



**Baobab Beach Resort & Spa v Mbugua & 2 others (Civil Appeal
165 of 2021) [2023] KEHC 18930 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 165 OF 2021
DKN MAGARE, J
MAY 10, 2023**

BETWEEN

BAOBAB BEACH RESORT & SPA APPELLANT

AND

PHILIP MBUGUA 1ST RESPONDENT

SUSAN AWINO 2ND RESPONDENT

SILVESTER MBANDI 3RD RESPONDENT

JUDGMENT

1. This Judgment relates to the following Civil Appeals, that is 157, 158, 159, 160, 161, 162, 163 and 164 of 2021. They relate to a simple issue of consolidation and joining of the defendant's employer, as a party.
2. The appellant, upon learning that its former employer had sued its other employees, made an application to the court to be joined and the matters be consolidated.
3. The matter was heard by honorable J.M. Omido and dismissed on 22/9/2021.
4. The prayers that had been sought in the lower court are: -
 1. Spent.
 2. Spent
 3. Spent
 4. This honorable court be pleased to order that Baobab Beach Resort & Spa, the applicant herein, be enjoined as a 3rd defendant in this suit.



5. The honorable court be pleased to order the plaintiff to serve the Applicant with all pleadings filed and the applicant be at liberty to file pleadings in responses thereto within such time frame as the court may direct.
6. Costs of this application be provided.

Duty of The Court

5. the duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another vs Associated Motor Board Company and others* [1968] EA 123, where the law looks in its usual gusto, held by as follows; -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

6. The court is to bear in mind now that it has not seen the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

7. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

8. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

9. I have noted that the parties were dealing with “enjoying” a party. I take to it that they were applying for joinder or joining of the appellant to the suit.

10. The court correctly analyzed the Law that is applicable, that is order 1 Rule 10 and the case of *Card/ Construction Engineers v Naomi Chepkoriri Langat* (2019) eKLR, where Justice Sila Munyao held as doth: -

“I have considered the matter. The application seeks joinder of the three mentioned persons as co- defendants. It should be remembered that this is a suit filed by the plaintiff seeking reliefs against the applicant who is sued as defendant.

The person who is seeking the joinder of additional defendants is the defendant in the matter. What this means is that if the application is allowed then KCB, Ms. Martha and Mr. Langat will be defendants, but the plaintiff in this matter has no claims or complaint whatsoever against the parties sought to be introduced as defendants. We will end up having an absurd situation where there are defendants in the matter but who the plaintiff has nothing against.”



11. However, the court failed to fathom that the cause of action was allegations made by employees of Baobab Resort & Spa to their employer. The allegations related to issues of Sexual harassment by the 1st respondent.
12. The 1st respondent by that time was a Deputy General Manager of the Appellant.
13. The appellant is enjoined by law, to ensure and protect its workers from Sexual harassment. The alleged publication was said to be to the appellant, by each of the defendants. The 1st respondent stood in a position of authority while the other respondents appear to be hapless Junior workers. Order 1 Rule 5 provides as doth: -

“It shall not be necessary that every defendant shall be interested as to all relief claimed in any suit against him.”
14. My understanding is that the 2nd and 3rd respondents in each of the Appeals.
15. The upshot is that the court, below erred in fact and in law in finding that Baobab Beach Resort is not a necessary party.
16. I therefore set aside the entire Ruling and in lieu thereof, substitute with an order allowing the application with costs to the intended 3rd defendant.

Determination

17. The upshot is that the Appeal herein is merited. Consequently, I make the following orders:-
 - a. I allow this with costs of Kshs. 100,000/= to the Appellant.
 - b. Given that the Appeals are related, the rest of the Appeals, that is 157 of 2021, 158 of 2021, 159 of 2021, 162 of 2021, 163 of 2021 and 164 of 2021, are hereby allowed with no order as to costs.
 - (a) The Appellant shall be joined to the proceedings against the 3rd defendant immediately after the current defendants in Kwale No. E022 of 2020, followed by the Appellant as the 3rd defendant, the defendants in E14 of 2020, E16 of 2020, E17 of 2020, E18 of 2020, E20 of 2020 and E29 of 2020.
 - (b) The appellant will have costs of 2,500/= only for the Application.
 - (c) In order to expedite hearing and avoid duplicity of suits, the following suits, that is, Kwale PMCC E014 of 2020, E16 of 2020, E17 of 2020, E18 of 2020, E119 of 2020, E20 of 2020, E22 of 2022 and E 29 of 2020 are returned to the lower court and fixed for directions on 6/7/2023.
 - (d) The 1st respondent to Amend the plaintiff to reflect the changes. This be done within 21 days from the date of service of this order.
 - (e) Baobab Beach Resort & Spa be and are herein added as the 3rd defendant in each of the suits.
 - (f) The suits are consequently, marked as consolidated with Kwale RMCC E 22 of 2020 as the lead file.
 - (g) For avoidance of doubt the appellant is a necessary party.



- (h) In default of the Amendment to include the appellant, the suits shall stand dismissed with costs on the 22nd day after service of this order.
- (i) The 3rd defendant/appellant herein is deemed to have been joined to the suit as the time of filing the Application to be joined to the proceedings.
- (j) This file is closed. The original files be returned to be heard by a court other than the Honorable Omido J.M.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF MAY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Karina for the Appellant

No appearance for the Respondent

Court Assistant - FIRDAUS

