



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 53 OF 2011

P.N.T.C WORLDWIDE P.V.T LTD PLAINTIFF
VERSUS

SUN PALM MANAGEMENT LTD1ST DEFENDANT

SUN PALM LTD2ND DEFENDANT

-
Coram:
Mwera J.
Kilonzo for plaintiff
Asige for defendants

RULING

The defendant companies filed a notice of motion dated 12/8/12 under Order O2r-15 (b) (c) (d), 040 rr 1,2,7 of CPR and ss 1A 1B, 3A of CPA as well as S. 366 of the Companies Act. The prayers were :-

- i) to restrain the plaintiff company from trespassing on the 2nd defendant's parcels of land No. KILIFI/JIMBA/669, 408 in particular BLOCK NO. 4 not covered by the court order of 20/7/12,**
- ii) to strike out the suit herein plus the defence to the counter-claim; or**
- iii) in the alternative the order of 20/7/11 be varied or discharged.**

It was stated that the plaintiff was a foreign company doing business in Kenya without complying with S.366 of the Companies Act. So it had no capacity to enter into legal/enforceable contracts here. The lease agreement involved was for more than 2 years but because it was not registered as per the Registered Land Act, it was unenforceable against the 2nd defendant, who was not a party to it. The tenancy relationship between the plaintiff and the 1st defendant ended with the latter reentering and repossessing the premises. The plaintiff was abusing the order of injunction involving plot No. KILIFI/JIMBA/405 by not paying mesne profits for Plot No. KILIFI/JIMBA/408 which it has illegally taken possession of. Such a state of things occurred when the plaintiff took advantage of injunction order of 20/7/11 to illegally take possession of the 2nd defendant's plots No. 669, 408 which were not the subject of a lease agreement dated 14/9/2009.

One Eleonora Cozzi, a director of the defendant companies, deponed that the plaintiff was tenant of the

1st defendant over a portion of plot No. 408. It failed to pay rents and the 1st defendant entered and repossessed the premises on 15/5/2011. So that ended their tenancy but with rent arrears of \$ 24,000. The 2-year lease agreement of 14/8/2009 between the two had never been registered and thus it is was unenforceable against the 2nd defendant. There was never a lease agreement between the defendants and the plaintiff in respect of Plot 405. But the plaintiff sued and got injunction order on 20/7/11, affecting plot No. 405. Documents relating to Plot No. 408 were exhibited as well as for plot 405. The court was told that with the injunction in respect of plot 405, the plaintiff had since declined to pay mesne profits over the portion of plot 408 it occupied and had also illegally occupied plot 669. The plaintiff company by reply to a written inquiry (Ec 4) did not confirm that it was illegally trading in Kenya. But the Registrar of Companies had confirmed that the plaintiff did not appear in this database (anne. Ec5), all contrary S.366 of the Companies Act, the Act. That means that from the time it started operating a hotel business in Kenya since 14/9/2009, all was illegal. Therefore it had no legal capacity to enter into enforceable contracts. Accordingly, the suit was scandalous, vexatious and an abuse of the court process. It must be struck out along with the defence to the counter-claim.

On 27/10/2011 Allesandro Nodari, manager of the plaintiff company swore a replying affidavit to the effect that it was the defendant's duty to register the lease agreement of 14/9/2009. In any event a copy of the registered lease was exhibited (ann.AN 1,2). Turning to the claim that the plaintiff was a foreign company running business in Kenya without complying with S.366 of the Companies Act, it was averred that on July 20,2011 Omondi J. had dismissed a prayer laid out in the defendants' application dated 31/5/2011. That the court had ruled that in any event the plaintiff was running business in Kenya through its wholly owned subsidiary M/S Stephanie Beach Ltd. That the Plaintiff had not breached its obligations under the lease. It had regularly paid rents. It had even availed large deposits against which the defendant could charge rents in the event of default. That Omondi J. had dealt with such claims before in the said ruling of 20/7/2011 or the defendants could levy distress for rent if any arose and not proceed to evict. The court was told that Kenya Revenue Authority had served an agency notice on the plaintiff's subsidiary operating on the tenancy premises for Sh. 19.2m. KRA was collecting any sum due to the defendant by that notice. Accordingly the defendants cannot expect rent sums at all. (ann AN 8 (a) (b)). There could be no substance in the plaintiff's claim that Omondi J's ruling referred to plot 405 and not 408. The fact was that the subject premises were the leased part of plot 408. And for illegally trying to evict the plaintiff from the suit premises contrary to the injunction of 20/7/2011, the defendants were in contempt of court and should not have audience before it at all .

