



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.183 OF 2018**

**(FORMERLY NAIROBI 2333 OF 2007)**

**NARESHCHANDRA GOVINDJI SHAH.....1<sup>ST</sup> PLAINTIFF**

**REKHA NARESHCHANDRA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SHREE MANAGEMENT LIMITED.....1<sup>ST</sup> DEFENDANT**

**DINKER KUMAR RAMANBHAI PATEL.....2<sup>ND</sup> DEFENDANT**

**KAMARKUMAR RAMANBHAI PATEL.....3<sup>RD</sup> DEFENDANT**

**RAMESHCHANDRA J.S.RAJANI.....4<sup>TH</sup> DEFENDANT**

**HANSADEVI RAMESHCHANDRA RAJANI.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By an **Amended Complaint** dated **7<sup>th</sup> December 2007**, and **Amended** on **18<sup>th</sup> July 2008**, the Plaintiffs herein brought a claim against the Defendants and sought for the following orders as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally:-

***a) The Defendants by themselves, their agents or servants be permanently restrained from constructing, encroaching on or interfering with the Plaintiffs right to the common area on the property LR.No.1870/X/20, Nairobi including damaging or in any other way interfering with the road of access being part of the common area or giving permission for any such acts.***

***b) The Defendants by themselves their agents or servants be permanently restrained from constructing or erecting any structure or building or giving permission for constructing or erecting any structure or building or giving permission for constructing or erecting any structure or building on any designated common area of the property LR.No.1870/X/20, Nairobi.***

***c) A declaration that the 1<sup>st</sup> Defendant cannot have and has no right to grant permission for the construction, erection or development of any structure on any part of the common area.***

***d) The Defendants do demolish the unlawful structure constructed on the road of access referred to hereinabove and reinstate the premises to its original condition at their own expenses.***

***e) A Declaration that the 1<sup>st</sup> Defendant must at all times comply with clauses 3(f), 4(i), 4(ii) and 4 (iv) of the terms of the Lease it has entered into with the Plaintiff.***

***f) A Declaration that the Defendants must at all times comply with clauses 2(v), 2(ix) and 2(xi) of the terms of the Lease they have entered into with the First Defendant.***

***g) A Declaration that the Defendants must at all times comply with Articles 7(ii) and 7(vi) of the First Defendants Articles of Association.***

*h) The Defendants restore the said road of access referred to hereinabove at their own expense.*

*i) Damages for the destruction of the road of access referred to hereinabove.*

*j) General damages.*

*k) Costs of this suit*

*l) Interest on (i) (j) and (k) hereinabove*

*m) Any other or further order deemed fit and just to grant by this Honourable Court.*

In their statement of claim that the Plaintiffs stated they are registered as joint proprietors /lessees of the **Maisonette No.5** on property, **LR.No.1870/X/20** located at the **Westlands** area of **Nairobi** which said Massionette is one of the six in the suit property and the 1<sup>st</sup> Defendant is a Management Company incorporated to undertake direct management of the land known as **LR 1870/X/20**, and also to acquire the leasehold for the said property. They averred that the 1<sup>st</sup> Defendant as a lessor entered into a Lease dated **27<sup>th</sup> day of May 2005**, with the Plaintiffs and the same was duly stamped and registered as identical lease as entered into between the 1<sup>st</sup> Defendant and the Plaintiff. They averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the owners Lessees and /or occupants of the adjacent Maisonette.

It was their contention that it was a condition of the Lease in recital Clause that for the purpose of managing the estate and the lessee of each Maisonette in the said Estate will simultaneously with the execution of this lease apply for **membership** in the Lessor to remain as inseparable portion of this lease. They averred that the 1<sup>st</sup> Plaintiff, 2<sup>nd</sup> Defendant are shareholders and Directors in the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Plaintiff being a shareholder in the 1<sup>st</sup> Defendant's Company, states that he is entitled to ownership of a one sixth indivisible share of the leasehold property known as **LR.No.1870/X/20**. and therefore no part of the common area of the said property is capable of being demarked and isolated. They further averred that the 1<sup>st</sup> Defendant has already entered into a separate but similar leases bearing clauses and covenants identical to the one entered into with

Plaintiffs and with the owners of the other Maisonettes on the suit property. Further, that there has been in existence a road designated as a common area on the suit property which is particularly delineated and marked on a site plan registered at the registry of Documents in Nairobi and it has always been a road for egress and ingress to be used in common by the Lessees, occupiers and invitees of all the owners of the property.

