



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO.45 OF 2011**

**MICHAEL CARNEL.....PLAINTIFF/APPLICANT**

**VERSUS**

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

**WOBURN ESTATE LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. I have before me a Notice of Motion application dated 20<sup>th</sup> December 2016. The Plaintiff Michael Carnel is seeking for orders that the two defendants, their servants and/or employees be restrained from disconnecting the electricity and water supply and be further restrained from interfering with the Plaintiff's quiet enjoyment and usage of their premises known as Apartment 5A Woburn Residence Malindi pending the hearing and determination of this suit.

2. The application is supported by an affidavit sworn by the Plaintiff on 20<sup>th</sup> December 2017 and is premised on a number of grounds which may be summarized as follows:-

*a. That the Parties herein entered into a consent dated 28<sup>th</sup> December 2015.*

*b. That the Plaintiff has been paying service charge for the apartment in accordance with the said consent.*

*c. That vide a letter dated 15/12/16, the Defendants have threatened to disconnect electricity and water supply to the apartment unless a sum of Kshs 700,000/= is paid by the Plaintiff.*

*d. That the Plaintiff and his family stand to suffer irreparable loss and damage if electricity and water is disconnected to their home.*

*e. The said acts of the defendants amount to disobeying the consent order and it is only fair and just that the same is respected and obeyed.*

3. The Application is opposed. In a Replying Affidavit sworn by Esposito Franco, one of the defendants' directors on 4th January 2017, the defendants aver that the Plaintiff entered into a Lease Agreement with the previous owner of Apartment No 5A within Woburn Residence Club. It is further their case that Clause 1(c) of part A of the fourth Schedule of the said Lease Agreement provides how service charge is to be calculated for the Apartment.

4. The defendants further aver that on 26<sup>th</sup> July 2013, they supplied to all apartment owners a summary of the Service Charge Account. This made a number of apartment owners including the Plaintiff to raise queries. From the Defendant's records, the Plaintiff is in arrears of Service Charge to the tune of Kshs 1,500,000/=

5. In regard to the consent, the Defendants state that following default in payments of Service Charge, the Defendants were unable to provide any services and had to withdraw services including disconnecting of water and electricity. It is the defendants' case that when this happened, the Plaintiff immediately offered to pay a sum of Kshs 250,000/= pending a meeting which was scheduled to take place on 22/1/2016 in Court. The said meeting however never took place and the consent has never been adopted in Court as an order of the court.

6. The defendants contend that the arrears of Service Charge has been accumulating due to the fact that the Plaintiff has been disputing the amount payable. It has now come to a point in their view when they are unable to provide services as there are no funds to meet the management related costs.

7. I have considered the application and the Affidavit in Reply. I have also considered the submissions placed before me by the Learned Advocates representing the Parties herein.

8. From the record, I note that this suit was filed by the Plaintiff on 4<sup>th</sup> May 2011 seeking for the following orders:-

a. An injunction to restrain the Defendants by themselves and/or their servants or agents from demanding and/or collecting the excess Service Charge and the Plaintiff's account be deemed as fully paid as at the time of appointing an independent auditor to be agreed upon by the Plaintiffs and the defendants and failing which to be appointed by the court.

b. A declaration that the Plaintiff has fully paid the Service Charge accounts.

c. Costs of this suit.

9. Filed on the same day with the Plaintiff was a Chamber Summons application seeking temporary orders of injunction to restrain the defendants from charging extra monthly Service Charge fees and for the defendants to be compelled to continue providing the services required to the Club pending the hearing and determination of the suit. That application was heard by the Honourable Justice Hellen Omondi and was on 8<sup>th</sup> June 2012 dismissed with costs.

10. It would appear however that the parties did not resolve the issue thereafter and on or about 18<sup>th</sup> September 2013, the defendants filed an application to have the suit dismissed for want of prosecution on the basis that the Plaintiff was using its existence to continue frustrating the collection of Service Charge. After hearing the application, the Honourable Justice Angote dismissed the application on 28/2/2014 on condition that this suit is fixed for hearing and is prosecuted within 90 days from the date of Ruling.

11. It is apparent that the suit was neither heard nor prosecuted within the 90 days as decreed by the Learned Judge. Instead the parties appear to have continued with the dispute as a result of which, if the defendants are to be believed, electricity and water was disconnected to the apartments in December 2015. Apparently sensing the gravity of the situation the Plaintiff offered to pay a sum of Kshs 250,000/= pending a meeting which was to be held on 22/1/2016 to review the matter and consider if their agreement could be filed in court.

12. It is now the Plaintiff/Applicant's case that the arrangement they entered into is binding and any failure to abide thereby is contemptuous and should not be permitted by this court. It is noteworthy that while the so-called Consent Order is dated 28<sup>th</sup> December 2015, it was not filed in court until 31<sup>st</sup> March 2014. It reads in part as follows:-

### **“Consent Order”**

*That the Plaintiff to pay a sum of Kshs 250,000/= to the defendants account on or before the 1<sup>st</sup> day of January 2016 and thereafter to continue paying a sum of Kshs 25,000/= per month towards the Service charge account.*

*That there be a further joint meeting on or before the 22<sup>nd</sup> January 2016 for purposes of determining the possibilities and applicability of the consent entered in Malindi ELC No 41 of 2014.*

*That the defendants to continue offering the services to the Plaintiff and not to disconnect the electricity (and) water or interfere with the quite enjoyment of the Plaintiff's occupation pending the determination of this suit.”*

13. Aware of the consequences of the Ruling delivered by Angote J on 28/2/2014, the Plaintiff also on the same 31/3/2016 filed another “Consent Order” apparently executed by both parties on 14<sup>th</sup> May 2015, which simply read:-

*“By consent Ruling delivered on 28<sup>th</sup> February 2014 be and is hereby set aside.”*

14. With respect to the parties herein, I have combed through the record herein but was unable to see when the two so- called consent orders were adopted and/or endorsed by the Court. In my considered opinion the two documents filed by the Plaintiff herein on 31<sup>st</sup> March 2016 amount to nothing but an expression of the intention of the parties that executed them. Unless and until the same are endorsed by the Court they are not binding and cannot become subject to the law governing the discharge of Court Orders and decrees.

15. In the circumstances the application dated 20<sup>th</sup> December 2016 is misconceived. The same is dismissed. Each party to bear their own costs.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of September, 2017.**

**J. O. OLOLA**

**JUDGE**