REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 20 OF 2015

CHRISTOPHER ORINA KENYARIRI T/A

KENYARIRI & ASSOCIATES ADVOCATES……..…..APPLICANT/DEFENDANT

VERSUS

SALAMA BEACH HOTEL LIMITED……...1ST RESPONDENT/1ST PLAINTIFF

HANS JUERGEN LANGER……...…….2ND RESPONDENT/2ND PLAINTIFF

TOURISTIC & TECHNOLOGY GMBH…...……3RD RESPONDENT/3RD PLAINTIFF

(TOUR & TECH GMBH)

ACCREDO AG…….....…….4TH RESPONDENT/4TH PLAINTIFF

RULING

[Notice of Motion Application dated 24th March, 2017]

1. Through the Notice of Motion application dated 24th March, 2017 the Applicant/Defendant Christopher O. Kenyariri T/A Kenyariri & Associates Advocates prays for two orders. His first prayer is that the interlocutory judgement entered herein be set aside. In the second prayer he seeks that this suit be transferred to the High Court at Nairobi for trial. The application is supported by the grounds on its face and an affidavit sworn by the Applicant on the date of the application.

2. The respondents/plaintiffs opposed the application through grounds of opposition dated 4th April, 2017 and an affidavit sworn by the 2nd Respondent Hans Juergen Langer on 19th April, 2017.

3. The Applicant's case is brief. On the prayer to set aside the interlocutory judgement, he avers that there is a defence on record and the interlocutory judgement should be set aside.

4. On the application for the transfer of the suit to Nairobi, the Applicant avers that the suit should be transferred to the High Court at Nairobi where his witnesses reside.

5. The respondents' response to the application to set aside the interlocutory judgement is that the same is regular as it was entered in accordance with the law. In reply to the question of transfer of the matter to

Nairobi, the respondents contend that the same is an afterthought which is only meant to delay the expeditious disposal of the matter. The respondents also assert that the issues raised herein are *res judicata.*

6. The instant application does not require a long ruling. On the question, as to whether the interlocutory judgement is regular, I find that the parties are agreed that the Applicant's defence in Malindi HCCC No. 16 of 2015 was adopted as the Applicant's defence in this case.

7. The respondents aver that the Court directed the Applicant to file a defence to the amended plaint but the Applicant never filed one and that is why it applied for interlocutory judgement to be entered.

8. Order 8 of the Civil Procedure Rules, 2010 provides for amendment of pleadings. Rule 1(2) states that: -

> **"Where an amended plaint is served on a defendant –**
>
> **(a) If he has already filed a defence, the defendant may amend his defence; and**
>
> **(b) …."**

The cited provision clearly shows that an amended plaint need not be automatically met by an amended defence. A defendant is at liberty to rely on the already filed defence or amend his defence in response to whatever is raised in the changed plaint. This is indeed clarified by Rule 1(6)of Order 8 which states that: -

> **"Where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1), then, if that party does not amend his pleadings under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order 2 rule 12 (2) shall have effect at the expiry of the period within which the pleading could have been amended."**

9. The Applicant therefore has a valid defence on record and the interlocutory judgement need not have been entered. The interlocutory judgement entered on 22nd June, 2016 against the Applicant and in favour of the respondents is therefore set aside.

10. Should this matter be transferred to Nairobi? I find that the issue is *res judicata.* I only need to point to the judgement of the Court of Appeal in **Malindi Civil Appeal No. 62 of 2016 Christopher Orina Kenyariri T/A Kenyariri & Associates v Salama Beach Hotel Limited & 3 Others** which was an appeal filed by the Applicant herein against one of the rulings delivered by Said Chitembwe, J in this matter. The Court of Appeal captured the Applicant's issues thus: -

> **"As a result the Appellant claimed that he was disabled from amending his defence and occasioned prejudice. He also complained that the respondents had failed to comply with Order 8 of the Civil Procedure Rules, which sets out how amendments should be effected. The ground as set out in the Appellant's affidavit in support of the application, was drafted in fairly vague terms as follows:**
>
> **"The plaintiffs (respondents) have refused to obey the law of institution of suits and hence the defendant (applicant) who is an advocate of this Honourable Court and a reputable scholar continues to suffer prejudice."**
>
> **Clearly that is what the late Madan, JA (as he then was) would have described as "a masterpiece of obscurity" (See Choitram v Nazari [1976-1985] EA 52). In straight forward terms, from his submissions before the High Court the appellant was complaining in the above ground that the respondents ought to have filed the suit in Nairobi rather than in Malindi because he resides in Nairobi."**

11. The Court then proceeded to render itself *inter alia:* -

> **"We must reiterate that the High Court of Kenya remains one and the same court, only that it sits at different locations in the country, such as Malindi and Nairobi. The location where it sits cannot therefore affect its jurisdiction. The practice and requirements that suits be filed in particular stations of the High Court are purely for administration and convenience in the hearing and determination of suits."**

12. The Court proceeded to dismiss the Applicant's appeal stating that: -

> **"We are satisfied that the issues taken up by the Appellant regarding the amendment of the plaint and the place where the suit was filed are objections of a technical character …."**

13. The question of the place where the suit was filed has therefore been fully addressed both by this Court and the Court of Appeal. The application seeking transfer is related to that issue and the Applicant out to have taken up the issue at that time. He failed to do so and he cannot be allowed to bring it up again. In short the issue is *res judicata.*

14. Even if I am wrong that the issue of transfer of this case is indeed *res judicata,* I would still find that the application has no merit. The Applicant himself did file some of the taxation matters in Malindi. It has taken the Applicant some time before raising the issue of the transfer of the suit to Nairobi. For those reasons I would hold that the application to transfer the matter to Nairobi lacks merit.

15. This is how the Court of Appeal introduced the judgement I have just cited:

> **"The parties to this interlocutory appeal have, deliberately or otherwise, rendered the litigation leading to the appeal an unnecessarily convoluted and tangled legal affair. A straightforward advocate-client dispute over fees has spewed out numerous applications and references both in the High Court and in this Court, which have achieved nothing but obfuscation of the issue in dispute and delay of the resolution of the suit."**

16. It is a high time that the parties proceeded with the hearing of this suit so that the substantive issues in this matter can be determined by the Court. They are directed to prepare the matter for hearing and list the same for disposal on priority basis.

17. On the issue of costs of the instant application, I note that the Applicant succeeded partially. For that reason, I direct each party to bear own costs of the application.

Dated, signed and delivered at Malindi this 5th day of June, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT