



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 5 OF 2019

ALMOND RESORT LIMITED.....PLAINTIFF

VERSUS

MOHAMED MAHAT KUNO.....DEFENDANT

RULING

A. Introduction:

1. Coming up for determination are the Defendant Notice of Motion Application dated 25th April, 2019 and Preliminary Objection dated 8th May, 2019 and the Plaintiff Notice of Motion Application dated 6th June, 2019.

2. The Defendant Application dated 25th April, 2019 is brought under Order 2 Rule 15(1)(d) and Order 8 Rule 2 of the Civil Procedure Rules 2010 and Section 3A, of the Civil Procedure Act, (Cap 21), Laws of Kenya and all the enabling provisions of the law. It is supported by the supporting Affidavit sworn by Mohamed Mahat Kuno of even date. The application seeks the following Orders: -

- 1) This Honourable Court do strike out the Plaintiff Amended Plaintiff.**
- 2) In the Alternative the Honourable Court do disallow the amendment in the amended plaintiff.**
- 3) The court be pleased to Order the plaintiff to pay to the 1st defendant the cost of the suit herein.**

3. The defendant Preliminary Objection dated 8th May, 2019 and filed on even date on the other hand raises the following Points of Law: -

1) The plaintiff filed a Notice of Motion Application on 30th July, 2018 in which he sought orders restraining the defendant from the management and affairs of the Plaintiff Company. The plaintiff Notice of Motion Application is still pending and is yet to be heard and determined. By a chamber summons application dated 18th April, 2019, the plaintiff has during the pendency of its Notice of Motion Application filed in Court on 30th July, 2018, applied to this Honourable Court for Orders with regard to the management and operation of the plaintiff company. The Plaintiff Chamber Summons Application offends the Provisions of Section 6 of the Civil Procedure Act as it seeks a determination of this Honorable Court in respect of a matter that is also directly and substantially in issue in a previously instituted proceedings between the same parties.

2) That the plaintiff's Chamber Summons Application dated 18th April, 2019 is an abuse of court process and the same should be stayed pending the hearing and determination of the Notice of Motion Application filed in Court on 30th July, 2018.

3) That the amended Plaintiff dated 11th April, 2019 and filed in Court on even date offends the provisions of Order 8 Rule 1 as the same has been filed without leave of the Court and the same ought to be struck out.

4) That the plaintiff Chamber Summons Application dated 18th April, 2019 which is premised and predicated on the said amended plaintiff is thus fatally defective.

5) That the Plaintiff Chamber Summons Application dated 18th April 2019 couched and disguised as an Application seeking for control of the Plaintiff company is spurious attempt by the plaintiff to obtain mandatory injunction to obtain possession in respect of Title Number Garissa/Block II/530 owned by the defendant and his Grandfather, Ali Dubat Fidhow.

6) That the Plaintiff Chamber Summon Application dated 18th April, 2019 is therefore an attempt to steal a match on the

defendant and circumvent the due process of the Law.

7) That the Plaintiff Chamber Summons Application dated 18th April, 2019 is unmerited and ought to be stayed or dismissed with costs.

4. In Response to the hereinabove defendant application and Preliminary Objection, the Plaintiff filed a Replying Affidavit dated 6th June, 2019 and filed on 11th July, 2019. And further filed a Notice of Motion Application dated 6th June, 2019 and filed on 7th June, 2019 on the other hands seeks the following Orders:

1) THAT this Honourable Court be pleased to admit the Plaintiff's amended Plaint dated 18th March, 2019 and filed on 11th April, 2019.

2) THAT the costs of this Application be in the cause.

5. Furthermore, the Plaintiff has filed a Chamber Summons Application dated 18th April, 2019 and filed on 23rd April, 2019 seeks the following Orders: -

1) THAT this application be certified as urgent and it be heard ex parte in the first instance during the current court vacation.

2) THAT the operation of the plaintiff business and hotel known as Almond Resort be under the management of an independent management company to be appointed within seven(70) days jointly by the plaintiff and the 1st defendant pending the hearing and determination of this application.

3) THAT in the alternative to (2) above , the operations and management of the plaintiff business and hotel known as Almond Resort be under the management of two(2) joint managers each of whom shall be appointed by the plaintiff and the 1st defendant respectively pending the hearing and determination of this application.

