



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT**

#### **AT MALINDI**

#### **LAND CASE NO. 28 OF 2017**

**LAWFORDS MANAGEMENT LIMITED.....PLAINTIFF**

**VERSUS**

**BARBIERI ROBERTA.....DEFENDANT**

#### **RULING**

1. Before me for determination is a Notice of Motion application dated 10<sup>th</sup> February 2017. By the said Notice, the Plaintiffs Messrs Lawfords Management Ltd are seeking injunctive orders to restrain the Defendant Ms Barbieri Roberta from erecting and or using a gate erected by her on the suit property known as Portion No. 10786 Malindi. In addition, the Plaintiff seeks orders of mandatory injunction to compel the Defendant to demolish the gate erected by herself on the suit property and restore the security wall. The Plaintiffs would like the Officer Commanding Malindi Police Station to supervise compliance with the Orders sought.

2. The Plaintiff's application is based on the grounds stated on the body thereof and that may be summarized as follows:-

- i. That the Plaintiff was incorporated to and manages Apartments built over Plot Nos. 696, 697, 3421 and 10786 Malindi;*
- ii. That every owner of an Apartment/Villa erected on the said Plots is entitled to be a member of Lawfords Management Ltd which was solely incorporated for purposes of acquiring all management rights for all departments/villas erected at Lawfords;*
- iii. That by virtue of a lease dated 12<sup>th</sup> January 2015, the Defendant is the registered proprietor of Villa No. 1 South Wing and erected on Portion No. 10786 Malindi;*
- iv. That the Defendant has unjustifiably and without any colour of right decided not to use the gates provided and designated parking lots and has illegally and without approval of relevant authorities created her own gate by demolishing part of the security wall at the Lawfords and now parks her car in the gardens;*
- v. That the Defendants said action is a nuisance and is causing the Plaintiffs members annoyance, threatening their security and interfering with their quiet possession of their properties; and*
- vi. That accordingly, in the interest of justice and fairness, the orders sought ought to be granted as prayed.*

3. In response to the said Application, the Defendant took out a Notice of Preliminary Objection dated and filed herein on 27<sup>th</sup> February 2017 objecting to the suit and the orders sought on the grounds that:-

- i. The application and the suit as a whole are fatally defective, incompetent and bad in law and amount to an outright abuse of the process of this Honourable Court;*
- ii. This Court has no jurisdiction to entertain either the application or the suits;*
- iii. The Plaintiff is not the Lessor under the lease dated 12<sup>th</sup> January 2015 and has not shown any basis or authority to bring this suit on behalf of the Lessor let alone obtain ex-parte mandatory orders under it;*
- iv. No proper grounds or evidence has been laid to show the need for any urgent ex-parte mandatory orders and these should, in any event, be discharged ex debito justitiae.*

v. *There is no resolution or, alternatively, any valid resolution, of the Plaintiff Company approving the institution of this suit.*

vi. *There is no resolution or, alternatively, any valid resolution of the Plaintiff Company appointing the firm of Binyenya Thurania & Company Advocates to institute any valid resolution of the Plaintiff Company approving the institution of this suit.*

vii. *There is no resolution or, alternatively, any valid resolution of the Plaintiff Company appointing the firm of Binyenya Thurania & Company Advocates to institute this suit for and on behalf of the Plaintiff Company.*

viii. *The filing of this suit by the said firm of Advocates is invalid for want of authority under seal from the Plaintiff's Company; and*

ix. *The suit herein is incompetent and ought to be struck out forthwith.*

4. I have considered both the Application and the Notice of Preliminary Objection. I have also taken into account the submissions filed by the Learned Advocates for the parties as well as the authorities they graciously referred me to.

5. The issues raised in the Preliminary Objection centre on the jurisdiction of this Court and the Competence of the application as well as the suit.

6. On the issue of jurisdiction, the Defendants submit that the cause of action herein arises from an alleged breach of contract, that is a Lease Agreement dated 12<sup>th</sup> day of January 2015. According to the Defendant, the prayers sought both in the application and the suit are for demolition of a purported gate erected by the Respondent/Defendant on the suit property. It is their case that there is no land or environment issue raised and hence the prayers sought can, competently be issued by any ordinary Court and not necessarily the Environment and Land Court. It is therefore the Defendant's submissions that as a result of that, this Court has no jurisdiction to hear and determine the suit.

