Tatu City Limited & another v Home Bridge Limited (Commercial Appeal E010 of 2024) [2025] KEHC 4086 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4086 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

COMMERCIAL APPEAL E010 OF 2024

FN MUCHEMI, J

MARCH 27, 2025

BETWEEN

TATU CITY LIMITED ..... 1ST APPELLANT

TATU CONNECT SEZ LIMITED ..... 2ND APPELLANT

AND

HOME BRIDGE LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. J. Were (CM) delivered on 30th April 2024 in Ruiru CMCC No. E339 of 2021)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Chief Magistrate in CMCC No. E339 of 2021 whereby the trial court dismissed the appellants' suit which sought judgment in its favour for outstanding service charge of Kshs. 10,003,930.59/- due and payable.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 12 grounds of appeal summarized as follows:-

    a. The learned trial magistrate erred in law and in fact by dismissing the appellants' suit and entering a finding absolving the respondent from paying the outstanding service charge of Kshs. 10,003,930.59 due and payable under Clause 6.3.1 of the leases dated 20th July 2016 and 22nd July 2016.

    b. The learned trial magistrate erred in law and in fact in failing to appreciate that once the 1st appellant was declared a Special Economic Zone on 22nd May 2017 vide Gazette Notice No. 4892 and subsequently a Special Planning Area on 7th June 2019 vide Gazette Notice No.

4975, certain conditions and/or obligations were placed upon it by the Ministry of Lands and Industry, to ensure that the zoned area is managed in a manner that reflects the national government's interest in the Special Planning Area.

c. The learned trial magistrate failed to appreciate the fact that Clause 6.2.1 of the leases obligate the respondent to comply with the covenants, conditions and restrictions under the Master Declaration including the provisions of Clause 5.1.3 of the Master Declaration of Covenants, conditions and Restrictions dated 30th July 2014 which mandates the appellant through its management company to manage billing and revenue collection on behalf of the Property Owners Association.

d. The learned trial magistrate erred in law and in fact by failing to appreciate the status of the 1st appellant as a Special Economic Zone and its powers to manage the billing and revenue collection process on behalf of the property Owners Association through its management company under Clause 5.1.3 of the Master Declaration.

e. The honourable magistrate failed to appreciate the 1st appellant's dual status as a Special Economic Zone and Special Planning Area in holding that it had no residual interest in the parcels sold to the purchasers despite the express provision in the approval condition in the Gazette Notice No. 4975 that empowers it to retain some interest in the sold parcels to facilitate the processing and issuance of development and construction permits and certificates of occupancy as envisaged under Section 11 of the *Special Economic Zones Act*, 2015.

3. Parties disposed of the appeal by way of written submissions.

The Appellants' Submissions

4. The 1st appellant is the registered proprietor of a leasehold interest over all the property known as LR. No. 28867/1 comprised in a grant registered at land registry as IR No. 137858/1 and situated in West Ruiru Municipality. The 1st appellant submits that it has developed a mixed use development on the property comprising of residential, retail and commercial developments known as Tatu City. To facilitate the realization of the vision, a Master Declaration of Covenants, Declarations and Restrictions (Master Declaration) dated 30th July 2014 was registered against the entire property and development known as Tatu City whose terms are binding on all purchasers or sub-lessors.

5. The appellants submit that the respondent was registered as the proprietor of unit L4-01 pursuant to a lease dated 20th July 2016, measuring 10 acres being a portion of precinct 4B-2 forming part of the 1st appellant's property and the terms and conditions set out in the Master Declaration registered as IR 137858/5 as well as those set out in the Agreement of Sale dated 18th May 2016. Through a further lease dated 22nd July 2016, the respondent was registered as the proprietor of unit L4-02 measuring 20 acres.

6. The appellants submit that the 1st appellant through Gazette Notice No. 5892 dated 22nd May 2017 was declared a special economic zone and subsequently a special planning area through Gazette Notice No. 4975. Pursuant to the declarations, the appellants submit that the 1st appellant was assigned specific obligations by the Ministry of Lands and Industry which included ensuring that the zone area is managed in a manner reflecting the national government's interests in the special planning area. Furthermore, under Gazette Notice No. 4975, the 1st appellant was empowered to retain certain interests in the sold parcels of land which was to facilitate the processing and issuance of development and construction permits as well as certificates of occupancy in accordance with Section 11 of the *Special Economic Zones Act*, 2015.

7. The appellants argue that since the 1st appellant hold majority ownership interest in the property, it retains exclusive rights and authority to engage a management company to fulfil duties assigned to itself, as the declarant under the agreement and to the Property Owners Association (POA). Pursuant to that authority, the 1st appellant entered into a service level agreement between itself and the 2nd appellant on 1st December 2020 designating the 2nd appellant as the managing agent responsible for the collection of service charge.

