

REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT NO. 35 OF 2010

ARN HOLDING COMPANY LIMITED PLAINTIFF

VERSUS

GESTIONE RESTORANTI AFFINI LIMITED DEFENDANT

RULING

1. The plaintiff company had closed its case when the defendant company, through its new advocates Munyao, Muthama and Kashindi Advocates filed the Notice of Motion dated 19th February, 2014. The said Notice of Motion was filed on 20th February, 2014 and seeks that the plaint be struck out and the suit dismissed. The Notice of Motion is expressed to be brought under Order 2 rule 15(d) of the Civil Procedure Rules and is supported by the affidavit of Eloisa Minoprino who describes herself as an officer of the defendant company. The defence hearing scheduled for 24th February, 2014 was therefore put aside to pave way for the hearing of the said application.

2. The plaintiff relied on grounds of opposition filed. When the application came up on 25th February, 2014, both parties made lengthy oral submissions and relied on multiple legal authorities. Initially, ruling was set for 15th April, 2014 but that was not to be as I was empanelled to sit in Constitutional Petition No... 594 of 2013 in Nairobi in that period.

3. I have now taken time to study the application and the submissions made by the respective parties and the authorities cited. In addition to perusing the two agreements which are the subject matter of the application. Three key issues emerging from the material before me are inter alia:

1. Which of the two agreements (made in Rome on 1st December 2008, and Malindi on 23rd January, 2009) is applicable.
2. Are the said agreements related, valid and enforceable.
3. Who are the parties to the two agreements?
4. Is the court entitled to assume jurisdiction over this dispute?

In my considered view, these issues cannot be conclusively determined without the benefit of weighing the evidence after hearing all the parties in this dispute. For this reason, I would direct that the trial does recommence expeditiously to enable the defendant call her witnesses.

4. With regard to the alleged defect in the plaintiff's verifying affidavit and the company resolution authorizing the filing of this suit, I do accept the defendant's objections. I will however, grant the plaintiff company an opportunity to file a compliant verifying affidavit and a proper copy of the company resolution with corrections duly endorsed by the plaintiff's directors. The documents be filed within 14 days.

5. Detailed reasons for this decision will be given in the considered judgment of the court at the close of the trial. The parties will be at liberty at the close of the trial to submit further on the issues germane to the present application. Costs will be in the cause.

Delivered and signed at Malindi this **18th** day of **June, 2014** in the presence of:

Mr. Shujaa holding for Mr. Kilonzo

Court clerk – Samwel

C. W. Meoli

JUDGE