



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 191 OF 2015**

VINCENT A. CHOKAA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

BROAD GAS PETROLEUM LIMITED.....2<sup>ND</sup>  
PLAINTIFF/APPLICANT

VERSUS

CHENGDU GUANGLING KENYA CO.LTD.....1<sup>ST</sup> DEFENDANT/2<sup>ND</sup>  
RESPONDENT

JAMES GICHUKI

WYCLIFF OLUOCH

REBECCA JUMA

(Sued as Chairman, Secretary and Treasurer of SUNNING HILLS

APARTMENTS WELFARE ASSOCIATION.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT

HERITAGE PROPERTY CONSULTANTS LTD.....3<sup>RD</sup>  
DEFENDANT/RESPONDENT

ODHIAMBO (Sued for on behalf of ODHIAMBO & OTHERS.....4<sup>TH</sup>  
DEFENDANT

**RULING**

The Plaintiffs filed an application dated 5<sup>th</sup> March 2015, seeking orders that:

***1. Spent.***

***2. Pending the hearing and determination of the application, the Defendants, their servants and/or agents to be stopped and restrained from interfering with the Plaintiffs' use and occupation of Flat Nos. M21 and M24 or parking bays Nos. M7 and M8 on LR No. 330/432, Lavington or the Plaintiffs' access to ingress and egress from the said property.***

**3. The Defendant whether by themselves, their servants and/or agents be stopped and restrained from registration or causing to be registered a company by the name of SUNNING HILLS MANAGEMENT COMPANY LIMITED.**

**4. The Defendants be stopped and restrained from withdrawing moneys from Account No. 1209001118 in the name of ODHIAMBOO AND OTHERS at National Industrial Credit Bank Ltd Junction Branch without an order of the Court.**

**5. Costs of the application.**

The application is premised on the grounds that the Plaintiffs are the owners of the flats on the property and are entitled to use and park their cars in the said parking bays by virtue of their ownership. The Plaintiffs aver that they have not authorized the Defendants to manage and control the management of the property or its use. Further, that the Defendants being strangers to the Plaintiffs, they have no right to control the Plaintiffs or the Plaintiffs' use of the property to collect money from the Plaintiffs' Bank Accounts unknown to the Plaintiffs.

The 1<sup>st</sup> Plaintiff swore the affidavit in support of the application, wherein he deposed as follows;- That he purchased **Flat M24** from the developer, the 1<sup>st</sup> Defendant herein in **2010**, whereas the 2<sup>nd</sup> Plaintiff purchased **Flat M21** from a previous owner, **Mr. George Odhiambo Onaga** in **2013**. At the time he purchased the flat, the property had not been fully developed. Nevertheless, he was allocated parking bay **No. 7** and **No. 8** allocated to **Flat No. M2**. It was a condition of the purchase that the developers would incorporate a company known as **Sunning Hills Management Company Limited**, where the owners of the flats would have shares and be the shareholders of the management company and the reversionary interest in the property would be transferred to the management company once all the flats had been sold. It is the Plaintiff's deposition that despite all the flats having been sold, the developers have never formed the management company.

It is deposed that in the years **2010 – 2013**, when he sold his flat, **Mr. George Odhiambo Onaga**, started an organization called **Odhiambo & Others** and began to collect service charge moneys from the flat owners without any formal authority. Subsequently, flat owners formed an unregistered organization called **Sunning Flats Apartments Welfare Association** which collected moneys from the flat owners and managed the property but later instructed the 4<sup>th</sup> Defendant to manage the property. The Plaintiff states that in managing the property, the 1<sup>st</sup> Defendant would issue receipts in the name of **Sunning Hill Apartments** but bank the money in the name of **Odhiambo and Others** thus their operations are opaque. It is his deposition that they are not members of the Association, but pay money to the Defendants failing which, the Defendants threaten to lock out them out and disconnect services to their flats.

The Plaintiff deposed that on **31<sup>st</sup> January 2015**, the Defendants' agents notified them of the re-organization of the Management Company and in that regard, that they had no right to park their cars at their allocated slots. This action, Plaintiffs contended, was exposing their vehicles and property to the risk of damage and theft whereas they have no authority to manage the property, hence the application for injunction.

**Cheng Qi**, the Managing Director of the 1<sup>st</sup> Defendant swore a Replying Affidavit dated **23<sup>rd</sup> March 2015** wherein he deposed that the 1<sup>st</sup> Defendant has no interest howsoever in the suit property having lawfully transferred all its interests on the suit property to various owners including the Plaintiffs. As is a requirement to register a management company before a developer can transfer the units in an apartment, the 1<sup>st</sup> Defendant duly formed and registered a Management Company known as **Sunning Hills Apartments Management Company Limited** and a certificate of incorporation issued on **5<sup>th</sup> June 2010**. It was deposed that the Management Company was a party to the lease agreement between the 1<sup>st</sup> Defendant and the Plaintiffs herein. The deponent stated that the 1<sup>st</sup> Defendant relinquished all his rights of a unit upon a transfer to be managed by the Management Company, therefore, there is no way it would interfere with the rights of any of the flat owners. Consequently, that prayers 2 and 3 of the application

cannot be granted as the 1<sup>st</sup> Defendant has no interest in the suit property as the management company already exists.

