



Silverspoon Restaurant Limited v Gohl & 2 others (Environment and Land Appeal 12 of 2021) [2023] KEELC 17031 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17031 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 12 OF 2021**

**SM KIBUNJA, J
APRIL 25, 2023**

BETWEEN

SILVERSPOON RESTAURANT LIMITED APPELLANT

AND

VRAJKUMAR MANILAL GOHL 1ST RESPONDENT

RAJNIKANT MANILAL GOHL 2ND RESPONDENT

VRK GOHL INVESTMENTS 3RD RESPONDENT

RULING

[NOTICE OF MOTION DATED 9TH NOVEMBER 2022]

1. Shabbir Nasir Jamal and Zainabsalim Nassor, the 1st and 2nd applicants respectively, filed the notice of motion dated the November 9, 2022 seeking:
 - a. to be joined in this appeal as respondents with leave to participate in the proceedings
 - b. or alternatively their ELCA No 12 of 2021 and E38 of 2022 be consolidated with this appeal as common issues of law may arise, as their liberty is at stake in CMCC No 1106 of 2013.
 - c. Further in the alternative, the applicants seek for an order of stay of further proceedings before the subordinate court in CMCC No 1106 of 2013 and 51 of 2018 to prevent a travesty of justice which may ensue if they are to be committed to civil jail for rent/mesne profits incurred and paid by Silverspoon Restaurant Ltd merely because the respondents have refused to surrender the stale bank cheques for encashment.



The application is premised on the eighteen (18) grounds marked (a) to (r) on its face and supported by the affidavit sworn by Shabbir Nassir Jamal, the 1st applicant, on the November 9, 2022, reiterating the grounds. He in addition deposed that the applicants gave up their positions as directors in the appellant company before the expiry of the sublease in 2013 that was subject matter of litigation in ELC No 1106 of 2013; that the appellant was actually in actual physical possession of the demised premises from January 2018 until September 4, 2020 when it was forcibly evicted by the respondents in execution of the decree in 1106 of 2013; that they have been parties in CMCC NO 1106 of 2013, 51 of 2018, ELCA No 12 of 2019, 12 of 2021 and 38 of 2022; that the said matters have common issues for determination and hence this application.

2. The application is opposed by the respondents through the replying affidavit sworn by Rajnikant Manilal Gohl, the 2nd respondent, in which he among others deposes that the application is bad in law as it does not meet the threshold in Order 42 Rule 22 of the *Civil Procedure Rules*, and is also an abuse of the court process; that the applicants were sued by the owners of the premises, evicted in September 2020 and have filed ELCA No 12 of 2019; that the applicants are strangers to this appeal; that there exist no common issues requiring this appeal to be consolidated with those others; that the appellants are not keen in prosecuting their appeal and are working with the applicants in frustrating the proprietors of the premises from enjoying the fruits of their judgement in CMCC No 1106 of 2013.
3. The learned counsel for the applicants and respondents filed their submissions dated the February 10, 2023 and March 10, 2023, and made further oral submissions when the matter came up for mention on the March 16, 2023. The court has considered the submissions by both sides.
4. The following are the issues for the court's determinations;
 - a. Whether the applicants have made a reasonable case to be joined in this appeal, or alternatively, the consolidation of this appeal with ELC No 38 of 2022.
 - b. Also in the alternative, whether the applicants have established reasonable basis for a stay of further proceedings order to issue in CMCC Nos 1106 of 2013 and 51 of 2018.
 - c. Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, the superior courts decisions cited thereon, and come to the following determinations;
 - a. The heading of the application shows that it is brought pursuant to the provisions of Order 42 Rule 22 of the *Civil Procedure Rules* and section 1A and 3A of the *Civil Procedure Act*. Order 42 Rule 22 of the *Civil Procedure Rules* provides as follows;

“Where it appears to the court at the hearing that any person who was a party to the suit in the court whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that such a person be made a respondent.”

Sections 1A and 3A of the *Civil Procedure Act* provides the overriding objectives and the restatement of the inherent powers of the court respectively. In their submissions the applicants inter alia submitted that the appellant herein was the plaintiff in Mombasa CMCC No 51 of 2021 whose dismissal gave rise to this appeal. The learned counsel for the applicants cited the case of *Departed Asian Property Custodian Board versus Jaffer Brothers* (1999) 1EA 55



at 63 to 64, and submitted that the appellant is a company incorporated by the applicants and their partner after they had signed the instrument of sublease for the one shop on Mombasa Block XX/178. That they are therefore not strangers in the suit and should be joined in the appeal as respondents either under Order 1 Rule 10 or Order 42 Rule 22 of the Civil Procedure Rules. Order 1 Rule 10 provides that;

“ 10.

- (1) Where a suit has been instituted in the name of the wrong persons as plaintiffs, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as the plaintiff upon such terms as the court thinks fit.
- (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
- (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant.”

