REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE 42 OF 2005

TROPICANA HOTELS LTD…….....…….....
……..PLAINTIFF

VERSUS

1. NARDIELLO MAURIZIO

2. CAPODARCA MAURIZIO

3. TESTA GIANCARLO

4. FEDRIGA FRANCESCO…….....…….....
……..DEFENDANT

RULING

By chamber summons filed on 4th August, 2005 the applicant who are the defendants in the main suit are seeking that the respondent's suit be struck out for being premature, an abuse of the Court process, frivolous and vexatious. That the suit is tainted with fraud and brought in bad faith.

The application is based on a further ground that the suit is irredeemably defective both in material and substantial sense. The application is supported by affidavit sworn by Nardiello Maurizio, the first applicant. It is averred in that affidavit that the suit herein has been brought with the sole aim of depriving the applicants of the suit property with a view of selling it to others. It is further deposed that the suit was brought in contravention of the Sale Agreement between the parties herein, which specifically stipulated conditions for termination of the Agreement. That the suit was filed in disregard to those conditions. None of the applicants was served with a 21 days' notice to make good the default. That the notice was addressed erroneously to directors of NAMI ITAL CO.

On the other ground it is contended that the intention of the plaintiff is to sell both the suit property and Eden Roc Hotel together to an American Investor.

The application was opposed and the respondent filed two replying affidavits on 14th September, 2005 sworn by Peter M. Magongwe and another by Bernd Graff, respectively.

In the affidavits, it is stated that Peter M. Magongwe personally served a demand letter giving 21 days notice to the applicants upon one Mr.Chanzera, a manager at Club 28.

It further argued that the applicants had associated themselves with a company referred to as NAMI ITAL

LTD in the Sale Agreement, hence the reference to that company in all correspondence, including the notice from the respondent to the applicants.

The replying affidavit further states that the current application by the applicants is aimed at delaying the determination of the suit. The existence of an American investor invested in the purchase of the suit property is denied as it is the applicants who are trying to sell the property to a Mr.Pane or Mr.Pessa. The respondent maintained that they only resorted to this action after the applicants defaulted in the instalment payments.

These are the rival arguments. Perhaps it will help to provide a very brief background to this application. The parties in this suit entered into a Sale Agreement for a parcel of land known as Plot No. 775 (original number 703/18) Malindi Municipality together with building comprising a club known as Club 28 and a Casino at a price of Euros.150,000. The applicants were the purchasers while the respondent company was the vendor. There was an arrangement as to payment of instalments which may not be necessary to set out here. But suffice to state that the applicants delayed in submitting instalment payments for various months. For this reason, the respondent alleges that a notice was sent to the applicant dated 6th April, 2005 to the effect all the outstanding instalment must be paid within 21 days of the letter or a suit would be instituted with the result that the applicants would forefeit the deposit as well as any instalments paid.

It is alleged that on receipt of this letter the applicants and made some payments, amounting to Euros,2,200 but leaving some balance uncleared. This prompted the respondent, through their lawyers, to write a further letter dated 19th April, 2005 reminding the applicants that the 21 days' notice issued earlier stood, despite the payment of E,2,200.

The notice expired an 27th April, 2005 and on 29th April, 2005, true to their word, this suit was filed. The objection being taken by the present application is two pronged in so far as the notice is concerned. It is the position of the applicant that according to Sale Agreement, the notice was defective as it was addressed to a non-entity. Secondly it was argued that the same was served upon a person not authorized to accept service. The other ground is that the suit is abuse of the Court process and is tainted with fraud. That the ultimate intention of the respondent is to reposess the property with the aim of selling it to individuals ready and prepared to pay more.

The final ground is technical and relates to the verifying affidavit, which I intend to deal with at the end of this ruling.

The application is expressed to be brought under Order 6 rule 13 (1) (b) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Order 6 rule 13 (1) aforesaid stipulate that:

"**13 (1). At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that –**

(a)…….

