



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MALINDI
IN THE ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 38 OF 2011

BRUNELLA PANINI & 66 OTHERS.....PLAINTIFFS/RESPONDENT
BELLUOMINI GIULIANA.....67TH PLAINTIFF/RESPONDENT
MARIA PETRINO.....68TH PLAINTIFF/RESPONDENT
GIANNA ELISA RECCOSTA.....69TH PLAINTIFF/RESPONDENT

=VERSUS=

1. POLICINO OASIS MANAGEMENT LIMITED

2. POLICINO OASIS LIMITED

3. GIOVANNI DE CARO

4. POLICINO COSIMO

**5. THOMAS HINZANO
NGONYO.....DEFENDANTS/RESPONDENTS**

AND

1. ALESSANDRO CAZZANTI

2. MARIELLA PALAZZI

3. CLAUDIO BONE

4. VIGNAROLI VITTORINA

**5. LUIGI
ARCARI.....INTERESTED
PARTIES/APPLICANTS**

R U L I N G

1. On 9th July 2013, I made a Ruling allowing Brunella Panini, Maurizio Turato and Paola Ippolito,

- who are Plaintiffs in this case, to jointly manage, protect, preserve and improve the assets of Polcino Oasis Village for a period of six months.
2. The Interested Parties have now filed an Application dated 19th August 2013 seeking for the following reliefs:
 - i. The Honourable court be pleased to grant leave to the interested parties to be enjoined in the suit and ventilate their issues.
 - ii. An injunction be issued to restrain Brunella Panini, Maurizio Turato and Paola Ippolito, Receiver-managers of Polcino Oasis Village, their agents, servants, jointly and/or severally from interfering with the ownership, use, access, quiet and peaceful possession or in any other way whatsoever by **ALLESANDRO CAZANTI, MARIELLA PALAZZICLAUDIO BONE, LUIGI ARCARI, VIGNORALI VITTORINA** and **GIANNA ELISA RECCOSTA** of all the apartments, common areas, service and benefits accruing therefrom pending the hearing of this application.
 - iii. The Honourable court be pleased to give clear guidelines and directions on the roles and powers granted by the Honourable court to the receiver managers.
 - iv. The Honourable court does issue any further and/or other orders as it may deem just and expedient in the circumstances.
 3. The Application is supported by the Affidavit of the 1st Interested Party who has deponed that after the purchase of the apartments, the Interested Parties were issued with sub-leases to confirm the ownership of the apartments; that they have always paid all the expenses required from them and that they are aware that there are common areas and general repairs which all the owners are mandated to maintain.
 4. It is the Interested Parties depositions that although they are aware of the dispute in court, they did not come on board because the protagonists in the suit had their own differences and that they continued paying the requisite service charge despite the suit that was pending in court.
 5. In July 2013, the Interested Parties received letters from the firm of Macharia Ngaru and Wetangula Advocates informing them that they were required to pay all the outstanding service charges to the new receiver managers which would be reviewed and that they informed the receiver managers that they had paid all the service charges until 2013 as required by the sub-leases prior to the Ruling of the court.
 6. It is the Interested Parties deposition that they subsequently received another letter from the receiver-manager's advocates advising them that all the service charge had been increased and further that all prior payments made by them to either Thomas Ngunyo or Cosimo Polcino were null and void.
 7. The Interested Parties have taken the view that the purported increase of the service charge and the opening of a Euro account by the receiver managers has no legal basis and does not abide by the Ruling of the court of 9th July, 2013; that the receiver-managers have been harassing the Interested Parties by denying them access to the common areas.
 8. Maurizio Turato, one of the receiver-managers filed a Replying Affidavit on 2nd September 2013 and deponed that on 21st December, 2011, this court restrained the then Receiver-managers from arbitrarily increasing service charge in view of the fact that they were not providing the basic services; that on 10th February 2012, this court in Mombasa HCCC No. 14 of 2004 terminated the appointment of Thomas Hinzano Ngunyo and Anne Wausi and directed that the owners of the apartments do select the replacements and that at the core of all the applications in these suits has been the issue of poor management of Polcino Oasis Village.
 9. It is the receiver-managers' deposition that the service charge contained in the sub-leases is revisable and that the 1st and 3rd Applicants have since the Ruling of this court delivered on 9th July 2013 been going round the apartments with a view of upsetting the decision of this court and that their advocate confirmed that the service charge could be increased after he inadvertently failed to take into consideration the import of paragraph 48 of the Ruling of 9th July 2013.
 10. According to the receiver-managers, the increased service charge is neither arbitrary nor malicious

