



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL SUIT NO. 10 OF 2020 (COMPLEX)**

**SALAMA BEACH HOTEL LIMITED.....1<sup>ST</sup> PLAINTIFF**

**ISAAC RODROT.....2<sup>ND</sup> PLAINTIFF**

**STEFANO UCCELLI.....3<sup>RD</sup> PLAINTIFF**

**MARIO SCOTTI CAMUZZI.....4<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**DR. ARCURI IGNAZIO.....1<sup>ST</sup> DEFENDANT**

**D.SSA DAL MORIO MADDALENA.....2<sup>ND</sup> DEFENDANT**

**AVV. DE CESARI PATRIZIA.....3<sup>RD</sup> DEFENDANT**

**CORAM: Hon. Justice R. Nyakundi**

**Munyithya Mutugi Umara & Muzna Advocates for the Plaintiffs**

**Walker Kontos Advocates for the Defendants**

**Makambo Makabila & Co. Advocates for an intended Defendant**

**Ndegwa Kiarie & Co. Advocates for an intended Defendant**

**RULING**

This Ruling relates to two Chamber Summons Applications dated 9<sup>th</sup> and 12 October 2020 respectively. They are both brought under **Order 1 Rules 3 and 10 of the Civil Procedure Rules 2010** seeking the joinder of proposed defendants to this suit and leave to be granted for the Plaintiffs' to amend their Plaint to include the intended defendants and for these intended parties to file their respective Defence's. Seeing as both Applications seek similar reliefs, I will tackle them contemporaneously, referring to each specific Application and its proposed Defendant where necessary.

In the Application dated 9<sup>th</sup> October 2020, the proposed Defendant is Temple Point Resort Limited ('Temple Point') while in the Application dated 12<sup>th</sup> October 2020, the proposed Defendant is Accredo AG ('Accredo').

The Temple Point application is buttressed by the affidavit of Elma Wagner, sworn on 7<sup>th</sup> and filed on the 9<sup>th</sup> of October 2020. It was opposed by the Plaintiffs' through an affidavit sworn on their behalf by Isaac Rodrot on 2<sup>nd</sup> and filed on 4<sup>th</sup> November 2020. This was responded to by an affidavit sworn by Elmar Wagner on behalf of Temple Point on 25<sup>th</sup> November and filed on 9<sup>th</sup> December 2020. Subsequently, a supplementary affidavit was filed in response, sworn by Isaac Rodrot on 18<sup>th</sup> December 2020 and filed on 22<sup>nd</sup> January 2021. Submissions on behalf of the Plaintiffs'/Respondents' dated 29<sup>th</sup> October 2020 were filed on 4<sup>th</sup> November 2020. For Temple Point, submissions dated 8<sup>th</sup> were filed on 9<sup>th</sup> December 2020.

Accredo, supporting its Application by an affidavit sworn by Hans-Jurgen Langer on 7<sup>th</sup> and filed on 12<sup>th</sup> October 2020 faced similar opposition to its application by the Plaintiffs'/Respondents' through an affidavit sworn on their behalf by Isaac Rodrot on 2<sup>nd</sup> and filed on 4<sup>th</sup>

November 2020. Again, submissions on behalf of the Plaintiffs'/Respondents' dated 29<sup>th</sup> October 2020 were filed on 4<sup>th</sup> November 2020.

### **Precis of the Applications**

For Temple Point, it is urged that the suit property, the 1<sup>st</sup> Plaintiff, in respect of which the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs seek declaratory reliefs is under the management of Temple Point pursuant to a Court Order issued on 26<sup>th</sup> February 2019 and on 18<sup>th</sup> February 2020 in **Milimani HC Insolvency Petition No. E016 of 2018; in the Matter of Salama Beach Hotel Limited** relating to the 1<sup>st</sup> Plaintiff herein taken out by Temple Point. The said Insolvency proceedings were taken out to recover a debt of Euros 6,907,801.89 owed to Temple Point by the 1<sup>st</sup> Plaintiff, which debt remains outstanding and the High Court has issued Orders in **Milimani HC Insolvency Petition No. F016 of 2018** vesting to Temple Point the operation and management of the affairs of the 1<sup>st</sup> Plaintiff. That on the strength of the vesting orders by the Court, Temple Point has put up considerable monetary investments into the running of the 1<sup>st</sup> Plaintiff suit property.

