



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

*(Coram: Ojwang, J.)*

**MISC. CIVIL APPLICATION NO. 528 OF 2009**

**SANDALWOOD HOTELS & RESORTS LTD.....APP/  
RESPONDENT**

**- VERSUS-**

**MUSUMARINI LIMITED.....1<sup>ST</sup>  
RESPONDENT**

**HANANEL ADINI.....2<sup>ND</sup>  
RESPONDENT/APPLICANT**

**YEHUDA SULAMI.....3<sup>RD</sup>  
RESPONDENT**

**RULING**

M/s. Mogaka Omwenga & Mabeya, Advocates, on behalf of the 2<sup>nd</sup> respondent, brought an application by Notice of Motion dated 3<sup>rd</sup> June, 2010 and filed on 22<sup>nd</sup> June, 2010; they sought one substantive order:

**“THAT the injunctive orders Nos. 2, 3 and 4 issued herein at leave stage [in respect of a contempt of Court application] on 5<sup>th</sup> November, 2009 be discharged.”**

The application rests on the following grounds:

- (i) the said injunctive orders are not contemplated without giving an opportunity for an *inter partes* hearing;
- (ii) injunctive orders are not contemplated in contempt proceedings;
- (iii) the leave sought and granted was in respect of existing Court orders made by **Lady Justice Koome** on the basis of facts of the leave stage;
- (iv) no injunctive relief is sought nor contemplated in the Statutory Statement on record;
- (v) the injunctive orders in question have restrained both the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from accessing their villa situated on a separately-fenced compound, independent and distinct from Plot L.R. No. 10861, CR No. 12869/1 owned by 1<sup>st</sup> respondent and which is located next to the Hotel plot;
- (vi) the restraining order issued by **Lady Justice Koome** covers the hotel premises which is on distinct plots from the plot on which the villa is situate;
- (vii) it is in the interests of justice that the said orders be vacated.

The applicant's case is supported by evidence set out in his affidavit. **Hananel Adini** depones as follows:

- (i) as advised by his advocate, he believes it to be true, that the proceedings are intended to punish him for the purported breach of the order that was made by **Lady Justice Koome** on **17<sup>th</sup> August, 2009** and subsequently extended;
- (ii) the orders in question, however, place no bar on 2<sup>nd</sup> and 3<sup>rd</sup> respondents entering the villa situated on L.R. No. 10861 – CR No. 12869/1, which villa does not fall **within** the Hotel premises;
- (iii) no orders of injunction are sought in the applicant/respondent's Statutory Statement;
- (iv) the *ex parte* proceedings seeking leave to commence contempt proceedings in respect of purported breach of injunctive orders do not contemplate issuance of additional injunctive orders of a final nature;
- (v) the Court should discharge the *ex parte* injunctive orders issued at the leave stage;
- (vi) by reason of the said final injunctive orders issued at the leave stage, the deponent and 3<sup>rd</sup> respondent cannot gain access to their villa situated on plot No. 10861 and which does not form part of the Hotel premises.

In a replying affidavit sworn on **7<sup>th</sup> July, 2010**, **Steve Kiramana**, the general manager of the applicant/respondent thus depones:

- (i) the applicant/respondent has possession of the Hotel in question under an agreement with a company which is not a party herein – and that agreement relates not just to the Hotel, but to the **whole of plot** No. 10861 – CR No. 12869/1 wherein the said villa is located;
- (ii) he believes to be true his Advocate’s advice, “that in certain circumstances especially if the danger of repeating the breach is real or sufficient, an injunction ought to be granted to maintain the *status quo*”;
- (iii) the injunction has been sought “on proper grounds”, because in the Statutory Statement, the applicant/respondent has sought the committal to civil jail of the directors of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> respondents/applicants;
- (iv) 2<sup>nd</sup> respondent/applicant does not own the property known as L.R. No. 10861 – CR NO. 12869/1;
- (v) The orders sought should not be granted because if they are granted, “the honour and dignity of this Court would be irreparably damaged”;
- (vi) The contempt proceedings were commenced “when they [the respondents/applicants] led an armed group of youth in total defiance of this Honourable Court’s order in H.C.C. No. 286 of 2009”.

On **5<sup>th</sup> November, 2009** learned counsel **Dr. Khaminwa**, for the applicant/respondent herein, came before this Court with an *ex parte* Chamber Summons application of that same date. Purely on a *prima facie* basis, relying on the affidavit tendered in support of the application, and on the submissions of learned counsel, the Court made several orders, three of which form the respondent/applicant’s gravamina herein, namely:

**“(2) That the Respondents [by] themselves, [their] agents, servants, [principals] or otherwise howsoever are restrained by way of an injunction from trespassing upon and/or otherwise dealing with the properties L.R. No. 10860 – C.R. No. 12860, L.R. No. MN/III/3366 – C.R. No. 29319 and L.R. No. 10861 – C.R. No. 12869/1 on which stands the Hotel business popularly known as Paradise Beach Resort pending the hearing and determination of this suit.**

**“(3) That the Respondents [by] themselves, [their] agents, servants, [principals] or otherwise howsoever are restricted by way of injunction from interfering with the Applicants’ quiet possession and management of the Hotel business popularly known as Paradise Beach Resort situated on the properties L.R. No. 10860 – C.R. No. 12860, L.R. No. 29319 and L.R. No. 10861 – C.R. No. 12869/1 pending the hearing and determination of this suit.**

**“(4) That [the] *status quo* be maintained pending the determination of the contempt proceedings.”**

The applicant/respondent had, on **5<sup>th</sup> November, 2009** come before the Court seeking leave to lodge

contempt proceedings: on the ground that there had been a breach of the orders made by **Koome, J** on **17<sup>th</sup> August, 2009**; and those orders were a restraint against terminating a joint-venture agreement.

