

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 20 OF 2011

ROMANTIC HOTELS KENYA LIMITED PLAINTIFF/APPLICANT

VERSUS

PETER SOLACHER

T/A PETLEY'S LAUNDING DEFENDANT/RESPONDENT

RULING

The Notice of Motion dated 9.8.2016 seeks to review, vary or set aside the orders of this court issued on 24.3.2015 dismissing the suit. The application is supported by two affidavits of the plaintiff's counsel, Jackline Chepkurui Chepkwony sworn on 9.8.2016 and 10.10.2016 respectively. Counsel for the respondent filed grounds of objection to the application as well as a replying affidavit sworn by Nelson Sitonik on 4.10.2016.

The issues raised in the application as indicated in the written submissions is that this court issued a notice for the dismissal of the suit. The notice was not served upon the plaintiff's counsel. The suit was dismissed by the court in the absence of both parties and their counsels. It is further indicated that on 30.8.2012 Hon. Justice C.W. Meoli had made orders to have this matter transferred to Mombasa High Court and be consolidated with Mombasa HCCC No. 111 of 2008. Unfortunately, those orders were not effected. Counsel for the plaintiff attended court on 26.7.2015 in Mombasa for Civil Suit No. HCCC 74 of 2011 when she learnt that this suit had been dismissed for want of prosecution. Counsel reiterate that the dismissal notice was not served upon her office. It is also stated that the order for the consolidation of the suits was made by consent.

Counsels for the respondent opposed the application. it is submitted that the order to consolidate is erroneous in that the three suits relate to totally different causes of action. Suit number Malindi HCCC 20 of 2011, Romantic Hotels Kenya Ltd v Peter Sollacher t/a Petley's Launding relate to an action based on nuisance caused by loud music from a disco. Suit number Mombasa HCCC 111 of 2008 Peter Sollacher t/a Petley Launding v Diani Peak Ltd involves a claim for breach of tenancy while Suit Number Mombasa HCCC 74 of 2010 Peter Sollacher v Romantic Hotels Kenya Ltd & Joseph Brunjehner involves a claim for breach of contract and is seeking repayment of 90,000 Euros.

It is further submitted that the orders to consolidate the suits was obtained irregularly and did not take effect. Further, the case breach of tenancy and the one for nuisance belongs to the Environment and Land Court while the one for breach of contract belongs to the Commercial Court. The plaintiff in this suit has not filed witness statements or taken any action.

I have read the rival arguments. The record herein shows that the original file was forwarded to the Mombasa High Court in line with the order of that court of 7.7.2016. Unfortunately, the original file was not photocopied to create the current skeleton file. Counsel for the applicant seems to have caused this skeleton file to be opened without an order of the court. What has been photocopied and made to be the skeleton file does not include the contents of the original file. The pleadings, summons, affidavits of service, orders issued by Meoli J for consolidation among others are not part of the record. The notice for dismissal was also conveniently omitted. On 1.8.2016 counsel for the applicant wrote to this court indicating that she had perused the court file and noted that the notice for dismissal was not served on her

and that there was an order to transfer the file to Mombasa.

Counsel for the applicant indicate that the order for consolidation was granted by consent. I have seen the order given on 30.8.2012. It was extracted and issue on 1.8.2016. This was three years later. It is evident that no effort was made to have the file transferred to Mombasa. Further, the order was given ex-parte and not by consent as stated in paragraph three of the plaintiff's further affidavit sworn on 10.10.2016.

As indicated hereinabove, I do not have the advantage of perusing the exact record of this case. The original file was sent to Mombasa. The issues being raised by the respondent's counsels are quite relevant as it appears that, the tree suits relate to different causes of action. However, since called for this file on 26.7.2016 for perusal, it would be convenient to allow the Mombasa Court peruse the files and make an independent decision. I will exercise my discretion and set aside the orders of this court dismissing the suit for want of action. This decision is purely made on the fact that the plaintiff seems to be totally in the dark. The suit was filed in 2011. By 2015 this file was idle in the registry and notices were issued of its dismissal. From 30.8.2012 when the order for consolidation was made upto 24.3.2015 when the suit was dismissed, a period of over two years, no follow up had been made. It is evident that even the pending suits in Mombasa were idle for all that long.

In the end, I do set aside the order of the court of 24.3.2015 dismissing the suit for want of prosecution. Parties shall bare their own costs.

Dated and delivered at Malindi this 30th day of January, 2017.

S.J. CHITEMBWE

JUDGE