



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 104 OF 2011

WOBURN ESTATE LIMITEDPLAINTIFF

=VERSUS=

RAYMOND MARK WARKER.....DEFENDANT

R U L I N G

1. What is before me is the Application by the Plaintiff dated 17th December, 2015. In the Application, the Plaintiff is seeking for the following orders:-

(a) THAT the Defendant/Respondent be ordered and/or directed to pay all sums due as service charge at the rate of Kshs.42,340/- a month now totaling to Kshs.1,850,038.92/-.

(b) THAT the costs of this application be provided for.

2. The Application is premised on the ground that while this suit is pending, the Defendant's obligations under part B clause 2.5 of the Lease Agreement does not cease to operate; that the Defendant has chosen to pay service charge of Kshs.22,000 per month instead of Kshs.42,340 and that the Plaintiff is facing difficulties in paying for water and electricity.

3. In response, the Defendant deponed that the main issue in dispute relates to the payable service charge in respect to the suit property; that it is premature to apply at this stage for an order requiring him to pay a monthly service charge of Kshs.42,340 in the absence of a full, proper, detailed and certified accounts and that by a Memorandum of Understanding dated 29th December, 2015, it was mutually agreed that he pays service charge of Kshs.25,000 per month plus Kshs.4,000 being VAT effective January, 2016.

4. According to the Respondent, in compliance with the provisions of Part B Clause 2.5 of the Lease Agreement, Mr. Maina Chege of Maina Chege & Co. Valuers and Property Consultants was appointed to determine the objection by the Lessees and that he prepared an expert report.

5. It is the Defendant's case that the Plaintiff has ignored the report of Maina Chege and instead filed this suit.

6. The parties' advocates filed submissions and authorities in respect to the Application. I have

considered those submissions and authorities.

7. In its Complaint dated 2nd August, 2011, the Plaintiff is seeking for an order compelling the Defendant to pay the entire arrears due in terms of service charges since July, 2009 till the date of Judgment with an alternative to terminate the terms of the Lease.

8. According to paragraph 8 of the Complaint, due to the high costs of living, the Plaintiff issued a notice to the Defendant increasing the service charge from Kshs.36,500 to Kshs.42,340 per month.

9. The Defendant is opposed to the increase of the service charge as pleaded in the Complaint.

10. The Plaintiff's Application is premised on the provisions of Clause 2.5 of Part B of the Lease Agreement which provides that any objection by the Lessee to the increase of the service charge shall not affect the obligation of the owner to pay the charges in accordance with the terms of the Lease and after the decision of the person appointed as an expert has given his report.

11. The only report by an expert contemplated by clause 2.5 viz-a-viz the payable service is the report of Mr. Maina Chege of Maina Chege & Co. Valuers and Property Consultants who was appointed to determine the objection by the Lessees.

12. Although the Defendant is agreeable to pay the service charges as per the said report, the Plaintiff is opposed to that.

13. Consequently, the Defendant cannot be said to be in breach of clause 2.5 of Part B and moreover he cannot be compelled to pay the service charge as suggested by the Plaintiff.

14. The Plaintiff having declined to accept the findings made in the said report, it should prosecute the suit and let the court determine the payable service charge.

15. It is premature for the Plaintiff to apply at this stage for a mandatory order requiring payment of the unsubstantiated monthly service charge of Kshs.42,340 per month.

16. For those reasons, the Application dated 17th December, 2015 is dismissed with costs.

Dated, signed and delivered in Malindi this 3rd day of February, 2017.

O. A. Angote

Judge



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