



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 118 OF 2009

ACCREDO AGPLAINTIFF

-VERSUS-

SALAMA BEACH HOTEL LIMITED..... 1ST DEFENDANT

HANS JURGEN LANGER2ND DEFENDANT

ZAHRA LANGER3RD DEFENDANT

STEFANO UCCELLI4TH DEFENDANT

ISAAC RODROT5TH DEFENDANT

1. EMMANUEL KADENGE NZAI

2. JUSTUS MAKAIKUMA MASAFU

3. EMMANUEL YAA

4. CHARO SHOMBO

5. KAZUNGU KARISA.....PROPOSED INTERESTED PARTIES

Coram: Hon. Justice R. Nyakundi

Mr. Munyithya for the 5th Defendant

Mr. Ndegwa for the plaintiff & the 1st, 2nd and 3rd defendant

Mr. Kibunja for the 4th defendant

Ms. Kavangi holding brief for Ms. Githogori for the interested parties

RULING

When this matter was first brought before **Justice Chitembwe**, several applications had been made seeking various reliefs. However, in respect of the application by the 4th Defendant dated 20th November, 2014, the main prayers sought for were as follows:

“3. THAT pending the hearing and determination of this application interpartes the court should stop the directors of the plaintiff company from disposing off the assets of the 1st defendant company.

4. THAT this honourable court be pleased to set aside or review the decree on record so that parties can be heard on merit.”

The said application was found to have been merited and the orders sought were granted. The Court made the following orders for purposes of clarity:

- “1. As indicated hereinabove the application by the 4th Defendant dated 20th November, 2014 is granted as prayed.**
 - 2. The Registrar of Companies shall remove the names of the 2nd and 3rd Respondents that is to say, Hans Jurgen Langer and Zahra Lawger, as directors of Salama Beach Hotel Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009.**
 - 3. The 2nd and 3rd Defendants to hand over all the properties belonging to Salama Beach Hotel Limited within seven (7) days thereof to the 4th and 5th Defendant defendants. Counsel for both parties to participate in the transfer process.**
 - 4. the 2nd and 3rd Respondents’ names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009.**
 - 5. In view of the previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station ensure that the court order is effected as hereinabove.**
- 6. Costs of the Application of the Applicant.”**

In view of the above orders by **Chitembwe J**, the Honourable judge did not only set aside a consent judgement which had been recorded by the parties on 21st January, 2019, but also ordered a change in the shareholding of the suit company. An appeal which impugned the aforementioned orders was dismissed in the Court of Appeal judgement of the Court delivered on the 15th day of December, 2017. It is very unfortunate to note that the order hereinabove have not been effected to date due to non-compliance of court orders by the 2nd and the 3rd Defendants.

In spite of non-compliance of the abovementioned court orders by the parties herein, there has been a plethora of application filed before this court seeking for several and different directions. One of which is an application dated 7th October 2019 seeking leave of the court to allow the proposed interested parties to actively participate in the proceedings hearing including but not limited to filing responses to the application by the plaintiff and the 5th Defendant.

In response, the 5th application the 5th Defendant filed a preliminary objection dated 21st October 2019 and the 4th Defendant filed grounds of opposition dated 17th October 2019. Subsequently, the 5th Defendant filed an application dated 4th November 2019 noting that the proposed interested parties in the instant suit lack the locus standi to respond to the said application.

Analysis and determination

“We have to accept the rule of Law, even when its inconvenient, if we are going to be a country that abides by the rule of Law.”

I have appreciated the issues raised by the Counsels for the parties herein in their respective submissions. I have watched these proceedings for the last six months with dismay and astonishment. Why? Justice is about orderliness. Secondly, blatant disregard of court orders and decisions under the guise of agitating a right under the constitution is not permissible.

