



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Appeal 79 of 2002

1. INTERJOINT INVESTMENTS1ST PLAINTIFF/RESPONDENT

2. SENGAZE LIMITED2ND PLAINTIFF/RESPONDENT

3. MULJI MAVJI RATNA3RD PLAINTIFF/RESPONDENT

VERSUS

1. PARADISE MOMBASA LTD.....1ST DEFENDANT/APPLICANT

2. MAKIWARA LIMITED2ND DEFENDANT/APPLICANT

3. PARADISE MOMBASA

MARKETING LIMITED3RD DEFENDANT/APPLICANT

4. MASUMARINI LIMITED4TH DEFENDANT/APPLICANT

RULING

1. At the hearing hereof, two applications were before me. The first, a notice of motion by the Plaintiffs dated 24th July, 2009 seeking summary judgment against the Defendants for US \$ 300,000 plus interest from 25th October, 1999 until payment in full. It is grounded on Applicant's averment that the Defence of the Defendant's defence is a sham and bare denial which does not disclose any triable issues.

The second application, a motion dated 16th December, 2011 seeks security for the 1st Defendant's costs from the Plaintiffs in the amount of Kshs. 3,000,000/=.

I directed the parties at the hearing that I would hear the first application then retire to write a ruling. This is the ruling on the first application.

2. The application was brought under Order XXXV Rules 1(1) (a), (2), and 5 and Section 3 of the previous Civil Procedure Rules Order XXXV Rule 91) (c) provides:

“In all suits where a plaintiff seeks judgment for:

(a) a liquidated demand with or without interest;....

where the defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for the recovery of land and rent or mesne profits.”

3. The application is supported by the Supporting Affidavit of Naran Mavji Ratna, director of the 2nd Plaintiff/Applicant, deponed on 24th July. In it he avers, *inter alia*, that:

- The Memorandum of settlement dated 14th April, 1998 (the first Agreement) between the Plaintiffs/Applicants and, *inter alia*, the 1st and 2nd Respondents, the 1st and 3rd Applicants agreed to sell to the 2nd Respondent their respective interests in the 1st, 3rd and 4th Respondents for US \$ 1,750,000 (Paragraph 4).
- The Applicants performed their obligations but the 2nd Respondent failed to so perform theirs. Consequently, a further agreement dated 23rd March, 1999 (the Second Agreement) was entered into between the Applicants and the 1st, 2nd and 3rd Respondents (Paragraph 6).
- By the Second Agreement, the 2nd Respondent agreed to pay the Applicants US\$1,000,000 in consideration of the Applicants selling their rights, title and interest in the 1st and 3rd Respondents. That despite the Applicants performing their obligations thereunder, the 2nd Respondent failed to fulfil its obligations.
- By a further agreement dated 14th August 1999 (the Third Agreement) between the Applicant and the 3rd Respondent the Applicants agreed to accept \$650,000 from 1st, 2nd and 3rd Respondents in full and final settlement of the Applicants claims against the 2nd Respondent.

The Respondents have only paid US\$ 350,000 and there remains a balance of US\$ 300,000.

All these averments are also contained in the Plaintiff's prayer of which claims the sum of US\$ 300,000.

4. The application is opposed by the Plaintiffs, on the grounds set out in the grounds of opposition dated 2nd November, 2009. Essentially, these are as follows:

“That the Court has no jurisdiction to entertain the suit and the application;

That the 1st Plaintiff was dissolved on 22nd November, 1999 and therefore has no juristic existence.

That the application is bad in law and an abuse of the process of the Court.”

5. At the hearing on 22nd February, 2012, Mr. Nyachoti for the Applicants recited their agreements which are the basis of the suit. He said the Third Agreement (of 14th August, 1999) superceded all the others, and an amount of \$ 350,000 was paid leaving the claimed balance of US\$ 300,000. The joint defence filed by the Defendants was silent on the amount, but asserted that the Court had no jurisdiction in the matter. Counsel argued that, though clause 12 of the Third Agreement ousts the jurisdiction of the Courts of Kenya, the agreement does not nominate jurisdiction of any other territory. The subject matter being shares in real property in Mombasa the jurisdiction of the Kenyan Courts may naturally be invoked. He cited **Valentine Investment Company Limited vs Federal Republic of Germany** [2006] e KLR which adopts the holdings of the Court of Appeal in **United Insurance Company Limited vs East African Underwriters (Kenya) Limited** [1985] KLR 895, There, the Court held, *inter alia*, that:

“1. Kenya courts have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign Court....

2.

3. The onus of establishing a strong reason for avoiding the jurisdiction of the Kenyan Courts is on the party who seeks to avoid that jurisdiction and that burden is a heavy one.”

6. Counsel further argued that by virtue of the fact of these proceedings having been going on in the Kenyan courts since 2002, such courts are naturally seized with jurisdiction. In addition, counsel criticised the veracity of the Defendant’s Replying Affidavit, sworn on 2nd November, 2009, on the ground that the exhibits annexed thereto were not certified and therefore their authorship uncertain.