That the plaintiff had as result commenced contempt proceeding and on 8./8/2011 Odero J. issued summons to the defendants' Eleonora Cozzi (of the supporting affidavit) which is still pending to show cause (ann. AN 9). The replying affidavit added that the present motion was res judicata in that what is raised in it ought to have been raised in the defendants' motion of 31.5.2011 which Omondi J. disposed of on 20/7/2011. The plaintiff had confined itself to the leased part of the premises and not gone beyond. The motion should be dismissed.

There appears to have been no response to that replying affidavit.

Asked to submit the defendant/applicants reiterated their prayers in the motion under review. Stressing the points of law, S. 366 of the Act was interpreted that it was specifically confined to a foreign company operating in Kenya, and which can sue and sued and hold land in its name. The plaintiff had sued in its name but without complying with S.366. It entered into the agreement of 14/9/2009 still before acquiring legal competence to do so. Pennington's Company Law (5th edn) was cited. That a company can only enter into contracts after due incorporation. The plaintiff company's compliance certificate (Ann. AN5) was issued on 1/9/2011. That means that it was not a company as per S.366 on 14/9/2009 when it into entered the lease agreement, or on 20/5/2011 when it brought this suit. All that was done before compliance, was invalid.

That the injunction order of 20/7/2011 attached to plot No 405 and not No. 408. It should be discharged. All in all for want of legal personality, the prayers sought ought to be granted.

In response the plaintiff reiterated the question of the present motion being res judicata because of the

earlier motion heard and determined by Omondi J. on 20/7/2011.

Turning to S. 366 of the Act the court was told that the defendants should have raised the issue in the earlier motion already referred to which Omondi J. decided - not to be raised here again. S. 6 of Civil Procedure Act barred such litigation.

By estoppel even the point of striking out the suit cannot hold. And that it had been found in the ruling of 20/7/2011 that the plaintiff had been legally running the business in question via a subsidiary called Stephanie Beach Ltd a locally incorporated company. Accordingly S. 366 had been complied with.

The plaintiff itself had not established business in Kenya and S. 365 (2) of the Act was cited. It was operating via an agent. Anyway its contract need not be invalidated but may only face penalties under the Act. Justice demands, and several cases were cited to support that principle, that all parties who come before court be heard on their pleadings. They should not be struck out. A trial could then determine all the disputes. The submissions from both sides, initial and by reply, were condensed as well as the authorities cited.

In this courts' view the points of law argued need to be determined first before the merits or demerits of the present motion. Points of law may and can be raised at any stage in the proceedings.

We begin with S. 366 of the Act. While the defendants argued that the plaintiff company had not complied with S.366 at the time it entered into the lease agreement herein and even when it commenced these proceedings, in that it did not have legal personality to do any of that, the plaintiff countered that it had not established business in Kenya as required by the law. It was in fact operating under its subsidiary M/S Stephanie Beach Ltd. It was pleaded in the plaint filed here on 20.5.2011 that:

“1. The plaintiff is a limited liability company duly registered in Mauritius vide Registration No. 080579 and having various investments and interests worldwide including Kenya whose address of service for the purpose s of this suit shall be care of MUTSYA BOSIRE & CO. ADVOCATES, MULLA PLAZA, 1ST FLOOR, LAMU ROAD P O BOX 260 MALINDI.”

It was added:

“4. At all material times the plaintiff is a tenant of the 2nd defendant who has appointed the 1st defendant as a (sic) attorney in respect of Jimba/405 Watamu hereinafter referred to as the hotel. That the plaintiff employed a Kenya company known as Stephanie Beach Limited to run the plaintiffs' operations on its behalf.”

Before moving to the notice of motion quite much alluded to here, the one dated 20/5/2011, attention goes to the defence and the counter -claim filed in court on 22/5/2011:

“2 In answer to paragraph 4 of the plaint the defendants aver that the plaintiff was until 15 May 2011 the lessee (of) the 1st defendant as attorney of the 2nd defendant, the proprietor of that piece of land known as KILIFI/JIMBAS/408 when tenancy was determined by way of re-entry and repossession of the premises by the lessor”

Two things appear right away from both pleadings. While the plaintiff refers to suit premises as plot No. 405, the defendants speak of plot 408 as the demised property. Then as the plaintiff avers that it had M/S Stephanie's Beach Ltd running operation on its behalf on the suit premises, the defendants do not deny that. The plaintiff thus far had disclosed that although it is a foreign company registered in Mauritius its business in Kenya are run by a local company – M/S Stephanie Beach Ltd.

