



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 50 of 2005

**MAYFAIR SERVICES & INVESTMENTS LIMITED
PLAINTIFF**

VERSUS

**PRUDENTIAL BUILDING SOCIETY (IN LIQUIDATION) 1ST
DEFENDANT**

**LAWRENCE NGAMAU 2ND
DEFENDANT**

**NDUNGU GATHINJI 3RD
DEFENDANT**

RULING

Mayfair Services Investments Limited is a limited liability company (hereinafter referred to as “Mayfair”), which owns a property in Eldoret, namely ELDORET MUNICIPALITY BLOCK 4/69 (hereinafter called “the subject property”) on which lies the Sirikwa Hotel.

Prudential Building Society which as its name suggests is a Building Society, is currently under liquidation. On 25/7/2003, the said Society appointed two Receivers over Mayfair. It would appear that the two Receivers took over the management of the subject property and have continued to manage the aforementioned Hotel, which action did not augur well with Mayfair, which decided to institute this suit against the Society, as well as the two Receivers.

It is Mayfair’s contention that the Legal Charge on the basis of which the Receivers were appointed is void and unenforceable and apart from therefore seeking several declaratory orders, it seeks a permanent injunction to restrain the Society and the two Receivers from appointing a receiver or exercising any powers of a receiver or receiver manager or “*any power of sale or other power whatsoever*” over the subject property. It also seeks an order to compel the two Receivers to be held personally liable for any losses incurred on account of their “*profligacy, forcible entry into the premises and adverse liability*”, and a further order to compel the Society to “*render true and accurate accounts excluding all illegal interest, penalties and charges*”.

The Society and the two Receivers who have filed a joint statement of defence and counterclaim have now moved this Court in an application in which they seek to have this suit transferred to the High Court at Milimani in Nairobi, for trial and determination.

They base their application on the grounds that advocates for all parties are based in Nairobi, and so are their clients; that there is another suit which is pending over the same subject matter in the High Court in Milimani; that all defence witnesses are based in Nairobi, and that the transfer would save both parties and the Court time and expense.

Mayfair is however of a different view. It urges this Court to find that its primary business which is material to this suit is the ownership, management and letting of the subject property which is within the jurisdiction of this Court. It denies, and has had its Chief Executive deposed, that the matters in the High Court at Nairobi, which the Society and the two Receivers refer to, are different and unrelated to these particular proceedings.

It was the submission of Mr. Simiyu learned Counsel for the applicant that though both the High Courts at Milimani and Eldoret have similar jurisdiction, it would however be more convenient to have the matter heard at Nairobi and he relied on the case of *Sarah Mugo v. S. Muriithi HCCC (Nyeri) 177 of 2002* where while transferring a matter from the High Court at Nyeri to the High Court at Nairobi, the Hon. Lady Justice Okwengu noted that *“it is evident that it would be convenient, less expensive and expeditious to have the trial at Nairobi”*.

Mr. Lilan, learned Counsel for the plaintiff, was of the view that the subject property, which is immovable property is situated within Eldoret Municipality, which is within the local jurisdiction of this Court, which Court has the relevant jurisdiction to deal with the matter.

Mr. Lilan also took issue with the supporting affidavit sworn by one Lugadiri Maurice on 3/3/2006 who is an advocate. It was his submission that the deponent has failed to disclose the source of his information or even the fact that he believes that what he has deposed upon in paragraphs 4, 7 and 8 are, as is required. He thus urged the Court to find that the affidavit is incompetent, and in this connection he relied on *Kenya Horticultural Exporters [1977] Ltd v. Pape (T/a as Osirua Estate) [1986] KLR 705* where the Court held that *“Order XVIII rule 3 (1) of the Civil Procedure Rules is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words “may contain” suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove”, and that “in the absence of an affidavit sworn by the respondent himself, it was doubtful whether the respondents’ advocate could by his own affidavit prove all the statements of information and belief”*.

He also relied on Mulla’s Code of Civil Procedure 16th Edition Vol. 1 where the section 16, which is referred to therein is similar in all ways to our section 12. It was also his submission that the High Court at Milimani would not have jurisdiction as the subject matter is based in Eldoret. He also relied on Judicial Hints on Civil Procedure Vol. 1 by R. Kuloba, at par. 126 and 128.