4) THAT the 1st Defendant do furnish accounts of all income and expenditure of the Hotel known as Almond Resort for the period between December 2017 to date.

5) THAT the operation of the Plaintiff business and hotel known as Almond Resort be under the management of an Independent management company to be appointed within seven (7) days jointly by the plaintiff and the 1st defendant pending the hearing and determination of this suit.

6) THAT in the alternative to (5) above, the operations and management of the Plaintiff business and Hotel known as Almond resort be under the management of two(2) joint managers each of whom shall be appointed by the plaintiff and the 1st defendant respectively pending the hearing and determination of this suit.

7) THAT this Honourable Court do issue such other directions and/or Orders as the court may deem just and expedient to grant.

8) THAT the costs of this application be in the cause.

6. Both Parties filed their respective submissions in regard to the Notice of Motion Application dated 25th April, 2019 and Preliminary Objection dated 8th May, 2019. The Defendant submissions are dated 26th June, 2019 and filed on 1st July, 2019. The Plaintiff submissions are dated 8th July, 2019 and filed on 11th July, 2019.

B. Background:

Defendants/Applicants Case:

7. Gist of the Defendant application dated 25th April, 2019 and his Preliminary Objection dated 8th May, 2019 is that the Plaintiff herein filed their amended Plaint on 11th April, 2019 without the leave of this Court.

8. It is the defendant case that in response to the Plaintiff suit, he filed his Statement of defence on 8th October, 2018 and served the same upon the plaintiff advocate on the same date, and in their submissions they allege that as provided for under Order 2 Rule 13 of the Civil Procedure Rules, 2010 pleadings should close 14 day after service of the reply to defence or Counterclaim and if none is filed then 14 days after service of the defence.

9. In this regard they submitted that since neither a reply nor a counterclaim was served, pleadings herein came to a close on 22nd October, 2018, that is 14 days after service of their statement of defence. In this respect, the Plaintiff amended plaint was filed on 11th April, 2019 contrary to Order 8 Rule 1 which provides that a party can amend their pleadings before close of pleadings, but to do so after close of pleadings the leave of the court is needed. They therefore submitted that since the plaintiff amended plaint was filed in breach of the above provisions of the law, being without the leave of the court, the same ought to be expunged, struck out or disallowed.

10. In addition, the Defendant has submitted that the Plaintiff action cannot be cured by Article 159 of the Constitution, arguing that the same is not a cure and a panacea for all manner of procedural lapses and blatant disregard of the law. He further argues that allowing the said amended plaint would be prejudicial to him as he would be denied an opportunity to challenge the proposed amendments.

11. In regard this the Defendant relies on the following authorities, *ELC Case No. 66 of 2013, George Kamau & 5 Others vs County Government of Transoia* and the case of *Zacharia Kinyua vs Muriithi Kallen, Embu High Court Civil case No. 159 of 2010.*

12. In respect to issue of *subjudice* raised by the defendant in his Preliminary Objection challenging the Plaintiff Chamber summons application dated 18th April, 2019. The Defendants submitted that the same offends section 6 of the Civil Procedure Act, as the issues raise in the chamber summons application are issues which are directly and substantially in issue between the same parties in the Notice of Motion Application dated 30th July, 2018 which is still pending before this court.

13. In sum the defendant is alleging that the issues being raised in the latter Chamber summon Applications are issues which are also to be addressed by this court in the earlier application by the Plaintiff dated 30th July, 2018, and this they argue offends the *subjudice* principles. In this respect they rely on the following authorities, *Heritage Insurance Company vs Patrick Kasina Kisilu, Machakos Civil Appeal No. 142 of 2015* and *E. Ouko vs Speaker of National Assembly, Nairobi Judicial Review Application Number 108 of 2017.*

14. In sum the defendants based on the foregoing is urging the court to allow their application and Preliminary objection

Plaintiff Respondent Case:

15. The plaintiff through their written submissions identified three issues to be addressed in regard to the Defendant application and Preliminary Objection and his own application dated 6th June, 2019 seeking the court to admit their amended plaint. The issues addressed by the plaintiff are as to whether the amended plaint should be struck out or admitted out of time, secondly, whether the court should allow pleadings filed out of time without leave and finally the prejudice if any suffered by the defendant.