(b) It is scandalous, frivolous or vexatious, or

(c)…….

(d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed, or judgment to be entered accordingly as the case may be"

This provision donates wide discretionary powers to the Court, only fettered by the requirement that the discretion must be exercised judicially.

Striking out of a suit is a drastic measure, considering that parties take time to prepare their pleadings,

expenses incurred and they want to have their day in Court. The Court will only strike out a suit under above provision where it is satisfied that the suit is so obviously hopeless and unsustainable. Do the grounds advanced by the applicants render the suit unsustainable?

It is the contention of the applicants that the suit is premature in that the respondents have not complied with condition 13 (b) (Note that there are two condition 13) of the Sale Agreement. Condition 13, (in question) provides;

"**13. If the Purchaser shall fail to comply with any of the conditions set forth herein, the Vendor shall give the purchaser at least Twenty One (21) notice (sic) in writing specifying the default and requiring the Purchaser to remedy the same before the expiration of such notice and if the Purchaser shall not comply with the said notice the Vendor shall at its sole option be entitled:-**

(a) Forthwith to forfeit the deposit and any instalments paid for the Vendor's own benefit as liquidated damages and declare this agreement to be rescinded OR

(b) To sue the purchaser for all sums due and unpaid by the Purchaser under the terms hereof and for specific performance".

From this, the respondent's options are quite clear in the event of default by the applicants. I need not paraphrase the options, suffice to state that this being an interlocutory application the Court has to exercise great care not to make any definite findings of fact or law lest the trial Court is left with nothing to decide.

The respondents in their plaint has certainly combined the options. The effect of that must await the trial.

I do not perceive the applicants to say that they never receive the notice. Rather their complaint is that is was addressed to a body not party to the Sale Agreement and served upon a person not authorized to accept service on behalf of the applicants.

It is instructive to refer once again to the Sale Agreement The preamble, in the pertinent provision reads:-

"……**of one part AND NARDIELLO MAURIZIO, CAPODARCA MAURIZIO, TESTA GIANCARLO AND FEDRIGA FRANCESCO as the promoters of NAMI ITAL LIMITED currently in the process of being incorporated within the Republic of Kenya, all care of Post Office Box Number 1234 Malindi…….."**

The four individuals, whose names are set out above are, in that Agreement, called "jointly and severally the Purchasers". T he term purchaser, it is further provided, shall include, where appropriately, their personal representatives and assigns.

So, in terms of the Agreement, the notice could be served upon any one of the applicants, their personal representatives or assigns. The terms personal representative in law is a term of art denoting an executor or administrator of a deceased person. Similarly an assign is a person to whom property rights are transferred by another.

It is in the replying affidavit of Peter M. Magongwe that the notice was served on one Chanzera. It has not been claimed that Chanzera was a party to the Agreement or a representative or assign as stated above. But in Peter M. Magongwe's affidavit there is an averment that Chanzera was a manager at Club 28. This fact has not been controverted by the applicants. Where any fact is especially within the knowledge of any party in civil proceedings, the burden of proving or disproving that fact is upon that party - see Section 112 of the Evidence Act. It was therefore incumbent upon the applicants to state whether or not Chanzera was a manager at the time of service. The notice was served upon Chanzera who held himself out as having authority to accept service. The service was effected at the suit property and Chanzera signed for the letter. Quite a part from this, condition 13 of the Sale Agreement does not demand personal service on any or all of the applicants. It merely states that the Vendor shall give the

Purchaser (I presume) 21 (days) notice in writing.

Although the applicants have denied it, it would appear that upon receiving the notice, no matter the means, the applicants, within three days, on the 9th April, 2005 made payment of Euros 2,200. The letter was not returned in protest.

If the Agreement were to be strictly interpreted, then it could as well be said that it was not specific on the period of the notice to be given by the respondent. As I have already observed the period is simply shown as 20.