I have looked at the affidavit in question, and it is clear that Maurice merely deposes to certain facts in paragraphs 4, 7 and 8 without stating his source of information or knowledge or even that he believes that what he has deposed upon is true. In my view the statements contained in the paragraphs do not appear to be supported at all by the source of his information, or even his belief in his own statements. The fact that he finally deposes in paragraph 11 of the affidavit that *“what is deposed to hereinabove is true to the best of my knowledge, information and belief”* is not acceptable, and it is by all standards worthless, for he should have disclosed the source of his information contained in each of the aforementioned paragraphs. I do in the circumstance find that the paragraphs 4, 7 and 8 of the said affidavit are incompetent and do strike them out, which means, that the application is supported by the affidavit whose remaining paragraphs indicate as follows:

- “1. THAT I am an advocate of the High Court of Kenya practicing as such in the firm of Musyoka & Wambua Advocates who have the conduct of this suit on behalf of the Defendants herein.
2. THAT I have the authority of the defendants herein to swear this affidavit on their behalf.

3. *THAT I am well versed with the facts of this case and therefore competent to swear this affidavit.*
5. *THAT there is a suit namely H.C.C.C. No. 427 of 2004 consolidated with H.C.C.C. No. 64 of 2004 (Eldoret) pending at Nairobi's Milimani Commercial Courts over the same subject matter on which issues therein relate to the present suit.*
6. *THAT although the subject matter of this suit is in Eldoret, it will be proper if the suit is transferred to Nairobi where all the parties are based.*
9. *THAT if the suit is heard in Nairobi, it will save both parties time and expense.*
10. *THAT I humbly believe that the High Court at Nairobi has jurisdiction to hear and determine this suit.*
11. *THAT what is deponed to herein above is true to the best of my knowledge, information and belief."*

In view of my above finding I now find that though it is one of their grounds, the defendants have not provided ample proof to show that there are other civil matters in Nairobi which they claim are similar to this suit and on which account they urge this Court to find in their favour. It is however clear that Mayfair has shown that the two cases which they Society and its receivers refer to, are between parties who are not parties to this suit, which fact, though deponed upon by Mayfair, has not been controverted. In my humble opinion, it means that there was no substance in the defence Counsel's submission, as their contention which is in any event denied is not supported at all in the supporting affidavit, which would in effect mean that there is no sufficient proof to show that the matters which are different courts have anything in common.

Be that as it may, it need not be reemphasized that the plaintiff has a right to choose a Court of competent jurisdiction, but he must adhere to the requirements of section 12 which I shall come to later.

I am well minded of section 15 of the Civil Procedure Act (the Act), which stipulates that:

"Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

The issue that comes to mind is whether bearing all the above submissions into mind, this Court has competent jurisdiction to deal with this suit.

Section 12 of the Act stipulates that:

"Subject to the pecuniary or other limitations prescribed by any law, suits-

(a) for the recovery of immovable property, with or without rent or profits;

(b) for the partition of immovable property;

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate: **(underlining mine)**

*Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either **(underlining is mine)** in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”*

It is clear that the proviso in section 12 operates where relief sought is of a personal nature, and in my view it would not be relevant to the circumstances of this application.

It is common ground that the matter revolves around the receivership and management of Sirikwa Hotel, which as I stated earlier is situate on the subject property, which is situate within the jurisdiction of this Court. It is also evident that though all the defendants are based in Nairobi, the two receivers who are named as the 2nd and 3rd defendants have actually taken up their appointment and that they manage the said Hotel.

Faced with the above scenario and bearing in mind that it is trite that real actions be instituted in forum re sitoe, which is where the immovable property is situate, I do form the opinion that this court is of competent jurisdiction to hear and determine this matter and in the circumstances, there would be no sufficient cause to order the transfer of this suit to the High Court at Milimani in Nairobi.

The application is thus dismissed with costs.

Dated and delivered at Eldoret this 15th day of May 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Lilan for the plaintiff

Mr. Cheruiyot for the defendant