REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 276 OF 2018

WAKF COMMISSIONERS OF KENYA.......PLAINTIFF

VERSUS

FARIDA ALMASI MUKIRA ....1ST DEFENDANT

SALMA ALMASI MUKIRA................2ND DEFENDANT

LYDIA KAGUNA JAPHETH ....3RD DEFENDANT

JUDGMENT

(Suit by the plaintiff, seeking nullification of the 3rd defendant's lease over premises owned by the plaintiff; plaintiff having leased the premises jointly to the 1st and 2nd defendants for 99 years; 1st and 2nd defendants transferring the lease to the 3rd defendant; plaintiff contending that no consent to transfer was ever given; Section 14 of the Wakf Commissioners Act, requiring consent of the Commissioners for any disposition giving an interest that is beyond one year; analysis of the terms of the Lease and the law, concluding that consent of the plaintiff, as lessor, was needed before the lease could be transferred; no consent issued; letter written to the defendants that the instrument would be signed not the equivalent of consent; defendants needed to see the signed instrument of consent before they could conclude that consent has been given; plaintiff further complaining that the 3rd defendant is selling alcohol on the premises contrary to the terms of the lease; lease containing a clause barring business that is contrary to Islamic beliefs; duty of holder or purchaser of the lease to undertake due diligence and find out what was prohibited and what was not; interpretation of the clause would conclude that selling of alcohol was prohibited; lease of 3rd defendant nullified; each party to bear its own costs as plaintiff did not act fairly to the defendants by sitting on the application for consent despite receiving payment for it)

PART A : INTRODUCTION AND PLEADINGS

1. This suit was commenced through a plaint filed on 25 November 2018. The plaintiff is a statutory body created under the Wakf Commissioners Act (CAP 109) Laws of Kenya and is owner of the land parcel Mombasa/Block XX/62 (the suit property) upon which is developed a hotel/lodge. It is pleaded that on 16 April 2013, the plaintiff leased the suit property to the 1st and 2nd defendants for a period of 99 years with effect from 1 January 2013 at a yearly rent of KShs. 47,880/=. It is pleaded that among the fundamental terms and conditions of the lease were inter alia :-

> i. not to permit use of the premises in a way that would offend the beliefs of Muslims which the lessor in its sole and exclusive discretion considered improper and prohibitory under Islam; and
>
> ii. not to sell, transfer, assign or charge the premises without the written consent of the lessor.

2. It is pleaded that in September 2015, the 1st and 2nd defendants, contrary to the terms of the lease, transferred to the 3rd defendant the suit property, without the written consent of the plaintiff. It is further pleaded that the transfer was contrary to the provisions of Section 14 of the Wakf Commissioners Act. It is the contention of the plaintiff that the transfer is therefore null and void. The plaintiff has further pleaded that notwithstanding the illegal transfer, the 1st defendant (probably meant 3rd defendant) has proceeded to carry out the business of selling alcoholic drinks, which business is claimed to be contrary to Islamic faith and beliefs. It is pleaded that it is well known world over, and that judicial notice can be taken, that the business of liquor and selling alcoholic drinks is prohibited in Islam. It is pleaded that this goes contrary to the lease.

3. In the suit, the plaintiff has asked for the following orders (slightly paraphrased for brevity):-

a. A declaration that the defendants jointly and severally have breached the mandatory and fundamental terms of the lease agreement dated 16 April 2013 and the mandatory provisions of Section 14 of the Wakf Commissioners Act.

b. An order nullifying the Lease agreement dated 16 April 2013 and the transfer of Lease by the 1st and 2nd defendants to the 3rd defendant .

c. An order of eviction against the 3rd defendant from the suit property.

d. A permanent injunction to issue restraining the defendants from the suit property.

e. An order for security from the police to enforce the above orders.

f. Costs of the suit.

4. The 1st and 2nd defendants filed a joint statement of defence wherein they denied that the plaintiff is the registered proprietor of the suit property. They nevertheless pleaded that they satisfied the conditions of the lease. In respect of the two issues raised, that of user of the premises and consent before transferring the lease, they pleaded that these are warranties and not conditions of the lease agreement of 15 April 2013. They pleaded that on 6 August 2015, they paid to the plaintiff the sum of KShs. 450,000/= being consent fees for the transfer of the lease to the 3rd defendant and a receipt was issued. It is contended that transfer was expressly granted to them by the plaintiff. They denied breaching any clause of the lease agreement and put the plaintiff to strict proof. They contested jurisdiction, claiming existence of an arbitration clause, but this was never followed up and no application to stay these proceedings was ever made.