16. On the first issue on whether the amended plaint should be struck out or admitted out of time, the Plaintiff submitted that the power of the court to strike out pleading is a discretionary one that can be exercised where an amended plaint amounts to an abuse of the court process. In this case they allege that their amendment to their plaint was necessitated by the defendant who registered another company by the name Palm Oasis Resort Limited and subsequently commenced rebranding of the plaintiff.

17. Further, the plaintiff submitted that the amendment was made after enquiring from the Deputy Registrar vide a letter dated 9th May, 2019 as to whether the defendant had filed a statement of defense or entered an appearance, which letter was not responded to, and upon perusal of the file they did not come across the same and thus were never aware of the filed defense until 27th May, 2019 when they were shown the same in court, and that the same had been served upon the Plaintiff former Advocates who did not notify him.

18. And that the reason they did not seek leave to file their amended plaint was because they were not aware that the plaintiff had filed a defence as their former Advocate never notified them despite being served. In this regard the Plaintiff relies on the following Authorities, *Crescent Construction Co. Ltd vs Delphis Bank LTD 92017) eKLR* and *Uchumi Supermarket Limited & Another vs Sidhi Investments Limited (2019) eKLR.*

19. On the second issue regarding as to whether a court can allow pleadings filed out of time and without leave, the Plaintiff submitted that section 95 of the Civil Procedure Act and Order 50 Rule 6 and section 59 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya clothes this court with powers to allow pleadings filed out of time and without leave, especially where there is no mala fides on the part of the party seeking the court indulgence. They submitted that an inadvertent failure by a party should not render civil proceeding incurable.

20. Further, the Plaintiff submitted that Article 159(2)(d) of the Constitution provides that courts should administer justice without undue regard to procedural technicalities, and in this case the instant amended plaint was filed without leave inadvertently and therefore the court ought to allow the same.

21. In this regard they relied on the following authorities, *Chairman, Secretary and treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another vs Francis Bahati Diwani & 2 Others (20140 eKlr, Nichlus Kiptoo Arap Korir Salat vs Independent Electoral and Bounderies Commission & Another(2013) eKLR.*

22. On the final issues addressed by the Plaintiff regarding prejudice if any, the plaintiff submitted that if the court allows the amended plaint the defendant would not suffer any prejudice, urging the court to allow the same so that it would be able to effectively deal with the matter in issue before it. In addition, they alleged that the intention of the defendant is to dismiss the suit so as to have sufficient time to rebrand the plaintiff and defeat justice heavily relying on Article 159 of the Constitution to urge the court to allow their amended plaint.

C. Issues Arising:

The following are the main issues in my view that arise from the foregoing

- a) Whether the court should strike out the amended plaint filed without the leave of the court
- b) Whether the Plaintiff Chamber Summons Application is *subjudice*

D. Issues and Analysis:

a) Whether the court should strike out the amended plaint filed without the leave of the court.

23. According to the Defendant, the Plaintiff Amended Plaint was filed out of time that is after the close of the pleadings without the leave of the court. They submitted that by the time the amended plaint was filed pleadings had closed and that the Plaintiffs required the leave of the court before filing the Amended Plaint

24. **Order 2 Rule 13** of the Civil Procedure Rules provides as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

25. **Order 8 Rule 1(1)** of the Civil Procedure Rules states as follows:

“(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”

26. It is therefore true, as submitted by the defendant that the pleadings in this matter should ideally have closed by 22nd October, 2018 being fourteen (14) days from 8th October, 2018 after the serving of the Statements of Defence upon the Plaintiffs. However, the plaintiff has alleged that they were never aware of the said defence filed by the Defendant as their former advocate never informed them of the same, and that they only became aware on 27th May, 2019 when the defendant served them in court.

27. Consequently, the Plaintiffs were entitled to file their Amended Plaint on or before 22nd October, 2018, which they did on 11th April, 2019. The Plaintiffs therefore required the leave of the court to file the Amended Plaint.

28. **Section 1A** of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and provides as follows:

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

29. **Section 1B** of the same Act, on the other hand provides for the duty of court and states:

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

30. In *Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another vs. Francis Bahati Diwani & 2 others(Supra)*, the Court in this regard noted:-

“Striking out of a pleading, especially where the Rule does not expressly provides so, which has been filed out of time is an extreme measure which is resorted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court.”

