Starnet Investments Limited v Maple Investment Limited (Environment & Land Case 124 of 2016) [2023] KEELC 562 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 562 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 124 OF 2016

EK WABWOTO, J

JANUARY 26, 2023

BETWEEN

STARNET INVESTMENTS LIMITED ..... PLAINTIFF

AND

MAPLE INVESTMENT LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff filed the subject suit vide a plaint dated 22nd of February 2016 and in respect of which the following reliefs are sought:

    a) A declaration that the Defendant as a management company under the *Sectional Properties Act* is bound to observe provisions of leases by purchasers of sectional properties units;

    b) A declaration that resolution Minute No 05/2015 Parking slots of resolutions of the Defendant made at the Connaught Apartments Westlands in Nairobi in so far as it subjects the Plaintiff's right to ownership and use of a second parking bay at Connaught Apartments on LR No 1870/VI/85 Nairobi on payment of Kshs 22 Million, is illegal;

    c) A Declaration that Resolution Minute No 05/2015 Parking slots of resolutions of the Defendant made at the Special General Meeting of the Defendant held on August 29, 2015 at Connaught Apartments Westlands in Nairobi directing the security agencies at the premises not to open the gate for the Plaintiff's directors and to tow away motor vehicles of the Plaintiff parking in a second parking bay on ground floor at Connaught Apartments on LR No 1870/VI/85 Nairobi, is illegal

d) A Declaration that the demand for Kshs 22 Million from the Plaintiff on account of arrears of service charge is unenforceable against the Plaintiff and un-claimable;

e) A permanent injunction be and is hereby issued suspending implementation of Resolution Minute No 05/2015 Parking slots of Maple Management Limited made at the Special General Meeting of the Defendant held on August 29, 2015 at Connaught Apartments Westlands in Nairobi resolving that since the same had a clause that the member should pay Kshs 106,000/= per month for the second parking, he should do so to enjoy the facility of having a second parking on the upper ground;

f) A permanent injunction be and is hereby issued restraining the Defendant by its servants, agents, employees or by any person whomsoever from interfering with the Plaintiff's proprietorship of Apartment Number 62(penthouse) at Connaught Apartments on LR No 1870/VI/85 Nairobi; and attendant rights and privileges, which are to say, connection to water, electricity, protection from towing of the Plaintiff's vehicles parked at the Plaintiff's parking bay 15 and or 16 on the ground floor of Connaught Apartments on LR No 1870/VI/85 Nairobi, or in any other way howsoever;

g) Cost of the suit on indemnity basis,

2. Following the filing of the subject suit, the defendant herein entered appearance and filed statement of defence dated February 17, 2022 in respect of which the defendant disputed the claim by the plaintiff in the following terms:

a) At all material times since December 8, 1998, the Plaintiff is and has always been in breach of its obligations and covenants under the Lease Agreement between SR Flats Limited and Starnet Investments Limited as regards Apartment No 62 at Connaught Apartments on LR No 1870/VI/85 Nairobi ("the Apartment"). In particular, the Plaintiff has failed and/or neglected to pay service charge of Kshs 106,000 per month since the said Agreement was executed.

b) Indeed, on or about August 29, 2015, the Defendant convened a lawful Special General Meeting to discuss the issue pertaining to the Plaintiff's outstanding service charge and members unanimously resolved that the Plaintiff should pay arrears of about Kshs 22,000,000/- failure to which the security should not open the gate for him and the Manager to tow away the vehicle he had parked at the extra second parking at his cost

c) The Defendant asserts that despite notices being served upon the Plaintiff to remedy the situation, he has failed to do so within the timelines provided and as such, he continues to be in breach

d) Indeed, the section 20(h) of the *Sectional Properties Act* provides that the duties of the Corporation include doing all things reasonably necessary for the enforcement of any lease or license under which the land is held.

e) As such, the Plaintiff's assertions that the Defendant's course of directing the security at the apartments not to open the gate for the Plaintiff and to

tow away the Plaintiff's vehicles parked at the extra parking are irregular and unconstitutional is totally misplaced.

