



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 10 OF 2020 (COMPLEX)

SALAMA BEACH HOTEL LIMITED.....1ST APPLICANT

ISAAC RODROT.....2ND APPLICANT

STEFANO UCCELLI.....3RD APPLICANT

MARIO SCOTTI CAMUZZI.....4TH APPLICANT

VERSUS

DR. ARCURI IGNAZIO.....1ST RESPONDENT

D. SSA DAL MORO MADDALENA.....2ND RESPONDENT

AVV. DE CESARI PATRIZIA.....3RD RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Munyithya, Mutugi, Umara & Muzna Advocates for the Applicants

Respondents in person

RULING

These proceeding seems to have originated from a fast track plaint dated 18.5.2020 by the Plaintiffs seeking various reliefs against the defendants.

By way of a certificate of urgency accompanied with a notice of motion dated the same day pursuant to Order 40 Rule (1) and (2) of the Civil Procedure Rules 2010 and Articles 35 and 159 (2) of the Constitution the following orders were applied for from this Court in the interim period.

(a). That an order of temporary injunction restraining the defendants by themselves, their successors in title, agents or otherwise while in Italy, Kenya or otherwise from disposing their interests (if any), properties, shares and or other assets in Salama Beach Hotel Limited, the 1st applicant pending the hearing and determination of this application interparties.

(b). That an order of temporary injunction restraining the defendants by themselves, their successors in title, agents or otherwise while in Italy, Kenya or otherwise from disposing their interests (if any), properties, shares and or other assets in Salama Beach Hotel Limited, the 1st applicant pending the hearing and determination of this suit.

(c). That a mandatory order be issued summoning the defendants; DR. ARCURI IGNAZIO, D. SSA DAL MORO MADDALENA and AVV. DE CESARI PATRIZIA to appear in Court for oral examination to confirm the status of the alleged receivership proceedings in Italy and the relevance of the receivership of proceedings to the identity and property of the 1st plaintiff.

(d). That the costs of the application be provided for.

It is clear from the directions that an order was issued to have the summons to enter appearance and the corresponding certificate of urgency a carrier to the notice of motion be served upon the defendants through their respective emails. The plaintiffs counsel in compliance with the order moved to serve the defendnats via emails which he depones came into his knowledge by virtue of his interaction in a matter already

pending in Court. With that the plaintiff counsel sought a determination of this Court with regard to the application.

Determination

In the entire suit and subsequent notice of motion, it seems to me from the statement of account and pleadings submitted to this Court, service presumably was not in conformity with the Civil Procedure Rules. The question in this case is on service of persons or entities outside Kenya that is provided for under Order 5 Rule 21 and the observance of Rules 25,26,27, 28, 29 and 30 of the Civil Procedure Rules.

With regard to foreign service of Court processes Order 5 Rule 25 provides as follows:

“Every application for leave to serve such summons or notice on a defendant out of Kenya shall be supported by affidavit or other evidence, stating that in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or county such defendant is or probably may be found, and whether such defendant is a common wealth citizen or British protected person or not and grounds on which the application is made, and no such leave shall be granted unless it is made sufficiently to appear to Court that the case is a proper one for service out of Kenya under this Order 26: Any order giving leave to effect such sentence or such notice shall limit a time after such service or notice within which such defendant is to enter an appearance. Such time to depend on the place or country where or within which the summons is to be served or the notice given.”

Admittedly, Order 5 Rule 25 and 26 of the Rules provides that, with regard to a domestic Court assuming jurisdiction and authority over defendants outside the extent of the local jurisdiction mode of service of any suit papers or summons has to afford the claimant an obligations governed under the rules of the game in rule 25 and 26 of our Civil Procedure Rules.

The next matter which arises is in respect of the order of this Court issued on 22.5.2020. That the applicants/plaintiffs advocate serve the material certificate of urgency notice of motion and or summons to enter appearance filed in Court through the digital platform and address known of the defendants/respondents. There is no denial that the applicants/plaintiffs counsel moved towards effecting service as deponed in his affidavit of service filed in Court on 26.5.2020. This purported orders issued on 22.5.2020 was not in compliance with Order 5 Rule 25 and 26 of the Civil Procedure Rules on application for leave for the Court to enquire and determine the issue on service of the suit material in a foreign country. This rule is concerned with entering of appearance on account of a suit or claim filed within the Court system in Kenya and the defendants reside out of the country.

If so, the leave so specifically applied for by the plaintiff/applicants to serve summons or notices of the Court outside the jurisdiction of the Republic should be sanctioned by the Court with clear directions for the determination of the rights of the parties on fair hearing and due process in Article 50 of the Constitution.

According to the record, the proceedings on record appear not to address service of summons or applicants case outside the country. This leads me further to point out that in the particular circumstances of this case, the advocates for the applicants/plaintiffs never sought leave prior to the issuance of the purported documents to be served through the respective emails or DHL upon the defendants as deponed in the affidavit of service. Lack of invoking a statutory provision on leave rendered any decision made effecting service of summons or motions outside the country null and void abinitio. As such because of the default provision on, this Court is unable to exercise jurisdiction over the motion as canvassed by the applicants/plaintiffs, without proper service.

In the upshot to afford the defendants/respondents an opportunity to be heard in person or through legal counsel due attention and regard be given to the provisions of Order 5 Rule 25 and 26 intended to apply in the nature of the proceedings initiated by the applicants/plaintiffs. It follows then that the order on temporary injunction pending the hearing and determination of this suit is not available to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JUNE 2020

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R. NYAKUNDI

JUDGE

This Ruling has been delivered in absence of the parties in terms of Article 48 and 159 of the Constitution and practice directions in Gazette Notice by the Chief Justice No. 3137 dated 17.4.2020.