The learned counsel went on to invite the court to take a liberal and purposive approach in interpreting Order 1 Rule 10 and Order 42 Rule 22 so as not to limit the court’s jurisdiction and powers to admit necessary parties to appeals even where they did not participate in the original suits. The counsel cited the Madras High Court decision in the case of Baluswami Aiyar versus Lakshmana Aiyar (1921) 44 Mad. 605, 63 1 C 374, (1921) AM 172 [FB] and Allahabad High Court case of Shiam Lal Dhanpat Rai [1925] 47 All. 853, 88 1C 493, [1925] AA 768. In the Baluswami Aiyar case [*supra*], the Madras High Court was interpreting Order 41 Rule 20 of the Indian Civil Procedure Code which counsel submitted is in pari materia with Kenya’s Order 42 Rule 22 and held that its power cannot be limited by this rule and can employ Order 1 Rule 10, which is pari materia with Kenya’s Oder 1 Rule 10, while in the case of Shiam



Lal Dhanpat Rai [*supra*] the Allahabad High Court held that the appeal court cannot add a party who was not a party in the suit.

- b. On their part the respondents submitted that as the applicants were not parties in the suit before the subordinate court, whose decree is the subject matter of this appeal, then Order 42 Rule 22 is not available to them. That indeed the applicants have themselves admitted that they were not parties in Mombasa CMCC No 51 of 2021. That the Oxygen principle and Order 1 Rule 10 cannot also come to the aid of the applicants. The learned counsel relied on the Court of Appeal decision in the case of *Kivanga Estate Ltd versus National Bank of Kenya Ltd* [2017] eKLR, where it was held that;

“The court will look closely at the conduct of the party bringing subsequent proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to ex debito justitiae prevent it. There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations.”

The counsel also cited the Supreme Court of Kenya decision in the case of *Communications Commission of Kenya & 3 others versus Royal Media Services Ltd & 7 others* [2014] eKLR, where the court held that;

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal.....

We cannot exercise our discretion to enjoin a party that disguises itself as an interested party, while in actual fact merely seeking to institute fresh cause.”

The respondents therefore submitted that as the applicants have failed to meet the threshold for joinder, they should proceed with the matters where they are parties in the respective courts, as to issue the consolidation or stay orders will merely be encroaching onto those courts order of business without justifiable cause.

- c. That from the foregoing, it is not disputed that the applicants were probably involved in incorporating Silverspoon Restaurant Ltd, the appellant herein. That the appellant is according to paragraph 1 of the plaint dated September 26, 2018 filed in Mombasa CMCC No 51 of 2018 in the record of appeal, a limited liability company incorporated under certificate number 149024 of January 8, 2008, and therefore has capacity to sue or be sued in its name. There is no record of the applicants herein being joined in that suit either as plaintiffs or defendants even though they must have been aware about the commencement and prosecution of the said suit, whose decree is the subject matter of this appeal.
- d. That there is nothing in this appeal to suggest that there is need to substitute any of the parties, or that the applicants herein are necessary parties to be joined for the effectual determinations of the issues before the court in the appeal. That the plain reading of Order 42 Rule 22 of the *Civil Procedure Rules*, taken together with the fact that the applicants were not parties in the original suit, Mombasa CMCC No 51 of 2018, and therefore do not fall under the category



of parties who have not been made parties in the appeal, leads the court to the conclusion that the said provision of the law is not applicable to the applicants' quest.

- e. That while the invitation by counsel for the applicants to consider going the Madras High Court way as in the case of Baluswami Aiyar [*supra*], of not limiting the court's jurisdiction in admitting parties to appeals is worth considering, the applicants herein have failed to demonstrate the existence of any interest in the result of this appeal that would make them necessary parties. That in any case, whatever the applicants have indicated as their interests to be, are matters best dealt with in the suits and or appeals where they are parties.
 - f. Though the applicants have alleged that there are common issues for determination in this appeal and the two others they seek to be consolidated herein, the respondents have disputed that claim and referred to the decision in *Shabbir Nassir Jamal & another versus Vrajkunver Manilal Gohil & 2 others* [2015] eKLR, in which the applicants herein had sought for among others stay of the Chief Magistrate's court case. The court declined to grant the order upon finding that the appellants [applicants herein] had no privity of contract with the respondents and do not stand to suffer if stay of proceedings is not granted. The applicants have failed to demonstrate the existence of common issues in the two other appeals and the instant one that would make it necessary to consider an order to consolidate them for hearing and determination. This court is not convinced that the ends of justice would be better served by consolidating the two other appeals with this instant one.
 - g. That on the alternative prayer of stay of further proceedings in Mombasa CMCC Nos 1106 of 2013 and 51 of 2018 ostensibly to prevent a travesty of justice which may ensue if the applicants were to be committed to civil jail for rent/mesne profits incurred, such an application should in the first instance be made before the trial court. A party may then if dissatisfied with the outcome consider preferring an appeal before this court. I therefore find the applicants have failed to convince the court why the alternative prayer should be considered when the same can and should be sought from the trial court.
 - h. That having found no merit in any of the prayers in the applicants notice of motion, then under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, they should be the respondents' costs.
6. Flowing from the above determinations, the court orders as follows;
- a. That the applicants notice of motion dated the November 9, 2022 is without merit and is hereby dismissed.
 - b. The applicants to pay the respondents' costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 26th DAY OF APRIL 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF;

APPELLANT : ABSENT

RESPONDENTS : ABSENT

APPLICANTS : ABSENT



COUNSEL: M/s Kimani for Mr Kimani for Appellant and Mr Ondego for Respondent.

WILSON – COURT ASSISTANT.