8. The appellants submit that the 2nd appellant calculated service charge in accordance with the provisions outlined in the Fourth Schedule of the leases and invoices were issued to the respondent encompassing both historical costs previously borne by the 1st appellant before 2020, and additional expenses and accumulated thereafter. The appellants further submit that the respondent made payment of Kshs. 2,100,000 in March 2021 which was credited on its account. The 2nd appellant asserts that it calculated the service charge in accordance with the Fourth Schedule of the leases resulting in invoices totalling to Kshs. 10,003,930.59 for the respondent broken down as follows:-

    a. Year 2016 the service charge amounted to Kshs. 126,068.81

    b. Year 2017 the service charge amounted to Kshs. 1,977,433.50

    c. Year 2018 the service charge amounted to Kshs. 2,605,606.16

    d. Year 2019 the service charge amounted to Kshs. 2,555,717.67

    e. Year 2020 the service charge amounted to Kshs. 2,864,578.23

    f. Year 2021 the service charge amounted to Kshs. 988,634

9. The appellants argue that the respondent's prior payments serve as clear evidence that it was aware of its obligation to pay the service charge. By fulfilling that obligation initially, the respondent cannot reasonably claim ignorance or lack of awareness regarding its responsibilities under Clause 6.3.1 of the leases dated 20th July 2016 and 22nd July 2016.

10. The appellants rely on the cases of Omar Gorhan vs Municipal Council of Malindi (Council Government of Kilifi) vs Overlook Management Kenya Ltd [2020] eKLR; National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Limited & another (2001) eKLR and Tom Otieno Odongo vs Cabinet Secretary Ministry of labour Social Security Services & Another (2013) eKLR and submits that parties are bound by the terms of their contract and a court of law cannot rewrite a contract between parties. Thus, the cessation of payments from the respondent does not absolve it from its contractual obligations but reinforces the notion that the respondent knowingly chose to default on payments despite having previously demonstrated both capacity and intent to comply.

11. The appellants submit that the leases dated 20th July 2016 and 22nd July 2016 impose the duty to the respondent to pay service charge under Clause 6.3 and Clause 9 of the Sale Agreements both dated 18th May 2016. Further, Clause C of the leases recognize that a Master Declaration for the mutual beneficial conditions and covenants for the improvement and preservation of the values and quality of the 1st appellant's development had been registered against the title of the property. Consequently, Clause 6.2.1. of the leases imposes the obligation to the respondent to comply with the Master Declaration.

12. The appellants argue that the respondent accepted liability vide the leases and agreements to pay the stipulated charges with effect from the date of occupation including payment of assessments, common expenses and all related charges of the Property Owners Association and precinct Property Association in respect of the management and administration of the common areas.

13. The appellants submit that the respondent's advocates wrote a letter to them dated 26th February 2021 seeking a detailed explanation of how the amount was arrived at and they responded vide letter dated 10th March 2021 but the respondent still failed to pay the outstanding service charge. The appellants further argue that the respondents previously paid a sum of Kshs. 2,100,000/- and they did not raise any objection to their capacity to levy and utilize service charge thus the respondent's objection to pay the outstanding amount is only an afterthought.

14. The appellants rely on Article 5.1, 5.2, 9.11, 6.1.1 of the Master Declaration, Clause L in the Recitals of the Lease and Clause M of the recitals of the Agreement of Sale and Clause 6.20.1 and 10.1 of the Agreement of Sale executed by the parties on the appointment of the management company. The appellants argue that the respondent does not contest that the 1st appellant has been providing services including but not limited to maintaining natural open spaces, architectural/ornamental features, plants, trees, gardens, collecting and disposal of waste as well as security for the common areas amongst other services contained in Part 3 of the Fourth Schedule including payment of land rent and rates with respect to the property.

15. The appellants submit that pursuant to Clause 9.11.2 of the Master Declaration, the 1st appellant signed a service level agreement with the 2nd appellant on 1st December 2020 for the collection of service charge and the 2nd appellant was appointed as the managing agent for the purposes of collecting service charge. Further Article 6.7 of the Master Declaration as read together with Clause 8 of the leases, is the power to charge and collect fees for services rendered by the lessor and to collect and levy assessments on the unit/precinct owners.

16. The appellants submit that the 1st appellant is still involved with the project and hold majority of the land within the project. Consequently, the powers and duties vested with the POA are to be exercised by the 1st appellant until it has sold all the units. The 1st appellant being the majority proprietor of the land, pursuant to Section 4 and 5 of the Special Economic Zone Act, 2015 was declared a special economic zone on 22nd May 2017 vide a Gazette Notice No. 4892 and subsequently a special planning area on 7th June 2019 vide a Gazette Notice No. 4975. Pursuant to the gazette notices, the 1st appellant automatically had an obligation to maintain the area subject to Section 32(1) and 33 of the Special Economic Zone Act 2015. According to Section 33(1) of the Act, the appellants submit that the computation of the service charge for maintaining and servicing was diligently undertaken by the 2nd appellant in compliance with the mandate conferred upon it under the terms of appointment. The charges were calculated in good faith and in alignment with the operational requirements of the Special Economic Zone. The appellants submit that their actions were lawful and in alignment with the Special Economic Zone Act 2015. Further, the 1st appellant holding dual status as a special economic zone and special planning area had residual interest in the parcels sold to the purchasers.