and that it was made in good faith owing to the dire state of disrepair of the structure, amenities and utility service in Policino Oasis Village; that over the years, the owners of the apartments have at times paid higher service charge when demanded and that the Applicants, without any duress and with full knowledge of the Ruling of the court of 10th February 2012 proceeded to voluntarily pay their service charge for the year 2012 and 2013 to Thomas Hinzano Ngunyo, well after his removal as a Manager had been made in the Applicants' presence in court.

Analysis

11. On 9th July 2013, I delivered a Ruling in respect to the Plaintiffs/Respondents Application dated 29th May 2013. In the said Ruling I appointed the three receiver managers named in the Application to jointly manage, protect, preserve and improve the assets of Polcino Oasis Village and to collect all the service charges and apply the said charges for the benefit of the Village.
12. In the same Ruling, the court removed Cosmo Polcino and Thomas Hinzano Ngunyo from the possession and custody of the Village.
13. Subsequently, the Receiver Managers' advocates brought to the attention of all the owners of the apartments the order of Omondi J in Malindi HCCC No. 73 of 2004, the order of Muriithi J in Mombasa HCCC No. 31 of 2006 and my Ruling of 9th July 2013 by way of a letter dated 20th July 2013.
14. In the same letter, the advocates informed the apartment owners that they were obliged to pay their outstanding service charges to the newly appointed receiver managers.
15. The receiver-managers' advocate wrote another letter dated 27th July 2013 demanding for service charges from all the apartment owners within the Oasis Village. The letter also informed the said apartment owners of the new Euro denominated bank account that the receiver managers had opened with Fidelity Commercial Bank Limited.
16. The letter further gave a tabulation of the revised service charges for the year 2013 which varied according to the type and size of the apartment.
17. Relying on my Ruling of 9th July 2013, the Receiver Managers' advocates also informed the apartment owners that Cosimo Policino and Thomas Hinzano Ngunyo, the 4th and 5th Defendants herein, were removed from the management of the Village by an order of Omondi J on 10th February 2012. Consequently, the advocates warned, any purported payment of service charge to the said Thomas Hinzano Ngunyo or Cosimo Polcino after 10th of February, 2012 was null and void and that the Receiver Managers shall disregard any such payments and further that the apartment owners should recover the payments they had made from Thomas Hinzano Ngunyo.

The Ruling of 9th July 2013

18. The misfortunes that have befallen the apartment owners of Oasis Village are self-inflicted. The apartment owners were directed by Omondi J to hold elections and appoint the people they would wish to manage the affairs of the Village, which directions were ignored. It is because of the failure to comply with the orders of Omondi J, among other reasons that this court appointed the current receiver managers to manage the affairs of the Village.
19. In my Ruling of 9th July 2013, I reproduced the pertinent parts of the Ruling of Omondi J in respect to the payable service charges. After analysing the said Ruling, I stated at paragraph 47 of my Ruling that the Applicants, in that Application, were under an obligation to continue paying the service charges under the old rates in conformity with the Ruling of Omondi J which has never been set aside or varied. At paragraph 48, I stated as follows:

“Consequently until the Ruling of the court (Omondi J) is set aside, all lessees within the Oasis Village will and should continue paying the old service charge until this suit is heard and determined.

20. The Receiver-Managers were aware of the order of Omondi J and my order in respect of the chargeable service rate. In fact, it is the receiver managers, with the other Plaintiffs herein, who

