



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 71 OF 2009

DREAM ISLAND RESIDENCE MALINDI LTDPLAINTIFF

VERSUS

GARRODA CORAL BEACH LTDRESPONDENT

R U L I N G

The Chamber Summons dated 21st October 2011 is made under Order VI Rules 13(1) (b) (c) and (d) and 16 Civil Procedure Rules and section 3 of the Civil Procedure Act – seeking that the plaint dated 24th July 2009 and filed on the same day, be struck out with costs.

Further, the verifying affidavit sworn by ZANDONA ADELINO on 24th July 2009 be expunged from the records.

This is on grounds that:

(1) Zandona Adelino was not a director of the plaintiff company at the time he swore the affidavit and so he had no authority from the plaintiff to swear the said affidavit as its director.

(2) The representation of Mr. Zandona Adelino that he was the director of the plaintiff company is misleading, unlawful and bad in law.

The application is supported by the affidavit sworn by GIOVANI MILES, a director of the Defendant company who has annexed a copy of Company Form 203A presented to the Companies Registry by the firm of **MULI AND OLE KINA** on 11th November 2008, notify the Registrar of Companies, that the said Zandona Adelino ceased to be a director of the plaintiff with effect from 27th August 2008 (annexture is marked GM1).

Also annexed is a copy of an affidavit sworn by the said Zandona Adelino in which he swore to being the plaintiff's director until 27th August 2008.

The application is opposed, and in a replying affidavit sworn by Maurizio Ongania (a director of the plaintiff company), he states that he and Adelino Zandona are the sole directors of Senpur Holdings Ltd, the largest shareholder of the plaintiff company which is duly registered at Tuitola, British Virgin Islands.

It is further deponed that as at July 2009, he and Zandona were directors of the plaintiff company and that although Zandona and one Gilandi Romeno sold shares to Serpur Holdings Ltd on 27th August 2008, and

ceased being directors, the said Maurizio Ongania, Zandona Adelino were reappointed as directors, by the company in February 2009.

The court had directed that this matter be disposed off by way of written submissions – which orders were made on 1st December 2010, but as at the time of writing this ruling, neither party had filed written submissions.

There is the plaintiff's list of authorities filed, but I do not know what it relates to as there are other applications dated 24th July 2009 and 12th July 2010 – which have not yet been prosecuted, and these authorities may well be in relation to those pending applicants.

I have however taken the liberty to read through those authorities and it would seem that at least the decision in **JANE MANYARA AND OTHERS V MAPENZI RESORT LTD AND OTHERS, HCCC NO. 59 OF 2005**, may be a response to this application as it addresses the issue of striking out and dismissing a statement in grounds of a defective affidavit.

There is no dispute that as at 27th August 2008, Zandona Adelino had ceased being director of the plaintiff company – that much is admitted even by Maurizio Ongania in his affidavit. This would then mean that were he to swear an affidavit purporting to be a director of the plaintiff after that date, then the same would be improper, unless it can be demonstrated that he was thereafter reappointed as director. Although there are claims regarding such reappointment, there isn't a single document annexed to confirm that, I would expect at least a resolution passed or some minutes of a meeting presented, to show that there was indeed such an appointment. There is none here and so I hold that as at 24th July 2009 when Zandona Adelino swore the affidavit, he has not a director of the plaintiff company and that verifying affidavit cannot be sustained in the court record and must be struck out from the record.

Should then the entire suit be struck out because there will now be no verifying affidavit.

This is where the cited decision of **JANE MANYARA** seems to offer some lifeline to the applicant. In that decision, the learned Hon. Justice Ouko, observed that courts do not casually strike out pleadings because it is such a drastic step that can only be resorted to where the court is satisfied that the suit does not disclose any cause of action.

The court in that case recognized that the verifying affidavit was invalid and ordered for it to be struck out. The question then remains, what happens to the plaint once the verifying affidavit is struck out. As Justice Ouko noted, verifying affidavit has a separate life, independent of the plaint it verifies and does not go to the root of the suit. That failure to file a proper and regular verifying affidavit can be rectified with leave of the court.

Indeed Order VI Rule (3) of the Civil Procedure Rules does not impose a compulsory duty on the court to strike out any plaint not accompanied by a verifying affidavit.

It states as follows;

“The court may of its own motion or on application of the defendant, order to be struck out, any plaint which does not comply with subrule (2) of the rule”

Consequently, the application only succeeds in part, to the extent that the verifying affidavit sworn by Zandona Adelino is improperly on record and is struck out.

I decline to strike out the entire suit and direct that the plaintiff files a verifying affidavit sworn by the plaintiff's recognized agent, within 14 (fourteen) days from today.

Costs of this application shall be borne by the respondent.

Delivered and dated this 21st day of **March 2011** at Malindi.

H. A. OMONDI
JUDGE

Mr. Kilonzo for respondent

Mr. Olaba holding brief for Kariuki