The Plaintiff averred that in breach of the conditions of the Lease Agreements the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants are using the premises in a manner that is causing a nuisance to them. They further averred that the Defendants in breach of the Articles of Association, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have also been conducting business from the premises and using the same as storage for goods and vehicles used in their business and parking vehicles used for their business in the common area thus reducing the space available for parking for the Plaintiffs. Further in breach of the Lease's conditions, the 4<sup>th</sup> and 5<sup>th</sup> Defendants through their agents began to construct and erect a structure on the said road being the common area to be used jointly and in common by the owners of the suit property.

They averred that on various occasions after commencement of the constructions, the Plaintiffs informed the Directors of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants of the fact that the construction was unlawful and on the common area, However the 1<sup>st</sup> Defendant ignored the protests and the 4<sup>th</sup> and 5<sup>th</sup> Defendants were allowed by the 1<sup>st</sup> Defendant to carry on with the construction and no **Statutory Notice** of meeting was given to the Plaintiffs nor were any resolutions approving the erection of the structure by the 4<sup>th</sup> and 5<sup>th</sup> Defendants availed to the Plaintiffs. They contended that the Directors of the 1<sup>st</sup> Defendants verbally informed the Plaintiffs that since five Directors had consented to the erection of the structure it was valid in law. They further averred that in breach of its duties, the 1<sup>st</sup> Defendant did not cause the construction to be stopped. They averred that 4<sup>th</sup> and 5<sup>th</sup> Defendants had not been granted the statutory permission and Licenses for the construction by the City Council of Nairobi and they were served with an Enforcement Notice from the City Council of Nairobi and the City Council caused the unlawful structure to be demolished on **16<sup>th</sup> August 2007**. They averred that after the structure was demolished by the City Council of Nairobi, they moved the structure in another part of the common area in breach and averred that their actions remains illegal and unlawful. The Plaintiffs stated that the 1<sup>st</sup> Defendant is not adhering to the terms of the said leases and are acting in contravention of the same to their detriment.

It was their contention that on **21<sup>st</sup> December 2007**, the 4<sup>th</sup> and 5<sup>th</sup> Defendants removed the unlawful structure from where it is and re-erected the structure in the same place where the structure was initially destroyed by the City Council of Nairobi and alleged that the 4<sup>th</sup> and 5<sup>th</sup> Defendants with the collusion of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants committed the acts to defeat the Plaintiff's contractual rights afforded to the Plaintiffs by the Lease. Despite being served with the Enforcement notice, the 1<sup>st</sup> Defendant has taken no action against them and as a result the Plaintiffs are suffering harm and loss as the structure hinders the movement and natural light to the Plaintiffs cooking area.

The suit is contested and the Defendants filed a Statement of Defence dated **18<sup>th</sup> January 2008**. They denied all allegations of fact contained in the Plaintiff. They averred that the physical location of the **Maisonette No.1** is different from that of **Maisonette No.5** and therefore the easements that apply to the respective maisonette vary in particulars. They denied being a nuisance or annoyance to any of the Lessees /owners or occupiers of the Massionetes or acted to the detriment or prejudice of their interest and averred that the Plaintiffs have not demonstrated any such nuisance. It was their contention that if the structure was demolished on **26<sup>th</sup> August 2007**, as alleged, then the Plaintiff's prayers do not hold true and they therefore urged the Court to dismiss the Plaintiffs suit.

After various Applications, the matter was finally set down for hearing and the Plaintiff called three witnesses and the Defendant also called three witnesses.

### **Plaintiffs Case**

**PW1 - Lekha Nareshchandra** the 1<sup>st</sup> Plaintiff herein stated that the Estate involving the suit land has six Massionetes and she owns one of them together with her husband and the Defendants too own houses that are adjacent to theirs and each one owns one share in the Management Company. The parties signed similar leases and the 1<sup>st</sup> Defendant has the duty to take care of their rights. It was her testimony that she should enjoy peace and comfort without annoyance or intervention from other owners. On the **20<sup>th</sup> of July 2007**, there was construction going on and holes were being dug in the tarmac. She wrote to the Defendants enquiring about the holes and after 2 days she found there was pre requisition by the 4<sup>th</sup> and 5<sup>th</sup> Defendants to put up a car shade in the common area. She testified that when she called a meeting of the home owners, the 4<sup>th</sup> and 5<sup>th</sup> Defendants informed them that they had the authority of the other home owners to erect the car shade and stated that she was not informed nor was her authority sought.

