



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT MALINDI

ELC NO. 131 OF 2015

1. MICHIELI ALBERTO

2. MONTI JEAN PIERRE

3. RIVA PATRIZIA

4. DANIELE COLLA & 36 OTHERS.....PLAINTIFFS

=VERSUS=

1. OVERSEE MANAGMENT KENYA LTD

2. WATERLILY PROPERTIES LIMITED.....DEFENDANTS

JUDGEMENT

1. On 31st July 2015, the 40 Plaintiffs herein describing themselves as the owners of villas and/or apartments situated at Lawford's, Malindi filed this suit against the two Defendant Companies. The Plaintiff, later amended on 15th September 2016 prays for Judgement against the Defendants jointly and severally for: -

(a) An injunction, restraining the defendants whether by themselves, their servants, agents or representatives from carrying out any new construction, partitioning, sub-divisions, sale, alienation, transfer, charging or in any manner pledging as security or in any manner dealing with all those properties known as Land Portion No. 697(Original No. M. 8/12) Malindi, Land Portion No. 696/1 Malindi, Land Portion No. 3421 (Original No. 696/3) Malindi , Land Portion No. 10786 Malindi Grant Number CR 43446 pending the hearing and determination (of) this matter of an arbitration between the Plaintiffs and the Defendants.

(b) Kshs 43,203,782

(c) Costs of this suit and interest and

(d) Interest on (b) and (c) above.

2. The Original Plaintiff was accompanied by an 'Affidavit' of verification sworn by Michieli Alberto, the 1st Plaintiff herein, on 30th July 2015. Annexed to the said Affidavit as a bundle marked "MA 1" were copies of Letters of Authority signed by individual Plaintiffs authorising the 1st Plaintiff to sign, swear

affidavits, testify and prosecute and/or defend the interests of the 39 other Plaintiffs in this case.

3. According to the Plaintiffs, the 1st Defendant is registered as proprietor as lessee of Land Portion Numbers 697(original No. 8/12; 696/1; 3421(Original No. 696/3 and 10786(Grant No CR. 43446, Malindi. On the other hand, the 2nd Defendant is said to be registered as proprietor as sub-lessee from the 1st Defendant of all those parcels of land known as Land Portion No.s 697, 696/1 and 3421 Malindi.

4. The 1st to 12th Plaintiffs are said to be holders of various sub-leases entitling them to ownership of a number of separate and distinct villas erected on the Portion of Land belonging to the 1st Defendant. The 13th to 33rd Plaintiffs are holders of similar sub-leases entitling them to ownership of a number of apartments erected on the portion of land belonging to the 1st Defendant. The 34th to 40th Plaintiffs are on the other hand registered proprietors as sub-leases of apartments belonging to the 2nd Defendant.

5. Save for the terms or durations granted thereby, the provisions and conditions of all the sub-leases are similar. As at the time the Plaintiffs bought the leasehold interests from the Defendants, it was understood that the Defendants had developed upon the suitland a hotel and residential complex comprising of a hotel block, reception and club houses, buildings, residential apartments and villas, gardens, swimming pools, paths, drives, parking area and other usual amenities associated therewith. Additionally, the sub-leases granted the Plaintiffs rights of services, access, entry, enjoyment and use of common areas and facilities.

6. It was further a term of the sub-leases that the Defendants would provide a number of services such as provision of security, cleaning and garbage collection as well as ensuring that electricity and water bills, land rent and rates were paid and/or settled timeously. Despite the Plaintiffs honouring their obligations under the sub-lease, the Defendants were said to have failed and/or refused to honour their part of the bargain as a result whereof the Plaintiffs had jointly and/or severally suffered loss and damages. It was accordingly the Plaintiffs' prayer that Judgement be entered against the Defendants as particularized in the Plaintiff.

7. In spite of Service of Summons upon the Defendants none entered appearance and/or filed a defence. The suit therefore proceeded to hearing by way of formal proof.

8. In support of their case, the Plaintiffs called two witnesses. PW1-DANIELE COLA- a resident of Villa No. 5 Southwing, Lawfords Malindi and the 4th Plaintiff herein gave a detailed background of this case. Having indicated that she had the authority of her co-Plaintiffs to pursue this matter on their behalf (as per the bundle of letters marked as PEX 1), she told the court that all the 40 Plaintiffs have valid sub-leases with the Defendants as outlined in the Plaintiff. It was her testimony that the 1st Defendant is the registered proprietor as Lessee for 49 years of land portion Nos 697, 696/1 and 3421(original No. 699/3 since 1st January 1987 pursuant to an indenture, dated 6/12/2006. The 1st Defendant is also the registered owner of all that land No. 10786 measuring approximately 4.042 Hectares pursuant to a Certificate of Title registered as CR 43446.

