

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 565 OF 2001

KULDIPS TOURING CO. LTD. PLAINTIFF

V E R S U S

MANGA LTD T/A

PARADISE MOMBASA RESORT DEFENDANT

R U L I N G

The plaintiff obtained default judgment in this cause against the defendant. Execution proceedings commenced and the defendant decided to apply to set aside the judgment and all subsequent orders.

Service of summons is admitted by the defendant. Other ground is that the suit is against the wrong party. It is sworn that the defendant is not indebted to the plaintiff as claimed. That the right defendant is Paradise Mombasa Tours (1997) Limited a foreign company of Tel Aviv, ISRAEL.

It is also sworn that the plaintiffs advocate Mr. Aboo is with knowledge of the dispute having acted for defendant in the matter previously and should not have acted for plaintiff as he is aware of matters in dispute and that he has participated in negotiations on behalf of the defendant. The said advocate is said to have made the defendant think of not filing Memorandum of Appearance because he misled them to think "the matter would be taken care of". In addition it is stated that the defendants defence discloses tenable and bona fide issues.

On perusing the supporting affidavit of Moses Mwakazi (hereinafter called Moses) of P.O. Box 78 Mtwapa it is to be seen that after receipt of summons to enter appearance Moses contacted his director Juda Sulami who was at that time in Israel. This discloses that Judah Sulami is a director of defendant company which is registered in Kenya. It appears the firm of the advocates Aboo & Co. was engaged in the incorporation of the Defendant Company in May 1999. Mr. Aboo swears that except for incorporation of the company he has never been instructed to act for defendant company in any claim with Kuldip Touring Co. Ltd. He further says that in connection with this case Mr. Sulami Director of the defendant telephoned him on 24.1.2002 after the goods were attached to request him to stop execution to enable him to come to Mombasa on 30.1.2002 to meet Jasmine Singh of the plaintiff to sort out the matter. This is confirmed by Aboos' letter of 28.1.2002 annexure 5. Mr. Aboo is a senior advocate and he should know what it means to act in unethical manner. I believe what he say. I find therefore that he has not omitted any breach of ethics as alleged and entitled to represent the plaintiff in this case.

Regarding the substance of the matter, defendant alleges that he is the wrong party to be sued. That there is a foreign company involved called "Paradise Mombasa Tours (1997) Ltd." whose address is in Israel. I notice there is an establishment known as Mombasa Paradise Resort here in Mombasa where summons was served of Box 78 Mtwapa. The defendant has not maintained the same or denied that it is its establishment. Mr. Jaswinder Singh of the plaintiff says that that is where services were rendered and he thought Judah Sulami and Mr. Maaman were directors. He also says that he knew that the director Sulami was citizen of Israel and that is how the money was paid from Israel.

It is also in evidence that the defendant company is a creation of PARADISE Mombasa Ltd of Isle of Man and Paradise Mombasa (Marketing) Limited of the same Isle of Man.

I have perused the documents and pleadings filed by the parties and the defendants statement and defence. I am satisfied that the transportation and the services rendered to the Paradise Mombasa Resort by the plaintiff are not disputed. The charges (invoices) for payment of services to that institution are not disputed. The dispute ranges as which corporation is liable to pay the plaintiffs claim. I find that the defendant is the party liable and I find no reason shown why they failed to enter appearance in the suit after having been duly served. There is no defence to the plaintiff claim to go to trial.

The application dated the 28th January, 2002 is hereby dismissed with costs.

Dated this 9th day of June, 2002.

J. KHAMINWA

COMMISSIONERS OF ASSIZE

Read in presence of Mr. Chigiti holding brief for Brayant. Mr. Chigiti – I apply for certified copies of ruling and proceedings. I also apply for temporary stay to allow a formal application to be made.

Court – Orders granted. Stay for 7 days is hereby granted.

J. KHAMINWA

COMMISSIONER OF ASSIZE