On the basis of the foregoing it is argued that the question of who has the lawful interest in the 1<sup>st</sup> Plaintiff cannot be determined fully or conclusively without the involvement of Temple Point who has a legitimate legal interest in the 1<sup>st</sup> Plaintiff and in view of the pending insolvency proceedings

On Accredo's behalf, it is averred that its interest in the 1<sup>st</sup> Plaintiff suit property stems from proceedings in Malindi HCCC No. 118 of 2009 wherein Accredo as the Plaintiff sought to realize an award of Euros 525,000 with interest from 2001 obtained by virtue of the Judgment in **Milan Tribunal Civil Case No. 62662/2001** for Euros 825,000 which was reduced to Euros 525,000 on appeal. It is contended that this judgment was for a claim by Accredo against Viaggi Del Ventaglio SPA, the controlling company of Ventaglio International S.A (now under Receivership) who were the majority shareholders in the 1<sup>st</sup> Plaintiff with 81,000 shares comprising 90% of the shareholding with the other 9,000 shares being registered to Abacus Services Limited.

According to Accredo, following the Judgment in Milan, the true Directors of the Judgement Debtor Bruno Colombo and Mario Scotti Camuzzi, the 4<sup>th</sup> Plaintiff herein participated in the proceedings in Milan and pledged the shares of the Judgement Debtor in the 1<sup>st</sup> Plaintiff to Accredo to satisfy the Judgment in Milan Tribunal Civil Case No 62662/2001 in their favour. That to realize its Judgment, Accredo filed Malindi HCCC No 118 of 2009 and obtained a Consent Judgment on 21<sup>st</sup> January 2010 by which Consent the shares held by Ventaglio International SA were allotted to Hans Langer and Zahra Langer to hold on behalf of Accredo.

It is urged that the said Hans Langer and Zahra Langer in accordance with their rights as majority shareholders took over control and management of the 1<sup>st</sup> Plaintiff suit property and invested in it until sometime in March, 2020 when they were evicted by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.

It is urged that Consent Judgment on 21<sup>st</sup> January 2010 was subsequently set aside by this Court on 30<sup>th</sup> April 2015 on an application by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs who claimed to be shareholders of the 1<sup>st</sup> Plaintiff that had allegedly been left out in the take-over by Accredo. It is averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs went on to falsify ownership documents in order to acquire possession of the suit property and are currently faced with prosecution in **Mombasa Criminal CM Criminal Case no 854 of 2020** for offences including forgery of ownership documents in relation to their purported shareholding in the 1<sup>st</sup> Plaintiff and do not have a lawful interest in it. That on the strength of the Milan Judgment obtained by Accredo; the concession made in the Milan Court by the 4<sup>th</sup> Plaintiff together with Bruno Colombo on behalf of Ventaglio International S.A (Under Receivership) affirming the award in favour of Accredo; coupled with the investment made in the 1<sup>st</sup> Plaintiff over the years by Accredo in excess of Kshs 500,000,000/= gives Accredo a legitimate and lawful interest in the 1<sup>st</sup> Plaintiff.

Controverting the claims by both Temple Point and Accredo, the Plaintiffs' contend that there is no visible nexus as between the instant proceedings and the interests of neither Accredo nor Temple point. They urge that their claim is against the receiver managers of Ventaglio International SA, and the prayers sought do not in any manner whatsoever affect the interests of both Temple Point and Accredo. The position taken by the Plaintiffs' is that they have not raised any claim against either Accredo or Temple Point that they would be required to respond.

It is contended that joining either Accredo or Temple Point as a party will broaden the case and crowd the issues the Plaintiffs have presented before the court for determination. For this reason, it is averred, the applicants will suffer no prejudice by not participating in this trial.

