



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC APPLICATION NO. 555 OF 2015**

**JAX KENYA LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SOUTH AFRICAN MUTUAL**

**LIFE AFRICAN MUTUAL.....DEFENDANT/APPLICANT**

**RULING**

1. The Notice of Motion Application herein is dated 10<sup>th</sup> November 2015, and filed by the Defendant, seeking for orders that, the Plaint/Amended Plaint be struck out with costs, and consequential order be made dismissing the suit with costs. The costs of the Application be provided for. The Application is based on the grounds thereto, and an Affidavit sworn by Ann Miano.
2. The background facts of the case are that, the Plaintiff sued the Defendant, South Africa Mutual Life Assurance Society (hereinafter referred to as “SAMLAC”) vide a Plaint dated 28<sup>th</sup> February 2000. The Plaint states that SAMLAC is “a body” incorporated by statute in the Republic of South Africa. and also registered in the Republic of Kenya with offices at Nairobi known as Old Mutual Life Assurance Company Limited, (herein after referred to as “OMLAC”).
3. According to the “Applicant” this description of the Defendant is totally mistaken and incorrect. It is factually wrong and it is not proof able.
4. The Applicant averred that OMLAC is a completely different and separate entity from SAMLAC. It is not in any way merged with SAMLAC and neither does OMLAC form part of SAMLAC, as stated in the original Plaint.
5. The Defendant/Applicant stated that the Plaintiff took out summons against SAMLAC and instead of applying to serve it out of the Jurisdiction, they served OMLAC as deposed by one John Irungu Absolom in an Affidavit sworn on the 17<sup>th</sup> October 2016.
6. That OMLAC, having been named in the Plaint as part and parcel of SAMLAC, entered Appearance and filed a written statement of defence “under protest”. Thus continuous participation of OMLAC throughout in this suit is clearly spelt out under protest. The Applicant further stated that SAMLAC ceased all it’s business in Kenya, sold and transferred all it’s assets and liabilities to OMLAC during the period of February or March 1995, that is five years prior to the commencement of this suit. Therefore, if the Plaintiff has a claim against OMLAC as the successor of the Defendant, the Plaintiff should have sued

OMLAC. Yet there is no suit against OMLAC.

7. The Applicant argued that the Summons taken out in this matter expired long time ago and well before the year 2003. The validity of the period within which to serve the summons also expired before the year 2003. In addition, the limitation period for commencement of any claim has also expired. Therefore, the best cause of action for the Plaintiff is to terminate this case and apply for leave to file proceedings out of time against SAMLAC and serve it out of the Court's jurisdiction, and proceed as it deems appropriate.

8. The Application was opposed based on the Replying Affidavit dated 25<sup>th</sup> February 2016, sworn by Nalichandra Lakhamshi Kimji Shah, who is the Managing Director of the Plaintiff's Company. He averred that the Application herein is an abuse of the Court process, intentionally made to derail the hearing and disposal of this old case, and **"the court must frown at it with abundant rage"**. That, the suit was filed against the Defendant as described, Summons and Plaint served on the Defendant in the year 2000 and that position has remained to date, as the Defendant has not been amended or deleted.

9. The Respondent argued that, the suit herein arises out of a lease contract between the Plaintiff (as the Lessee) and the Defendant (as the Lessor). The Lease describes the Defendant as the "Lessor" which expression shall where the context so admits include its successors and assigns. The Defendant has transferred all its assets and liabilities to Old Mutual Insurance Co. Ltd and the liability sought to be proved is enforceable on the successors or assigns of the Defendant. The Summons and Plaint were served on the Defendant which has defended the suit since then to date.

10. Subsequent to the amendment of the Plaint, the Defendant has filed Affidavits through its officers expressly indicating and admitting that they are employees of the Defendant. It is **"bizarre"** for the Defendant to bring this Application twelve (12) years after the Amendment of the Plaint. If the advocate on record does not act for the Defendant, then they lack the right to bring this Application on its very behalf. That it is unbelievable that a party would defend proceedings for sixteen (16) years for which it has no interest at all. The Defendant's attempt to run away from this suit is in vain. From the documents filed, it is evident that the Defendant has used names Old Mutual Kenya or Old Mutual Life Assurance interchangeably but that did not affect its identity as those names merge into the Defendant which is sued. Thus the Application herein is inept and lacks merit and must be dismissed with costs.

