Case Number:	Civil Suit 144 of 2012
Date Delivered:	11 Oct 2012
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	John Wycliffe Mwera
Citation:	John M. Chamia & 6 others v Managing Trustee, National Social Security Fund & another [2012] eKLR
Advocates:	Kenzi for Plaintiffs Wafula for 1st Defendant Ouma for 2nd Defendant
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Parties ordered to utilise alternative dispute resolution mechanisms
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 144 OF 2012

DR. JOHN M. CHAMIA & 6 OTHERS……..……..……..……..PLAINTIFFS

VERSUS

1. THE MANAGING TRUSTEE, NATIONAL SOCIAL SECURITY FUND

2. KIRAGU& MWANGI LTD……..……..DEFENDANTS

Coram:

Mwera J.

Kenzi for Plaintiffs

Wafula for 1st Defendant

Ouma for 2nd Defendant

Court Clerk Furaha

RULING

The plaintiffs filed a notice of motion dated 1st August, 2012 under Order 40 rules 1, 2 of the Civil Procedure Rules and sections 1A, 1B o the Civil Procedure Act. The main prayer was:-

(i) that the defendants be restrained from levying distress for or in any way attempting to recover the backdated and increased extra service charge against the applicants, tenants in the property known as MBA BLOCK XXV/123, Social Security House.

In the grounds laid out it was contended that the plaintiffs were the tenants of the defendants in the said building. The tenancy agreements provided and the plaintiffs, it transpired were acting in a representative capacity for/on behalf of other tenants, all totaling about one hundred and fifty, were paying service charges separate from the rents. The services to be provided by the 1st defendant (landlord) through the 2nd defendant (managing agent) included provision of electricity, water, cleaning, repairs, security, etc. That the leases provided that annually the plaintiffs could be provided with actual

expenditure of/on service charges – being credited with any surplus or required to make good any deficit. That such an audit of expenditure should be provided not later than six months after a given calendar year i.e. 31st December. That the defendants were now demanding backdated extra service charges for the years 2009/10 and 2010/11 contrary to the leases and without justification. The plaintiffs saw this move to be unfair and oppressive likely to result in closure of businesses and other financial losses.

Dr. John Chamia (1st plaintiff) swore a supporting affidavit on his own behalf and on behalf of the co-tenants. Besides expanding on the contents of the grounds above, Dr. Chamia said that on July, 2012 all tenants received letters demanding extra backdated service charges for the years 2009/10, 2010/11 (annexure JC2) along with an audit report signed by the defendants (annexure JC3). That the plaintiff/tenants were not involved in the preparation of the audit report stated. That the services charged for were poor with lifts not working, dirty toilets and kitchens let out. So the notices effective from 31st July, 2012 were unexpected, short and backdated. That that was oppressive and unfair. That the notices were even invalid, working retrospectively – hence this application.

The file did not easily yield the replying affidavits of the two defendants but the 1st plaintiff (Chamia) filed a further affidavit. Non-retrieval of those affidavits need not prejudice the defendants since all was borne out in the submissions by their counsel – Mr. Wafula and Mr. Ouma.

In the further affidavit of Chamia, it was denied that some tenants had yielded to paying the contested service charges. That in the year 2009/10 the plaintiffs were not consulted on how some services were to be outsourced and bills raised. It was claimed that the defendants had failed in rendering the necessary services despite written complaints (annexure JC5). And therefore that orders sought were warranted.

In the written and oral submissions tendered, the whole thing revolved around the manner service charges were to be audited and where there was a deficit, the same made good by the plaintiffs. And the time within which that audit had to be done. The other point was whether the 2nd defendant (agent) should have been joined in this suit when the principal (landlord) was known and sued as the 1st defendant.

Dealing with this last point first – it is generally held in law and application plus the authorities which avail in abundance that where a principal is disclosed and known, his/her agent should not be sued in the same cause as a co-defendant. What it means simply is that the agent executes/acts for and on behalf of the principal. The principal takes benefits and should also absorb penalties e.g. costs in a suit. Of course there are far exceptions e.g. when an agent is operating outside the mandate of the principal. To cut the whole story short, it is clear here that the 2nd defendant is the managing agent of the 1st defendant as regards Social Security House where the plaintiffs operate from. The 1st defendant, the Managing Trustee, National Social Security Fund is known – the landlord of the plaintiffs. Thus even if the plaintiffs are greatly aggrieved by the allegedly poor services the 2nd defendant oversees on the ground, the buck ultimately rests with the 1st defendant. It was thus not tenable to sue the agent (2nd defendant) along with its known principal landlord. There is nothing demonstrated to warrant that course. Accordingly, the 2nd defendant is hereby struck out from these proceedings.

Now the point of contention – the audits for service charges covering years 2009/10 and 2010/11 and how that ought to have been done. Both parties referred to an offer of lease to each plaintiff dated 30th September, 2009, especially clause 6 thereof:

“6. SERVICE CHARGE

Each tenant will be liable to pay a service charge determined in the manner stated in the standard lease in order to reimburse the landlord for a fair portion of the operating expenses of the building."

The services to be rendered were then enumerated e.g. electricity in common areas, water, security, insurance, etc.

Then the clause went on:

"The landlord will provide, through its managing agents, independently audited accounts for the service charge expenditure no (sic) later than six months after the end of each calendar year to all tenants of the building. In the event audit indicates an over-expenditure, the tenant will pay Additional Service Charge on demand."

The lease under reference (annexure JC1) was in favour of one Amanye General Supplies. Quite likely the space occupied by the tenant was not equal to or similar in size with the rest but its rate was at Shs. 12/= per square foot and the charge to be paid was computed at Shs. 2,136/= p.m., with effect from 2009.

The plaintiffs stated that the service charge was paid separately from rent and that is what Clause 6 says. They claim that because the landlord received these charges to ensure that services were rendered to the tenants all stood in the manner of a trust and thus the landlord (1st defendant) was impliedly required to transparently and in a fair manner, involve the tenants in the audit of the money they paid for the services. It is not an issue here but they claimed that the 1st defendant did not involve them. It did not render any audited account as at December, 31 following the year 2009/10. Instead it has brought up the audit for that year together with that covering 2010/11, served both with a computation that all the tenants pay back service charges of Shs. 15 million as at 31st July, 2012, presumably at once – not in instalments. The plaintiff took this as oppressive being based on a short notice, and that the audit of 2009/10 was not carried out and served as per the said Clause 6 (above). And that all this was oppressive and unfair – likely to result in loss of business, etc.

Mr. Ouma while admitting that the audit of 2009/10 was not carried out as per Clause 6, it was delayed, nonetheless posited that the 2010/11 one was regular and should attract no dispute. The plaintiffs should pay up in respect of that year. In essence Mr. Ouma appeared to be indicating to the court that the parties could sit down, separate the audits for the two accounts and settle as to the mode and level of payment by each tenant. It is not denied that whatever level of quality the services were rendered. If the figures on the audit reports were blurred, unclear or whatever as to their incorporation, that still is a matter parties can discuss about. Unless any reason e.g. where the lease has expired and not renewed, it is apparent that the litigants herein wish to continue with each other.

On that account this court directs that parties do take advantage of sixty (60) days from the date hereof in invoking any alternative dispute resolution mechanism as provided for in the Constitution (Article 159) and the Civil Procedure Rules to sort out their dispute. In the meantime the extra and backdated service charge as laid out on the notices served be kept on hold. But the plaintiffs should continue to pay at the rates prevailing before the notices. In the event the discussions reveal over-expenditure or under-expenditure of these charges (parties may opt for separate/joint auditing exercise) then Clause 6 to be put into place as the case may be. A mention to be fixed in sixty (60) days. This time may be enlarged if that will help parties sort out their dispute.

Orders accordingly. Each party to bear its own costs.

Delivered on 11th October, 2012.

J. W. MWERA

JUDGE

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