### **The Submissions**

In their submissions in support of the Application for the joinder of Temple Point, Makambo Makabila Advocates rely on **Order 1 Rule 10 (2) of the Civil Procedure Rules** for the submission that Temple Point has not only demonstrated its interest in the subject matter of this suit but also is a necessary party in order to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit. Furthering this line of argument, reliance is placed on **Lucy Nungari Ngigi & 128 Others vs National Bank of Kenya Limited & Another [2015] eKLR; Civicon Limited -vs- Kivuwatt Limited & 2 Others [2015] eKLR and Pravin Bowry -Vs- John Ward & Another [2015] eKLR.**

Vehemently in opposition to the twin applications for joinder, Muniyithya Advocate for the Plaintiffs submits that the Applicants are underserving of the reliefs sought as they have failed to meet the threshold to be enjoined by failing to demonstrate how the determination of this suit would affect the interests of either Temple Point or Accredo. In pursuit of this argument, reference is made to the following cases: **Francis Kariuki Muruatetu Ltd & another V Republic & 5 Others in Petition No. 15/16 of 2016 KLR; Britania Sacco v Jambo Biscuits Limited [2018] KLR; Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR; Isaac Mugo & 13 others v Fred Okengo Matiang'i & 2 others; Independent Electoral and Boundary Commission of Kenya (1st Interested Party) & 18 others [2019] eKLR. 5. Republic v Office of the Director of Public Prosecution & 4 others Ex-parte Sylvia Wairimu Njuguna also known as Sylvia Wairimu Muli [2018] eKLR and Lucy Nungari Ngigi & others v National Bank**

### Analysis and Determinations

Having perused the Parties' pleadings and digested both the Applicants' and the Respondents' advocates respective submissions with regard to the twin Chamber Summons Applications seeking the joinder of parties to this suit, I am satisfied that both Applications turn on whether the Applicants' are entitled to be enjoined as Defendants in the instant suit.

The law on joinder of parties is to be found in **Order 1 Rules 3 and 10 of the Civil Procedure Rules 2010** which not only identify who may be a defendant but also delineate the process of substitution and addition of parties respectively. They are reproduced below for an appreciation of their full tenor and effect.

#### Rule 3

*"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."*

#### Rule 10

*"(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.*

*(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 defendants."*

Armed with the law, I now turn to the guiding authorities that advance the position of the law. To begin with, in **Kenya Anti-Corruption Commission v Lucy Kerubo Ogeto, Kisii High Court civil case number 119 of 2008 [2010] eKLR, Makhandia J**, regarding who may be joined as a defendant, expressed himself as follows:

*"Order 1, rule 3 of the Civil Procedure Rules provides an answer to the of who may be sued. It provides that all persons may be joined as defendant against who any right to relief in respect of or arising out of the same act, transaction or series of acts or transactions is alleged to exist, whether jointly severally, or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise. This rule makes very broad provisions as to who may be sued or joined in a suit as a defendant. The only limitation, however, is that a right to relief must exist. Order 1, rule 5 of the Civil Procedure Rules, however, qualifies rule 3 aforesaid by providing that it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him. Further, it is trite law that where a plaintiff is not sure or is in doubt as to who to sue, he should sue everybody remotely connected with the claim so that the question of liability as between the defendants may be determined or sorted out by the court. Finally, rule 9 of the same order provides that misjoinder or non-joinder cannot be used to defeat a plaintiff's claim. From the foregoing it is quite apparent that the plaintiff or the applicant as the case here has a very wide latitude to find a cause of action against any person(s) he believes he is entitled to seek a relief for redress against, even if in the process he enjoins an innocent party. It will be up to the court to give redress to such party wrongly sued."*

Ringera, J (as he then was) in **Werrot & Co Ltd and others v Andrew Douglas Gregory and others, Nairobi (Milimani) High Court civil case number 2363 of 1998** found that when determining the question of whom is a necessary party, there are two tests. The first is that there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question. Additionally, it should not be possible to pass an effective decree in the absence of such a party. See also **Sarkar's Law of Civil Procedure Volume 1 at pages 531-532**.

Dealing conclusively with the matter of joinder of a defendant, in a holding to which I wholly associate, the Court of Appeal in **Civicon Limited v Kivuwatt Limited & 2 others [2015] eKLR** opined:

*"Under Order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or;*

*a. whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.*

*b. the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or*

*relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."*

The Court of Appeal in the **Civicon case [supra]** drew inspiration from its findings by a differently constituted Court in **Meme vs Republic (2004) KLR 637** where, considering an application for joinder, held that joinder will be permissible in circumstances where the presence of the party will result in the complete settlement of all the question involved in the proceedings; the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law; and where the joinder will prevent a likely course of proliferated litigation.

