly, I note that the material shares are still held by the defendant. The disputed amount has been deposited in court, is secure, and is available for deposit in an interest earning account should the parties so resolve. In the circumstances, the balance of convenience tilts in favour of preserving the shares and the Flat.

20. In light of the foregoing, the plaintiff's notice of motion dated 5/3/2019 is disposed in the following terms:

***a) Pending the hearing and determination of this suit, the defendant together with its agents/servants are restrained against interfering with the plaintiff's right to the exclusive occupation and use of Flat No J21 within Delamere Flats, Nairobi.***

***b) Pending the hearing and determination of this suit, the defendant together with its agents and servants are restrained against selling or transferring Flat No J21 or disposing the plaintiff's shares in the company relating to the said Flat.***

***c) Pending the hearing and determination of this suit, the plaintiff shall continue to pay service charge as resolved from time to time within the framework of the Articles of Association of the defendant company.***

***d) Costs of the application shall be in the cause.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF FEBRUARY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Chacha holding brief for Mr Mogeni for the Applicant

June Nafula - Court Clerk