IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 20 OF 2018

BETWEEN

WOBURN ESTATE LIMITED ..... 1ST APPELLANT

WOBURN MANAGEMENT LIMITED .....2ND APPELLANT

AND

DYSARA INVESTMENTS LIMITED .....1ST RESPONDENT

INTERNATIONAL LEGAL

RESOURCE CORPORATION LTD.....2ND RESPONDENT

UGO TROIANI .....3RD RESPONDENT

ROBERT FERRARI ..... 4TH RESPONDENT

LIVIO LUIGI BERETTA ..... 5TH RESPONDENT

DR. MINAZI PUNJANI..... 6TH RESPONDENT

DOTTORESSA FRANSECA TURINA.....7TH RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Malindi (Angote, J.) dated 8th November, 2017 **in E.L.C No. 51 of 2014.)**

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JUDGMENT OF THE COURT

1. The relationship between the 1st appellant and the respondents is that of a lessor and lessees. The respondents leased some of the apartments erected on Plot No.10714 situated in Malindi also known as Woburn Residence Club. The 2nd appellant is registered as the management company of the said premises.

2. Of relevance to the dispute between the parties was the amount of service charge payable by the respondents. Upon each of the respondents executing their respective lease agreements on diverse dates, it was agreed that they would each pay a provisional monthly rate as service charge which was subject to review. The review was to be based on statements of accounts which would be availed by the appellants and ratified by the respondents.

3. Each of the respondents contend that despite the foregoing, the appellants demanded for amounts which exceeded the provisional rate. To make matters worse, the appellants had failed and/or neglected to avail statements of accounts which the respondents believed was calculated to facilitate the imposition of exorbitant charges. It appears that in the midst of that state of dissatisfaction the respondents came to learn that the provisional service charge was not uniform, that is, some of the lessees were paying more than others. They believed that the provisional service charge of Kshs.10,000 was reasonable.

4. After all attempts to resolve the dispute between the parties had failed, the respondents claim that in the year 2010 as per Clause 2.5 of the Fourth Schedule of the leases they approached the Chairman of the Institute of Surveyors of Kenya who appointed Mr. Maina Chege, a licensed surveyor to resolve the dispute. Thereafter, Mr. Chege made a number of recommendations in his report key among them that the appellants do avail statements of accounts.

5. According to the respondents, the appellants did not comply with Mr. Chege's recommendations and continued demanding for unsubstantiated amounts. Once again the respondents approached the Institute of Surveyors Kenya and they were informed that the appellants had already referred the dispute. Subsequently, on 24th October, 2013 the Chairman of the Institute appointed Mr. Paul Wambua, a registered valuer to look into the issue. Mr. Wambua prepared a report dated 5th November, 2013 detailing his findings and recommendations on the issue of service charge.

6. The respondents were not happy with the said report and they informed both the Institute and Mr. Wambua as much. The bone of contention was that the statement of accounts which had been used by Mr. Wambua had not been ratified by the respondents. Consequently, the said Mr. Wambua in a letter dated 15th January, 2014 addressed to the Institute and copied to the parties expressed:

> **"RE: REPORT AND SERVICE CHARGE ASSESMENT WORBURN ESTATE LIMITED PORTION 10714 (ORIG. NO. 659/660) MALINDI**
>
> **…**
>
> **I do hereby confirm in the meeting held on 10th January, 2014 at Woburn Estate Limited, the issues highlighted in V.N Okata & Co. Advocates' letter were discussed and the agreement was that due to the gravity of the issues surrounding the disputed accounts presented to us by Mr. Esposito for use in our assessment, we recall our report until such a time when forensic accounting is carried out and ratified by all the owner prior presentation to us to enable us to prepare a fresh report…**
>
> **This letter is to formally recall our report until all the conditions set out in the agreement are met…"**

7. As per the respondents, the appellants frustrated every effort made to have the accounts audited as recommended by Mr. Wambua. The final nail in the coffin was when the appellants demanded for substantial amounts from the respondents for purposes of an insurance policy whose details were unclear. This prompted the respondents to file suit on 19th March, 2014 in the Environment and Land Court (E.L.C) being E.L.C No. 51 of 2014 seeking *inter alia*, a declaration that the payable service charge is Kshs.10,000; taking of accounts of service charge paid by the respondents; refund of service charge paid over and above the requisite service charge of Kshs.10,000 per month from 23rd July, 2009 to the date of filing suit; and a permanent injunction restraining the appellants from evicting the respondents.

8. The respondents also filed an interlocutory application praying for various interim orders. Thereafter, the appellants entered appearance and filed a notice of preliminary objection challenging the jurisdiction of the ELC to entertain the suit in question. The long and short of it was that the parties had agreed on a dispute resolution mechanism set out in the lease agreements hence the court had no business entertaining the dispute. The decision as contained in Mr. Wambua's report was final as per the parties' agreement.

9. In response, the respondents argued that Mr. Wambua had withdrawn his report by the letter dated 15th January, 2014. In any event, the objection did not as a matter of fact amount to a preliminary objection as the court could not determine the same without delving into the evidence. As far as the respondents were concerned, the suit was properly before the court.