On this point I come to the conclusion that the applicants, at least the 1st applicant, had notice of the respondent's letter in question.

The next ground is that the notice was not addressed to the applicants but to the Directors of NAMI ITAL LTD. The respondents did not pluck this name from air. It is specifically provided for in the Agreement as set out in the preceding paragraphs. One would ask, on reading the Agreement what the purpose was for the inclusion, in the Agreement of the fact that the four applicants were the promoters of NAMI ITAL LTD, a company which was in the process of formation.

The term promoter covers a wide range of persons. It may cover a person or company that places shares or negotiates preliminary agreements or floats off the company's capital. Probably the most apt definition is that which was given to the term by Cockburn, CJ in **Twycross V Grant** (1877) 2 C.P.D. 469 at P 541 C.A – as follows:

"**A promoter undertakes to form a company with reference to a given project and to set it going and…….takes the necessary steps to accomplish that purpose".**

The applicants were in the process of forming a company with regard to a specific project and had probably initiated the necessary steps towards that direction. I still find no explanation why that fact had to be included in the Agreement. The applicants cannot now turn around to complain about their being described as directors, albeit prematurely or erroneously, of the company, yet they must have supplied the name to the drafters of the Agreement with certain intentional. They cannot, metaphorically speaking, run with the heirs and hunt with hounds.

I find that the applicants have not been prejudiced by them being described as Directors of NAMI ITAL LTD. It is noted that the applicants have protested at the issuance of receipts in the name of NAMI ITAL LTD. And advised that future receipts be issued in the names of the applicants.

The other ground is that the suit is an abuse of the Court process, frivolous vexatious and is tainted with the fraud and in bad faith. That the respondents are only interested in selling the property to a third party. According to the applicants the respondents have identified a buyer. Their intention is clearly demonstrated by the numerous applications for amendment of the plaint. Parties may amend their pleadings at any stage without leave of the Court before pleadings are closed.

The Court on the other hand has an unfettered discretion to allow amendment at any stage after close of pleadings and before judgment. In the instant case I find nothing to suggest that the Court process is being abused by the previous and current application for amendment. The respondents have explained that the amendment sought is to capture the current status of the suit property. No particulars of fraud were provided.

Finally, I turn to the objection to the verifying affidavit to the amended plaint. It is argued that it does not disclose the physical address of the deponent and it has also failed to state that matter deposed are correct. The word "true" is used in place of the word "correct".

Order 7 rule 2 of the Civil Procedure Rules is in mandatory terms that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the "correctness" of the averments contained in the plaint.

The Court may, according to rule 3, order to be struck out any plaint not in compliance with the above rule. It is noted that the original verifying affidavit was properly word and had the physical address of the deponent. This is the kind of mistake that was envisaged in the formulation of Order 18 rule 7 of the Civil Procedure Rules. Those breaches are curable and I so find.

In the result I come to the conclusion that this application must fail and I so find. The same is dismissed with costs.

Dated and delivered this 6th day of October 2005 at Malindi

W.OUKO

JUDGE

6.10.2005

Ruling delivered in the presence of

Mr.Machuka & Mr.Mwadilo & Mr.Mouko

Cc: Linda

W.OUKO

JUDGE

Mr.Mouko: I apply for certified copies of the ruling and proceedings.

W.OUKO

JUDGE

Court: certified copies of the ruling & proceedings may be supplied an payment of usual fees.

W.OUKO

JUDGE

Mr.Machuka: There is a pending application – chamber summons dated 28.7.2005. I wish to apply to amend the application.

W.OUKO

JUDGE

Mr.Mouko: I object. Let the plaintiff make a formal application.

W.OUKO

JUDGE.

Mr.Machuka: Provisions for amending are there within the law.

W.OUKO

JUDGE

Court: Mr.Mouko has objected to the application. It is ordered that leave to amend is granted and the amended application must be served & filed within 7 days from today. The respondent are similarly granted leave to file further affidavit.

W.OUKO

JUDGE