17. The appellants rely on the cases of Yooshin Engineering Corporation vs Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment) and Apungu Arthur Kibira vs Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR and submit that they have demonstrated that the learned magistrate erred in law and in facts in arriving at the impugned judgment.

The Respondent's Submissions.

18. The respondent submits that under Recital 1 of the Sale Agreement read together with Recital H of the lease, the 1st appellant represented to the respondent that it had incorporated a body known as the Property Owners Association (POA). POA would own, manage and control the common areas in Tatu City and provide through its agents the common services provided in the Third Schedule of

the lease. The respondent submits that Clause 8 of the leases read together with Clause 6.7 of the Master Declaration set out the powers of POA which included charging and collecting fees for services rendered by the lessor and the POA and their respective agents.

19. The respondent submits that the membership of POA was clearly set out under Article 6 of the Master Declaration as being the declarant, Tatu City and the various precinct property owners within Tatu City including the respondent. with that understanding, the respondent submits that it accepted responsibility to pay service charge and other charges to POA for invoices lawfully assesses and levied by the POA in respect of common areas within Tatu City as expressly set out under Clause 9 of the Sale Agreement.

20. The respondent refers to Clause 1.1.36 of the lease and submits that parties agreed that service charge shall have the meaning ascribed to in Part one of the Fourth Schedule of the lease. The respondent submits that the Fourth Schedule is salient in determining what was contemplated to constitute service charge under Clause 1.18, the body responsible for assessing and levying service charge under Clause 2.2.1 and the mode of assessment under Clause 1.1.9 and 1.1.6.

21. The respondent submits that the 1st appellant wrote to them on 5th February 2019 notifying them that it would commence levying service charge to cater for the maintenance and operational cost of provision of shared services of common areas. In the said letter, the 1st appellant forwarded to them an invoice for service charge for the year 2018 for recovery of actual costs in relation to security services and statutory services.

22. The respondent submits that it paid the invoice amount for the year 2018 in the sum of Kshs. 218,484 being the first ever invoice charged by the 1st appellant in respect of service charge. Having cleared the 2018 expenses, the respondent reasonably expected that the subsequent invoices would relate to provision of services from the years 2019 and subsequent years however the appellants sent to them an email dated 9th December 2020 with an invoice dated 5th December 2020 demanding payment of Kshs. 9,910,920.42/- which contained historical claims for the years 2016, 2017, 2019 and 2020.

23. The respondent submits that upon receiving the invoice, through its lawyers, wrote to the appellants by a letter dated 26th February 2021 challenging the basis of the invoice as well as the computation of the invoice amount. The 1st appellant responded vide letter dated 10th March 2021 conceding that the invoice contained errors relating to historical costs for the years 2015, 2016 a period when the respondent had not bought the land and further confirmed that the calculation of service charge was based on the total land area and not gross buildable area as provided under the Fourth Schedule.

24. The respondent submits that vide a letter dated 15th march 2021, they wrote to the appellants seeking further clarification on the basis of calculation of service charge and allocation of the common areas. Pending resolution of those issues and in good faith, the respondent vide letter dated 17th March 2021 forwarded the appellants three cheques totalling to Kshs. 2,100,000/-. Meanwhile and while discussions were still ongoing in a bid to resolve the disputed issues, the appellants issued additional invoices dated 11th April 2021 and 5th July 2021 which were loaded onto the impugned invoice amount all totalling to Kshs. 10,003,930.59/-.

25. The respondent submits that while it acknowledges its contractual obligation to pay service charges for the common areas as is stipulated in the lease, any such charges must be verifiable and assessed in a transparent manner as required by the lease. Service charge represents actual/genuine expenses incurred for management of common areas and hence the respondent submits that its contractual obligation to pay for such services should be based on actual proof of provision of services and receipts evidencing payment against which a reimbursement can be sought. It is on that basis that Clause 2.2.1

of the Fourth Schedule to the lease provided that the POA would provide a periodic expenditure distinguishing between actual expenditure and a reserve for future expenditure.

26. Thus, the respondent argues that while the appellants allege to have provided services as tabulated in the three impugned invoices, they failed to demonstrate to the required standard or at all that indeed those services were rendered and paid to justify a claim for reimbursement. Furthermore, the same has neither been supported by evidence of actual services rendered and or an audit done to verify the amount claimed.

27. The respondent refers to Clause 2.2.1 of the Fourth Schedule of the Lease, Clause 1.1.8 and 1.1.6 of the Fourth Schedule and submits that the appellants were required to provide a computation showing prorated allocation of periodic expenditure reasonably attributable to the various property owners including the 1st appellant as the owner of the bulk of the undeveloped land. The statement was meant to distinguish between actual expenses and expenses reserved for the future and the formula for computation was clearly defined as Kenya Shillings Thirty per m2 of the GBA per annum.