9. On the other hand, PW1 testified that pursuant to a sub-lease dated 25th June 2007, the 2nd Defendant is registered as proprietor as sub-lease from the 1st Defendant of all those parcels of land known as No. s 697, 696/1 and 3421 Malindi. It was PW1's testimony that as at the time they bought the leasehold interests from the defendants, the Defendants had developed upon the said parcels of land a hotel and residential complex comprising of a hotel block, reception and club house building, residential apartments and villas, gardens, swimming pools, paths, drives, parking areas and other amenities. PW1 further testified that the sub-leases copies of which she produced in court as Exhibits 5 and 6 additionally granted the Plaintiffs rights of services, access, entry, enjoyment and use of common areas and facilities.

10. PW1 testified that even though the obligations to provide services under the sub-leases vested solely upon the defendants, the 1st Defendant initially entered into a Management Contract on 7th May 2012 with M/s Oaks Management Ltd but when the said contract expired on 30th June 2014, the same was not

renewed as a result whereof the Plaintiffs began experiencing numerous difficulties even though they continued on their part to honour their obligations. It was PW1's testimony that the situation worsened after one of the 1st Defendant's directors died in February 2015 as thereafter the Defendants failed to pay for electricity and water bills, land rents and rates, insurance services, garbage collection services and provision of security services.

11. PW1 testified that when the Defendants failed to provide the agreed services, the Plaintiffs were compelled by the circumstances to engage a property manager, a new garbage collection company and a new security company at their own cost. The Property Manager received all the bills for various utilities which would then be shared among the owners of the villas and/or apartments using a formular based on the surface area occupied by each of the plaintiffs. Among other things the Plaintiffs had to pay electricity bills to Kenya Power amounting to Kshs 6,849,909.35. According to PW1, in the year 2015, the Plaintiffs spent a sum of Kshs 25, 602,891/ for services which the Defendants were required to render to them under the sub-lease. Similarly, by the end of the year 2016, the Plaintiffs estimated that they would spend Kshs 17,601,891 for the same services. PW1 produced various invoices and receipts (marked as Exhibits 11-13) as proof of payments made to various utility companies.

12. In concluding her testimony, PW1 told the court that the failure of the defendants to discharge their obligations as per the sub-leases had caused the Plaintiffs jointly and severally to suffer loss and damage. Accordingly, in addition to the sums spent in running the premises amounting to Kshs 43,203,782.00/= ,they also claim damages from the defendants for breach of contract.

13. On her part, PW2- VALENTINA BERTONCELLI- testified that she is a director of Global Services Management Ltd, the company that manages the suit property on behalf of the Plaintiffs. She produced in court a contract dated 1st March 2015 between her company and the Plaintiffs (marked as Exhibits No. 17).

14. PW2 testified that when she took over the management of the suit premises, there was a huge amount of unpaid power bills and the staff providing various services had not been paid for a long period of time. In addition, no maintenance was being done in the common areas and some equipment were on the verge of collapse. The company therefore put in place corrective measures and ensured that all outstanding dues were paid and the occupants of the suit premises continued to enjoy the services that they were entitled to under the sub-lease.

The issues for consideration

15. Arising from the foregoing, I think four broad issues arise for determination by this court.

(i) Whether there were valid contracts between the Plaintiffs and the Defendants.

(ii) If the Answer to (i) is yes, whether the said contract have been breached by the Defendants either jointly and/or severally.

(iii) Whether the Plaintiffs are entitled to the sum of Kshs 43,203,782.00 as sought in the Amended Plaintiff.

(iv) Whether the Plaintiffs are entitled to Judgement for general damages as sought.

I will proceed to determine each of the issues in the same chronological order.

(i) Whether there were valid contracts between the Plaintiffs and the Defendants.

16. In their List of Documents, the Plaintiffs have attached a Certificate of Incorporation issued by the Registrar of Companies indicating that the 1st Defendant M/s Oversee Management Company Limited was incorporated on 13th May 1994. From the testimony of the Plaintiff's witnesses and the exhibits

produced herein it is evident that pursuant to an indenture dated 6th December 2006, the 1st Defendant is registered as proprietor as Lessee of Land Portion No. s 697(original No. M. 8/12); 696/1 and 3421(original No. 696/3) all situated in Malindi. It is similarly evident that pursuant to a Certificate of Title issued on 1st July 1998, the 1st Defendant is also registered as proprietor as Lessee of Land Portion No. 10786(Grant Number CR 43446) Malindi. On the other hand, the 2nd Defendants is registered as proprietor as sub-lessee from the 1st Defendant of all those parcels of land known as Numbers 697, 696/1 and 3421 Malindi.

17. It is evident from the various sub-leases executed between the Plaintiffs and the Defendants that as at the time of execution thereof, the Defendants had developed a hotel and residential complex comprising of a hotel block, reception and club house buildings, residential apartments and villas, gardens, common swimming pools and other amenities and christened it “the Lawfords Resort”.