5. The 3rd defendant filed a separate defence through separate counsel. She pleaded that she did not have any knowledge whatsoever of the existence of a lease between the plaintiff and 1st and 2nd defendants and that she only came to see it after this suit was filed. She pleaded that she entrusted the conveyance to a law firm, and that as far as she is concerned, the entire conveyancing was carried out properly and she consequently became the registered owner of the suit property. She avers that she was duly informed, that on 6 August 2015, the plaintiff received the sum of KShs. 480,000/= from the 1st and 2nd defendants as fees for consent, and that the plaintiff sent to her (3rd defendant), a letter dated 17 August 2015 acknowledging the same and allowing the transfer of the lease to proceed. There is reference to some letters dated 16 November 2016 and 21 April 2017 through which the plaintiff claimed never to have given consent to transfer. She pleaded that before proceeding with the transfer she did a search of the property which did not reveal any encumbrances or user limitations. She has thus pleaded that she is a bona fide purchaser for value without notice of any limitations on the user of the suit property. She has pleaded that no demand whatsoever was made by the plaintiff to her on the user of the suit property. She has pleaded that even prior to the transfer of the suit property, the suit property was known as “White Label Bar” and operated as a bar and restaurant business, and that the plaintiff is thus estopped from raising the issue that it is wrong to sell alcoholic beverages thereon. She has pleaded that it is the Land Registrar who effected registration, and that the suit is malicious against the 3rd defendant, in the pretence that it is in the interests of the Islamic faith. She pleaded that if the plaintiff has suffered loss, they ought to direct their claim to the Ministry of Lands and Housing.

PART B : EVIDENCE OF THE PARTIES

6. PW-1 was Mohamed Kibwana Shali. He described himself as the Administrative Assistant to the Wakf Commissioners of Kenya (the plaintiff). When the suit was filed, he was the Secretary of the plaintiff. He testified that the 1st and 2nd defendants had a lease with the plaintiff. This is the lease dated 15 April 2013. He produced the same as an exhibit. He testified that the 1st and 2nd defendants subsequently transferred the lease to the 3rd defendant. He stated that they did not obtain consent of the plaintiff and no consent was given to transfer the lease. He stated that it was later that they discovered the 3rd defendant operating on the premises without the consent of the plaintiff and that she was operating a liquor business of a bar and restaurant. He referred the court to the Lease agreement at Clause (e), and averred that no person was to undertake business that is offensive to Islam, and to clause (h) on the aspect of consent. He stated that in Islam, alcohol is “haram”, and this will cover the sale, purchase or dealing with liquor. He testified that the plaintiff operates a bar in the premises known as “Rainbow Bar”. He acknowledged that the plaintiff received a sum of KShs. 450,000/= as consent fee but no consent was issued. He stated that consent needed to be issued before entering into an agreement which was not the case here. He pointed out that the agreement between the 1st and 2nd defendant and the 3rd defendant is dated 1 June 2015 whereas the receipt for the KShs. 450,000/= was issued on 6 August 2015. He stated that they issued a warning to the 3rd defendant to stop sale of liquor.

7. PW-1 was first cross-examined on his authority. He did state that the plaintiff is composed of 6 commissioners, and two ex-officio members being the Regional Commissioner and the Chief Kadhi. He stated that he had their authority to swear the verifying affidavit though he could not avail a document on that. He did not have the resolution that directed the filing of this suit. He stated that the Secretary has authority from the Commissioners to represent them in legal matters. He also did not have the minutes of the Commissioners that authorised the filing of the suit, though he had a letter dated 19 September 2018, addressed to M/s Khalid Salim & Company Advocates, giving them instructions to file this suit. He acknowledged that the plaintiff received money for consent, but asserted that they did not issue the consent. He stated that they first receive the money before issuing a consent. He claimed that they declined to issue consent because of sale of liquor on the premises. The money that was paid for consent was never refunded. He affirmed that the money was received on 2 August 2015. He was cross-examined on a letter dated 17 August 2015 written by himself, (which I will address later in my analysis) which letter advised that the Chairman of the plaintiff is out and consent will issue once the Chairman is back. He did state that the Chairman came back but did not sign the consent. He did not write to the 1st and 2nd defendants to inform them that the Chairman was back. He stated that the money has not been refunded because the matter is still pending before the Wakf Commissioners and also pending in court. He did not agree when it was put to him that they are acting dishonestly. He stated that the plaintiff never addressed the issue of transfer without consent to the Land Registrar. It also did not occur to them to enjoin the Land Registrar. He however asserted that the Land Registrar misused his power in allowing the transfer. He affirmed that the plaintiff has not registered any restriction against the title on the nature of use of the suit property. He was examined on the use of the premises and he stated that it used to sell liquor while it was still under the plaintiff. He stated that the lease before the year 2013 had no provision on Islamic matters. He stated that when the 1st and 2nd defendants got the lease in 2013, they