28. Based on the prorated provisional assessment, the respondent submits that they were required to pay a provisional sum quarterly and at the end of the financial year, an audit would be done to reconcile the payments made against actual expenditure to determine whether there is a deficit or surplus payable to the POA. Contrary to that contractual obligation, the appellants did not provide periodic estimates of expenditure incurred or reasonably reserved to be incurred and audited accounts as required. PW1 and PW2 testified in cross examination that the appellant did not provide the respondent with periodic estimates of expenditure on a quarterly basis as required and no audit was done for the years 2016, 2017, 2019 and 2020 being the period for which the amount sought in the impugned invoice relates.

29. The respondent submits that whereas the appellant in its letter dated 26th march 2019 undertook to submit audited accounts at the end of every financial year to provide a reconciliation of actual expenditure vis a vis the provisional sums paid over the year, no such audit was done for the years in contention.

30. The respondent further submits that the statement of account for the years 2020 and 2021 which was sent to them in May 2021 as done so as a precursor to the filing of the suit and subsequently produced in the appellant's further list of documents before the trial court does not meet the legal threshold of an audited account as required under the lease. The documents itself states that the accountant relied solely on information from general ledgers without reviewing primary supporting documents such as invoices, receipts and contract. A valid audit must include a review of primary source documents to ensure accuracy and compliance. The failure to conduct audits for the years 2016, 2017, 2018 and 2020 as required by the Fourth schedule of the lease renders the statement of account legally deficient.

31. The respondent submits that the formulae for computation of the share of the service charge payable by each property owner was provided under the First Schedule of the lease as Kshs. 30 per m2 of GBA per annum. The respondent argues that the appellants' witnesses testified and submitted that the allocation of the respondent's share of service charge was based on gross land area of 43 acres estimated to be the extent of the common areas which was not the formula provided in the First Schedule item 6. The respondent further argues that the appellants did not compute the service charge as expressly provided and further they did not furnish any formula or justification applied demonstrating the basis upon which the amount claimed in the impugned invoices were arrived at and how the same was allocated to them.

32. The respondent submits that PW2 testified that from 2016 to date, there has been no demarcation of the common areas within the more than 1,625 hectares of unsold and undeveloped land in Tatu City. Additionally, to date no documents or information has been provided to property owners specifying

the acreage designated as common areas or outlining the respective liabilities and responsibilities attributable to various property owners. The respondent submits that the witness struggled to explain the basis upon which the purported allocation of 13 acres to them as their share of the common areas out of the undeveloped land was determined. The witness further confirmed that the property owners were not consulted in that process and acknowledged that the allocation was unilaterally decided by the 1st appellant.

33. The respondent argues that the proposed allocation of 13 acres to them as their share of common areas from the total unsold land measuring approximately 1,625 acres is based on the erroneous presumption that approximately 43% of the unsold land constitutes common areas. The respondent further argues that that assertion is not only inconsistent with established land use planning principles but also lacks legal and factual justification. Under the Physical Planning Act, the proportion of land a private developer may be required to surrender for public utilities typically does not exceed 10% of the total land area.

34. The respondent submits that in the absence of a clear formula outlining how the allocation of the common areas was conducted or a distinct demarcation of those areas, it was logically impossible for the appellant to determine the proportion of unsold land associated with common areas and the respective share reasonably attributable to each property owner. It was on that basis that the trial court found correctly that the formulae for assessment was opaque and was not done in consultation with the property owners. Thus the respondent submits that the computation was conducted arbitrarily, without the application of a reasonable, scientific or verifiable methodology in determining the amounts payable by property owners.

35. The respondent relies on the cases of Christine Mwigina Akonya vs Samuel Kairu Chege [2017] eKLR and Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR and submits that the claim for Kshs. 10,003,930.59/- characterized as a special damage claim ought to be specifically pleaded and proved. The respondent submits that under Article 5.1.1 of the Master Declaration which the appellant relies on as the basis of raising invoices, the management company employed by the 1st appellant to discharge the function of the POA was required to employ independent contractors or such other employees as it may deem necessary and to describe their duties and set their compensation. However the appellants did not produce any evidence of any contracts with independent contractors purportedly engaged for the provision of the services they claim to have rendered.

36. The respondent submits that none of the claims set out in each of the three invoices totalling to Kshs. 10,003,930.59/- were proven to have been incurred and paid for. Relying on the cases of Nancy Ndea Muriithi & Another vs Moses Kinyua Ndigwa [2019] eKLR and Total (Kenya) Limited formally Caltex Oil (Kenya) Limited vs Janevams Limited [2015] eKLR, the respondent submits that invoices themselves without supporting documents cannot constitute proof of a special damage claim.