**Wycliff Cleophas Omondi Oluoch**, the Chairman of the 2<sup>nd</sup> Defendant swore a Replying Affidavit on **8<sup>th</sup> May 2015**, wherein he deposed as follows;- He is the owner of **Flat No. 5G** upon purchase on **10<sup>th</sup> September 2008**. Upon taking occupation, owners and residents had lodged several complaints with the 1<sup>st</sup> Defendant regarding the overall welfare of the entire property including security and the provision, use and maintenance of amenities and common areas. However, the 1<sup>st</sup> Defendant failed to heed to their demands. The deponent narrated that there was a security breach on **17<sup>th</sup> January 2011** when a security guard was shot and injured, but that the 1<sup>st</sup> Defendant declined to offer any assistance. The 1<sup>st</sup> Defendant and the Management Company failure to offer essential services to the residents necessitated the formation of a residents' association comprising of all the owners of the units. It is deposed that the 1<sup>st</sup> Plaintiff participated in the formation of the association and acted as its legal advisor on the contentious issues. The deponent referred to copies of minutes and resolutions of the residents' association marked "WO3" and deposed that the 1<sup>st</sup> Plaintiff attending the meetings and duly appended his signature to the resolutions. The residents also opened a bank account called **Odhiambo & Others** so as to enable the residents create a pool of money from which to meet the expenses for the common amenities.

The deponent stated that despite the 1<sup>st</sup> Defendant admitting to have effected full transfer of the apartments, it has failed to transfer the management company to the owners as is required by law so as to address most of the issues giving rise to the suit. It was deposed that the membership of the association is voluntary and the Plaintiffs voluntarily pay service charge to the account called **Odhiambo & Others** for purposes of provision of basic amenities including security, garbage collection, and water supply. It was deposed that all expenses and revenue collected are accounted for and are not only published on the notice boards every month they are presented during the association's annual general meeting. Due to the need for professionalism in management of the estate, the association engaged the 3<sup>rd</sup> Defendant, an estate management company. The deponent contended that all correspondence, meetings and decisions made were communicated to all home owners for their participation.

In respect to allegation of parking spaces, the deponent stated that until **March 2015**, there were no parking allocations to any flat owner as there were no markings whatsoever for any particular unit. The association resolved to mark one parking slot for each unit to curb the confusion as some owners were parking more than one vehicle in the compound and living other residents without parking space. The confusion also occasioned congestion in the compound as some vehicles were parked behind others thus causing a gridlock at the parking and made it difficult to exit from the parking thus inconveniencing other residents. The deponent stated that there are 168 units in the suit property and an equal number of parking spaces hence the need for a well-reasoned resolution of the issue. Further, that the parking slots were done in an orderly manner in line with the numbering of the apartments and no resident was accorded any preferential treatment. It was deposed that the Plaintiffs were allocated parking spaces less than 10 metres away from their respective houses and there is no danger as to theft as alleged. The deponent urged the court to dismiss the application deposing that parking spaces were already marked before the institution of the suit, and no *prima facie* case and risk or irreparable losses have been demonstrated by the Plaintiffs.

The 1<sup>st</sup> Plaintiff swore a Further Affidavit on **23<sup>rd</sup> April 2015**, in response to the 1<sup>st</sup> Defendant's reply. Thereunder he deposed that he was never aware of the incorporation of the Management Company since at the time of entering to the agreement, the certificate of incorporation was not presented to him. Further, that he has never been incorporated as a shareholder in the company and offered shares therein. The deponent also stated that the 1<sup>st</sup> Defendant had not relinquished its interest in the suit property as it has never transferred the reversionary interest to the Management Company therefore was still the legal owner of the property. The 1<sup>st</sup> Plaintiff referred to an annexed search from the Registrar of Companies dated **15<sup>th</sup> April 2015** showing the directors and shareholders of the management company marked "VC4". In this regard, he deposed that as evidenced by the search, the flat owners were neither the shareholders nor directors of the management company. It was further deposed that the said management

company does not manage the property but has ceded its responsibility to strangers.

The application was canvassed by way of written submissions which I have carefully read. The issue for determination by this court is whether the Plaintiff has established a case so as to entitle the court to grant temporary injunction order as prayed. The principles to be considered by the court was enunciated in the case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A 358**, which stated ;- **that an injunction would not be issued unless the applicant establishes that he has a prima facie case with a probability of success. Secondly, that he would suffer irreparable injury which is not likely to be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience.**

Firstly, the Plaintiff conceded that Prayer No. 3 of the application cannot issue as the Management Company is already incorporated and was in existence at the time the Plaintiff purchased his flat. This prayer therefore collapses.