3. Subsequently, the said matter was fixed for hearing and it proceeded on September 19, 2022.

Plaintiff's case

4. Mr. Martin Ogang testified as PW1 and the sole Plaintiff's witness. He stated that he was a financial consultant and a director of the Plaintiff Company. He relied on his witness statement dated February 23, 2016 and bundle of documents which were adopted by the Court.

5. In cross-examination, he confirmed that his daughter was the current occupant of Apartment 62. He also reiterated that they were entitled to 2 parking lots as per the lease agreement but were currently unable to utilize either of them. He highlighted that Clause 1.1. And 1.6 of the Lease was different from other tenants to which he could not explain why.

6. In re-examination, it was stated that he paid Kshs 12 million in 1998 to pay for the apartment. The consideration included 2 parking lots No.s 15 and 16 which later changed to 25 and 26. He informed the Court that in 2015, some of his family members moved to Canada and subsequently thereafter some people tried to grab the parking slots.

7. It was his testimony that he paid service charge over the years as evidenced in invoices and receipts within his bundle of documents. He also stated that no demand of payment had been made prior to the meeting and he had not received any invoice demanding Ksh 22,000,000/=

8. In submissions dated October 18, 2022, it was submitted that under Clause 2.2 in the Fourth Schedule indicates that the initial provisional charge was to be paid from commencement date to the computing date next following the date of the lease. It was further argued that the provisional charge was a safeguard until most units had been sold.

9. It was submitted that the Special General Meeting was held contrary to Section 53, 54 and 56 of the Articles of Maple Management Company without the required twenty-one (21) day notice. It was claimed that the Defendant did not issue the Plaintiff with a notice of the meeting, the same was deliberate and aimed at concealing the Defendant's actions

10. Relying on the case of *Nguruman Limited v Jan Bonde Nielsen &2 others*, CA No 77 of 2012; [2014] eKLR, it was emphasized that the Plaintiff had demonstrated irreparable harm it was likely to suffer in denial of proprietary rights and disruption of Plaintiff's quiet possession.

Defendant' case

11. Roy Wachira testified as DW1. He confirmed that he was a business man and a director of the Defendant Company. He relied on his witness statement and bundle of documents dated February 17, 2022 which was adopted by the Court as his evidence-in-chief.

12. He testified to there being three parking areas i.e. upper, middle and basement. Each shareholder has been allocated parking at the upper and middle areas which added up to 36 parking units.

13. He confirmed that the Defendant Company bought the premise from I &M Bank and was set up by 36 shareholders, including the Plaintiff. It was confirmed that the costs of service charge is now divided according to the size of the units.

14. In cross-examination, DW1 confirmed that he owned four apartments on the premise for which he paid Ksh 60,000 quarterly for his penthouse. He did reiterate that from some of the Plaintiff's exhibits,

he could not confirm payment had been done and therefore maintained that the Plaintiff had not paid service charge even after being served with an invoice in 2014.

15. In submissions dated November 30, 2022, it was averred that if the Plaintiff had been allocated parking No 15 and 16(currently 25 and 26) then Gimco Ltd would not have allocated Parking 25 to Rukia Ahmed.

16. It was undisputed that the Defendant issued the Plaintiff with invoices which were provisional sums calculated using the service percentage. With regard to the special general meeting, he relied on the case of *Kihingo Village (Waridi Gardens) Management One Limited v William Edward Pike & 7 others* [2020] eKLR where it was submitted that the decision was in adherence to the majority principle rule,

Issues and determination

17. The Court having considered the pleadings of the parties, evidence tendered and submissions, is of the view that the following issues are for determination;

    i) Whether the resolution Minute 05/2015 as made in the Special General Meeting is valid?

    ii) Whether the demand for Kshs 22,000,000/= by the Defendant is valid?

    iii) Whether the Plaintiff is entitled to the reliefs sought?