stopped the sale of liquor, and that it was the 3rd defendant who resumed sale of alcohol. He was examined on the Islamic beliefs said to be covered in clause (e) of the lease and he affirmed that the beliefs are not explicit in the lease. He stated that they are codified in their religious books. He however did not agree, that since not everybody is conversant with the Islamic faith, there was a duty to list these beliefs and register them under a restriction. His view was that if a person buys the lease he can inquire on the beliefs. He did acknowledge that when they wrote to the 3rd defendant, she had carried out business for over one year. Their first letter to her was dated 16 November 2016. The next letter was dated 21 April 2017. He denied an assertion that they had sought to extort the sum of KShs. 3 million from the 3rd defendant and that this case is aimed at blackmailing the 3rd defendant.

8. He was re-examined and he reiterated that the fee for consent is paid before consent is given. He stated that consent to transfer was not signed because they got a report that liquor was being sold on the premises. That is when they wrote the two letters dated 16 November 2016 and 21 April 2017. He testified that the 1st and 2nd defendants were aware that alcohol should not be sold in the premises and he mentioned that it was their responsibility to hand over the terms of the lease to the 3rd defendant.

9. With the above evidence, the plaintiff closed its case.

10. DW-1 was Farida Almasi Mukira, the 1st defendant. The 2nd defendant is her sister. She testified inter alia that, when they intended to sell the suit land, they consulted with PW-1 all the way and that they were given consent to sell. She paid KShs. 450,000/= on 2 August 2015 for the consent and was issued with a receipt. She stated that she would not have known what to pay for consent if the plaintiff was never involved in the first place. She testified that consent to sell was issued on 17 August 2015 through a letter of even date. She stated that she has never received any letter from the plaintiff complaining that they have not issued consent or complaining about the transfer to the 3 rd defendant. Neither has the money paid for consent ever been refunded.

11. Cross-examined, she stated that the letters dated 21 April 2017 and 16 November 2016 written by the plaintiff to the 3 rd defendant were never copied to them (1st and 2nd defendants). She offered that before the lease was transferred to them, it was previously held by their father, who is now deceased. Their father was a muslim and he still operated a bar which was selling alcoholic drinks on the suit premises. The business was called “White Rembo Bar and Restaurant” which later changed name to “Rembo Hotel.” After the death of their father in the year 2002, they continued with the same business until expiry of the lease. When the lease was renewed to them in the year 2013, she stated that one condition for renewal was that there should not be sale of non-Islamic products. They were not therefore selling alcohol at the time they transferred the lease to the 3rd defendant. She referred to what she termed as the consent letter of 17 August 2015 and agreed that it did not state that the transferee should not sell non-Islamic products. She mentioned that there are other Wakf Commissioners properties in Mombasa which she claimed also sell liquor. She affirmed that she and her sister are Muslims and they are aware that selling alcohol is prohibited in the Islamic faith. Her interpretation of clause (e) of the lease was that selling alcohol on the premises was prohibited. On the letter dated 17 August 2015, she stated that PW-1 gave them the go ahead to sell the property as they awaited for the Chairman to seal the letter of consent. She was aware that one of the conditions was that there should be no sale of the premises without a written consent. She stated that at the time they executed the sale agreement with the 3rd defendant on 1 June 2015, the property was charged to Housing Finance Company of Kenya (HFCK). They sold the property for KShs. 60 million and part of the purchase price (about KShs. 9 -10 million) was paid directly by the 3rd defendant to HFCK to discharge the debt. She averred that the sum of KShs. 450,000/= for the consent was paid on 6 August 2015. She stated that she gave all the documents to the 3rd defendant together with her lawyer. She testified that the whole sale process was guided by the plaintiff. It was pointed out to her that the letter of 17 August 2015 mentioned that the signature of the Chairman was awaited but according to her it was a “done deal.” She appreciated that no consent was signed on 17 August 2015. The sale agreement and the transfer were never executed by the plaintiff. Re-examined, she asserted that the payment she made was confirmation of consent having been given. I questioned her and she had her own confusion on the interpretation of what may be “haram” and what may not be. For example, she mentioned that she had taken a loan with HFCK where interest is paid, with the sanction of the plaintiff, yet in Islamic faith, payment of interest is “haram”. She thought that at times, the Wakf Commissioners play games on what is “haram” and what is not.

12. DW-3 was the 3rd defendant. She is generally engaged in the hotel business and she has a couple of hotels, apart from the one in dispute, under her enterprise. She testified that she developed interest in purchasing the suit property and entered into negotiations with the 1st defendant who disclosed that the property was charged. She took the documents to her lawyer, Mr. Mangnan, of M/s Sachdeva & Company Advocates. One of the advocates in his offices, a Mr. George, mentioned that the bank needed to be paid off first so as to release the title. The amount due was KShs. 9 million. She and the 1st defendant proceeded to the offices of the plaintiff and met PW-1; he said that it is okay, that she could purchase the property. After the 1st defendant obtained the letter dated 17 August 2015 and had paid for the consent, she went back to the plaintiff’s office, and she asked PW-1 whether she could now pay the purchase price; he said that it was okay, that she could proceed to make payment. She stated that she never received the letters dated 16 November 2016 and 21 April 2017. After she got registered as proprietor, she claimed that one of the Wakf Commissioners came to her and called her for a meeting. She attended the same and they told her that the property had been transferred to her without their consent. They also raised the issue that she was selling liquor on the premises. She claimed that they told her that if she gave them KShs. 3 million, they would not revoke her title. She did not oblige. She was surprised as PW-1 had not informed her of any such condition yet he knew that she was a Christian. She stated that he had opportunity to inform her but he did not. Neither was she informed of such a condition by her advocate who was overseeing the conveyance. She alleged that there are other Wakf properties which sell liquor. After her meeting with the Wakf Commissioners, she went back to her advocates. She met a Mr. Swaleh who went through the documents and seemed surprised that there were clauses on issues offensive to the Islamic faith. She contended that the plaintiff had no problem with the transfer of the property to her and they cannot now turn around. She offered that she would have no problem if the plaintiff refunded her the purchase price of KShs. 60 million.

13. Cross-examined, she stated that she consulted PW-1 before she made payment and he gave the go-ahead. She testified that she is not new in Mombasa and knew of “White Rembo” which was a bar for many years on the same premises. She agreed that in the year 2015, before she purchased the property, alcohol was not being sold on the suit property, but she did not find this unusual, for one can run their business as they wish, and indeed, a previous hotel that she purchased was not selling alcohol. She did not see the need to inform the seller of what she intended to do with the premises as that was her business. She did appreciate that it was the duty of her advocate to study the documents. All she saw was the leasehold title which had a clause that transfer cannot be effected without consent. There was no other condition. She had not been given the lease document but her lawyer had a copy. She thought that she was being selectively discriminated.

14. With the above evidence, the 3rd defendant closed her case.

PART C : ANALYSIS AND FINDINGS

15. I invited counsel to file written submissions which they all did. I have taken into account these submissions. Having gone through the submissions, I think three issues are open for determination. These are :-

i. Whether the suit is competent.

ii. Whether the lease in issue was transferred to the 3rd defendant without the consent of the plaintiff.

iii. Subject to the holding above, whether the plaintiff is entitled to forfeiture of the lease for breach of its terms, specifically, by the 3rd defendant selling liquor on the premises.

16. On the first issue, it is the contention of the defendants that the suit is incompetent. Counsel for the defendants submitted that the suit is defective because the plaintiff did not annex a resolution of the Wakf Commissioners under seal, authorising the filing of this suit. I was referred to Section 7 of the Wakf Commissioners Act, which provides that the Commissioners are a body corporate with capacity to sue and to be sued. It was submitted that pursuant to Order 4 Rule 1 (4) of the Civil Procedure Rules, 2010, where the plaintiff is a body corporate, the verifying affidavit must be sworn by an officer authorized by such a plaintiff under seal. The verifying affidavit to this suit was sworn by Mohamed K. Shali (PW-1), and it is submitted that there is no evidence that he was given authority to so swear the affidavit. It was submitted that the minutes authorising this suit were also not tabled in evidence.

