REPUBLIC OF KENYA

IN THE ENVIROMENT AND LANDS COURT

AT MALINDI

ELC NO. 289 OF 2016

MWEKANGI HOLDINGS LIMITED .....PLAINTIFF/APPLICANT

VERSUS

WOBURN ESTATE LIMITED…….…….....…….1ST DEFENDANT

WOBURN MANAGEMENT LIMITED.....2ND DEFENDANT

RULING

1. This is a Ruling on a Notice of Motion Application dated and filed in court on 27th October 2016. The application brought under Order 40 Rules 1, 2, and 4 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act is seeking for orders: -

1. Spent

2. Spent

3. THAT upon inter-partes hearing and pending the hearing and determination of this suit, this Honourable Court do issue an order of a temporary injunction restraining the defendants, their directors, agents, servants, employees or any person acting under their instructions from interfering in any manner whatsoever with the Plaintiff/Applicant and its tenants' quiet possession, occupation and enjoyment of Apartment No. 5B in Block 5 (of) Woburn Residence Club(situated) on Land Refence No. 10714 Malindi.

4. THAT this Honourable Court do issue an order that the Plaintiffs pay a maximum Service Charge of Kshs 10,000/= per month as service charge (sic) and an order restraining the defendants from demanding and receiving any amount over and above Kshs 10,000/= as service charge pending the hearing and determination of this suit.

5. THAT this Honourable Court do issue an order that the defendants render to the Plaintiffs certified accounts of service charge from the 19th April 2015 to-date.

6. THAT the costs of this application be borne by the defendants.

2. The Application is supported by the annexed affidavit of Diana Ngungi Kilonzo, a director of the Plaintiff Company sworn on 27th October 2016. The basis for the application is the averment that the Plaintiff Company is the owner of all that property known as Apartment No. 5B within Woburn

Residence Club, Malindi having purchased the same on 19th April 2015 from Kenya Commercial Bank which Bank was at the time acting in the exercise of its Statutory Power of sale. It is the Plaintiff's case that after the said purchase, the 1st and 2nd Defendants who are respectively the leasehold owners of the suitland and the company managing the condominium known as the Woburn Residence Club, have been illegally and arbitrarily demanding conflicting, irregular and excessive service charges contrary to the service charge payable of Kshs 10,000/= contained in the Lease Agreement of the suit property. In addition, the defendants have threatened to disconnect electricity supply to the said Apartment No. 5B unless the Applicant pays the excessive and arbitrary service charge fees demanded and the plaintiff therefore prays for orders to restrain the defendants as it stands to suffer irreparably if the defendants continue to act in the manner threatened.

3. In a Replying Affidavit sworn by one of the directors of the Defendant companies Franco Esposito on 8th November 2016, the Defendants object to the grant of the orders sought. The Defendants state that the 1st Defendant is the lessor and owner of Woburn Residence Club and has executed various leases to apartment owners within the condominium. The defendants admit that some 11 years ago, they executed a Lease Agreement in favour of one Scholastica Indombo Shimechero pertaining to the Apartment No. 5B Block 5 within Woburn Residence Club, which apartment has since been sold by the Kenya Commercial Bank to the Applicant. They also admit that the lease agreement provided for serve charge of Kshs 10,000/= but aver that this was an initial, provisional charge which would not last forever but was subject to change as provided under Part A of the Fourth Schedule of the Lease Agreement. The defendants are of the view that this application is of no basis and should be dismissed. It is their case that Plaintiff have always been given notice of the service charge payable but have failed to do so and as per the counterclaim, are now in arrears of payment of Kshs 302,000/= as at November 2016.

4. I have considered the application before me and the Affidavit in Reply. I have equally considered the Applicant's Written Submissions and List of Authorities. The Defendants did not file any submissions even though they were given time to do so.

5. The principles for the grant of injunctions are now well-settled. In the often cited case of ***Giella -vs- Cassman Brown & Co Ltd (1973) EA 358***, the court stated 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 the balance of convenience."**

6. In this regard, this court is obliged first of all to establish if the Applicant has made out a prima facie case with a probability of success. A prima facie case as was stated In ***Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others (2003) eKLR (Civil Appeal No. 39 of 2002)*** includes: -

> *"but is not confined to a "genuine and arguable case". It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.*
>
> ……
>
> *A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."*

7. In the application before me, it is not contested that the Plaintiff company is the lessee of all that property known as Apartment No. 5B situated within all that condominium collectively known as Woburn Residence Club, Malindi. According to the Plaintiff, subject to a lease dated 4th February 2010,

between the 1st Defendant and the previous owner of the Apartment one Scholastica Indombo Shimechero the Provisional Service Charge was fixed at Kshs 10,000/=. The same was however revisable upon the 1st and 2nd Defendants supplying the Plaintiff with proper accounts of the management and upon the Plaintiff ratifying the said accounts. In Paragraph 8 it is further the Plaintiff's case that as at the time of acquiring the house, the Kenya Commercial Bank which sold the suit property to them in exercise of its Statutory Power of sale had cleared all service charge arrears left by the previous owner. The Plaintiff does not therefore understand on what basis the Defendants have been invoicing them for serve charge at Kshs 36,500 per month.

8. I have looked at the Lease signed between the 1st Defendant and the said Scholastica Indombo Shimechero dated 4th February 2010 (annexure DNK3 to the Supporting Affidavit). Part 1 of the Definitions and Interpretation Clause defines Service Charge as follows:

"Service Charge" shall have the meaning ascribed to it in the Fourth Schedule".

9. Under the Fourth Schedule to the Lease, Part A deals with definitions and introduces a term known as "Initial Provisional Service Charge Percentage." Part B of the Fourth Schedule deals with Performance of the Services and Payment of the Service Charge.

10. A casual perusal of the stipulations in the Fourth Schedule clearly reveals that the said Service Charge was not at any time going to be a static and standard figure under the Lease. Indeed as the Defendants have demonstrated, as at the time the suit premises was under attachment by the Kenya Commercial Bank, arrears of Service Charge had accumulated to the sum of Kshs 1,483,475,45 which was calculated at the rate provided under the Lease.

11. In my view, it was incumbent upon the Plaintiff as at the time of acquiring the suit premises to confirm what the payable Service Charge would be. The sum of Kshs 10.000/= mentioned in the Lease Agreement is properly described as initial and provisional and was therefore subject to change between 4th February 2010 when the Original Lease was signed and 19th April 2015 when the Plaintiff purchased the property.

12. Indeed the Defendant have clearly shown that before the Plaintiff purchased the suit premises, the Bank cleared Service Charge amounting to Kshs 1,483,475.45/= which figure was calculated at the rate of Kshs 36,500/= together with VAT as per the copies of invoices annexed to the Replying Affidavit and marked "FE1". In my view, it was incumbent upon the Applicant as purchaser of the premises to obtain as much information from the Bank as possible.

13. Arising from the foregoing, I am not convinced by the evidence placed before me so far that the Plaintiff has a right which is threatened by infringement by the Defendants and/or which cannot be compensated by an award of damages. In any event perusal a of the Lease reveals that there were inbuilt mechanisms of resolving some of the misunderstandings that may arise from such problems of calculations and other outstanding issues raised herein. The Parties herein are encouraged to consider pursuing those mechanisms with a view to resolving some of the misunderstandings that have arisen.

14. In the meantime, the application dated 27th October 2016 stands dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J.O. OLOLA

JUDGE