18. The Defendants then proceeded to grant sub-leases of the villas and apartments on the Lawfords Resort to the Plaintiffs. From the evidence adduced in court, the 1st to 12th Plaintiffs were registered as proprietors of villas from the 1st Defendant vide similar sub-leases dated 25th May 2011. The 13th to 33rd Plaintiffs were on the other hand registered as proprietors of apartments from the 1st Defendant vide similar sub-leases all dated 31st January 2011 while the 34th to 40th Plaintiffs are registered as proprietors of apartments from the 2nd Defendant pursuant to similar sub-leases also dated 31st January 2011. Save for the terms or durations granted thereby the provisions and conditions of all the sub-leases aforesaid are similar.

19. Accordingly, I am satisfied and I do find that there were in existence valid sub-leases between the Plaintiffs and the Defendants.

(ii). Whether the said contracts have been breached by the Defendants

20. A perusal of Clause 2 of the copy of the sub-lease executed by the 1st Plaintiff on 25th May 2011 annexed to the Plaintiffs’ List of Documents reveals that the Plaintiffs were required to pay a Service Charge annually in advance before the thirtieth day of January of each year. PW1 testified that although the Plaintiffs continued to observe this covenant, the Defendants only observed their part of the bargain upto and until 30th June 2014 when a contract the 1st Defendant had entered into with a Management Company known as Oaks Management Ltd expired. Thereafter, and following the death of one of the Directors of the 1st Defendant in February 2015, the Plaintiffs were basically left on their own.

21. Indeed, PW2 testified that when her company M/s Global Services Management Ltd took over the management of the suit premises after being engaged by the Plaintiffs on 1st March 2015, they found a huge amount of unpaid power and water bills. The utility companies providing these services were threatening the Resort with disconnection as Kenya Power alone was owed in excess of Kshs 6.8 Million. According to PW2, the common areas were not being maintained as staff had not been paid and various equipment were in a state of disrepair. A perusal of Exhibits 11-13 clearly reveal that the Plaintiffs had to clear electricity and water bills as well as land rent and rates to the County Government of Kilifi through their new property management.

22. Evidently, the contract envisaged that the development known as the Lawfords Resort would require certain shared services especially in areas referred to as the “Common Areas”. It would appear from the wording of the contract and the testimony of the two witnesses that these services were an absolute necessity for the comfort and well-being of the plaintiffs hence the requirement that the Defendants would undertake the responsibilities at Clause 3 of the sub-lease.

23. In light of the uncontroverted evidence of the Plaintiffs witnesses I find and hold that the Defendants breached their obligations under the sub-leases by:-

(i) Failing to settle electricity bills.

(ii) Failing to settle water bills.

(iii) Failing to provide security services.

(v) Failing to collect garbage and clear the common areas of the Resort.

(vi) Failing to pay land rent and rates.

(vii) Failing to insure the promises.

(iii). *Whether the Plaintiffs are entitled to General Damages as sought.*

24. At paragraph 14 of the Amended Complaint, the Plaintiffs aver that by reason of the failure of the Defendants to discharge their obligations as per the sub-leases, the Plaintiffs have jointly suffered loss and damage. The particulars of the said loss and damage are then given as follows:

Particulars of Loss and Damage

(a) Sum spent in the year 2015 to run, maintain and operate the premises.....Kshs 25,601,891.00

(b) Sum spent in the year 2016 to run, maintain and operate the premises.....Kshs 17,601,891.00

Total

43,203,782.00

And the Plaintiffs claim damages.

25. In their submissions, the Plaintiffs have now asked this court to award their General damages for Kshs 10,000,000/ for breach of contract. I am unable to find the justification for such an award in the circumstances of this case. Accordingly, I decline to award the same.

(iv). *Whether the Plaintiffs are entitled to Judgment in the sum prayed.*

26. In their List of Documents, the Plaintiffs have annexed various receipts from payments made for electricity and water bills, land rates and rent, insurance and other utilities that were demanded for by the various responsible authorities. According to the Plaintiffs, they had until the time of filing this case spent Kshs 43,203,782 as a result of the Defendant's failure to discharge their obligations. It is the Plaintiffs case that they had already paid Service Charge in advance for the year 2015 and they were compelled to spend extra money to maintain the properties, pay outstanding bills, pay the new Management Company and salaries for workers. I am satisfied and I find that the Plaintiffs had a duty to mitigate their losses after the two defendants abdicated their responsibilities under the lease. The Plaintiffs were therefore justified to make payments for these utilities as failure to do so would have led to their losing out on their investments. Having made the payments, the Plaintiffs are in my view perfectly in order to demand reimbursements for double payments made for 2015. It is however my view that the payments made to utilities as per clause 2 of the sub-lease for the year 2016 are not recoverable from the Defendants as the plaintiffs were still expected to pay for them in any event. Only those payments made outside their obligations such a payment to the Management Company and for staff salaries and maintenance of common areas are recoverable.

27. Accordingly, I hereby enter Judgment for Kshs 35,543,408 made up as follows: -

43,203,782

Less 3,247,234 Electricity Bills

Less 8,640 Water Bills

Less 4,404,500 Security Expenses

35,543,408

28. The Plaintiffs shall also have the costs of this suit.

Dated, signed and delivered at Malindi this 2nd day of June, 2017.

J. O. OLOLA

JUDGE