37. The respondent submits that the invoice dated 5th December 2020 for the sum of Kshs. 9,910,920.42/- was issued by the 2nd appellant, a company that was appointed by the 1st appellant on 1st December 2020, while the invoice sought payment of historical claims, spanning from the years 2015 to 2020, the 2nd appellant had not been appointed during that period. Thus, the 2nd appellant could not lawfully demand payment for services it neither rendered nor had oversight over during a period it had not been appointed.

38. The respondent submits that it disputed the said invoice as it challenged the land rates and rents as the impugned invoice contained payment for land and ground rent for the year 2015 but the respondent had not purchased its properties. The respondent states that while the 1st appellant in its letter dated 10th March 2021 acknowledged the said amounts for the year 2015 was erroneous, the appellants'

witnesses confirmed that a revised invoice showing the correct amount under each of the years that this claim was made was never issued. Further the appellants filed a bundle of list of documents dated 28th July 2022 in an attempt to justify the claim for reimbursement of land rent and rates. However on cross examination, PW2 confirmed that the bulk of receipts produced could not apply to the respondent as they relate to a period prior to the date when they either purchased the land or took up possession.

39. The respondent submits that it challenged the amount titled historical security costs for the sum of Kshs. 69,694/- in the year 2016 and the amount increased significantly by over 200% over the years to Kshs. 1.5M, 2.1M for each of the subsequent years. The respondent argues that no evidence was provided to show what security services were indeed provided and by whom. The respondent submits that it contested the admin fee, land scaping costs and waste management as no receipts were produced to show who rendered those services and how much they were paid. Furthermore, the appellants' witnesses confirmed that the common areas have not been demarcated and thus they were unable to explain the nature of landscaping services and road maintenance services provided in relation to the undemarcated land.

40. The respondent submits that the impugned invoice contained manifest errors which by virtue of Clause 9.2 of the Sale Agreement and Clause 2.2.1 of the Fourth Schedule entitled them to withhold payment until a correct invoice was issued. To support its contentions, the respondent relies on the case of Worburn Estate Limited vs Margaret Bashforth [2013] eKLR.

41. The respondent argues that the partial payment of Kshs. 2.1 million was not an acknowledgement of the claim but was payment made in good faith in anticipation that the parties would discuss and negotiate the disputed items. Thus, the respondent submits that it did not waive its objections regarding the unreasonableness and inaccuracies of the amounts claimed.

42. The respondent submits that the body tasked with the mandate of assessing and levying charge for the common areas within Tatu City was the POA thus the 1st appellant as the declarant had no authority to impose or assess service charge as it had sought to do. Further, the respondent argues that due to its membership in the POA they had a legitimate expectation that as a POA member, they would actively participate in decision making regarding the method of assessment of the service charges, the calculation thereof and the selection of service providers engaged to deliver services for the common areas.

43. Contrary to that expectation and in breach of the lease and master Declaration, the 1st appellant deliberately refused to operationalize the POA with a view of retaining exclusive control over the management and decision making process related to service charge within Tatu City.

44. The respondent refers to Recital F of the Master Declaration and Article 5 of the Master Declaration and submits that the import of Article 5.1 of the Master Declaration is that while the 1st appellant as the declarant had the authority to appoint a management company, the agreement envisioned that the management company would wield power on behalf of the POA. The agreement did not envisage a scenario where the 1st appellant would unilaterally usurp the powers and functions of the POA.

45. By legal implication, even though appointed by the 1st appellant, the management company was intended to function strictly as an agent of the POA, exercising only those powers expressly delegated to it which created a principal agent relationship between the POA and the management company, reinforcing the requirement of transparency, accountability and adherence to the consultative process agreed upon by parties.

46. The respondent submits that the management company was obligated to consult and engage property owners and the declarant as members of the POA prior to making any decisions pertaining service

charge. The management company could not wield power to itself or unilaterally to the 1st appellant to the exclusion of the property owners. PW2 testified that the 2nd appellant did not and still does not consult with property owners who are members of the POA nor does it report to the POA. According to the witness, the 2nd appellant is appointed, controlled and solely reports to the 1st respondent. Furthermore, during cross examination, PW2 testified that the 2nd appellant was appointed by the 1st appellant on 1st December 2020 as the management company. Consequently, before 1st December 2020, the 2nd appellant was not responsible for managing the service charge within Tatu City. Furthermore while PW2 testified that the 1st appellant as the declarant provided service related to service charge before 1st December 2020, no evidence was submitted to show when and how the POA delegated that responsibility to the declarant or that the 1st appellant had the authority to appoint itself as the management company responsible for providing services and imposing service charges.

47. Furthermore, PW2 confirmed that while Article 5.1 of the Master Declaration envisioned that the management company could enter into agreements with service providers for services, no such service level agreements were signed or presented in court to show the entities responsible for providing services within Tatu City. Additionally, the members of POA were not involved or consulted in the process of engaging a service provider. From the evidence of PW2, the respondent argues that the 1st appellant breached the provisions of Article 5.1 of the Master Declaration by appointing a management company to serve its interests and not the interests of the POA. The 2nd appellant consistently functioned as a proxy of the 1st appellant and not as an agent of the POA as contemplated under the Master Declaration.