The residual prayers are No. 2 and 4 of the application. Under Prayer 4 of the application, the Plaintiffs seek an injunction order to restrain the Defendants from withdrawing monies from the bank account known as **Odhiambo & Others**, until the further orders of the Court. As submitted by the Defendants, the manner in which Prayer No. 2 is couched, ***Pending the hearing and determination of the application***, an injunction to restrain the Defendants from interfering with the Plaintiff's use and occupation of their flats **M21 and M24** and their parking slots **M7 and M8**. It is at this point spent. However, guided by the principle mandating the court to administer justice without undue regard to technicalities, I will proceed to determine the prayer as if it was sought pending the determination of the suit.

The Plaintiffs contend that the 2<sup>nd</sup> – 4<sup>th</sup> Defendants are strangers and do not have authority to manage the suit property. It is their submission that the money collected from the flat owners and banked into **Odhiambo & Others** account is run in an opaque and unaccountable manner. Further, that the management of the property by the said Defendants result into interfering with parking and parking bays on the property to the detriment of the Plaintiffs. Consequently, that their actions are unlawful and illegal and should therefore be stopped.

The Defendants in response state that the Plaintiffs have not demonstrated in any way how their use and occupation of their flats have been interfered with. In respect of the parking slots, the Defendants submitted that the Plaintiffs have failed to show that they were allocated parking slots **M7 and M8** upon purchase of their flats. It was their submission that parking spaces were allocated in **2014**, after they were marked through the collective efforts of the residents through the 2<sup>nd</sup> Defendant.

I have perused the lease agreement between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. It expressly states that the 1<sup>st</sup> Defendant leases and demise unto the lessee **Flat No. M24**. The lease also gives the lessee the right and liberty to, together with the other owners and/or occupiers of the other flats, roads, pathways and parking areas. Evidently, the Plaintiffs are entitled to parking slots. However, there is no evidence to show that they were allocated slots M7 and M8 upon purchase of their flats.

After careful perusal of submissions made by both parties, what emerges is that the 1<sup>st</sup> Defendant is yet to formally hand over the Management of the property to the flat owners. Both parties contend that whereas the Management Company was incorporated by the 1<sup>st</sup> Defendant, none of the flat owners has been made a shareholder of the said company and certainly not in control of the property through the Management Company. The Defendants further elaborated that the 1<sup>st</sup> Defendant has since abandoned its responsibilities in matters of security, garbage collection, water supply and management of common areas of the property. The point of departure is the formation of the association and subsequently the engagement of the 3<sup>rd</sup> Defendant to manage the property. The Plaintiffs maintain that they did not consent to the said Defendants assuming the control of the property.

The 1<sup>st</sup> Defendant furnished a certificate of incorporation of the Management Company. I have also

perused the lease agreement which, at clause 4 provides that the manager has been incorporated for the purpose of managing the estate. The clause also stipulates that each lessee will simultaneously with the execution of the lease apply for membership in the manager. Neither the Plaintiff's nor the members forming the 2<sup>nd</sup> Defendant showed evidence of subscription to the Management Company under clause 4. Even if such subscription was done, none availed a copy of a share certificate received from the management company. Deducing from this is that the flat owners are not incorporated into the Management Company. As a stop gap measure, the Defendants depose that they formed the association to address the issues pertinent to them as flat owners.

Whilst it is the duty of the Management Company to manage the suit property as provided for under **Section 20 of the Sectional Properties Act**, the situation at hand is that the Management Company herein is not operation for failure of a hand over from the 1<sup>st</sup> Defendant. The Defendants have expressed the difficulties experienced by the flat owners as result of this lapse. In the circumstances, it would be unjust, in my view, for this court to interfere with the flat owners' arrangement to mitigate the challenges, devoid of cogent evidence from the Plaintiffs of the allegations of interference and unaccountability by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. As correctly submitted by the Defendants counsel in Paragraph 13 of their submissions, it is incumbent upon the Plaintiffs to show in which way the money are being used to their detriment and that of the residents. They do not appear to have done so and in the circumstances an injunction cannot issue. The Plaintiffs have also not shown what irreparable loss they stand to suffer if the orders sought are not granted. Seeing that the general welfare of the residents is at stake, I find that the balance of convenience tilts in favor of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who in the interim are managing the affairs of the suit property.

Having now carefully considered the instant Notice of Motion and the written submissions, the court finds that the logical conclusion is that the Plaintiffs' application is not merited. The same is dismissed entirely with costs being in the cause.

Dated, Signed and Delivered this 7<sup>th</sup> day of **October, 2016**.

**L. GACHERU**

**JUDGE**

In the Presence of:-

Mr Kamunye holding brief for Mr Keyonzo for the Plaintiffs/Applicants

None attendance for the 1<sup>st</sup> Defendant/Respondent

Mr Marete holding brief Mr Mosesti for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Vincent : Court Clerk

**L. GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the presence of Mr Kamunye holding brief for Mr Keyonzo for the Plaintiff/Applicant

Mr Marete for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants/Respondents.

**L. GACHERU**

**JUDGE**