17. In consideration of the above submissions, I have looked up at Section 7 of the Wakf Commissioners Act, and it provides as follows :-

7. Commissioners to be a body corporate with a common seal

(1) The Wakf Commissioners shall be a body corporate having perpetual succession and a common seal, and shall have all the powers, functions and duties conferred and imposed by this Act.

(2) The Wakf Commissioners may sue and be sued in its corporate name, and may for all purposes be described by that name.

(3) The seal of the Wakf Commissioners (Cap. 47) shall be authenticated by the signature of the chairman, or a commissioner authorised to act in that behalf, and the secretary, and the seal shall be officially and judicially noticed.

(4) All documents, other than those required by law to be under seal, made by, and all decisions of, the Wakf Commissioners may be signified under the hand of the chairman, any commissioner authorized in that behalf, or the secretary.

18. There was also reference to Order 4 Rule 1 (4) which provides as follows :-

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorised under the seal of the company to do so.

19. I am not persuaded by the arguments, that this suit is incompetent and ought to be struck out. But even before I got deeply into this, my view is that when a party is of the opinion that a suit is incompetent because of want of authority, such party needs to plead that issue, or even if it is not pleaded, such party needs to file an application before the suit is heard, so that the issue is sorted out early in the proceedings. Indeed, this is what Order 4 Rule (6) provides. It states as follows

The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3) (4) and (5).

Subrule 4 is that which deals with who should swear a verifying affidavit for a corporation. The essence of this is to allow the plaintiff to respond to the application. The plaintiff can in response to such application, demonstrate that it has given authority for the filing of the suit, and authority to the person who swore the verifying affidavit. I do not think that it is fair, to ambush a plaintiff, when its witnesses are testifying, when the issue has not been raised in the pleadings, and no application has been filed raising such issue. It is instructive that none of the members of the plaintiff has complained that the Commissioners are not aware of this suit, or have not sanctioned its filing. Further, it is not disputed that the person who swore the affidavit, was at the time, the Secretary of the plaintiff. It has not been demonstrated to me, that a Secretary of the Wakf Commissioners, is not a person who would ordinarily have the authority, to sign documents on its behalf. Indeed, when I look at Section 7(4) of the Wakf Commissioners Act, the Secretary is mentioned as one of the persons who can sign documents on behalf of the Commissioners, when such document does not require to be under seal. I am not aware, and I have not been pointed to any law, which provides that for the Wakf Commissioners to file suit, then such suit can only be filed under the seal of the Commissioners. I will reiterate that if the defendants wished to present this point, they ought to have made it clear in their pleadings, or they ought to have filed an application so that the plaintiff can respond to it. I find this issue to be an unfair ambush on the plaintiff, but even on the merits of it, I am not persuaded to strike out this suit, for I am not persuaded that it has been demonstrated to me that the Wakf Commissioners did not authorise its filing or did not authorise the Secretary to sign the verifying affidavit, that is assuming that such authority was needed in the first place, for I have already pointed at the provisions of Section 7 (4) of the Act.

20. I have also gone through the various authorities provided by counsel to back up the argument, that where a plaint by a corporation is not backed by a resolution, the same is untenable in law. First, I ask myself whether the plaintiff herein, can be termed as a corporation under the provision of Order 4 Rule 1 (4). I understand the meaning of "corporation" under this provision, to refer to a company formed under the Companies Act. My interpretation of that word "corporation" is buttressed by my reading of Order 5 Rule 3, which prescribes the manner in which a "corporation" should be served. It provides that service upon a "corporation" should be effected inter alia upon the secretary, director, or other principal officer of the corporation. The plaintiff is a statutory body established by the Wakf Commissioners Act. In my view, it is not a "corporation" and I do not think that the provisions of Order 4 Rule 1 (4) will apply to it.