48. The respondent argues that the appellants' contention that interest is due by operation of Clause 6.20.1 of the lease is fundamentally conceived as interest can only be levied on the actual amount due upon being properly ascertained, agreed upon and verified as representing legitimate expenses incurred and paid for as service charge, in accordance with the provisions of the Fourth schedule of the lease.

49. The respondent relies on the cases of D. Njogu & Company Advocates vs Kenya National Capital Corporation NRB HC Misc. No. 21 of 2005 [2006] eKLR and Otieno Ragot & Company Advocates vs Kenya Airports Authority [2017] eKLR and submits that until such time as the correct amount is properly determined and established with the governing agreements, the claim for interest is premature, unjustified and unfounded.

50. The respondent refers to the case of Kabogo *vs Gitau (Civil Appeal 82 of 2019*) [2025] KECA 193 (KLR) (7 February 2025) (Judgment) and submits that issues framed for appeal must be issues that arose from the trial court and a party cannot be permitted to introduce issues that did not arise from the trial court. The issue of Tatu City being declared a Special Economic Zone and the obligations arising therefrom was neither pleaded nor canvassed before the trial court. A review of the pleadings and the list of issues framed for determination confirms that this matter was not in contention at trial. In any event, the respondent argues that the *Special Economic Zones Act* does not contain any provisions that permit the appellant to deviate from the contractual terms, particularly the Fourth Schedule to the lease regarding the manner and process of levying service charge.

51. The respondent argues that the trial court's findings were firmly grounded in the evidence on record and that the court correctly applied the law in holding that the demand for the payment of Kshs. 10,003,930.59/- together with interest contravened the provisions of the agreements between the parties. The respondent thus urges the honourable court to uphold the findings of the trial court and direct that the appellant to immediately operationalize the POA and levy service charge in strict conformity with the Fourth Schedule of the lease.

Issue for determination

52. The main issue for determination is whether the learned magistrate erred in his finding that the appellants failed to prove their claim.

The Law

53. Being a first Appeal, the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

54. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

55. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

    a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

    c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appellants proved their claim on a balance of probability.

56. It is the 1st appellant's case that it is the proprietor of land parcel known as LR. No. 28867/1 comprised in a grant registered as IR No. 137858/1 situate in West of Ruiru municipality in Kiambu County. The said property was declared a Special Economic Zone by Gazette Notice No. 4892 published on 22nd May 2017. Furthermore, the 1st appellant was designated a Special Planning Area by Gazette Notice No. 4975 published on 7th June 2019 to facilitate the realization of Tatu City as a Special Economic Zone.

57. Accordingly, on 22nd August 2016, the 1st appellant entered into a lease agreement with the respondent in respect of the property known as Unit Number L4-01 measuring 10 acres being a portion of precinct 4B-2 and forming part of LR No. 28867/1. The terms and conditions governing the said lease were set out in the lease itself, the Master Declaration registered as IR 137858/5 and the Agreement of Sale dated 18th May 2016. A further lease was registered for the respondent in respect of Unit Number

L4-02 measuring 20 acres and being portion of precinct 4B-2 and LR. No. 28867/1 on the terms set out in the Master Declaration.

58. The 1st appellant through its witness, PW1, made reference to various clauses of the lease, which it averred required the respondent to comply with the conditions and restrictions in the Master Declaration of covenant, Conditions and Restrictions for Tatu City. Particularly Clause H of the lease, the 1st appellant as lessor incorporated a Property Owners Association (POA) which would preserve the values and quality of Tatu City. Further pursuant to Clause 6.3.1 of the lease, the respondent was under an obligation to pay the charges or such other form of payment as the lessor, Property Owners Association, precinct 4B-2 Property Owners Association or management company from time to time to nominate on the days set out in the lease free and clear from any deductions.

59. The witness made further reference to the Agreement for Sale under Clause 9 where he stated that the the respondent accepted liability to pay the stipulated costs and charges with effect from the date of occupation including payment of assessments, common expenses and all related charges to the Property Owners Association in respect of the management and administration of the common areas.

60. It was further evidence of the witness that the respondent was obliged to comply with the Master Declaration and the obligations stipulated thereunder. The witness drew attention to Clauses 5.1 which provided that the 1st appellant would have exclusive right and power to employ the Management Company to exercise on behalf of the Property Owners Association powers and responsibilities including the collection of service charge. The witness further stated that the 1st appellant had been providing the services but not limited to maintaining natural spaces, architectural/ornamental features, plants, trees, gardens, collecting and disposal of waste as well as security for common areas and payment of land rent and rates.

61. For the collection of service charge, the 1st appellant signed a Service Level Agreement with the 2nd appellant on 1st December 2020 with the 2nd appellant being appointed as the managing agent for purposes of collecting service charge by the 1st appellant. Accordingly, the 2nd appellant raised invoices for the service charge chargeable in the sum of Kshs. 10,003,930.59/ which the respondent failed or refused to pay

62. According to the respondent through its witness, DW1, they purchased their properties from the appellants for commercial and residential purposes. Liability was to accrue from the date of purchase through the POA for the common areas however POA had not been operationalized for it to undertake its functions.