She further testified that the Directors refused to heed to their Plight and they then wrote to the **City Council of Nairobi** to issue a Notice to stop the construction and the **City Council** issued an **Enforcement Notice** and when they did not comply, they came and took it down. However, they moved to the common area of **House No.1**. She testified that they have covered their parking with iron sheets but the structure has meant sunlight is blocked. Despite writing various letters to lessor to hold meetings nothing has been done. She produced her exhibits in court and asked that the common area be protected.

In cross examination she stated that the issue relates to common area that are roadways and parking and allows coming in and going out of the compound. She testified that the cars are not parked on the road and the Parking has no gate. That the car shade has obstructed them and confirmed her backyard is covered by Iron sheets and it is legal. She further testified that the structure has taken over the parking of two cars but the lease does not say how much space each car can occupy.

**PW2 - Rekha Nareshchandra** testified that the common area serves all of them and everyone has a right to use it as it allows their entry and exit. He testified that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were using their residence area for other activities restricted by the lease like storing goods and living more than one family while the houses are for single families. It was his testimony that the car shade was put up in the common area .He denied breaching any condition of the lease and interfering with the common area and stated that he had the City Council approvals for the alterations that makes it legal.

On cross examination, he stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants park in a space meant for visitors, however everybody can park there. He stated that they bring goods in their houses and use the common area where they park for loading and offloading and leave their Van there for several days though they do not carry on business there. He confirmed that his house has flower pots and steel bars to protect and further that he put them up before Management Company came into being and confirmed that one cannot alter the house without permission.

In Re examination he testified that they have no right as tenants to annex any part of the common area and stated that he obtained authority for the tank. It was his evidence that any authority to build in the common area is illegal.

**PW3 - Dominic Mutegi**, testified that he worked with the **Nairobi City Planning Department** as **Acting Assistant Director of Planning** in **2007** and on **7<sup>th</sup> September 2007**, he wrote a letter giving authority to put up a car shade to **Ramesh S Rajani** and indicated the same was subject to the authority of the landlord. He further testified that the authority was in respect of his designated parking area.

On cross examination, he stated that the building plan was given and when he sent an officer to check the complaint and reported that the shade had not been put in the correct place and when he went to the site, he found that the shade had been erected in the common area and moved at the far end. He stated that he did not know the location of the current shade.

### **Defendants Case**

**DW1 - Praful Pabari** testified that he is one of the Directors of the 1<sup>st</sup> Defendant and further stated that they hold annual meetings in which they resolve any disputes. He stated that the Plaintiffs were invited to the meeting but they did not attend and that he gave his authority for the construction of the shade and it did not obstruct anyone.

On cross examination, he stated that the quorum of a meeting is 5 out of 6 and that **Rajani** sent request to shareholders but the Plaintiffs did not give authority. He confirmed that they have authorized Dimicor Pasful to put up a shade in the common area.

In re-examination he stated they gave their approval after the City Council approval.

**DW2 - Dinker Kumar Ramanbhai** testified that he has leased **Masoinette No.1** from **Shree Management** and he is one of the six Directors. He stated that he does not share a common boundary with them and denied repairing cars. He testified that he parks his Motor vehicle at the designated parking and it is two tones as allowed. It was his testimony that Rajani got permission from the City Council to construct his temporary shade and the Directors consented. He alleged that the Plaintiffs also have a car shade that has intruded into the drive way and they did not give their consent and it has affected other occupants and has done multiple other things without approvals. He denied that they have breached the lease agreement.

On cross examination, he stated that the Management Company has sued the Plaintiff and denied that **Mr. Rajani** constructed a car park at the common area but in his parking and he sought authority from **Nairobi City Council**. When he constructed, he approached them individually as they do not have meetings but started holding meetings when the case was filed. It was his evidence that he has one van that

brings food stuff to his house and it is parked at his parking. He testified that the Plaintiffs do not attend meetings. He agreed that the Structures devalue the property.

On re-examination he testified that the proposed plan was not registered and that **Rajani's** shade is in the parking and not common area and it has not devalued the property. He stated that though the property was demolished, the demolition was illegal as he had authority.

**DW3 Ramesh Chandra Rajani** testified that he lives in one of the Massionettes. He decided to put up a temporary garage in front of his house so that he can park his motor vehicle under the shade which was his designated car park. He stated that he talked to the Management to seek consent and was given consent by five people and the Plaintiff objected. He further testified that he went to the **City Council of Nairobi** and got approval to put up the car shade and it was only demolished when the Plaintiff complained. He stated that the Plaintiff has also built a car shade and a water tank which is obstructing the drive way and has therefore breached the terms of the lease. He therefore asked the court to dismiss the suit.

On cross examination, he testified that no individual is supposed to abrogate the common area to himself and each member has his own designated parking area and he has built a shade in his common area. He stated that he got approvals for building and that his house and that of the plaintiff are close and the Plaintiff is not affected by the shade. Further that he has no counter claim and that **Dinker's** building of a car shade was approved in their meeting.

On re-examination, he testified that he put a car shade in his designated carpark and he did not block the common area.

The parties were directed to file written submissions and the Plaintiff through the **Law Firm of Sharpley Barret & Co. Advocates** filed their submissions on **15<sup>th</sup> December 2014**. It was submitted that the Defendants did not file a counter claim in the suit and their grievances are being done in a vacuum. That the plaintiffs are suffering harm and loss arising from the acts of the Defendants and the Court was urged to enter Judgment for the Plaintiff

The Defendants through the **Law Firm of Mohammed & Samnkay Advocates** filed their submissions on **4<sup>th</sup> March 2015** and submitted that the Plaintiffs have come to court with malafides and have shown that they are not deserving of the orders of the equitable remedy and relief and Judgment ought to be entered against them.

The Court has now carefully considered the pleading and submissions of the parties. The Court would first like to point out that the

Plaintiff has submitted on the issue of the site visit. However vide Application dated **5<sup>th</sup> December 2017**, the plaintiff prayed that the Court vacate the orders ordering for the site visit and indicating that the Defendant had pulled down the shade and therefore there was no need of the site visit and withdrew the request. **On the 20<sup>th</sup> June 2018** the Court allowed the Application and the issue of the site visit was dispensed with.

The Court will now deal with the issues for determination. These issues are:-

- i. Whether the 1<sup>st</sup> Defendant has acted Ultra Vires*
- ii. Whether the Plaintiff is entitled to the prayers sought.*
- iii. Who bears the costs?*

#### **i) Whether the 1<sup>st</sup> Defendant has acted Ultra Vires**

The **Memorandum and Articles of Association** of a **Company** are like its Constitution. They provide for the dealings of the members and any decision that is made that is inconsistent with **Memorandum and Articles of Association** is **null** and void as the Articles remains the law that would govern the members and they are bound by them unless the parties amend them.

In the same spirit a lease that is signed and registered by parties become its contract and parties are bound by it and are therefore not allowed to deviate from it until and unless they alter it as it becomes their point of reference.

In the case of **Okuya Omtatah Okoiti & 3 others versus Nairobi City County & 5 others (2014)eKLR**, the Court stated:-

***“The Articles of Association of a Company constitute the constitution of any Company and play a Vital Role in defining and distributing powers and functions and regulate the functioning of the Company . It may thus be argued that the Articles of Association of the 5<sup>th</sup> Respondent prevail over the provisions of the water Act in relation to the appointment of directors of the 5<sup>th</sup> Respondent.”***

I agree with the Plaintiff that it is the duty of the 1<sup>st</sup> defendant to ensure observance and performance by the Lessee and in so doing, must observe the rules that are in force and that means that the Memorandum and Articles of Association together with the Lease must be adhered to. Any resolution by the Board members that is contrary to the provisions of the **Memorandum and Articles of Association** therefore becomes null and void.

The Articles were very clear with regards to the issue of the common area and its appropriation. Though in a Company the decision of the majority of the Board members may carry the day, this decision must also be made in conformity with their laid down rules, in this case the

Articles of Association. The Articles are very clear that the common area must not be used by a single member. The Plaintiffs have in evidence produced a map that indicates what the common area is. Further, PW3 who is an officer of *Nairobi City Council* also testified that the 5<sup>th</sup> Defendant had put up a shade in the common area contrary to its authority to put it up in his designated car park before they pull it down. It is therefore not in doubt that the shade was put up in the common area. Though the 5<sup>th</sup> Defendant has argued that he had permission from the majority of the *Board Members* and the *County Council* to put the shade, even if there was such permission, the Articles of Association reign supreme and therefore the Board had no powers to grant such permission as they were acting ultra vires.

