



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 286 OF 2009

SANDALWOOD HOTELS & RESORTS LTD.....PLAINTIFF

VERSUS

1. A.D.M. LIMITED

2. MUSUMARINI LTD.....DEFENDANTS

RULING

Coram: Mwera, J.
Gekonde for Khaminwa for Plaintiff
Munyithya, Mogaka for 2nd Defendant

Kahindi for Mungu for 1st Defendant

Court Clerk Furaha

The plaintiff company filed a notice of motion dated 14th March, 2012 under Order 42 Rules 6(1), (2), (4), Order 51 Rules 1, 3 of Civil Procedure Rule and sections 1A, 1B, 3A of Civil Procedure Act praying:

i)that there be a stay of execution of orders following the ruling dated 9th March, 2012 until the applicant appeals to the Court of Appeal.

It was stated in the grounds that the said ruling of 9th March, 2012 covered two applications that had been heard together in this cause and also touching on HC Misc. Application No. 528/09. That the plaintiff was granted orders sought in its application dated 14th August, 2009 against the defendant and yet in the final part of that ruling the court dismissed that application, thereby causing confusion. That it was wrong to make a finding that the plaintiff was a trespasser on the suit premises when the correct position was that it was invited there by the 1st defendant when it was in possession. The 2nd defendant had intimated that it was about to evict the plaintiff from those premises, a thing that would cause great loss to the plaintiff by virtue of its heavy investment in the business and that the ruling of 9th March, 2012 did not state specifically the applications concerned whether they were two or three. A supporting affidavit was filed and sworn by Leon Ndubai, director of the plaintiff company. It was followed by a further affidavit sworn by the same Leon Ndubai.

Grounds of opposition filed on behalf of the 2nd defendant, the 1st defendant having indicated to Mr. Munyithya for the 2nd defendant that it was no longer interested in the matter, were wide ranging: that no appeal could be sustained against the ruling of 9th March, 2012 without first obtaining leave of the court; that the plaintiff has all the time been exploiting the property of the 2nd defendant without right, consent

or other. Or that the subject property be placed in the hands of a court-appointed receiver to manage. No substantial loss had been demonstrated, etc. Then both sides submitted and supplemented the same with highlights essentially reiterating what had been set out in the application and the grounds of opposition. The brief determination of the prayers set out in the plaintiff's motion is as follows:

i) **Stay of execution of the Ruling of 9th March, 2012:** The court is not minded to grant this because it granted the prayers sought in the plaintiff's application dated 14th August, 2009. The 1st defendant was restrained from terminating the joint venture agreement of 24th May, 2009. The court also granted the plaintiff's prayer in that motion that the 1st defendant should not prevent the plaintiff from meeting the obligations under that agreement. There was a further order directed to the 1st defendant to account for all the money it had received from the business and to deposit it in a bank at Mtwapa. The 1st defendant was restrained from interfering with the plaintiff's running of the hotel business in question and in the meantime the two parties were free to go for arbitration of their dispute. The court however declined to direct local police to move onto the suit premises unless there was a risk of insecurity. The orders were to go the whole way until the suit between the plaintiff and the 1st defendant was finally determined.