Issue No. 1 Whether the resolution Minute 05/2015 as made in the Special General Meeting is valid?

18. It is undisputed that the owners of Connaught Apartments were shareholders of Maple Management Limited and therefore subject to its Articles of Association (AOA).

19. Section 52 of the AOA, describe all other general meetings, other than Annual General Meetings shall be called Extraordinary General Meeting. It was averred by the Plaintiff that the failure to give notice of the Special meeting was intentional, however any claim of invalidity would be extinguished by Section 56 which elucidates that omission to give notice would not invalidate the proceedings.

20. In this instance the Special General Meeting would be interpreted as an extraordinary general meeting. According to the defendant, the resolution of the said meeting would be protected under the majority principle.

21. The majority principle as established in the case of *Foss v Harbottle* (1843) 2 Hare 461 is often applied in its strictest sense. I am guided by the Court in the case Eldoret ELC No 24 of 2012 *David Langat v Luke Othopeadic & Trauma Hospital Ltd* where it was stated:

> " I think to insist that there must be a majority and minority before the exceptions in the Rule in Foss v Harbottle can be applied has the capacity to lead to injustice. In my view the court has inherent jurisdiction to ensure that justice is done. This inherent jurisdiction is indeed the very foundation of the exceptions to the Rule in Foss v Harbottle. These exceptions are founded in equity and are meant to cure the hardship and injustice that may be occasioned to the company and to its shareholders by a strict application of the Rule in Foss v Harbottle.
>
> I can do no better than echo the words of Lord Denning MR in Wallersteiner v Moir (No.2).'
>
> > 'But suppose [the company] is defrauded by insiders who control its affairs – by directors who hold a majority of the shares – who then can sue for damages?

> Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize the proceedings to be taken." [Emphasis Mine]

22. Therefore, the application of the majority rule can neither outweigh nor strike out the minority's right to legal recourse.

23. In the Lease Agreement dated December 8, 1998, Clause 1.1. Includes a right to use two parking slots numbered 15 and 16 on the ground level and any other such parking bay as the Company may from time to time designate. Under Clause 1.6, the amount of Kshs 106,000 was set as an initial provisional service charge.

24. Therefore, I find that the attendees of the meeting could have misled themselves in considering that Ksh 106,000 was payment for the second parking. For this reason, I am inclined to find that the resolution Minute 05/2015 as made in the Special General Meeting on August 29, 2015 is invalid.

Issue No. 2 Whether the demand for Kshs 22,000,000/= by the Defendant is valid?

25. First, the Court must determine whether the Parties are bound by the terms of the lease agreement. The Novation Agreement dated May 27, 1998 made between SR Flats, Maple Investments and Starnet Investments states as follows:

> "...Maple undertakes to perform the Agreement and to be bound by the terms of the Agreement in every way as if Maple were a party to the Agreement in place of SR Flats..."

26. The above mentioned Clause clearly demonstrates intention to be bound to act as the proprietor. In the Lease Agreement dated 8th December 1998, Clause 1.6. states that the amount of Kshs 106,000 was set as an initial provisional service charge and would be subject to variations as prescribed in Clause 1.9 and the Fourth Schedule.

27. It is a long established principle that Courts will not interfere with the will of the parties as expressed in their contracts. This is echoed in *National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd*, Civil Appeal No 95 of 1999:

> "..A Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."
>
> Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."