Learned counsel, **Mr. Mogaka** submitted that the thrust of the *ex parte* applicant's case before this Court had been that nobody should terminate the said joint-venture agreement: and leave was being sought to invoke the Court's penal jurisdiction against those said to be in breach of the said order.

**Mr. Mogaka** urged that the applicant/respondent's Statutory Statement in aid of the leave application states the reliefs sought, and **injunction** is not one of them; counsel attached significance to this fact – as the Statutory Statement constituted the substratum of the leave application. More significance was attached to that fact, on the ground that all that the applicant/respondent had sought was leave to file proceedings for penal action against those said to have been in breach of a **previous injunction** (made by **Koome, J** on **17<sup>th</sup> August, 2009**). Counsel urged it to have been inappropriate to grant with finality, *ex parte*, the injunctive orders No. 2, 3 and 4 of **5<sup>th</sup> November, 2009**. For this reason, **Mr. Mogaka** asked the Court to discharge the said orders of **5<sup>th</sup> November, 2009** in the particulars indicated; and this, more particularly as the applicant/respondent, in seeking the said *ex parte* orders, had provided no undertaking in the nature of security to the respondent/applicant.

**Mr. Mogaka** submitted that the order of **5<sup>th</sup> November, 2009** imposed no restraint against use of the villa in question, but only prevented interference with the joint-venture agreement; and the applicant/respondent had only come to Court seeking leave to commence contempt proceedings for breach of the order of **5<sup>th</sup> November, 2009**.

Counsel submitted that even though this Court had granted the applicant/respondent leave to file proceedings for contempt, the same had not been done, and service had not been effected upon the respondent/applicant: the effect being that the *ex parte* orders of **5<sup>th</sup> November, 2009** have come to be final orders when the respondent/applicant has had no opportunity to state his case; but counsel for the applicant/respondent showed that such service was effected through the daily press.

Both learned counsel **Mr. Mogaka** and **Dr. Khaminwa** (for the applicant/respondent) urged that the overriding objectives of the judicial method in civil matters, as stated in s. 1A of the Civil Procedure Act (Cap. 21, Laws of Kenya), stood in favour of their respective positions in this matter.

**Dr. Khaminwa** registered his objection to the respondent/applicant's representation that he (the respondent/applicant) had any rights at all to access the villa situate in the vicinity of the Hotel business which was the subject of orders by **Koome, J** on **17<sup>th</sup> August, 2009** (in the suit, **Sandalwood Hotels & Resorts Limited v. ADM Limited**, Nairobi Milimani Commercial Courts Civil Suit No. 599 of 2009). **Dr. Khaminwa** urged that: “the property is not registered in the names of [2<sup>nd</sup> and 3<sup>rd</sup> respondents/applicants]”, “the villa is in the name of 1<sup>st</sup> respondent – a limited liability company [Musumarini Limited]”; “the three plots have distinct titles; they are next to one another; they are inseparable; they comprise one business unit which can be referred to as **business premises**; the Hotel is on two plots, built across two plots; the Hotel has facilities – housing for manager, swimming pool, etc; this particular villa has always been occupied by staff of the Hotel; it is part and parcel of the Hotel premises”.

Learned counsel urged that the joint-venture agreement (in relation to which **Koome, J** had made injunctive orders) is the legal basis for **possession** of the business premises by the applicant/respondent. Counsel urged that: “It is unreasonable for anyone to contend that there are only two plots.”

Beyond the immediate issues emerging from the terms of the application, **Dr. Khaminwa** raised general points of law, founded on authority. In particular, learned counsel made submissions on the law of **possession**, urging that the applicant/respondent **was** in possession of all the properties associated with

the Hotel business: and therefore this Court ought to restrain the respondent/applicant from accessing the same. Counsel relied on the Court of Appeal decision in **Waljee v. Rose** [1976-80] 1KLR 32 in which the following passage (**per Law, V-P** at page 41) appears:

**“...I do not see how there can be an abandonment [of tenancy] without an assumption of, or entering into, possession by the landlord. If the tenancy was not surrendered or abandoned, it still subsists and the appellant was let into possession while it subsisted. Whether the appellant is a trespasser, or a licensee, the landlord not having had possession has no cause of action for ejectment. If she has somehow acquired the status of sub-tenant, only the tribunal can determine the sub-tenancy”.**

Counsel urged that the **joint-venture agreement** had conferred possession upon the applicant/respondent, on **24<sup>th</sup> May, 2009**: and therefore, the respondent/applicant was not entitled to gain access to the villa in question.