The second motion was that of the 2nd defendant amended on 26th August, 2012. The first prayer there was that the *ex parte* orders issued against the 1st defendant on 17th August, 2009 be vacated. It had been brought up in Misc. Application No. 528/09 by the plaintiff against the 2nd defendant citing the latter for contempt. These two files had been brought together in the proceedings that resulted in the ruling of 9th March, 2012. The court found that the 1st defendant against whom the injunction order was granted on 17th August, 2009 was not an agent or principal of the 2nd defendant (the owner of the suit property) and so it was a prejudicial error to extend it to the 2nd defendant, who had not been a party to the joint agreement in respect of which the injunction was given. The order on Misc. Application No. 528/09 was found by this court to be unjustified and oppressive of the 2nd defendant. The court set it aside and accordingly dismissed the plaintiff's application to cite the 2nd defendant for contempt in Misc. Application No. 528/09 together with the extended injunction order to the 2nd defendant. If the plaintiff was in doubt as to the 3rd application or its application that was dismissed in the ruling of 9th March, 2012, it is the Misc. Application No. 528/09. In essence it was the 3rd application to the chamber summons of 14th August, 2009 and the amended motion of 28th August, 2012. The reasons to set aside those orders were gone into in detail. After the discharge/vacation of the *ex parte* injunction against the 2nd defendant the court rejected the 2nd defendant's plea that the plaintiff do deposit US\$ 250,000 in the event the injunction was maintained. Also rejected was the 2nd defendant's prayer that the plaintiff do deposit in a joint account 55% share of income generated from its property. Again reasons were stated for that rejection. But the court observed, by the way, that the 2nd defendant having been kept out of its property for over three years on no account of its own, no benefit accruing to it, it was only fair that it craves for some remedy from the court. The 2nd defendant was however told to go ahead and value its property. But the court declined to strike out the suit herein, the 2nd defendant having joined it all on its own volition. And with that the 2nd defendant against whomever at this point when it has been permitted to amend its defence; just as the plaintiff has been granted to further amend its plaint, there appears to be no cause of action pleaded against the 2nd defendant. But be that as it may, so what does the plaintiff seek a stay of and what does it not? And has it even sought leave to appeal, if such was necessary? The 2nd defendant argued so but the plaintiff did not respond.

The plaintiff by its blanket prayer wishes to have a stay of all the aspects of the ruling on 9th March, 2012. Does it seek stay of orders given in its favour? That should be ridiculous. Does it really wish to stay the order discharging the injunction order that was unjustifiably "*extended*" to the 2nd defendant? After all it still holds between it and the 1st defendant – the parties to the agreement upon which the injunction was issued. The 2nd defendant was not in it by whatever extension. The court while appreciating the present suit, Misc. Application 528/09 alongside HCCC 170/07 came to the conclusion that what transpired especially in HCCC 170/07 left the 2d defendant as the undisputed proprietor of the premises

where the hotel business stands. Does the plaintiff who was only in that hotel business – not the property, want to stay that finding of ownership? What would be the basis of the stay? If any it has not been demonstrated and at no time has it been shown that substantial loss will be suffered. There is no evidence except a claim that the plaintiff had invested heavily in the businesses. That sounded a mere claim. What about the prejudice being suffered by the 2nd defendant? The property belongs to it; the plaintiff and the 1st defendant have been haggling about the business on that property while not giving even a cent to the 2nd defendant! And the plaintiff is not even offering anything as security despite the ruling on 9th March, 2012 having hinted that it could consider a compromise with the 2nd defendant.

If it is to clarify who pays what costs regarding what application herein, the court observes that that should not have been by way of the present application. It has no merit and it is dismissed with costs. However, if the plaintiff felt confused with the last orders in the said ruling let us see if the following clears that:

(i) the plaintiff's application against the 1st defendant dated 14th August, 2009 is allowed with costs between those two.

(ii) The 2nd defendant's amended motion of 26th August, 2010 against the plaintiff (the litigants on Misc. Application No. 528/09) save as to some of the prayers there which were refused, is allowed with costs.

(iii) This suit still subsists with the plaintiff, the 1st defendant and the 2nd defendant. Parties to comply with Civil Procedure Rules 2010 in thirty (30) days as regards preparing it for trial, the plaintiff and the 2nd defendant having been granted leave to amend their pleadings.

(iv) The finding that the registered proprietor of the premises on which the hotel business stands was gleaned from all the material placed before court especially the conclusion of HCCC 170/07. And if the plaintiff is not the proprietor, lessee, a licensee over that property, it did not demonstrate otherwise and the court was left with no other description to give to it but that of trespasser. The proprietor, the 2nd defendant has denied links with the plaintiff in any way, over the suit property.

Orders accordingly. Costs to the 2nd defendant.

Delivered on 26th April, 2012.

J. W. MWERA

JUDGE