In the counter claim the defendant plead that the plaintiff had been in breach of terms of their tenancy and so there was reentry and repossession of the premises w.e.f 15/5/2011 and from that date on, the plaintiff was a trespasser. An order of eviction should issue against it.

Under PART X of the Companies Act, Companies Incorporated Outside Kenya, we look at S. 365, Application of sections 366 to 375:

“365. (i) Sections 366 to 375 shall apply to all foreign companies, that is to say, companies incorporated outside Kenya which have, before the appointed day, established a place of business within Kenya and continue to have a place of business within Kenya on and after the appointed day:

Provided.....”

Then comes subsection 2:

“(2) A foreign company shall not be deemed to have a place of business in Kenya solely on account of doing business through an agent in Kenya at the place of business of the agent.”

S. 366 refers to Documents etc.....to be delivered to Registrar of foreign companies carrying on business in Kenya.

“366 (1) Foreign companies, which after the appointed day, establish a place of business within Kenya shall, within thirty days of establishment of the place of business deliver for registration-

(a) a certified copy of the charter, statute or memorandum and articles of association of the company or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in English language, a certified translation thereof;

(b) a list of directors and secretary of the company containing the particulars mentioned in subsection (2);

(c) a statement of all subsisting charges created by the company, being charges of the kinds set out in subsection (2) of section 96 and not being charges comprising solely property situate outside Kenya;

(d) the names and postal addresses of some one or more persons resident in Kenya authorized to accept service on behalf of the company service of process and any notices required to be served on the company, and

(e) the full address of the registered or principal office of the company.

(2).....(3)94).....”

Having all the above in mind the court is minded to accept and find that until the plaintiff filed its certificate of compliance it had not established a place of business in Kenya. It was a foreign company but it ran its operations/business through M/S Stephanies Beach Ltd, a local company. That was pleaded but was not denied or proved otherwise. And that falls within the ambit of S.365 (2), of the Act. What it did or executed at the offices of its local agent was lawful and valid. E.g. to enter into lease agreements. And save for the lease agreement the court has not been shown any other activity that a foreign company not S. 366- compliant did, that ought to be invalidated for want of legal personality. All that the entire S. 374 provides for is a fine for any party defaulting. And that is for the Registrar of Companies to pursue though the criminal justice system. What the parties did between them remains

valid or invalid according to the legal regime they were operating under. For the litigants here the lease agreement between them was shown by the plaintiff to have been registered anyway. Or if not so found, to do justice to the case before the court, if lack of registration did hobble the enforceability of that agreement, the court would still treat it as a contract inter se. But be that as it may, and even without wondering why the plaintiff refers to M/S Stephanie Beach Ltd in these proceedings as its subsidiary company, it was sufficient to remain with it as its local agent. Accordingly in the light of S. 366 this court is unable to find that either the tenancy agreement was invalid or this suit is incompetent. The court should however add that it did not easily glean from Omondi J's ruling of 20/7/2011 that the question of S.366 of the Act featured before her or that she determined it. In any event estoppel only applies to matters of fact but not law.

The injunction order of 20/7/2011 need not be varied or discharged. True, the notice of motion that gave rise to it alluded to Plot No. 405 as per the plaint. The defence referred to the correct plot No. 408 and arguments went back and forth leading to that learned judge's ruling. This court holds that all the time the parties knew the correct plot –No. 408, and that is the plot the ruling of 20/7/2011 attached to despite the error.

The order of injunction still remains in force.

It was submitted by the plaintiff and not denied/refuted by the defendants that their director faced summons to appear before court and show cause why she should not be punished for disregard and intention to breach the injunction order, by proceeding to possibly throw out the plaintiff. In such state of things, that injunction order remains in force as directed. No reasons have been advanced to vary/discharge it. If anything, the defendants are facing contempt proceedings arising from that injunction of 20/7/2011.

All in all the motion dated 12/8/2011 is dismissed with costs. Parties to exchange witness statements, bundles of paginated copies of documents plus issues in 30 days from today for directions as to the trial of this suit.

Delivered on 23/3/2012

J.W. MWERA
JUDGE