21. That aside, I refuse to take an overly simplistic view, that where a company or other corporate entity has sued, the suit is incompetent if there is not annexed minutes authorising the suit, or a resolution authorising the suit, or an authority to demonstrate that the person swearing the affidavit has authority to do so. Simply because one is not annexed, does not mean that the suit is unauthorised, or that the person who has sworn the affidavit is not authorised to do so. Corporations have their own internal mechanisms which authorise the filing of suits. If a person is in doubt, whether the suit is authorised or not, he can demand to know from the plaintiff corporation whether the suit is authorised or not. I reiterate, the mere fact that a written authority is not annexed, does not necessarily mean that there is no authority. The issuance of a resolution or the decision to file suit is an internal matter within the company. If a person swears an affidavit and says that he has been duly authorised to swear it, bar a contention from that company, or other evidence that the person is not duly authorised, the presumption should be that the person is so authorised. I wouldn't struck out a suit simply because no resolution has been tabled when none of the organs of the company are complaining, and no evidence tabled that the suit is unauthorised. Of course, where there is a clear law or provision, say in the articles of association, that requires a corporation or any corporate body, to file suit through a seal, or demanding explicitly that any suit must be filed together with a written resolution and authority, then one can point at that and argue that because none has been tabled, the suit is incompetent. But that is not the case here. Even then, as I have said before, the best avenue would be to file an application so that the plaintiff can have a chance to be heard on that point. An ambush during the hearing is not fair. My finding therefore is that this case is properly suited and I will go to the merits of it.

22. On the merits of the case, the first point is whether the transfer of the title to the 3rd defendant was preceded by the consent of plaintiff. The evidence is clear that the suit property is owned by the plaintiff, despite the denial, in the pleadings of the 1st and 2nd defendants. It is the plaintiff who is the lessor of the suit property. The plaintiff did grant, jointly to the 1st and 2nd defendants, a lease for 99 years from 1 January 2013. That lease does contain a clause (h) which states :-

> The lessee hereby covenants with the lessor as follows :-
>
> > h. Not to sell, transfer, assign or charge the premises without the written consent of the Lessor (which consent will not be unreasonably withheld) provided, however, the Lessee shall bear all legal expenses as well as such consent fee which the Lessor shall exclusively determine from time to time.

23. The requirement for consent is also indicated in the Certificate of Lease. It is therefore in the instruments of title, that is the Lease and the Certificate of Lease. Apart from this, Section 14 of the Wakf Commissioners Act, also requires written consent where the disposition is one that gives an interest beyond one year. The said provision is drawn as follows :-

> 14.Contracts or agreements relating to wakf property for more than one year must be sanctioned by commissioners :-
>
> No contract or agreement of any description whatsoever purporting to sell or to lease or otherwise alienate any property the subject of any wakf for any period exceeding one year shall be valid unless the sanction in writing of the Wakf Commissioners has first been obtained.

24. The transaction between the 1st and 2nd defendants, and the 3rd defendant, transferred an interest in a lease that went beyond one year. It follows from the above that there needed to be sanction, in writing, of the Wakf Commissioners to be obtained as required by Section 14 above.

25. It is also instructive to note the provisions of Section 55 of the Land Registration Act, Act No. 3 of 2012, which provides as follows :-

> Section 55. Lessor's consent to dealing with leases
>
> If a lease contains a condition, express or implied, by the lessor that the lessee 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.

26. It is a right reserved by statute to the lessor of property, to first give consent, unless waived, and this consent needs to be in writing, before a lessee can transfer the interest in the lease to another person. It is in fact a critical right of the lessor, for it must be appreciated, that the property remains that of the lessor, and therefore, he/she needs to sanction any downstream dispositions that have an effect on the property. And there should not be any ambiguity on whether or not consent has been issued, and that is the reason why the law requires that this consent be in writing. The issue of consent by a lessor, is therefore one that cannot be taken lightly. Any person purchasing an interest in a lease must be very sure, that consent of the lessor has been given, before entering into any disposition over such property. If there is any ambiguity, this must be cleared, and cleared explicitly, before the transaction is entered into. In the case at hand, I have no doubt in my mind

that the consent of the plaintiff, as lessor, was needed before the property was transferred from the 1st and 2nd defendants to the 3rd defendant, and this consent needed to be in writing.

27. The next matter that I need to decide is whether or not consent was given as required by both the law and the instrument. Whereas the plaintiff asserts that consent was never issued, the position of the defendants is that consent was duly paid for and issued. The defendants contend that the consent is contained in the letter dated 17 August 2015. I have looked at that letter and it states as follows :-

17 August 2015

M/s Farida Almasi Mukira & Salma Almasi Mukira

(Address given)

Dear Madam,

RE : CONSENT

TRANSFER OF LEASE

MOMBASA/BLOCK XX/62

Please refer to our **Official Receipt No. 53294** dated August 06th, 2015 for K. Shs. 450,000/= **(K. Shs. Four Hundred Fifty Thousand Only)** being **Consent Fee** in respect of **Transfer of Lease** quoted above.

