



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 30 OF 2019 (OS)

RUKHSANA HAQ (Beneficiary of the Estate of

the Late Nusrat Shah).....APPLICANT

=VERSUS=

WESTLANDS HOUSING

ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. On 6/2/2019, Ruksana Haq (**the applicant**) took an originating summons dated 24/1/2019 on behalf of the estate of Begum Nursrat Shah seeking the following verbatim orders:

1) The applicant be declared as the legal owner and as rightfully entitled to the entire title and possession of Maisonette Number A5 situated on LR No 209/71/1/1 Westlands, Nairobi, as an absolute owner by virtue of Certificate of Confirmation of Grant dated 18th May 2016.

2) The applicant be registered as the proprietor of Maisonette Number A5 situated on LR No 209/71/1/1 Westlands, Nairobi, as an absolute owner in lieu of the respondent in whose name the property is currently registered.

3) The last original indentures in respect of LR No 209/71/1/1 which are with the respondent be dispensed with and declared null and void.

4) That the costs of this application be provided for

2. The case of the applicant was that she was the personal representative and executor of the last will of the late Nusrat Begum Shah. The late Nusrat Begum Shah was the beneficial owner of **5 Shares** in Westlands Housing Enterprises Limited (**the Company**), which she inherited from her late husband, **Mohamed Eliyas Shah** alias **Mohamed Eliyas Mohamed Nawaz Shah**, pursuant to Succession Proceedings in **Nairobi High Court Succession Cause No 363 of 2006; Estate of the Late Mohamed Eliyas Shah alias Mohamed Eliyas Mohamed Nawaz Shah**.

3. The applicant added that, the 5 Shares in the company entitled the owner thereof to Maisonette Number A5, situated on Land Reference Number 209/71/1/1, comprised in Title Number IR 89738, registered in the name of the respondent. The applicant further contended that pursuant to succession proceedings carried out in **Nairobi High Court Succession Cause Number 3305 of 2014; In the matter of the Estate of the Estate of the Late Nusrat Begum Shah**, she was the absolute beneficial owner of the said 5 Shares together with Maisonette Number A5. It was her case that the process of conveying the Maisonette has been ongoing for over 40 years. She exhibited a copy of the mother title together with the Certificates of Confirmation of Grant relating to the two estates mentioned in this matter.

4. The respondent entered appearance through the firm of **MA Khan Advocate** and filed a replying affidavit sworn on 17/10/2019 by Firoz Nanji. He stated that he was the Managing Director of the respondent. He added that the respondent had no objection to the conveyance of the Maisonette to the applicant provided the prorated management charges of Kshs 1,036,276/30 Cents, payable by Maisonette A5 as at October 2019, are paid. He itemized the details of the management costs and demonstrated how they arrived at the above prorated figure.

5. In her rejoinder to the replying affidavit, the applicant deposed that the management expenses of Kshs 8,298,210.83 Cents, set out in the respondent's response were an afterthought and had no bearing on the respondent's failure to convey the title for over 40 years. She added that the demand that Kshs 1,036,276,30cents be paid prior to conveyance of the Maisonette to her was a manifest violation of Article 40 of the Constitution.

6. The originating summons was canvassed through written submissions. The applicant filed written submissions dated 22/3/2020 through the firm of **Meritad Law Africa LLP**. Counsel for the applicant framed the following as the two issues falling for determination in the originating summons: (i) *Whether the applicant is the absolute legal owner of Maisonette No A5 situated on LR No 209/71/1/1 Westlands, Nairobi; and (ii) Whether the applicant's registration as the absolute legal owner of Maisonette No A5 situated on LR No 209/71/1/1 Westlands, Nairobi, ought to be curtailed by the requirement to pay management fees.*

7. On the first issue, counsel submitted that there was a common intention between the applicant (sic) and the respondent to transfer the suit property from the respondent to the applicant(sic) as per the sale agreement. It was further argued that the respondent had received purchase price and had placed the applicant's (sic) family in possession of the suit property. Counsel contended that the respondent had represented to the applicant and her family that they owned the suit property and should therefore not be allowed to renege on the sale agreement.

8. On the second issue, counsel submitted that conveyance of the suit property should take place first before the issue of management charges is raised.

9. The respondent filed written submissions dated 21/7/2020. Counsel for the respondent submitted that proportionate management charges related to lease extension, land rent, land rate and guard wages which the proprietor of Maisonette No A5 had not paid. Counsel added that it was the duty of the management company to manage the suit property under Section 20 of the Sectional Properties Act. Counsel urged the court to grant the applicant a conditional order directing conveyance of the suit property subject to the applicant paying the estate's share of the management charges. Counsel urged the court to condemn the applicant to pay costs of this suit because failure to pay management charges is what led to these proceedings.