- filed the Application restraining the Defendants herein from increasing the service charges which order was gracefully granted by Omondi J.
21. The Receiver Managers have never sought the order of this court to vary the orders of Omondi J and my orders of 9th July 2013 on the payable service charges. Indeed, in their Application to be appointed as receiver managers, there was no prayer for the variance or increase of the payable service charges.
 22. I therefore do not understand, unless it was by the consent of the apartment owners, why the Receiver Managers increased the service charge as indicated in their advocate's letter of 27th July 2013.
 23. In view of the existing orders, the service charge payable by the apartment owners can only be increased either by the consent of the apartment owners or by an order of this court.
 24. The order of this court was clear on that issue: unless and until evidence is called at the hearing of main suit or a formal application, the old service charge, which should be ascertainable on the basis of the existing records, should be paid by the apartment owners.
 25. It may be true that the receiver managers were appointed by this court to facilitate and expedite the quick rehabilitation of Polcino Oasis Village, and that the service charge must be commensurate to the quality of the service rendered.
 26. However, it is the apartment owners who should make a decision on the quality of services that they want the receiver managers to offer them. It is unfortunate that the sub-leases did not provide a formula of how the service charge was to be increased over a period of time. The sub-leases state as follows:

“The lessee shall pay the lessor a sum of Kshs.40,000 per year (Revisable). In case the expenses for providing the services mentioned herein below is more than the sum of Kshs. 40,000/- for the apartment then the lessee would be required to pay proportionately higher service rent.”

27. The sub-leases do not state how the “proportionate higher service rent” is to be calculated. In my view, the proportionate higher service charge can only be determined by a professional body like the Institute of Surveyors of Kenya or any other recognised body dealing with matters of valuation of land or by the consent of the apartment owners. That is the evidence that must be placed before the court by the receiver managers or any other party before they can increase the service charge.
28. The other issue that I have been called upon to decide is the fate of the payments which were willingly made by the Applicants to and received by Thomas Hinzano Ngonyo after 10th February 2012 with their full knowledge of his removal as a Receiver Manager of Polcino Oasis Village.
29. In the Ruling of Omondi J delivered on 10th February 2012 in Malindi HCCC No. 73 of 2004, it was recognised by the court that it was Thomas Hinzano who was running the affairs of Polcino Oasis Village. The court directed the apartment owners to appoint somebody whose services they will not question and the said Hinzano was ordered to submit all the accounts from the condominium fees collected from May 2010 until April 2011.
30. Nothing appears to have happened after the orders of Omondi J were given. The said Hinzano Ngonyo continued collecting the service charge after the order in view of the fact the apartment owners never appointed someone to run the affairs of the Village.
31. In the circumstances, it is the Receiver Managers and by the extension the apartment owners who should move the court to compel the said Hinzano Ngonyo to provide the accounts as ordered by Omondi J and also to account for the subsequent monies that he received from the apartment owners.
32. The apartment owners cannot be blamed for paying the service charge to Mr. Hinzano Ngonyo. They were not served with any court order indicating that Mr. Hinzano was not authorised to collect service charge.
33. In the circumstances, the apartment owners should not be faulted by the receiver managers for making any payment in respect to the service charges to Mr. Hinzano or to Polcino Oasis Limited before 9th July 2013. It is Mr. Hinzano or Polcino Oasis Limited who should account for the payments that were paid by the apartment owners. Indeed, one of the prayers in the Plaint against the Defendants is for the taking of accounts in respect to the Village since the year 2005.

34. In any event, the orders of this court of 9th July 2013 removed Cosmo Polcino and Thomas Hinzano Ngonyo from the management of the Polcino Oasis Limited and Polcino Oasis Village on the said date.
35. The order itself, and by extension the Receiver Managers' Application, recognised that the two Defendants were the *de facto* managers of the Village until 9th July 2013 when they were removed as such by this court.
36. For the reasons I have given above, I find that the Interested Parties Application is meritorious. I therefore make the following orders:
- a. **The Interested Parties be, and are hereby enjoined in this suit.**
 - b. **The Receiver Managers appointed by this court on 9th July, 2013 should not increase the service charge, unless with the consent of the apartment owners, until the hearing and determination of the suit or with the order of this court.**
 - c. **The service charge paid to Polcino Oasis Limited or Hinzano Ngonyo by the apartment owners before 9th July 2013 should be treated as duly paid.**
 - d. **The Plaintiffs, if they deem fit, to make a formal application for taking of accounts from the previous managers of Polcino Oasis Village.**
 - e. **Any apartment owner interested in the outcome of this suit to apply to be joined in the suit within 60 days from today.**
 - f. **This suit to be set down for hearing within 90 days from today.**
 - g. **The costs of this Application to be in the cause.**

Dated and Delivered in Malindi this 8th day of November 2013

O.A. ANGOTE

JUDGE