Kindly be advised immediately the Chairman is back the Transfer Document will be executed and sent to you.

Yours Faithfully,

Muhammad K. Shali

Secretary

WAKF COMMISSIONERS OF KENYA.

28. Would one say by a mere reading of the above letter that it is unequivocal that the Wakf Commissioners has given its consent to the transfer of the lease from the 1st and 2nd defendants to the 3rd defendant ? I think not. Nowhere does the letter state that it is a letter of consent and that the plaintiff has given the requisite consent to transfer. What I can see is that the letter acknowledges receipt of the sum of KShs. 450,000/= and then goes on to state that the Chairman (of the Wakf Commissioners) will come and execute the transfer. There is of course nowhere in the transfer instrument that the plaintiff, or its chairman, would be required to sign, and the only instrument that I can think of, that the Chairman was to sign, is the consent. Even if we are to assume that the Chairman was to sign on the transfer as a signal that it has issued consent for the transaction, there is no transfer that has been signed by the Chairman or any of the Commissioners. There is certainly no document that you can point at and say :- *"this is a document of consent signed by the Chairman of the plaintiff of any of the Commissioners of the plaintiff."* This consent, as I have taken time to explain above, was an extremely important document, and is not the sort of document that any party, entering into the transaction of the nature herein, ought to have taken lightly, or to assume to have been issued, if the document purporting to be the consent was not clear on its content. The defendants, and/or their appointed advocates, ought to have ensured that there is no grey spot in the issuance of the consent. If there was any ambiguity, they ought to have, out of abundance of caution, pointed this out, and soughted to have the air cleared, on whether consent has been issued or not. We have to understand that pursuant to the Lease instrument and the provisions of Section 14 of the Wakf Commissioners Act, it is the consent of the Commissioners themselves that must be given, not a letter from the Secretary. My understanding is that the consent must be signed by the Commissioners, or a person authorised by the Commissioners. I have not seen any consent presented in this case, which has been signed by the Chairman of the plaintiff, or any of the Commissioners. Neither do I have any document, that would inform me that the Commissioners had authorised the Secretary to sign the consent on their behalf. Given the foregoing, I can come to no other holding, other than, that no written consent, in terms of clause (h) of the Lease, and in terms of Section 14 of the Wakf Commissioners Act, and Section 55 of the Land Registration Act, was ever given. The letter of 17 August 2015, to me, is not the equivalent of a written consent, as required by the lease instrument and the law.

29. I am aware that Ms. Mango, learned counsel for the 1st and 2nd defendants, and also Mr. Gikandi, learned counsel for the 3rd defendant, submitted that the plaintiff led the defendants to believe that consent was issued and thus the doctrine of estoppel ought to apply. I am not persuaded by that argument. The letter of 17 August 2015 mentioned that the Chairman was to sign a document. The defendants were therefore alerted that there is a document that requires the signature of the Chairman before they could complete their transaction. DW-1 did in fact concede, during cross-examination, that she appreciated that there was a document that needed to come from the Chairman before the transaction could be completed. The defendants never saw that document that was signed by the Chairman. How then, can they argue that they were misled by the letter of 17 August 2015 ? Neither can the defendants try to rely on claims that the Secretary told them to proceed. What is required is *written consent*; oral representations, even if I were to believe that any were made, would still not be good enough. Further, the fact that some money was paid for the consent is not the equivalent of issuance of the consent. It is not unusual for one to make payment as a precondition to the issuance of an instrument in land. The fact that payment is done, does not mean that the instrument has been affirmed and issued. One may make payment and yet the application for the instrument can be rejected. The only right that the applicant would have in such an instance, if the payment was not non-refundable, would be to seek a refund of the payment made, not to assume that the instrument has been issued by the mere payment of the requisite fees. I therefore do not see how the doctrine of estoppel can apply in this

case.

30. Having found that no consent was issued, the only resulting finding that I can arrive at, is that the transfer of the lease from the 1st and 2nd to the 3rd respondent is null and void. I am aware that the 3rd defendant's counsel submitted that the Land Registrar ought to have been made a party for this order to be issued. It would have been good to enjoin the Land Registrar, but merely because he was not enjoined, does not negate the fact that no consent was issued. The consent was not supposed to come from the Land Registrar, but from the plaintiff, and I have held that the plaintiff did not issue the consent. The result is that a transfer that was not supposed to be effected, was effected, and this will need to be reversed.