#### ***ii) Whether the Plaintiffs are entitled to the prayers sought***

The Plaintiffs have also complained that the shade as evidenced by the photographs produced as exhibits prevented the Light from illuminating in their backyard. The court confers that the shade might have prevented the light from illuminating their back utility area. However a further look at the photographs shows that the plaintiff had erected iron sheets in their backyards too, a fact that they have also acknowledged in their evidence and the Court finds that the Light that the shade was preventing was at the common area but not their backyard as their backyard was already covered thus minimal light if any was passing through.

The Plaintiffs have accused the 3<sup>rd</sup> and 4<sup>th</sup> Defendants of having lorries which come into the Compound and are parked at the undesignated areas. That they also carry out repairs in the suit property and hereby devaluing the property. They have also been accused of carrying out business in the property contrary to the Lease. The Court agrees with the Plaintiffs that these are prohibited acts and therefore the defendants are guilty of breach. However on the issue of carrying out business, the Defendant have stated that they just store their goods in the house for further transmission. If that is the case, then that is not carrying on business as there is evidence that they have their business in Meru and it would be impossible to determine what a party can and cannot store in their houses unless there is a clear provision in the Articles of Association to that effect.

On the other hand, the 2<sup>nd</sup> Plaintiff acknowledged parking his car to wash it in a place that is not his designated area. He also acknowledged putting a water tank but denied that it was erected in the common area. He further confirmed that in his Maisonette, there is a gutter and he has covered it with iron sheets. He however stated that he had built it when the management company was not existing. For him, the Iron sheets cover was not illegal and he did not seek permission to put up the gutter and on cross examination, he acknowledged that alterations are not allowed without permission. Though the Plaintiffs claimed to have sought authority, no evidence was adduced to support the allegation.

The Plaintiffs have come to Court to seek equitable remedies. However the Plaintiffs are also guilty of breaching certain terms of the Memorandum and Articles of Association and lease agreement. He who seeks equity must come with clean hands and also do equity. The Plaintiffs also in their own way have also failed to live upto the terms of the Lease and the Memorandum and Articles of Association and are therefore not entitled to Damages. In the case of *Kyangaro....Vs....Kenya Commercial Bank Ltd & Another (2004) 1KLR 126* as cited in *Patrick Waweru Mwangi & Another....Vs....Housing Finance Co. of Kenya Ltd (2013) eKLR at page 145* stated:-

***“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. .. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity.”***

The Plaintiff has complained that in contravention of the terms of lease and Articles of Association, the 2<sup>nd</sup> Defendant lives with his brother who is not part of a single family unit as provided in the lease agreement. What is a family? A family may consist of the nuclear family or the extended Family. The provisions are ambiguous as it has only stated a single family unit and the same has not been defined. The Court is alive to the fact that we are an African country and it is likely that in our culture, our brothers and sisters form part of our family. It would be unreasonable to equate a family to only ones wife and children.

Wikipedia defines a family as a ***group of people related either by consanguinity (by recognized birth), affinity (by marriage or other relationship), or co-residence (as implied by the etymology of the English word "family") or some combination of these. Members of the immediate family may include spouses, parents, brothers, sisters, sons, and daughters'***

In light of the fact that 7(ii) of the *Articles of Association* provides that members can only park at the designated parking bays adjacent to each maisonette that is similar to (vi), then parking at undesignated parking area amounts to breach.

However, the Court finds that Plaintiffs are not entitled to Damages as they are also guilty of breach of the Memorandum and Articles of Association.

Having now carefully considered the available evidence and the exhibits thereto and the written submissions, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiffs against the Defendants as prayed in prayers No.(a), (b), (c), (d), (e), (f) and (g) of the Plaint herein.

In terms of prayer (h) and (i) the Court notes that these prayers have already been overtaken by events as both parties have acknowledged that the shade has already been removed.

#### ***iii) Who bears Costs***

Costs always follow the event. The Court has granted some prayers to the Plaintiffs. However, the Plaintiffs are also guilty of breach of some Clauses of the Lease. The Court therefore finds that each party should bear his/her/its own costs.

It is so ordered.

***Dated, Signed and Delivered at Thika this 3<sup>rd</sup> day of April 2019.***

**L. GACHERU**

**JUDGE**

**3/4/2019**

In the presence of

No appearance for Plaintiffs

No appearance for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

No appearance for 3<sup>rd</sup> Defendant

No appearance for 4<sup>th</sup> Defendant

No appearance for 5<sup>th</sup> Defendant

Lucy - Court Assistant

**Court** – Notice of Entry of Judgment to be served upon all the parties herein by the ELC Registry and a Return of Service filed.

**L. GACHERU**

**JUDGE**

**3/4/2019**