At the heart of the instant application is the question as to whether this court has the jurisdiction to entertain the two applications dated 15/10/2019 and 7/10/2019. Jurisdiction is the foundation of the competence of a court to hear and determine any matter. The question of jurisdiction takes primacy and urgency over any other issue that is pending before the court.

The locus classicus on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1** where **Justice Nyaragi** of the Court of Appeal held that:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In the case at hand, the question of jurisdiction was raised by the 5th Defendant in his notice of preliminary objection and his subsequent submissions on the same. The issue of res judicata was raised during the hearing of the applications. This issue within the ambit of preliminary point of law that can determine the outcome of the application. Thus the question of res judicata goes to the root of the competence these applications.

The question of res judicata is defined in terms of Section 7 of the Civil Procedure Act which states as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and

substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”

In **Henderson vs Henderson (1843) 67 ER 313** the doctrine of res judicata was explained as follows:

“.....where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.....”

In the instant matter, the 5th Defendant maintains that the two applications in question herein are not competent until and unless the order made by **Chitembwe J** on 30/4/2015 has been fully implemented. The said orders were upheld by the Court of Appeal on 15/12/2017 in Civil Appeal No.36 of 2015. The 5th Defendant contends that proceeding with the two applications would be contemptuous of the orders of this court issued **Korir J.** on 20/3/2018 which once again affirmed by the Court of Appeal in Civil Appeal No. 43 of 2018.

The 5th Defendant’s view is that this court is bound by the decision of **Korir J.** as upheld by the Court of Appeal and that the court has lacks the requisite jurisdiction to hear the application dated 7/10/2019 that the same should be forwarded for hearing and determination by the Employment and Labour Court.

On the other hand, the Learned Counsel for the Plaintiff, the 1st, 2nd and 3rd Defendants submitted that the court has the jurisdiction to handle the application placed before it as it is not yet *factus officio*. In the Learned Counsel’s view, the 5th Respondent has filed two applications seeking various remedies and if this court lacked jurisdiction to hear this application then it would automatically lack jurisdiction to hear any other application.

Further, Counsel is of the view that there is no similarity the instant application and the pending applications in this file and the applications are pending and yet to be determined. In that respect, Counsel submits that the issues in this application cannot be res judicata. He also contends that the application to set aside or review the decree which was determined by **Justice Chitembwe** was sought so that the parties can be heard on merit.

I’m in agreement with the submission by the Counsel for the 5th Defendant that this matter fall squarely within the ambit of res judicata. The argument by the Counsel for the Plaintiff, the 1st, 2nd and 3rd Defendants that the matter is yet to be heard on merits is untenable. The matter herein relates to the orders of 30th April, 2015, and it appears to me that those issues have been determined and what remains and has exhibited to be problematic is the execution of the decision delivered by **Hon. Chitembwe**.

This offends the cardinal principle of the rule of law as obedience to court orders is one of its cornerstones. I echo the powerful principles in the case of **Kenya Human Rights Commission vs Attorney General & Another {2018} eKLR** that the court has inherent powers to enforce its orders under Article 159 of the constitution as follows:

“Article 59 of the constitution recognizes the judicial authority of courts and tribunals established under the constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the constitution and the Law (Article 160) and exercises its judicial authority through its Judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.”

In **Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11(75/2015)**. **Nkabinde J** observed that:-

“The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

59. In the case of **Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2) [1975] 48 D.L.R(30)**, the court stated that;

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

60. Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in *Carey v Laiken* [2015] SCC17 that;

“Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect”

61. It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (Louis Ezekiel Hart v Chief George 1 Ezekiel Hart (-SC 52/2983 2nd February 1990). And in *Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another* [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

62. It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.”

It is abundantly clear from the about cases that all countries which observe and believe in the rule of law frown at the disgust act of disobeying court orders, decrees and/or direction. It would be a failure of justice to give a relief, hear or determine an application made contemptuous Applicant without having a single reasonable explanation as to why he has not complied with previous court orders. Thus, the Applicants herein do not deserve to be granted audience if the orders in **Justice Chitembwe’s** ruling have not been effected or executed. If so this Court shall allow impunity and disobedience to prevail in the circumstance.