31. Finally, there is the issue of the complaint by the plaintiff that the 3rd defendant is undertaking the business of selling liquor contrary to the terms of the lease. The lease did contain the following clause :-

> (e) Not to permit or suffer illegal use of the Premises or any part thereof which would offend in any way any law and, in particular, the beliefs of muslims which the Lessor in its sole and exclusive discretion considers improper and prohibitory under Islam.

32. The 3rd defendant's argument, in response to this, is that the said beliefs are nowhere particularised in the lease nor noted in the register. My view is that it was upon the purchaser to conduct due diligence, and know exactly what she was purchasing. It follows that if one purchased the lease, they would be bound by all the terms of the lease, just the same way that the transferee thereof was previously bound. In our case, if the 3rd defendant, and/or her advocates, had done their part, they would have known of this clause, and if they had doubts on its import, they would have sought clarification from the lessor. If the lessor is of opinion that the selling of liquor is against its Islamic beliefs, I cannot fault the lessor for saying so. It would therefore mean that the selling of liquor by the 3rd defendant was not permitted. I do not see how, in such an instance, given the express terms of the lease, the 3rd defendant can complain. What she needed to do was to ensure that due diligence had been carried out. She has of course mentioned that she entrusted her advocates to do so, but if her advocates let her down, she cannot place the blame at the doorstep of the plaintiff. She may have a right against her advocates, for not doing their work properly, if indeed this is what happened, but she cannot avoid her obligations under the lease.

33. And it does not help the defendants to argue that there are other premises owned by the plaintiff which sell liquor. First, there was no proof tabled that the premises mentioned by the defendants, as selling liquour, are owned by the plaintiff, and I cannot assume that they do, merely because the defendants mentioned so orally. But even assuming that they were owned by the plaintiff, I wouldn't know the terms of the lease of these premises, for none was presented to me. It could be that they do not have a clause such as the one in this particular lease. Indeed, there before, the lease for the subject premises, did not contain such a clause, and that is why the father of the 1st and 2nd defendants could sell liquor in the premises when he held a lease. Neither would I wish to be drawn into the debate of what is "haram" and what is not "haram" under Islamic law. What is important in our instance, is that there is a clause in the lease restricting the use of the premises for purposes that are prohibited under Islam. It is the duty of the person taking such a lease to be aware of what is prohibited and what is not prohibited and comply with the term thereof. If in doubt, the person needs to seek clarification from the lessor.

34. Given my above discourse, it will be seen that I am persuaded that the plaintiff has proved its case on a balance of probabilities. What then should happen ? The transfer of the lease must be nullified, and it is hereby nullified, and the leasehold title of the 3rd defendant must be cancelled, and it is hereby cancelled. This would result in the lease reverting back to the ownership of the 1st and 2nd defendants, not to the ownership of the plaintiff. It also means that the 3rd defendant has no right to do business in the suit premises. She will need to vacate, and I give her 3 months to do so. If she does not vacate, as ordered above, the plaintiff is at liberty to apply for her eviction. The 3rd defendant may have a claim for her money against the 1st and 2nd defendants, but I am unable to make a firm order on this, because there is no cross-claim in the suit by the 3rd defendant against the 1st and 2nd defendants. If I proceed to do make the order for refund, I will be doing it without first giving the 1st and 2nd defendants an opportunity to defend such claim and an opportunity to be heard on it and without the appropriate pleadings. That therefore, may have to be considered in a separate suit, if the 3rd defendant is minded to file one. On the sale of liquor, this will need to stop, because, as I have explained, it is part of what the plaintiff considers to be prohibited in the lease. The 3 months given to vacate, covers this as well.

35. The only issue left is costs. Costs would ordinarily follow the event, but in this case, I am not persuaded to grant costs to the plaintiff. I refuse to do so because I do not consider the plaintiff or its agent/s to have been fair to the defendants. They received money for the issuance of the consent but slept on the same without dealing with the application for consent to transfer. It is not fair for the plaintiff to have retained this money for this long without communicating to the defendants. Because of that conduct, I decline to award costs to the plaintiff. The result is that each party will bear his/her own costs.

36. Judgment accordingly.

DATED AND DELIVERED THIS 16 DAY OF JULY, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

<u>AT MOMBASA</u>

Delivered by way of email to :-

M/s Khalid Salim & Company Advocates for the plaintiff;

M/s Kanyi J & Company Advocates for the 1st and 2nd defendants;

M/s Gikandi & Company Advocates for the 3rd defendant.