



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 110 OF 2012**

**GIANLUIGI CERNUSCHI ..... PLAINTIFF**

**VERSUS**

**MERRY BEACH LTD ..... DEFENDANT**

**RULING**

The notice of motion dated 12<sup>th</sup> September 2015 seeks leave to amend the plaint as per the draft amended plaint. The application is supported by the plaintiff's affidavit sworn on 12<sup>th</sup> September, 2015 and a further affidavit sworn on 22<sup>nd</sup> February, 2016. The defendant filed a replying affidavit sworn by Walter Kilonzi on 30<sup>th</sup> November 2015. The defendant also filed a preliminary objection on 1<sup>st</sup> December, 2015. The objection is against both the entire suit and the application dated 12<sup>th</sup> September, 2015. Parties agreed to determine both the application and the preliminary objection by way of written submissions.

Counsel for the applicant submit that the amended plaint seeks to enjoin another defendant by the name Massoud Mowlazadeh who is a director of the defendant company. It is also submitted that there were some documents and information that was not in possession of the plaintiff but he has now obtained the information hence necessitating the amendments. Counsel contend that this is not an employment dispute as alleged by the defendant in the preliminary objection dated 27<sup>th</sup> November 2015. Counsels maintain that the plaintiff obtained work permits in 2009 and the same were issued through the defendant company. Whether those permits enabled the plaintiff to undertake some work are issues to be determined during the hearing. The defendant acknowledges in its counter claim that the plaintiff and the person to be enjoined as a second defendant were co-directors of the defendant company.

It is also submitted for the plaintiff that Order 1 rule 3 of the Civil Procedure Rules allows a party to be enjoined if there is a claim against him. Further, Order 109 provides that no suit should be dismissed by reason of misjoinder or non-joinder of parties. The preliminary objection does not meet the requirements of a preliminary objection as set out in the case of **MUKISA BISCUITS MANUFACTURING LTD VS WEST END DISTRIBUTORS LTD** (1969) E.A. 696.

Counsel for the defendant opposed the application. Counsel maintains that the preliminary objection is based on the fact that the plaintiff is not a Kenyan licensed Architecture and that the plaintiff had a class H permit as a shareholder and director of Merry Beach Ltd. The defence counsel has gone into great details to enumerate all classes of permits issued under Immigration Act No. 12 of 2011. The permits range from class A to M. Counsel has explained the purposes of each class of permit. For the purposes of this ruling I do find that there is no need to go into great details of each class of permit.

Counsel for the defendant submit that the plaintiff suit is bad in law and a nullity since the plaintiff had no permit authorizing him to work in Kenya. Class H permit is issued to an investor and not an employee. Counsel relies on cases of **FIVE FORTY AVIATION LTD VS CAPTAIN RICHARD OLOKA**. Civil Appeal No. 506 of 2013, Milimani Nairobi [2015] eKLR and that of **KENYA AIRWAYS LTD VS SATWANT SIGNH FLORA** [2013] eKLR. In both case the High Court and Court of Appeal held a suit based on an illegality ought to be struck out. It is also contended that the request to enjoin Massoud Mowlazadeh is also not supported by any proof that the plaintiff was employed by him. When the plaintiff applied for the entry permit dated 8<sup>th</sup> June, 2009 he indicated that he is a Canadian yet in the amended plaint he states that he is an Italian. The defendant company is distinct from Massoud who is only a director. It is further submitted that this court has no jurisdiction to deal with matters relating to employment. Reference has been made to the case of **JEFFERSON KALAMA KENGA & 2 OTHERS VS REPUBLIC**. Court of Appeal. [2015] eKLR.

The original plaint was filed in this court on 11<sup>th</sup> July, 2012. The prayers being sought were payment of Kshs.19,425,000/= equivalent to 185,000 euros. The proposed amended plaint is seeking payment of 354,000 euros which is approximately Kshs.47,790,000/=. The total amount being claimed is itemized as balance of payment for agreed emoluments for the supervision of work and/or restitution totalling 147,250,000/= euros. The second item is three months' pay in lieu of notice and damages for unlawful termination totaling 63,750 euros. There is a claim for director's salary in the sum of 110,000 euros and finally a refund for the purchase of two motor vehicles totaling 33,000 euros.