7. Mr. Mogaka for the 4th Defendant/Respondent opposed the application for summary judgment. In Grounds of Opposition dated 2nd November, 2009 the Defendants asserted that the Kenyan Courts have no jurisdiction to entertain the suit and application. This was said to be because clause 3 of the First Agreement contains an arbitration clause. Further, the Defendants say that the 1st Plaintiff was dissolved on 22nd November, 1999 and therefore has no juristic existence. Finally, counsel argued that the agreement on which the claim for US\$300,000 is predicated, and which the Plaintiffs seek to enforce, was not signed by the 4th Defendant. Consequently, summary judgment cannot be effected against them. Counsel referred to the case of **M/V Lillian vs Caltex**, the famous authority on jurisdiction.

8. I have carefully considered the parties’ submissions and documents referred to. The Applicants’ prayers for summary judgment are under the old Order XXXV Rules 1 (1) a, 2 and 8. The relevant provision states:

“1 (1) In all suits where the Plaintiff seeks judgment for –

a) a liquidated demand with or without interest, or

b)

Where the defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

9. The authorities are clear on the circumstances under which summary judgment may be permitted:

- That there are no triable issues
- That there is a definite liquidated amount owing to the Plaintiff
- That the grounds of opposition do not contain anything of substance but mere generalisations,

which are not elaborated or substantiated.

On these see **Kenya National Corporation Ltd vs Rose Muia and Another Nairobi HCCC 5893 of 1993;**

Co-operative Bank of Kenya Limited vs Nairobi City Council HCCC 361 of 2000 Milimani;

National Industrial Credit Bank Limited vs Raptael Obonyo Okello (Malimani) HCC 1186 of 2000;
Kenindia Assurance Company Limited vs First National Finance Bank Limited Civil Appeal 874 of 2002.

10. In the present case, the Defence at paragraphs 2 and 3 clearly assert that the Court has no jurisdiction in the matter. However, their Memorandum of Appearance dated 14th October, 2002, was unconditional as the Defendants had not indicated that there was any jurisdictional objection. Accordingly, by an application dated 5th April, 2004, they sought to amend their Memorandum of Appearance having taken instructions that **“the Courts of Kenya have no jurisdiction over the parties in this action or competent to adjudicate on the issues arising between the parties.”** The application was allowed by Honourable Lady Justice Khaminwa in a Ruling dated 18th May, 2006 so that, the current position is that appearance by the Defendants is conditional as **“under protest.”**

11. Consequently, in my view, the question of jurisdiction remains alive issue. And although the Plaintiffs sought to deal with the point of jurisdiction as part of their response to the grounds of opposition in this application, the focus of the application was summary judgment. That is what was argued at the hearing even though the Plaintiffs had supplied a list of authorities including several authorities or the question or jurisdiction. These will be relevant when the issue of jurisdiction is formally tried.

12. I think a second triable issue arises in this matter, which was raised by the Defendants is in their argument that the 4th Defendant had not signed the agreement which is sought to be enforced by the Plaintiffs.

I have carefully perused the Plaintiff and the three relevant agreements, and I think it is proper that I set out what I have found.

The 4th Defendant is described/cited in the Plaintiff at Paragraph 9 as follows:

“At all material times, the 4th Defendant was the registered proprietor for the said properties.”

And in the prayers in the Plaintiff, the Plaintiff seeks:

“Judgment against the Defendants jointly and severally for:-

- a) The said sum for US\$ 300,000 together with interest thereon at the rate of 15% per annum for**
- b) Costs of this suit and interest thereon at the Court rate[s]”**

Summary judgment is therefore sought against, *inter alia*, the 4th Defendant jointly severally.

13. The First Agreement dated 14th April, 1998 is between the 1st Plaintiff as Settlor, the 2nd Plaintiff as Financier and the 3rd Plaintiff on the one part, and Tehur Sulami and Ithzak Maman as Guarantor, on the second part and Makiwara Limited, the 2nd Defendant, as the Buyer of the third part.

The Second Agreement dated 23rd March, 1999 was between the 1st, 2nd and 3rd Defendants.

The Third Agreement was made on 14th August, 1999. The parties were the 1st, 2nd and 3rd

Plaintiffs as the First Party, the 2nd Defendant as the Second Party and the 1st and 3rd Defendants as the Third Party. These facts are reiterated in Paragraphs 10, 13 and 15, of the Plaintiff.

14. Clearly, from the above assertions of the Plaintiffs and the position reflected in the three Agreements, it is clear that the 4th Defendant was not a party to any of the agreements under which the liquidated sum of \$ 300,000 is sought to be summarily adjudged. In the light of the above, the prayer that the 4th Defendant be jointly and severally liable to pay the same is, therefore, a fundamental triable issue.

15. Finally, I should point out that at the hearing of the application, Dr. Khaminwa appeared and indicated that there was an application by a third party to be enjoined in the suit. He referred to a Notice of Motion dated 29th September, 2003, which I have, however, not seen.

16. Given all the foregoing, I am unable to agree with the Applicants in their prayers for summary judgment. The application is therefore dismissed with costs to the Defendants.

Orders accordingly.

SIGNED BY:

R.M. MWONGO
JUDGE

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Read in open court on this 8th day of June, 2012
(BY HON. JUSTICE JOHN MWERA)

Coram:

1. Judge: Hon. John Mwera

2. Court clerk: T. Furaha

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....