10. The learned Judge (**Angote, J.)** weighed the arguments put forth by the parties and by a ruling dated 15th November, 2017 he dismissed the preliminary objection with costs. In his own words he stated:

> **"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.**
>
> **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."**

11. The appellants were not happy with that finding and they preferred this appeal. Basically the appellants complain that the learned Judge erred by holding that the preliminary objection was not a pure point of law and dismissing the same.

12. At the interpartes hearing, Mr. Khagram appeared for the appellants while Ms. Okata appeared for the 1st to the 5th respondents. There was no appearance for the 6th and 7th respondents. The appeal was disposed by way of written submissions as well as oral highlights.

13. Mr. Khagram began by submitting that at the heart of this appeal is the principle that courts cannot re-write the terms of a contract between parties. Rather the court's role is limited to enforcing the terms as agreed by the parties. To that extent reliance was placed on the persuasive decisions of the High Court in ***Fina Bank Limited vs. Spares & Industries Ltd [2000] eKLR*** *and* ***Sammy Japheth Kavuku vs. Equity Bank Ltd & Another [2014] eKLR***.

14. It is common ground that the parties herein had agreed on the mechanism to be adopted in the event a dispute arose with respect to service charge vide Clause 2.5 of the Fourth Schedule of the respective lease agreements. Having appreciated as much, the learned Judge had

no basis for failing to honour the terms of the contract. Furthermore, in a bid to justify the erroneous position the learned Judge placed undue regard to the respondents' allegations that Mr. Wambua had withdrawn his report. Mr. Khagram argued that Mr. Wambua did not have the power to withdraw the report.

15. He went on to state that even assuming that Mr. Wambua had withdrawn the report, which was not the case, the learned Judge failed to appreciate that as per the parties agreement the dispute before the court could only be resolved through the identified mechanism, that is, referral of the same to an expert appointed by the Institute of Surveyors of Kenya. All in all the court's jurisdiction had been ousted by the parties' agreement.

16. On her part, Ms. Okata opined that the dispute resolution mechanism stipulated in the lease agreements had been defeated by the appellants' conduct of deliberately failing to comply with the recommendations made by the initial expert Mr. Chege and subsequently Mr. Wambua. More specifically, the appellants' refusal to not only appoint an auditor jointly with respondents but also to have the accounts in issue audited. As such, the ELC's jurisdiction could not be ousted in light of the prevailing circumstances. Bolstering the foregoing line of argument reference was made to the Supreme Court's decision in ***Judges & Magistrates Vetting Board & 2 others vs. Centre for Human Rights & Democracy & 11* others [2014] eKLR**.

17. Besides, the objection raised by the appellants did not amount to a preliminary objection as defined in the *locus classicus* case of ***Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd [1969] E.A 696***. According to the respondents', contrary to the appellants' assertion they were seeking enforcement of the agreements between the parties. In other words, they sought the implementation of the report which had been prepared by Mr. Maina Chege in line with agreed dispute resolution mechanism.

18. We have considered the record, submissions made on behalf of the parties and the law. The nature of a preliminary objection has been the subject of several judicial pronouncements and is well settled. More recently this Court in ***J E N vs. D O K [2018] eKLR*** restated that a preliminary objection is founded on law and not facts. The Supreme Court also addressed its mind on this issue in the case of ***Aviation & Allied Workers Union Kenya vs. Kenya Airways Ltd & 3 Others*** **[2015] eKLR** and stated:-

> **"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."**

19. Based on the foregoing, we, unlike the learned Judge, find that the objection raised by the appellants was on a pure point of law, namely, jurisdiction. It was also based on uncontroverted facts, that the parties had agreed on a dispute settlement mechanism under Clause 2.5 of the Fourth Schedule of the various leases which reads in part:

> **"If the owner shall at any time during the Term object to any item of the Charges as being unreasonable or, the insurances mentioned in Section 5 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 institution 's successors or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding upon the parties …"**

20. Our position is further fortified by the following sentiments of Law, J.A in the ***Mukisa biscuit case***:

> **"…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 or a 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."** *[Emphasis added]*

21. In light of the fact that parties to a contract are free to determine terms that govern their relationship and courts role is limited to enforcement of those terms (See ***Filipo Fedrini vs. Ibrahim Mohamed Omar [2018] eKLR***) we agree with the appellants that the ELC had no jurisdiction to entertain the dispute which was centred around service charge. The parties were bound by the terms of their respective leases to have the dispute resolved through the mechanism set out thereunder.

22. It is also not in dispute that the parties invoked the dispute resolution mechanism in question which ultimately resulted in the report prepared by Mr. Wambua. As for the effect of the letter dated 15th January, 2014 we believe that Mr. Wambua who acted as an expert within the terms of the dispute resolution mechanism lacked the mandate or power to withdraw his report. Consequently, the learned Judge erred in relying on the allegation of withdrawal of the report as the basis of dismissing the preliminary objection.

23. Accordingly, we find that the appeal has merit and is hereby allowed with costs. We set aside the ruling dated 8th November, 2017 in its entirety and substitute the same with an order allowing the preliminary objection, *to wit* that the respondents' suit at the ELC is struck out with costs for lack of jurisdiction.

Dated and delivered at Mombasa this 20th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR