



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 51 OF 2014

DYSARA INVESTMENTS LIMITED.....1ST PLAINTIFF

INTERNATIONAL LEGAL RESOURCES CORP. LTD.....2ND PLAINTIFF

UGO TROIANI.....3RD PLAINTIFF

ROBERT FERRARI.....4TH PLAINTIFF

LIVIO LUIGI BERETTA.....5TH PLAINTIFF

DR. MINAZ PUNJANI6TH PLAINTIFF

DOTTORESSA FRANSECA TURINA7TH PLAINTIFF

VERSUS

WOBURN ESTATE LIMITED.....1ST DEFENDANT

WOBURN MANAGEMENT LIMITED.....2ND DEFENDANT

RULING

1. This Ruling is in respect to the Defendants' Notice of Preliminary Objection dated 3rd April, 2014 and filed on the same day.
2. In the said Notice of Preliminary Objection, the Defendants have averred that this court does not have jurisdiction to hear or determine the suit and the Notice of Motion and that the suit should be dismissed with costs.
3. The Notice of Preliminary Objection is based on the ground that Clause 2.5 of the Lease that was entered into between the Plaintiffs and the 1st Defendant provides that the appointee of the Institute of Surveyors of Kenya shall make his determination as an expert and not as an arbitrator; that the decision of the said appointee shall be final; that the decision of Paul Wambua valuer was final and binding on all the parties and that this court cannot re-write the contract that was entered into between the parties.
4. The Notice of Preliminary Objection proceeded by way of written and oral submissions.
5. In his submissions, the Defendants' advocate submitted that this suit arises out of a dispute relating to the payment of service charge by the Plaintiffs pursuant to the Leases that they entered into with the 1st

Defendant.

6. The Defendants' counsel submitted that Clause 2.5 of Part B of the Fourth Schedule sets out the Agreement between the parties as to the manner of resolving a dispute relating to service charge; that it is not the function of the courts to re-write contracts for the parties but rather to enforce what is agreed and that this court ought to down its tools in light of the provisions of Clause 2.5 of the Fourth Schedule of the Lease.

7. The Defendants' advocate submitted that the Chairman of the Institute of Surveyors of Kenya appointed Paul Wambua pursuant to the joint reference by the parties who made a determination by way of a report dated 5th November, 2013; that the said Paul Wambua found that no unreasonable charges had been charged on the service charge account payable by the Plaintiffs and that the report of Paul Wambua was final and binding upon the parties as agreed.

8. The Defendants' counsel relied on numerous authorities which I have considered.

9. In response, the Plaintiffs' advocate submitted that the Preliminary Objection does not conform with the definition of a Preliminary Objection as set out in the case of ***Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A 696.***

10. Counsel submitted that after being appointed as an expert by the Institute of Surveyors of Kenya, Paul Wambua subsequently withdrew his report on the ground that the Defendants had falsified accounts; that Mr. Wambua has to date been unable to proceed with a second report due to the Defendants' inability to produce certified approved accounts and that the suit is not based on the mistake by the expert but falsified accounts by the Defendants.

11. The Plaintiffs' advocate referred to the court to several letters, including the letter dated 15th January, 2014 by Paul Wambua, which, according to counsel, highlight the Plaintiffs' frustrations.

12. The Plaintiffs' counsel finally submitted that the Plaintiffs are seeking to implement the expert's report of Maina Chege that was commissioned in the year 2010 and that the Notice of Preliminary Objection cannot be argued without looking at the history of the case as set out in the Plaintiff.

13. The Plaintiffs' counsel relied on numerous authorities which I have considered.

14. The suit was commenced by way of a Plaintiff dated 19th March, 2014.

15. In the Plaintiff, the Plaintiffs narrated how they entered into separate Lease Agreements with the 1st Defendant in respect to a property known as "Woburn Residence Club" situate on plot number 10714, Malindi.

16. In the Plaintiff, the Plaintiffs averred that since signing the Leases, the Defendants have continued issuing irregular, arbitrary and illegal demands of sums over and above the service charge applicable.

17. Some of the particulars of fraud, breach of trust and misrepresentation of facts that have been enumerated in the Plaintiff include: Failing to openly and transparently disclose accounts relating to payments made on service charge, receipts and operations of the 2nd Defendant; failing to have accounts ratified by the 5th Plaintiff; failing to adhere to the meaning of service charge as agreed and failing to comply with the recommendations made by the Institute of Kenya Surveyors Report carried out by Mr. Maina Chege.

18. On the issue of the appointment of Paul Wambua as an expert pursuant to Clause 2.5 of the Lease, the Plaintiffs averred as follows:

"36. The Institute of Kenya Surveyors did appoint Mr. Paul Wambua to proceed and prepare a

report on the property known as “Waburn Residence Club” on portion number 10714 Malindi Municipality which report the Plaintiffs received on the 10th December, 2013 which report was later withdrawn on the 15th January, 2014 by the said Surveyor as he was not made aware by the 1st and 2nd Defendants of the falsified accounts concerning service charge.”

19. In the prayers, the Plaintiffs have prayed, *inter alia*, for a declaration that the Defendants do carry out the recommendations proposed by the Maina Chege Report of 2010 and for an order that accounts for all the service charge paid by the Plaintiffs since 23rd July, 2009 be taken.

20. On the basis of the allegations in the Plaint, the Plaintiffs filed an Application dated 19th March, 2014 in which they sought for temporary orders of injunction restraining the Defendants from interfering with their quiet possession of the suit land, amongst other prayers.

21. Upon entering appearance under protest, the Defendants filed the Notice of Preliminary Objection, the subject of this Ruling.

22. The meaning of what a Preliminary Objection is was defined by the court in the case of ***Mukisa Biscuits Manufacturing Co. Ltd (supra)*** as follows:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

23. It is not in dispute that all the Plaintiffs’ signed Leases which had Clause 2.5 of Part B of the Fourth Schedule which provided as follows:

“2.5 if the owner shall at any time during the Term object to any item of the charges as being unreasonable or the Insurance... as being insufficient then the matter in dispute shall be determined by a person to be appointed by the Chairman for the time being of the Institute of Surveyors of Kenya (or such institutions successor or an Arbitrator and whose decision shall be final and binding on the parties...”

24. The Plaintiffs have admitted that indeed a dispute as to the payable service charge arose and that the Chairman of the Institute of Surveyors of Kenya did appoint Mr. Paul Wambua as an expert to determine the payable service charge.

25. However, the Plaintiffs have averred in the Plaint and the Notice of Motion dated 19th March, 2014 that Paul Wambua recalled and withdrew his report after discovering that the Defendants had falsified the accounts that he had relied on in preparing his report.

26. The Defendants have not denied that indeed Paul Wambua recalled and or withdrew his report, meaning that a report by an expert as contemplated under Clause 2.5 does not exist.

27. Considering that the court will have to examine the purported reports of Paul Wambua and Maina Chege viz-a-viz the provisions of Clause 2.5 of the Lease, and in view of the averments by the Plaintiffs that Paul Wambua did withdraw his report, the Preliminary Objection cannot be said to be a pure point of law arising by a clear implication out of pleadings.

28. The veracity of the Defendants’ claim that the report of Paul Wambua determined the issue of the payable service charge can only be determined after a full trial and not by way of a Preliminary Objection.

29. For those reasons, I dismiss the Notice of Preliminary Objection dated 3rd April, 2014 with costs.

DATED AND SIGNED AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2017.

O. A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 15TH DAY OF NOVEMBER, 2017.

J. O. OLOLA

JUDGE