63. The witness further testified that pursuant to the lease agreement, service charge was to be apportioned according to the Gross Buildable Area (GBA) in relation to the whole land. The respondent had 30 acres whereas the 1st appellant had 2640 acres. Assessment was to be done annually and the rates fixed by POA and not the 1st appellant. The respondent queried the assessment and charges raised by the appellants as they were unreasonable and not properly grounded on the POA and lease agreements executed by the parties. The witness testified that the invoices raised have not been supported by any audited accounts as required and approved by POA and further the said invoices have been unilaterally raised by the 1st appellant.

64. It was the respondent's case that the management company envisaged in the Master Declaration was to be an independent company separate from the declarant. Furthermore the Master Declaration did not confer upon the 1st appellant the power to appoint itself as the management company so as to provide services and levy service charge.

65. From the record and testimonies of all the parties and Clause 8 and 9 of the leases, the purpose of the POA was to enable the vendors and purchasers have a joint forum for the assessment and billing of the service charge due from all the purchasers. The POA (Property Owners Association) was created under Recital I of the Sale Agreement together with Recital H of the lease and its mandate was outlined under Clause 8 of the leases as read together with Clause 6.7 of the Master Declaration as:-

    a. To approve budgets of the POA and Precinct Property Owners Associate (PPOA) and to levy and collect assessments on the precincts, parcels and/or owners of parcels in terms of such budgets and to enforce payments of such assessment.

    b. To charge and collect fees for services rendered by the lessor and the Property Owners Association and their respective agents.

66. Part 3 of the Fourth Schedule of the lease set out the nature of services that the POA was required to provide in respect of the common areas within Tatu City as follows:-

    a. Maintaining, repairing and amending retained parts and keeping the retained parts in good and substantial repair, order and condition.

    b. Maintaining, repairing and amending roads, ways, pavements and drainage.

    c. Maintaining any architectural or ornamental features within the common areas and

    d. Providing security in the common areas among other services.

67. It is not in dispute that the POA has not been operationalized. Service charge has been assessed and collected by the appellants particularly the 2nd appellant who was appointed the managing agent for the purposes of collecting service charge by the 1st appellant.

68. The formula for computing service charge was defined clearly in Schedule Four of the lease. Clause 1.18 of the Fourth Schedule of the lease agreement service charge is defined as the share of periodic expenditure arrived at according to prorate allocation of the period expenditure based on the Gross Buildable Area (GBA) buildable of the premises relative to the entire land arrived at in accordance with such other formula as may be determined by the POA from time to time. Service charge share has been defined under Clause 1.1.9 of the Fourth Schedule to mean the percentage specified in paragraph 6 of the First Schedule. Paragraph 6 of the First Schedule defines service charge share to mean Kenya Shillings thirty per m2 of the GBA per annum. Clause 2.2.1 of the Fourth Schedule to the lease provided that the POA would provide a periodic expenditure distinguishing between the actual expenditure and a reserve for future expenditure as follows:-

> POA and PPOA shall within three months after each computing date (that is 31st December of every year) prepare an account showing the periodical expenditure (distinguishing between the actual expenditure and reserve for future expenditure) for the financial period containing a fair summary of the expenditure referred to in it and upon such account been certified by the accountant shall be binding on POA, PPOA and the lessee except in the case of material manifest error.

69. From the above, the charges were to be assessed based on the acreage of each purchaser vis a vis the unpurchased parcels and the appellant was meant to provide a computation showing prorated allocation of the periodic expenditure reasonably attributable to the various property owners. The statement was meant to distinguish between the actual expenses and expenses reserved for the future and the formula for computation was clearly defined as Kshs. 30 per m2 of the GBA per annum.

70. The respondent contested the computation of service charge vide its letters dated 13th March 2019, 26th February 2021 and 5th July 2021 to which the appellants responded through letters dated 5th February 2019, 26th March 2019 and 10th March 2021 attempting to explain how it had arrived at the said figures. Furthermore from the appellants' witnesses' testimonies, the appellant did not provide the respondent with periodic estimates of expenditure on a quarterly basis as required and no audit was done for the years 2016, 2017, 2019 and 2020.

71. Furthermore, despite the appellants' witnesses testifying and submitting that the allocation of the respondent's share of service charge was based on gross land area of 43 acres estimated to be the extent of the common areas, the same was in contradiction with the First Schedule Item 6 on service charge share being Kshs. 30/- per m2 of the GBA. It is evident from the record that the purchasers only received invoices with the demand for payment to be done. The said invoices did not provide for the assessment and formula of how the service charge was computed and neither did the purchasers participate in the assessment of the service charges. Furthermore, no audit was done to bill the purchasers for the actual expenditure taking into consideration of the acreage of respective purchasers' land. In this regard, the appellants did not adhere to the computation as provided for in the lease, sale agreements and Master of Declaration.