10. I have considered the originating summons and the response thereto. I have also considered the law relevant to the key issue in this dispute. The respondent admitted that it sold the suit property to the late Mohamed Eliyas Shah. They further averred that they have been ready and willing to convey the suit property to the beneficial purchaser provided the prorated management charges are paid by the beneficial purchaser. The only issue falling for determination in this originating summons, in the circumstances, is whether the beneficial purchaser is obligated to pay the prorated management charges before the suit property is conveyed to her.

11. The original purchaser of the suit property was Mohamed Eliyas Shah. By dint of the Certificate of Confirmation of Grant in Nairobi HC Succession Cause No 363 of 2006, his Widow, Nusrant Begum Shah, became the first beneficial purchaser of the property. The applicant in this originating summons is the second beneficial purchaser by dint of the Certificate of Confirmation of Probate issued in Nairobi HC Succession Cause No 3305 of 2014. The applicant contests the demand for management charges.

12. The applicant did not exhibit a copy of the sale agreement which was executed by the parties in 1975 when the suit property was purchased. The respondent too did not exhibit the sale agreement. It does, however, emerge from the letter dated 30/10/1985 from M/s Ngobi & Chawla Advocates, marked as **Applicant Exhibit No "RH6"** that the purchaser was liable to pay prorated company expenses. The letter reads as follows:

RMN/145/85/WHE

30th October, 1985

Mr Mohamed Eliyas Shah,

P O Box 41193,

Nairobi

Dear Sir,

INDENTURE OF LEASE L R NO 209/71/1/1 BETWEEN WESTLANDS HOUSING ENTERPRISES LIMITED AND YOUSELF

We refer to the above matter previous (sic) correspondences and various meetings heretofore held.

We submitted the lease for purposes of stamp duty assessment and the same was assessed at \$361(pounds) and 15/= Kshs. The registration fees will be about Kshs 300/=.

Our Advocates fees in the matter amount to Kshs 15,570/= for the transferee and Kshs 15,570/= for the transferor, in total Ksh 31,140/=.

We shall allow a deduction of 1/6 of the fees as we are acting for both parties and for which you are liable to pay under the lease agreement under clause 9(iv) (g) page 14.

At the same time let us have the balance of your share contribution towards the agreed company expenses payable by you amounting to Kshs 12,054/=.

Pease expedite to enable us complete to successful conclusion this long outstanding matter.

Yours faithfully,

Ngobi & Chawla Advocates

Signed

NGOBI RICHARD MOSES

13. The above exhibit by the applicant indicates that M/s Ngobi & Chawla Advocates were, at that time, acting for both the original purchaser and the respondent herein. Secondly, the original purchaser was liable to pay stamp duty and a portion of the common advocate's legal fees. Thirdly, the purchaser was to pay company expenses of Kshs 12,054 at that time. There is no evidence of any payment made by the original purchaser in terms of what his advocates set out in the above letter. Similarly, the applicant has not exhibited evidence of any payment made by the two subsequent beneficial purchasers.

14. The suit property is a maisonette sitting on a shared title. Eight maisonettes share the same title. What is to be conveyed to the purchaser is a leasehold interest in Maisonette No A5 for the unexpired term of the title. Expenses relating to the mother title and to the estate are shared proportionately among the proprietors of the 8 maisonettes. The applicant has not shown the court that the prorated share of Maisonette No A5 have been paid.

15. On its part, the respondent has shown how the prorated figure of Kshs 1,036,276.20 was arrived at. According to the respondent, this is the sum payable by the owner of Maisonette No A5 out of a total of Kshs 8,290,210.83 made up of: (i) Land Rates-Kshs 1,200,316.83; (ii) Land Rent – Kshs 649,455; (iii) Lease Extension Expenses – Kshs 3,000,000; (iv) Accounting Fees – Kshs 1,182,601; (v) Secretarial Fees – Kshs 109,300; (vi) Security Charges – Kshs 1,981,538; and (vii) Management Fees [1994-2018] – Kshs 177,000

16. From the above evidence, the court is not satisfied that the applicant is making a reasonable demand by asking the court to order the respondent to convey the lease to her without any regard to the above expenses which are payable by the purchaser/owner of Maisonette Number A5. It is not lost to the court that had the respondent not found ways of raising money to extend the lease, there would be no title to litigate over.

17. In light of the foregoing, I make the following disposal orders in relation to the originating summons herein:

a) Subject to the payment of the current prorated management expenses by the applicant, the respondent shall forthwith execute all instruments necessary for conveying the leasehold interest in Maisonette Number A5 erected on Land Reference Number 209/71/1/1, Westlands, Nairobi, together with the corresponding Shares in the Management Company, to the beneficial owner thereof

b) The beneficial owner thereof shall bear stamp duty together with related conveyance expenses

c) Parties shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Ms Rweya for the Plaintiff /Applicant

Mr Mwangi for the Defendant/Respondent

Court Clerk - June Nafula

Note

This Judgment was supposed to be delivered on 13/10/2020. This was not possible because I was assigned duties outside the Station.

B M EBOSO

JUDGE