31. In addition, Madan JA in *D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another [1980] eKLR* stated thus:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

32. Further, the Court of appeal in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & others (2013) eKLR*, held as follows:

“... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

33. The above decision of the Court of Appeal shows that the strict compliance with form should not be adhered to at the altar of substance, additionally the court in exercising such discretion on whether or not to order striking out of any pleading that is non-compliant with the rules ought to be alive to its obligations under Article 159 of the Constitution of Kenya, 2010 to see to it that justice is administered without undue regard to procedural technicalities.

34. In this regard the plaintiff reason to this court for filing their amended pleadings out of time was that they were never aware that the defendant had entered appearance and filed a defence which defence was served upon his former counsel, whom they allege never informed them of the same.

35. In my view I find the reason plausible, as mistake of Counsel should not be visited upon a litigant, this is in view of the fact that the plaintiff somehow has attempted to demonstrate that he took some positive steps including writing to the Registrar of this court and perusing the court file with a view to ascertain as to whether a defence was filed. Therefore am convinced that in the interest of justice and the stage of this suit that no prejudice would be suffered by the defendant if the amended pleadings are allowed.

b) Whether the Plaintiff Chamber Summons Application is subjudice:

36. On this issue, the Defendant submitted that the Plaintiff in their hereinabove chamber summons Application dated 18th April, 2019 has raised matters similar as those raised in their Notice of Motion dated 30th July, 2018 arising between the same parties and the same subject matter.

37. The prayers sought by the plaintiff in their notice of Motion Application dated 30th July, 2018 are Orders:

1) THAT this application be certified as extremely urgent and service be dispensed with at the first instance and the same be heard ex parte.

2) THAT an order of temporary injunction do issue restraining the defendant whether by himself, his agents, proxies, servants or any person acting under his authority from presenting, passing and/or conducting himself as a director of the plaintiff including making, authoring, signing and/or executing any document related to the plaintiff such as resolution, signing cheques, borrowing money on behalf of the plaintiff, dealing with the plaintiff assets or in any manner abusing his position as a director of the plaintiff company pending hearing and determination of this application.

3) THAT an order of temporary injunction do issue restraining the defendant whether by himself, his agents, proxies, servants or any person acting under his authority from presenting, passing and/or conducting himself as a director of the plaintiff including making, authoring, signing and/or executing any document related to the plaintiff such as resolution, signing cheques, borrowing money on behalf of the plaintiff, dealing with the plaintiff assets or in any manner abusing his position as a director of the plaintiff company pending hearing and determination of this suit.

4) THAT the Honourable Court be pleased to grant any other order and relief that it may deem fit and just to grant.

5) That the cost of this application be in the cause.

38. Sections 6 of the Civil Procedure Act prohibits a court from hearing a matter that is *sub judice* as follow:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

39. Consequently, for the doctrine to apply the following principles ought to be present:

(1) There must exist two or more suits filed consecutively.

(2) The matter in issue in the suits or proceedings must be directly and substantially the same.

(3) The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.

(4) The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

40. The importance of the *subjudice* principle was well captured in the case of *Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993*:

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

41. In this case there is no doubt that the two applications by the Plaintiff are between the same parties and filed within the same suit, however the Defendant has failed to demonstrate that the prayers sought in the two applications are necessarily similar.

42. An ordinary look at the hereinabove prayers in the two applications in my view, although relate to the same subject matter are not the similar, It must be noted that where a party raises an objection barring the Court from proceedings with a matter, the burden is upon that party to satisfy the Court that the conditions favourable to the grant of such orders do exist since the Court does not ordinarily bar a party from accessing the seat of justice without compelling reasons.

43. It was therefore incumbent upon the defendant to place before this Court materials upon which the Court would be in a position to make a definite finding that in fact the issues in the two applications at this stage are similar or substantially the same. Am not convinced at this juncture that the issues in both applications are the same or are in substance the same.

CONCLUSION:

In conclusion, it is my finding, holding and order that;

i) That this court admits the plaintiff amended plaint based on the fore-going.

ii) The court dismisses the Defendant application dated 25th April, 2019 and Preliminary Objection dated 8th May, 2019.

iii) And instead allow the Plaintiff Notice of Motion Application dated 6th June, 2019.

iv) The respondent gets costs in any event.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT GARISSA THIS 25TH DAY OF JULY, 2019.

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C. KARIUKI

JUDGE