The preliminary objection is premised on the contention that the claim involves an allegation of employment and therefore it is only the Employment and Labour Relation Court that can hear the dispute. It is also submitted that the plaintiff is not a registered Architecture and cannot claim any payment for such services. Lastly it is submitted that the plaintiff had no work permit to enable him engage in gainful employment. The defendant filed a defence and counter claim on 15<sup>th</sup> October 2012. Paragraphs 19 and 20 of the defence and counter claim states as follows: -

**19. One of the plaintiff's other directors at the material time Mr. Massoud Mowlazadeh who resides and is domiciled in Italy had trusted the 1<sup>st</sup> defendant, as his co-director and had entrusted him with the fiduciary duty to oversee the affairs of the plaintiff concerning the development of the plaintiff's Plot Chembe/Kimbamshe/374, Mayungu, Malindi. That trust extended to signing cheques which he would then release to the 1<sup>st</sup> defendant for the 1<sup>st</sup> defendant to also sign and release the cheques for payment for the expenses of the plaintiff, Merry Beach Ltd.**

**20. Further to paragraph 19 above, in breach of his fiduciary duty to the plaintiff, Merry Beach Ltd, the 1<sup>st</sup> defendant executed agreements on behalf of the plaintiff with the 2<sup>nd</sup> defendant, Simncho Building & general Contractors Ltd for the construction of certain villas, apartments and other improvements on the plaintiff's said property. The 1<sup>st</sup> defendant did not disclose to the plaintiff that he was both a majority shareholder and a director of the 2<sup>nd</sup> defendant.**

It is clear from the defence that the two parties herein engaged each other and that the plaintiff was the one overseeing the affairs of the defendant company. The plaintiff is now claiming payment for the role of overseeing the affairs of the defendant company. The term "**oversee**" is defined by the Oxford English Dictionary to mean to "**supervise**". It is clear that there was no employment agreement between the two parties. The pleadings also show that the plaintiff was not engaged as an Architect but simply made a draft of the sketch plan for the development on the suit land, Chembe/Kibambamshe/374, Mayungu, Malindi. The plaintiff also was a director of the defendant company. He later resigned from his directorship. He is claiming payment for the role he played during the construction of properties on the suit land. The defendant is also claiming about 85,000 euros from the plaintiff.

A preliminary objection should raise pure legal points. In the **MUKISA BISCUITS** case (supra) the court states as follows: -

**“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.”**

In the case of **OMONDI & ANOTHER V NATIONAL BANK OF KENYA LTD & 2 OTHERS [2001] KLR 579**, the court held that it is forbidden for counsel to take, and the court to purport to determine a preliminary objection contested facts or in the exercise of a judicial discretion. The facts herein are contested. There is the prayer to amend the plaint which depends on the discretion of the court. The court has discretion to either allow or reject the request to amend. Such a request cannot be subjected to a preliminary objection.

Given the pleadings herein, I do find that the preliminary objection is purely argumentative but not one which settles the disputes between the parties should it be upheld. There is a claim of 33,000 euros for the purchase of two motor vehicles, a pick up and a Rav4. The plaintiff alleges that he used his own money to buy those vehicles and he is now seeking a refund. The vehicles were registered in the name of the defendant company. The claim by the plaintiff is not one based on a contract of employment but emanates from a business relationship. According to the plaintiff he was asked by the yet to be enjoined defendant to come to Kenya and oversee the development. The plaintiff also indicate that it is the defendant who processed work permit for him. The defendant acknowledges that it is the plaintiff who was supervising the work, engaging professionals relating to the work and even used to make payments for those providing services during the construction. For the defendant to claim that the plaintiff was not authorized to work yet it is the same defendant who allowed the plaintiff to carry out all the development activities is to make an about turn. The plaintiff was entrusted with over 1 million euros during the construction. All the issues involving the relationship between the parties leading to the plaintiff's claim and the defendant's counter claim are better resolved through a full hearing.

With regard to the request to enjoin Massoud Mowlazadeh, it is submitted by the plaintiff that he is the person who requested him to come to Kenya and oversee the work. There is no harm in having Massoud Mowlazadeh enjoined personally as a defendant in this suit. The overriding objective is to have any party who is alleged to have been involved in the suit and against whom a claim is made to be enjoined so that he can defend himself. Should the plaintiff be successful, the judgement would be against the defendant company as well as Mr. Massoud Mowlazadeh as an individual. The counsel for the defendant is not acting for Mr. Massoud Mowlazadeh and should therefore not be heard objecting to the request to enjoin him. No prejudice will be suffered by the defendant.

It has been submitted that the plaintiff lied to the Immigration officer and indicated that he is a Canadian yet he is an Italian. I have seen a letter dated 19<sup>th</sup> November, 2013 from the firm of Kinyua Muyaa & Co. Advocates addressed to several Government officers. The letter indicate that the plaintiff was a director of Merry Beach Ltd and he holds both an Italian and Canadian passport. The defence counsel is therefore aware that the plaintiff has dual citizenship. That cannot be an issue to be brought for determination at this stage.

The upshot is that the preliminary objection lacks merit and is hereby disallowed. The plaintiff's application dated 12<sup>th</sup> September, 2015 is granted as prayed. The plaintiff to file and serve the amended plaint within fourteen (14) days hereof. Costs shall follow the outcome of the main suit.

**Dated and delivered in Malindi this 16<sup>th</sup> day of June, 2016.**

**S.J. CHITEMBWE**

**JUDGE**