7. In all seriousness, I am unable to see how the fact that the prayers sought "can be competently issued by any ordinary Court and not necessarily this Court" can result in the conclusion that this Court has no jurisdiction to hear and determine the matter. The Defendant has not pointed anything either in law or in fact that bars this Court from considering the issues raised. In any event a perusal of paragraphs 8, 9 and 10 of the Plaintiff reveals that the dispute herein relates to land and the use thereof in relation to the premises occupied by the parties herein and this Court therefore has jurisdiction to deal therewith by dint of Section 13 of the Environment and Land Court Act.

8. The Defendant further contends that the Plaintiff is not the Lessor under the lease dated 12<sup>th</sup> January 2015 and has not shown any basis or authority to bring this suit on behalf of the Lessor. In the absence of authority from the Lessor, the Defendant submits that the Plaintiff cannot purport to use its Memorandum and Articles of Association to claim the Lessor's right under a separate lease contract to which they are not privy to.

9. A perusal of the Plaintiff however reveals that the suit is not brought on behalf of the Lessor. The Plaintiff Company clearly states that it was incorporated on 10<sup>th</sup> July 2015 to inter alia carry out the business of a Management Company and in that regard to undertake or direct the management of Apartments built over Plot Nos. 696, 697, 3421 and 10786 Malindi. The Defendant does not in fact deny that she is one of the members and shareholders of the Company by virtue of her being the owner of Villa No. 10786 Malindi aforesaid. As I understand it, the Plaintiff accuses the Defendant of interfering with the proper management of the suit premises by purportedly demolishing a security wall surrounding the Apartments. That is a matter properly within the purview of the Plaintiff's Memorandum and Articles of Association annexed to the Supporting Affidavit and I do not therefore find merit in that objection.

10. The Defendant has also asserted that this suit is invalid for want of authority and/or resolution approving the institution of the suit or appointing the firm of Binyenya Thurania & Company Advocates to institute the suit. In response to this submission, the Plaintiff has submitted that a resolution by the Board of Directors of a Company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. In support of this position, the Plaintiffs have relied on among others, the decision of *Gikonyo J in Leo Investments Ltd –vs- Trident Insurance Company Ltd(2014)eKLR* where the Learned Judge observed that:-

***"If a suit is filed without a resolution of a Corporation, it may attract some consequences. The mere failure to file the same with the Plaintiff does not invalidate the suit. I associate myself with the decision of Kimaru J in Republic –vs- Registrar General & 13 Others Misc Application No. 67 of 2005(2005) eKLR and hold that the position in law is that such a resolution by the Board of Directors of a Company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence therefore is not fatal to the suit."***

11. To their credit, the Defendant having considered the Plaintiff's submissions concede this point. It is however their argument that the later filing of the resolution or authority is not automatic and will depend on the circumstances of each case. The Defendant's therefore proceed to invite this Court to consider the emails annexed to the Plaintiff's further affidavit sworn by Maurizo Gallo and to make a finding that the resolution appears to have been made or sent later in the day after the instructions to file suit were issued to Binyenya Thurania & Company Advocates on the morning of 10<sup>th</sup> February 2017.

12. As Justice J.B. Ojwang(as he then was) stated in *Oraro –vs- Mbaja(200501KLR 141:-*

***"...A "Preliminary Objection" correctly understood is now well defined as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary Objection. Anything that purports to be a***

***Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”***

13. Arising from the foregoing, I do not find merit in the Defendant’s Preliminary Objection dated 27th February 2017 and the same is dismissed with costs.

14. In regard to the Plaintiffs Application for the grant of an injunction, the principles for the grant thereof were long settled in the off-cited case of ***Giella –vs- Cassman Brown Company Ltd(1973)EA 358*** where the Court held that:-

***“.....First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”***

15. In the matter before me, the Plaintiff contends that it has a genuine grievance in the form of a right which was being infringed upon by the Respondent. It is the Plaintiff’s case that the Defendant has unjustifiably and without any colour of right and in utter contravention of the Lease and County Government Bylaws as well as the Building Code decided not to use the gates provided and the designated parking lots. That she has illegally and without approval of the relevant authorities created her own gate by demolishing part of the wall of the suit premises known as Lawfords and turning the same into her gate.

16. The Defendant did not file an affidavit in reply and has not denied the Plaintiffs assertions that she has illegally created a gate by demolishing the wall shared with other shareholders of the Plaintiff Company.

17. In the absence of any fact on the contrary, and in light of the Plaintiff’s detailed submissions herein and the evidence placed before me, I am satisfied that the Plaintiff’s application dated 10<sup>th</sup> February 2017 has merit. The same is allowed with costs.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of March, 2018.**

**J.O. OLOLA**

**JUDGE**