Guided by the antecedent jurisprudence, my understanding of **Order 1 of the Civil Procedure Rules** especially as it relates to joinder of parties is that the proposed Defendants can only be enjoined in the suit if they can demonstrate that they ought to have been joined or that their 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.

Alternatively, to be joined as a Defendant, the proposed Defendants would each have to prove to the Court the existence of a question or issue arising out of or relating to or connected with any relief or remedy claimed, which in the court's opinion it would be just and convenient to determine as between the proposed Defendants and the other parties to these proceedings.

It is also not lost on this Court that past judicial authorities have lent credence to the notion that Courts ordinarily have a wide latitude in the exercise of their discretion in determining who ought to be the proper parties to a suit. The Court may on its own motion, where it sees that it is prudent for the satisfactory adjudication of the matters in dispute, order for the joinder of the proposed Defendants.

Keeping the foregoing in mind, I am satisfied that the respective Applicants have shown that their presence in this suit will not only protect their rights but also result in the complete settlement of all the question involved in the proceedings. My reasoning for taking this position is sounded out below.

In the case of Temple Point, it has demonstrated its legitimate interest in the subject matter by showing that it is engaged in insolvency proceedings relating to a debt owed to it by the 1<sup>st</sup> Plaintiff. It has also made the argument, which I accede to, that it has made substantial considerable monetary investments into the running of the 1<sup>st</sup> Plaintiff suit property.

As for Accredo, its interest in the matter is confirmed on the basis of the contestation as to the rightful directors of the 1<sup>st</sup> Plaintiff. This legitimate interest is concretized on the strength of the Milan Judgment obtained by Accredo which was adopted by a contentious consent that asserted the ownership rights of its directors in the 1<sup>st</sup> Plaintiff. While the consent order was eventually set aside, the matter is still pending final resolution and it would be prejudicial to Accredo to lock them out of a suit that is directly connected to the ownership, management and control of the 1<sup>st</sup> Plaintiff while its rights in that property are yet to be fully ascertained.

Of consequence to the preceding rendition is my finding that both Temple Point and Accredo AG have satisfactorily demonstrated that their interests ought to be represented in this matter if at all its conclusion is to result in the complete settlement of the issues in these proceedings, which in my view can be boiled down to the ownership, management and control of the 1<sup>st</sup> Plaintiff Company.

Be that as it may, even in the event that I had not been convinced by the pleadings and arguments put forth by the proposed Defendants, this Court would have, based on its independent duty to ensure that all necessary and proper parties are before it, ordered that the proposed Defendants be enjoined to enable it to effectually and completely determine and adjudicate upon all matters in dispute. I say so emboldened by the knowledge that I am no stranger to the matters in issue in the instant suit. In fact, there are a plethora of cases at different stages in this Court all relating or connected in one way or the other to the ownership, management and control of the 1<sup>st</sup> Plaintiff Company. In pursuit of finality in this matter therefore, Temple Point and Accredo AG need to come on board and give their side of the story.

In the upshot, the following Orders are issued:

- a. The Chamber Summons Application dated and filed on 9<sup>th</sup> October 2020 succeeds in terms of prayer (ii) and Temple Point Resort Limited is hereby enjoined in this suit as the 4<sup>th</sup> Defendant.**
- b. The Chamber Summons Application dated and filed on 12<sup>th</sup> October 2020 succeeds in terms of prayer (ii) and Accredo AG is hereby enjoined in this suit as the 5<sup>th</sup> Defendant.**
- c. The Complaint dated 18<sup>th</sup> May 2020 and filed on the same day be amended to reflect the addition of the 4<sup>th</sup> and 5<sup>th</sup> Defendants and leave is hereby granted for them to file and serve their respective Defence's within 14 days from the date of this Ruling.**
- d. All parties to comply with the provisions of Order 11 and have the matter set down for hearing within 45 days from the date of this Ruling.**
- e. Costs shall abide by the outcome of the suit.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF JANUARY 2021**

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**R NYAKUNDI**

**JUDGE**