**Dr. Khaminwa** submitted that possession had originally been in the hands of one ADM Limited [not a party herein], and that ADM Limited had won a judgment sounding in damages to the tune of Kshs. 500,000,000/= against 1<sup>st</sup> respondent/applicant herein: and so, recognition must be accorded possession as inhering entirely in the applicant/respondent.

Counsel cited **Sir Robert Megarry’s The Law of Real Property**, 4<sup>th</sup> Edition (London: Stevens & Sons, 1975) in aid of the contention that possession vesting in the applicant/respondent herein must be upheld (at page 1168):

**“The possessory assizes were further remedies introduced by Henry II in order to bring litigation about land into the royal courts. Seizure of land was a disturbance of the peace as well as a civil wrong, and the principle behind these remedies was that for the sake of public order the law should protect possession, whether rightful or wrongful, in order that the title might be tried peaceably”.**

Counsel urged that when **Koome, J** issued injunctive orders on **17<sup>th</sup> August, 2009**, the applicant/respondent was already in possession, by virtue of the joint-venture agreement of **24<sup>th</sup> May, 2009**.

Counsel submitted that the instant application was unsustainable, because the respondent/applicant was seeking to review a matter in respect of which a proper decision had been made: **Eastern and Southern African Development Bank v. African Green Fields Limited & Others** [2002] 2EA 371 CCK (**Ringera, J**).

On **17<sup>th</sup> August, 2009** **Lady Justice Koome** made injunctive orders against a defendant (the plaintiff/applicant being the applicant/respondent herein), requiring the upholding of a joint-venture agreement of **24<sup>th</sup> May, 2009** “pending the hearing and determination of the suit”. By virtue of the said agreement, the applicant/respondent herein took possession of a Hotel business, and learned counsel **Dr. Khaminwa** has submitted that such possession extended to the main Hotel building as well as all auxiliary properties managed as part of the Hotel business – including the villa that is the subject of the application herein; the fact-details on that point, in my view, is a controversial point which can only be determined in the course of the hearing of a suit. I must take it that there were valid *prima facie* grounds leading the Judge to issue the injunctive orders. It is apparent to me, at this stage, that since the entry into force of the joint-venture agreement, the applicant/respondent has been in possession. This is the basis on which the injunctive orders of **5<sup>th</sup> November, 2009** were made – *ex parte* and on a *prima facie* basis.

Is it proper for the 2<sup>nd</sup> respondent/applicant to seek discharge of the *ex parte* orders of **5<sup>th</sup> November, 2009**?

Learned counsel, **Dr. Khaminwa** has urged that the substantive law regulating the rights of parties, in particular the law of possession, stands in favour of the applicant/respondent, and against the 2<sup>nd</sup> respondent/applicant: and so there is a valid basis for this Court's further injunctive orders of 5<sup>th</sup> **November, 2009**. Counsel submits, on that basis, that the making of the relevant orders was properly done by virtue of the applicable **judicial discretion**.

By contrast, learned counsel **Mr. Mogaka**, for the 2<sup>nd</sup> respondent/applicant, urges that the said orders should not have been made *ex parte*, and that they have operated as final orders.

What is the significance of that contention? It has already been shown that there **is** a contempt matter pending, in respect of alleged non-compliance with the injunctive orders in force: so there is a clear opportunity for the 2<sup>nd</sup> respondent/applicant to raise any relevant issues before the Court. The effect is that any disagreement with the position of the High Court on the matter, will be a proper basis for an **appeal**.

I am in agreement with the decision of **Ringera, J** (as he then was) in **Eastern and Southern African Development Bank v. African Green Fields Limited & Others** [2002] 2EA 371 (CCK), that judicial orders when made, are only required to rest upon the law and the regular judicial practice, and to bear judicial conviction, but do not have to be the most attractive or appealing to any particular party, nor must they be the most perfect by any particular criteria; and a party who disputes their integrity or propriety, must contest them only by way of appeal: for any such contest is a contest of inherent merits, and it must be a matter for **appeal**. To quote **Mr. Justice Ringera** (*op. cit.*, page 381):

**“In my discernment, an order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that other Judges of co-ordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue. In my opinion the proper way to correct a Judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose”.**

Against this background of pertinent fact, of counsel submissions, and of relevant authority, the full import of the 2<sup>nd</sup> respondent's Notice of Motion of 3<sup>rd</sup> **June, 2010** can be seen. The application ill-matches the larger questions of fact that lie at the foundation of the orders being contested; those questions can fully be resolved only in substantive proceedings; and besides, the application amounts to a quest for **review**, whereas the right course would be an **appeal**.

Accordingly, the application is dismissed, with costs to the applicant/respondent.

It is so ordered.

**DATED and DELIVERED at MOMBASA this 21<sup>st</sup> day of January, 2011.**

**J. B. OJWANG**

**JUDGE**

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Applicant/Respondent: **Dr. Khaminwa**

For the 2<sup>nd</sup> Respondent/Applicant: **Mr. Mogaka**