Furthermore, said orders were issued by a court of concurrent jurisdiction and they were subsequently affirmed by a Court superior to this Court hence there can be no doubt that this court is bound by the orders in question. If the Plaintiff, the 1st, 2nd and 3rd Defendant, have felt aggrieved with the orders of April 30th aforementioned, their only recourse would an application to review the orders in question at the court of appeal or filing an appeal at the Supreme Court. As long as the these orders have not been varied by the court of appeal or the supreme, the hands of this court will remain tied up as regards entertaining and determining applications in this matter. In any event, this court is not able to hear and determine applications which interfere with the said orders for the reasons that the issues pertaining to the ownership of the suit company, its status and what should happen have already been decided.

I will proceed to say that whether the continuant of disobedience of court orders would be saved by further applications and motions by the applicants. This is not possible as stated in the persuasive authority from the Supreme Court of Jamaica in **Port Services Ltd v Mobay under Sea Tours Ltd and Firearms Fuew Insurance Co. SCCA No. 18 of 2001** the court reiterated:

“For there to be respect for the Law, and for there to be the prospect of smooth, and speedy dispensation of justice in our country, this court has to set its fact firmly against the inordinate, and in excusable delays in complying with rules of procedure once there is a situation such exists in this case, the court should be very reluctant to be offering a helpful hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigants deliberate action or inaction.”

It is imperative that the parties herein comply with the previous court orders as directed by **Justice Chitembwe**. As it stands the suit company is not properly constituted. Until and unless the 2nd and 3rd Defendants have not handed over all the properties belonging to **Salama Beach Hotel Limited** to the 4th and 5th Defendant defendants, an application or suit instituted in the name of the company is undoubtedly incompetent. This owes to the fact that the company does not have the capacity to sue and any suit purportedly made in its name is an illegality. As long as the Plaintiff wishes that the case be heard on merits, the applications which speak to that effect are res judicata because the ruling by **Chitembwe J** made definitive orders. Currently the plaintiff has not framed an issue for determination by the court hence the proposed interested parties have no an entry point.

Unless there is something in the contest of the pending applications which permit the court in doing equitable justice by granting the orders sought, this court’s view should be first to give effect to the Ruling of the court and compliance with the substantive orders. These words in the ruling as affirmed by the Court of Appeal appear to be commanding enough to be regarded as mandatory in nature. The tilting of impunity towards courts orders is a monumental time bomb and its consequences would plunge the country into anarchy.

As I have stated elsewhere, I am therefore in agreement with the Applicant that this matter directly and indirectly touches on issues that have already been litigated before a competent court by the same parties. For the above reasons, I make the following orders.

Orders:

By virtue of the decision of Justice Chitembwe on the 30th April, 2015, the applications herein remain non-suited until there is compliance with court orders. In this particular case, the order on eviction is self-executing and in my view requires no further motion to secure the remedy.

The decision by the court was fait accompli in regard to the legal entity in the name and style of Salama Beach Hotel Ltd. The suit initially contested with the 1st defendant and four (4) others is unlikely to retain its original claim as shown by all relevant facts taken together from the ruling of the court dated 30.4.2015.

In my view, if it was to be otherwise the intended proposed interested party claim belongs to ELRC. The applicant save for the settled issues are at liberty to apply for seeking such leave with such evidence to be determined with such consequential orders as may be necessary to avoid multiplicity of suit on the same cause of action.

I make no orders as to costs.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 24TH DAY OF FEBRUARY, 2020.

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Munyithya for the 5th Defendant
2. Mr. Ndegwa for the plaintiff and the 1st, 2nd and 3rd defendant
3. Mr. Kibunja for the 4th defendant
4. Ms. Kavangi holding brief for Ms. Githogori for the interested parties