11. The parties disposed of Application through filed written submissions which they highlighted. I have considered the submissions alongside the other documents filed. I find that the issue for determination is whether the Applicant herein referred to and abbreviated as OMLAC has been wrongfully involved in this matter. The basis for this Application is that, the said entity is distinct from the named Defendant herein. However, the Respondent argues that the said entity is a successor of the Defendant as supported by the Kenya Gazette Notice No. 6757 of 10<sup>th</sup> December 1993, where the assets and liabilities of the Defendant were transferred to the said OMLAC. I have had the benefit of the said Kenya Gazette and I note that indeed the assets and liabilities of the Defendant was transferred as aforesaid.

12. The other issue is whether the Summons and Plaint were served on OMLAC who are not the Defendant herein. The Respondent maintains that, the Summons and Plaint were served on the Defendant. I have gone through the court record, unfortunately, I have not seen an Affidavit of Service sworn by the Process Server who served the Plaint and the Summons. This makes it difficult for the Court to ascertain with certainty who among the Defendant and OMLAC was served with the Plaint/Summons. Be it as it may, subsequently, the Plaint was amended vide an Application dated 31<sup>st</sup> December 2001, where by the words "also registered in Kenya as Old Mutual Life Assurance Co. Limited" OMLAC have been deleted. The legal effect of the same is that OMLAC, is no longer involved or deemed as a Party in this matter. Therefore, the Defendant remains SAMLAC as named herein. If the Plaintiff did not serve the Plaint and Summons on the named Defendant, as required under the law, that issue can only be raised by the named Defendant. OMLAC who has distanced itself from these proceedings cannot apply on behalf SAMLAC, to have the Original or the Amended Plaint struck out. As the Plaintiff maintains that, the service of the Plaint and Summons were effected on the correct party, the suit should proceed. The issue of proper and effective service will be dealt with at the main hearing. I have also observed that this suit has been in Court for the last 16 years. Parties have filed and prosecuted

several applications herein and the main suit certified ready for hearing, and even scheduled for the same on several occasions.

13. Although the Applicant avers that they have participated under protest, by conduct of continuous participation, under the doctrine of Estoppel, they may be deemed to have conceded being a Party to the suit. The Plaintiff submitted that the issues raised now should have been raised at the earliest opportunity, and relied on the case of **Republic VS Chief Registrar of the Judiciary & 2 others (2015) eKLR** which stated that *“if there is a valid objection in law to a matter proceedings before a court of law, either for want of jurisdiction or for some other sufficient reason, then such objection should be raised at the earliest opportunity to avoid a waste of valuable judicial time”*.

14. The Plaintiff also submitted that although, the Application has been brought under Order 2 Rule 15, on the ground that, the Plaint is scandalous, frivolous and vexatious, or it may embarrass or delay fair trial of the action. The Applicant has failed to prove the same. The suit raises triable issues, which need to be addressed. The unfortunate state of affairs is that, once the Applicant pleads that it is not a proper party to be sued or sue, and it is neither a Plaintiff or Defendant, it cannot seek for any orders herein. It could not do so, as a Party to be struck out if improperly enjoined or sued.

15. In conclusion, I find that, although the Applicant avers that it has been wrongly and mistakeably involved in these proceedings, I find that, the Defendant named herein is SAMLAC. The Applicant OMLAC has not been named Defendant. Again, subsequent to the Amendment of the Plaint, the reference to OMLAC made in the Original Plaint was deleted. If OMLAC is not a Party or a Defendant herein, then it lacks the locus standi to seek for the striking out of the Plaint and/or the Amended Plaint. Finally, the issues raised herein are matters of facts that can be considered alongside the hearing of the main suit.

16. The upshot of this is that the Applicant has not met the threshold under Order 2 Rule 15 of the Civil Procedure Rules to strike out the Plaint or Amended Plaint. The Application therefore is dismissed with costs to the Respondent.

**Dated, signed and delivered on this 16th day of March 2017.**

**G. L. NZIOKA**

**JUDGE**

**In open Court in the presence of**

Rach for the Applicant

Nyawara for the Respondent

Teresia – Court Assistant