27. The question before this Court is whether the lease agreement can be construed as unreasonable or unfair. The Plaintiff presented several instances under which it claims service charge was paid as follows:

Cheque 004878	40,713
Cheque 004461	45,933
Cheque 004521	45,933
Cheque 005174	108,228
Receipt number 4542 dated 14th July 2010	52,101
Receipt number 005 dated 15th January 2014	52,101
Cheque 006454	52,101
Cheque 006562	52,101
Cheque 006622	44,914.66
Cheque 006830	52,101
Payment confirmation dated 13th August 2015	137,709
Receipt 003 dated 7th December 2015	52,500
Total Amounts	Kshs 689,554.66

28. Consequently, the payment was reflected on statements of account addressed to Mr Ogang (PW1). This would extinguish the Defendant's assertion that service charge was never paid.

29. The Service charge payment owed under Apartment 62 as per Annual General Meeting held on April 11, 2015 includes the entire calendar year from 1998-2015. I find fault in these tabulations based on the confirmed payments amounting to Kshs 689,554.66.

30. By virtue of their conduct, I find that neither parties have presented a case of the contract being commercially unreasonable or grossly unfair. However, the demand of Ksh 22,000,000/- as a lump sum was invalid considering the fact that part payment of Ksh 689,554. 66 had already been made by the Plaintiff.

Issue No. 3 Whether the Plaintiff is entitled to the reliefs sought?

31. The Plaintiff sought for various reliefs which were pleaded in its plaint. From what I have stated above, I find no merit in the defence that have been put forward by the Defendant to the Plaintiff's claim. The Plaintiff has proved its claim against the defendant to the required standard and as such it is entitled to the reliefs sought in the plaint.

32. On the prayer for injunction, I align myself with the well-established principles in *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012, where the Court stated that:

> " ...the applicant has to satisfy the three requirements to;

(a) Establish his case only at a *prima facie* level,

(b) Demonstrate irreparable injury

(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour"

33. I find that the Plaintiff stands to suffer an infringement of its rights and for this reason should be granted an injunctive remedy.

34. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. However, in the instant case, I have considered the fact that the reasonable service charge due to the Plaintiff is yet to be determined and further that the Plaintiff will still be required to pay the same, I direct that each party to bears own costs of the suit.

35. Before I issue the final orders, I wish to state that neither of the parties effectively assisted the court in determining as to what exactly amounts to service charge. Be it as it may the issue of the exact amount of the reasonable service charge due to the Plaintiff remains undetermined. Neither of the parties herein also requested the court to determine as to what exactly was the reasonable service charge due. However, noting that the concept of sessional properties is gaining prominence in the country, courts may still be faced with similar disputes as between the parties herein.

Final orders

36. From the foregoing analysis, the count finds that the Plaintiff has proved its case on a balance of probabilities against the Defendant and in this regard, the following final orders are issued;

a) A declaratory order is hereby issued that the defendant is bound to observe provisions of lease agreement dated December 8, 1998.

b) A declaratory order do issue that the Resolution Minute No 05/2015 Parking slots made at the Connaught Apartments Westlands in Nairobi in so far as it subjects the Plaintiff's right to ownership and use of a second parking bay at Connaught Apartments on LR No 1870/VI/85 Nairobi on payment of Kshs 22,000,000/- Million, is illegal and any action stemming from the said resolution is hereby suspended from implementation.

c) A declaratory order is hereby issued that the demand for Kshs 22,000,000/- Million is unclaimable in lump sum by virtue of payments received between 2009-2015 amounting to six hundred and eight nine thousand, five hundred and fifty four thousand and sixty six cents (689,554.66)

d) A permanent injunction be and is hereby issued restraining the Defendant by its servants, agents, employees or by any person whomsoever from interfering with the Plaintiff's proprietorship of Apartment Number 62(penthouse) and parking bay 25 and 26 at Connaught Apartments on LR No 1870/VI/85 Nairobi on the basis of non-payment of Kshs 22,000,000/=

e) Each party to bear own costs of the suit.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

E. K. WABWOTO

JUDGE

In the Presence of:

Mr. Ogutu for the Plaintiff

Ms. Onchwagwa for the Defendant

Court Assistant: Caroline Nafuna

E.K. WABWOTO

JUDGE