



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

A.D.M. LIMITEDPLAINTIFF

VERSUS

MSUMARINI LIMITED1ST DEFENDANT

PARADISE MOMBASA LIMITED2ND DEFENDANT

HOLIDAY OWNERS (TRUSTEE) LIMITED3RD DEFENDANT

SULAMI YEHUDA 4TH DEFENDANT

FREE HOLIDAY LIMITED5TH DEFENDANT

HANNAN ADINI6TH DEFENDANT

CATHERINE MWIHAKI GAMBI7TH DEFENDANT

YOSEF GUZI8TH DEFENDANT

DANKTA ENTERPRISES LIMITED1ST OBJECTOR

MUSAMARINI LIMITED.....2ND OBJECTOR

RULING

Pursuant to the provisions of Order XLIV rule 1 of the Civil Procedure Rules, Musumarini Ltd., the 1st Defendant herein, took out the motion dated 27th May 2008, in which it prayed for this court's ruling delivered on 20th December 2007 to be reviewed with a view of setting it aside. A.D.M. Ltd, the plaintiff herein filed the replying affidavit of Nelson Havi to oppose the motion.

When the motion came up for interpartes hearing, Mr. Munyithya learned advocate for the 1st, 2nd, 3rd, and 5th defendants urged this court to allow the motion for the following reasons:

(i) that at the time of deliveries the ruling of 20.12.2007, the

entries in the companies registry had not been changed to reflect the directors of the 1st defendant; hence this evidence could not be availed or produced by the 1st defendant.

- (ii) There is an error apparent on the face of record.
- (iii) There are sufficient reasons to enable this court review the order.
- (iv) This court has no jurisdiction to entertain the entire suit.

Mr. Hayanga, learned advocate for the 4th, 6th, 7th and 8th defendants adopted the submissions of Mr. Munyithya in urging this court to allow the motion.

On his part, Mr. Havi, learned advocate for the plaintiff urged this court to dismiss the motion for various reasons. First it is said the motion is *res judicata* and an abuse of the court process. Secondly, it alleged that the motion is supported by an affidavit of an incompetent person. Thirdly, that the motion was filed in bad faith. Fourthly, that there is no discovery of new and important matter to warrant review of the judgment of 20th December 2007. Fifthly, that there is no error apparent on the face of record.

I have considered the grounds set out on the face of the motion dated 27th May 2008 and the facts deponed in the affidavits filed for and against the motion. I have further considered the written and the oral submissions tendered by learned advocates. It is the submission of Mr. Munyithya that the plaintiff relied on the representation of one Sulami Yehuda, the 4th defendant a person who had been adjudged bankrupt in Israel to make huge investments. It is the submission of the learned advocate that when the contract was entered into between the plaintiff and the 4th defendant in 2005, the 4th defendant

was already an undischarged bankrupt. The questions which arise include whether such a person can enter into a valid contract to bind a company where he was a director before the receiving order was made. Secondly, whether such a person could instruct an advocate. Thirdly could he serve as a director of the 1st defendant and whether the plaintiff obtained leave to file a suit against a person adjudged bankrupt. It is the submission of Mr. Munyithya that there is an error apparent on the face of record in that Kenya has no reciprocal arrangements with Israel and that this issue was not brought to the attention of the court. On this account, it is the submission of the learned advocate that the 4th defendant had locus standi to appoint the firm of A.I. Hayanga and co. Advocates.

In a related argument, it is the submission of Mr. Munyithya that the contract entered between the 4th defendant and the plaintiff is void because of two reasons. First, the 4th defendant had no capacity and secondly the agreement was oral hence contrary to Section 3 of the Law of Contract Act. The plaintiff has also been accused of approbating and reprobating.

In response to these arguments, Mr. Havi was of the view that there was nothing new that was brought up to enable this court review its ruling. It is said that the issues raised herein were canvassed before and determined by this court in the summons dated 18th January 2008 and the notice of Preliminary Objection dated 22.02.2008. In short it is said the issues are *res judicata*.

I notice there are many issues which were raised in the motion and the affidavits filed for and against the motion. However, the most serious issue which was raised and which I think I should determine first is whether there is an error apparent on the face of record and whether there is a discovery of a new and important matter to warrant

a review of the ruling of 20.12.2007. After a careful consideration of

the arguments and the material placed before me I am convinced that there are errors which glaring on the face of record and that new

matters which were not brought to the attention of the court have emerged. The issue which came out clearly is whether or not Kenya has a reciprocal arrangement with Israel so that if a litigant is adjudged bankrupt in either country, it would be recognized . This is a new and important matter which was not brought to the attention of the court at the time of delivering the ruling of 20.12.2007. A close perusal of the aforesaid ruling delivered on 20.12.2007, will reveal that this court held that the 4th defendant had been adjudged bankrupt. And since there was no affidavit to controvert the averments this court believed on those averments. Perhaps the failure to file a replying affidavit on the part of the 4th defendant was by sheer incompetence on the part of his erstwhile advocate. It is only through this motion that the issues which were not availed to court then, came out clearly.

In order for the dispute to be resolved, it is important to re-open the case so that the same can be heard on its merits. In the ruling of 20.12.2007, this court struck out the summons dated 4th September 2007 and the motion dated 29th November 2007. In the same ruling I allowed the summons dated 12th November 2007. The issues raised in the motion dated 27th May, 2008 are so weighty and grave that they can only be resolved by the court after hearing the substantive suit. This court retains the inherent power to see to it that justice is done in a matter of this magnitude. In the end I find that the motion dated 27.5.2008 is well founded. Consequently I review the order of 20.12.2007 by setting aside the same. Since the issues raised in applications which gave rise to that ruling are contentious, a fair order

will be to set aside that order and substitute it with an order

dismissing the three applications together, with an order directing the parties to list the substantive suit for hearing within the next 90 days,

costs of the application to await the outcome of the entire trial.

Dated and delivered at Mombasa this 3rd day of October 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Munyithya for 1st, 2nd, 3rd and 5th and the 2 objectors

H/b Hayanga for 4th, 6th 7th and 8th Defendants.

Mr. Mwakireti h/b Havi for Plaintiff