72. It was the appellants' case that the 1st appellant signed a service level agreement with the 2nd appellant on 1st December 2020 appointing the 2nd appellant as the managing agent for purposes of collecting service charge by the 1st appellant. Consequently before 1st December 2020, the 2nd appellant was not responsible for managing service charge within Tatu City. Interestingly, the respondent was issued with an invoice dated 12th May 2020 purportedly issued by the 2nd appellant for payment of accrued service charge in the sum of Kshs. 9,910,920.42/- in respect of services rendered between the years of 2016 until 2020. Additionally, the respondent received a letter from the appellants dated 5th February 2019 informing the respondent that the appellant was commencing levying service charge to cater for maintenance and operational costs of provision of shared services and maintenance of common areas. The letter was accompanied by a 2018 invoice for recovery of actual costs incurred in respect of services provided in the year 2018 and a Q1 2019 provisional service charge for the total sum of Kshs. 218,484/-. Notably, the said letter and invoices are contrary to the sale agreements, leases and Master Declaration which did not give the 1st appellant power to either assess or collect service charge which was a function purely for the POA. Furthermore, the date for commencement of billing was in contradiction with the Master Declaration and the Agreements for Sale with the agreement of sale providing that the levying began upon occupation which is defined under clause 1 as the date the respondent took possession. Furthermore, the computation process failed in the paramount part of not including the participation of all the purchasers in the assessment of the services charges. It is evident that the 1st appellant's failure to operationalize the POA is an attempt by it to assume unilateral control and management of services within Tatu City and without the consultation of the precinct owners.

73. From the record, the appellants rely on Clause 5.1 of the Masters Declaration and argue that they have the power to employ the management company. Clause 5.1 of the Masters Declaration provides that:-

> So long as the declarant, (the 1st appellant) holds ownership interest in any portion of the property and/or project, the declarant shall have the exclusive right and power to employ the management company to enforce this declaration and to:-
>
> Exercise on behalf of the Property Owners Association (a) its powers and responsibilities as set out in this entire Declaration, (b) its property affairs and (c) to employ independent contractors or such other employees as it may deem necessary and to describe their duties and to set their compensation.

If applicable, operate and manage the infrastructure services and utilities on behalf of the declarant and/or the Property Owners Association and where such infrastructure services and utilities have been concessioned to third parties to manage the concession agreement and relationship with the concessionaire on behalf of the declarant and/or the Property Owners Association.

To manage the billing and revenue collection process on behalf of the Property Owners Association and the Precinct Property Owners Associations and to allocate and apportion any payments received from any owner in the following manner in respect of any indebtness on the part of the owner.

74. Notably, the Masters Declaration dated 30th July 2014 was executed between the 1st and 2nd appellants before the respondent purchased their interest in the city, which begs the question as to what extent would it bind the purchasers. Furthermore, from the above provisions, the import of Clause 5.1 of the Master Declaration is that the management company so appointed would exercise its authority on behalf of the POA meaning the management company was to be accountable to the POA. The appellants were thus in breach of the said provisions as the 1st appellant unilaterally usurped the powers and functions of the POA which undermined the principles of transparency and accountability while collecting the service charge.

75. From the foregoing, it is evident that the appellants failed to prove their claim on a balance of probabilities as there are glaring contradictions on the computation of service charge and the Masters Declaration, lease agreements and sale agreements which govern the parties relationship is contradictory itself. Thus, the resultant assessment of service charge is wanting and it would be unjust to hold the respondent liable for the claim which is uncertain and contrary to the agreements. It is noted that the appellants did not adhere to the provisions of the lease agreements, sale agreements and the Master Declaration by unilaterally assuming control over the management of common areas while failing to operationalize the POA.

76. The appellants argued that through Gazette Notice No. 5892 dated 22nd May 2017, the 1st appellant was declared a Special Economic Zone and subsequently the area was declared a special planning area through Gazette Notice No. 4975. The appellants further argue that pursuant to the gazette notices, they automatically had an obligation to maintain the area subject to Section 32(1) and 33 of the Special Economic Zone Act, 2015. I have perused the record and noted that this issue has been raised by the appellants at the appellate stage. The pleadings in the trial court and the witness testimonies did not touch on this issue. Furthermore, the appellants argue that the trial magistrate failed to acknowledge that the 1st appellant was declared a special economic zone but that issue was never raised during the hearing of the suit. In fact the appellants were very categorical that the parties relationship was governed by the Master Declaration, the leases and the Agreement for Sale dated 18th May 2016. It seems the appellants have introduced the issue of the special economic zone to justify their computation and collection of service charge. Parties are bound by their pleadings and the appellants have brought a totally new issue that was neither pleaded in the suit or even addressed by the parties herein.

77. Accordingly, the appeal lacks merit and is hereby dismissed with costs to the respondent.

78. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE