



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL SUIT NO. 118 OF 2009

TEMPLE POINT RESORT LIMITED...APPLICANT/PROPOSED INTERESTED PARTY

VERSUS

ACCREDO AG.....1ST RESPONDENT/PLAINTIFF

SLAMA BEACH HOTEL LIMITED.....2ND RESPONDENT/1ST DEFENDANT

HANS JUERGEN LANGER.....3RD RESPONDENT/2ND DEFENDANT

ZAHRA LANGER.....4TH RESPONDENT/3RD DEFENDANT

STEFANO UCCELLI.....5TH RESPONDENT/4TH DEFENDANT

ISAAC RODROT.....6TH RESPONDENT/5TH DEFENDANT

RULING

[THE PROPOSED INTERESTED PARTY'S APPLICATION DATED 22ND JANUARY, 2018]

1. The Proposed Interested Party, Temple Point Resort Limited filed an untitled application dated 22nd January, 2018 on 23rd January, 2018. The application is brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 1 Rule 10(2) of the Civil Procedure Rules, 2010. The application is supported by grounds on its face and an affidavit sworn by Elmar Wagner. Of the orders sought by the Applicant, only one can be addressed at this stage. This is the prayer for joinder. The other prayers can only be addressed if the Applicant's application to be enjoined in this suit succeeds.

2. The foundation of the Applicant's case is that it entered into a lease agreement with the 1st Defendant, Salama Beach Hotel Limited on 18th June, 2012 and has since operated hotel business over the suit property. The Applicant asserts that on 11th January, 2018 it was confronted by the 5th Respondent/4th Defendant, Stefano Ucceli and the 6th Respondent/5th Defendant, Isaac Rodrot who demanded a forceful takeover of the property leased to it on the grounds that they had a court order permitting them to take over the said property. According to the Applicant, that is when it learned of the orders granted by this court on 30th April, 2015. The Applicant states that the said orders which were issued without its participation in the court proceedings will affect its lease and it is only just and fair that it be allowed to participate in these proceedings.

3. Counsel for Accredo AG (1st Respondent/Plaintiff), Salama Beach Limited (2nd Respondent/1st Defendant), Hans Juergen Langer (3rd Respondent/2nd Defendant) and Zahra Langer (4th Respondent/3rd Defendant) indicated to the court on 16th April, 2018 that they were not opposed to the application.

4. Stefano Ucceli (5th Respondent/4th Defendant) did not file any response.

5. Isaac Rodrot (6th Respondent/5th Defendant) opposed the application through grounds of opposition dated 16th April, 2018 that:

“1. The application is *res judicata*.

2. The court has no jurisdiction to grant prayers 4 and 5 hereof.

3. The application is barred in law and is for striking out.”

6. The application was argued on 16th April, 2018 with Mr. Okoth reiterating the contents of the application. He cited the decision of the Court of Appeal in **JMK v MWM & another [2015] eKLR** as outlining the principles governing joinder of parties in suits. He submitted that the grounds of opposition filed by the 6th Respondent/5th Defendant could only be addressed once the application for joinder is dispensed with.

7. Submitting in opposition to the application, Mr. Munyithya for the 5th Defendant stated that the application is *res judicata*, the issues raised having been dealt with previously. Secondly, that although the Applicant claims to have been in exclusive possession of the suit premises, the court record shows that it is the 3rd and 4th respondents who have been in possession all along.

8. Thirdly, that the lease agreement exhibited by the Applicant shows that the same was signed by the 3rd and 4th respondents on behalf of the 2nd Respondent/1st Defendant and Johann Boog and the 3rd and 4th respondents on behalf of the Applicant. He asserts that the lease agreement is between the same parties and it cannot be said that the Applicant was not aware of this matter.

9. Fourthly, that Elmar Wagner who swore the affidavit in support of the application has not disclosed his relationship with the Applicant. That it is therefore not known in which capacity he swears the affidavit. Further, no resolution by the board of directors of the Applicant authorizing the lodging of the application has been exhibited.

10. It does not require any intensive legal interrogation for this court to agree with counsel for the Applicant that the application for joinder is not *res judicata*. The Applicant has not previously, in these proceedings, sought to be made a party. The 6th Respondent's assertion that the application is *res judicata* is aimed at the other prayers of the application, which as earlier indicated are not the subject of this ruling. I therefore find and hold that the 5th Defendant's claim that the application for joinder is *res judicata* is without merit. The assertion is thus rejected and dismissed.

11. I agree with counsel for the Applicant that the principles applicable to an application for joinder are as stated by the Court of Appeal in **JMK v MWM & another [2015] eKLR**. Let the Court of Appeal speak for itself:

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar’s Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”

This Court adopted the same approach in **CENTRAL KENYA LTD. V. TRUST BANK & 4 OTHERS, CA NO. 222 OF 1998**, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. *Sarkar’s Code*, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in **TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448**, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

12. It is, however, important to state that a party who desires to join proceedings must lay the basis for such an application. An applicant must also justify why the application for joinder is being made at that particular point in time. This will help the court in determining whether the application is being made in good faith.

13. In the case at hand, it is clear that the application for joinder rides on the back of dishonesty. The Applicant claims that it only knew of this suit on 11th January, 2018 after the 5th and 6th respondents threatened a forceful takeover. This is not true. The lease agreement dated 18th June, 2012 entered between the Applicant and the 2nd Respondent/1st Defendant shows that the 3rd and 4th respondents are said to be directors for both the Applicant and the 2nd Respondent/1st Defendant. How then can it be said that the Applicant was not aware of the suit when its directors were parties to the same from the time of its inception in 2009? I find that the Applicant has all along been aware of this matter.

14. It has also been pointed out by counsel for the 6th Respondent, and which assertion has not been rebutted by the Applicant, that there is

no resolution by the Applicant's board of directors authorizing the filing of the instant application. What is only exhibited is a letter by Elmar Wagner instructing counsel to prosecute the application. The position of the said Elmar Wagner in the Applicant company is not disclosed. He is not one of the directors who signed the lease agreement with the 2nd Respondent/1st Defendant. He does indeed aver that he was nominated by Suprama AG, a shareholder of the Applicant. The loan agreement dated 11th May, 2010 is between Supramar AG and the 2nd Respondent/1st Defendant as lender and borrower respectively. Although the account given as belonging to the lender is indicated as Temple Point Resort, Barclays Bank, Malindi branch, the relationship between Temple Point Resort and Supramar AG is not stated. In short, there is no authority for the Applicant to launch the instant application.

15. Finally, the relationship between a lender and a borrower has no role in the dispute which involves the determination of the ownership of the company. A landlord-tenant relationship cannot also interfere in the determination of a dispute over the property between the landlord and a third party. Once the dust settles, the Applicant will not be left without a remedy. It will be entitled to pursue its rights as per the lease agreement. That is not a matter to be addressed in this case.

16. The outcome of this application is that the Applicant has not laid any basis for allowing it into these proceedings. I thus find its application for joinder without merit and dismiss the same with costs to the 6th Respondent/5th Defendant.

Dated, signed and delivered in Malindi this 17th day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT