



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 16 OF 2013

(CONSOLIDATED WITH)

MISC. CIVIL APPLICATION NOs. 13, 14, 15, 17, 41 & 42 OF 2013

KENYARIRI & ASSOCIATES ADVOCATES.....APPLICANT/DECREE HOLDER

VERSUS

SALAMA BEACH RESORT LIMITED.....1ST RESPONDENT

HANS JUERGEN LANGER.....2ND RESPONDENT

ZAHRA LANGER.....3RD RESPONDENT

STEFA UCCELI.....4TH RESPONDENT

ISAAC RODROT.....5TH RESPONDENT

AND

TEMPLE POINT RESORT LTD.....OBJECTOR

RULING

[Notice of Motion Application dated 22nd March, 2017]

1. This ruling answers the application dated 22nd March, 2017 brought by the Applicant/Decree Holder Kenyariri & Associates Advocates under sections 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. Salama Beach Hotel Limited, Hans Juergen Langer, Zahra Langer, Steffano Ucceli and Issac Rodrot, the judgement debtors, are named as the respondents. Through the application, the Applicant prays for orders as follows: -

“1. The Hon. Court be pleased to release to the Decree Holder Kenyariri and Associates advocates, the sum of Kshs.2,450,374/= deposited in this Court by the Judgement Debtors.

2. Any other Order that the Court may deem fit to issue.”

2. The application is supported by the grounds on its face as follows:

“a) The judgement debtors applied before this honourable High Court at Malindi to have stay of execution of the decree herein pending determination of Malindi Civil Suit No. 20 of 2015 against the Decree Holder and stay was granted on condition that the decretal sum is deposited in court and indeed the said sum was deposited in court.

b) On the same ground again, the judgment debtors moved the honourable High Court at Nairobi to stay execution of another decretal sum of Kshs.2,836,698/= using the same Malindi Civil Suit No. 20 of 2015 against the decree holder and another stay was granted on condition that the decretal sum is deposited in an interest earning account in the names of the advocates representing the parties, and the said sum of Kshs.2,836,698/= is deposited at NIC Bank Nkrumah Road at Mombasa in the joint names of Kenyariri & Associates and Opolu & Company.

c) The sum at NIC Bank aforesaid is enough to satisfy the alleged claim against the decree holder in case the said claim succeeds and there is no need of keeping away from the decree holder the money deposited in this honourable High Court at Malindi.”

3. The application is also supported by an affidavit sworn on the date of the application by Dr. Christopher O. Kenyariri. The affidavit reiterates the grounds on the face of the application.

4. The respondents opposed the application through grounds of opposition and an affidavit sworn by the 2nd Respondent Hans Jurgen Langer, all dated 18th April, 2017.

5. In a ruling dated 1st December, 2016, my brother Said Chitembwe, J issued orders that:

“In the end, I do find that both applications are merited. The applicants’ application dated 11th August, 2016 is granted in terms of prayer three (3) whereby there shall be stay of execution of the decree in favour of the respondent pending the determination of Malindi HCCC No. 20 of 2015. Equally, the respondent’s application dated 23rd September, 2016 is hereby granted in terms of prayer two (2) whereby the applicants are hereby ordered to deposit in court the sum of Kshs.2,450,374 within Ninety (90) days hereof. Each party shall meet their own costs for both applications.”

6. In a ruling delivered in Nairobi High Court, Commercial and Admiralty Division, Misc. Civil Application No. 298 of 2013, Kenyariri & Associates Advocates v Hans Juergen Langer, Fred A. Ochieng, J held that:

“52. I have given careful consideration to the matters before me and have decided that justice can only be done to both parties if I grant conditional stay of execution. If that is done, neither of the parties would be placed in a situation which was prejudicial.

53. The Decree-holder would know that if the case against him failed either completely or partially he could thereafter recover what was due to him, without too much hustle.

55. Accordingly, I now order that;

(1) Within the next 30 days from today, the judgement-debtor shall pay into an interest-earning account, the whole decretal amount.

(2) The Account shall be operated jointly by the advocates for the judgement debtor and the law firm which is run by the Decree-holder.

(3) Provided the decretal amount is deposited within the prescribed 30 days, there shall

be a stay of execution until the court at Malindi determines the case filed by Hans Juergen Langer against Christopher Orina Kenyariri, Trading as Kenyariri & Associates Advocates.

(4) In the event that the Judgement-debtor does not make available the decretal amount timeously, so that it can be held in the joint account within the stipulated time-span, execution may thereafter proceed.”

7. Now the facts in brief. The Applicant herein is an advocate of the High Court of Kenya. At one time he entered into an agreement to render legal services to Salama Beach Hotel Limited; Touristic and Technology GMBH (Tour and Tech GMBH); and Accredo AG. The said business relationship did not end well, resulting in taxation of client-advocate bills of costs in this matter (Malindi HCCC Misc. Application No. 16 of 2013 as consolidated with Misc. Application Nos. 13, 14, 15, 17, 41 and 42 of 2013) and the already stated Nairobi H.C. Commercial and Admiralty Division Misc. Civil Application No. 298 of 2013. The bills of costs were taxed against the respondents in favour of the Applicant. He then moved to recover the same in this matter and in the case at Nairobi. The respondents sought to stay execution resulting in the issuance of the stay orders already cited.

8. After the issuance of the stay orders the Applicant firm of advocates now seeks through the instant application the release of the money deposited in this Court by the respondents in compliance with the orders of Said Chitembwe, J.

9. The respondents are opposed to the application. They say that the application is incompetent, scandalous, frivolous and vexatious. It is their view that the court is *functus officio* and this particular issue is *res judicata*.

10. According to the respondents, the Applicant is through this application seeking a review of the orders of Chitembwe, J. Further, that an attempt by this Court to entertain the application would amount to sitting on appeal over its own decision.

11. It is the respondents' position that this Court has no access to the files in Milimani HCCC Misc. Civil Application No. 298 of 2013 and Malindi HCCC No. 20 of 2015 and it cannot make orders on matters not before it.

12. The respondents also assert that the Applicant is indebted to them in excess of Kshs. 7.8. million which he has declined to pay and that is why the claim in Malindi HCCC No. 20 of 2015 has been brought against him.

13. Let me start with the respondents' assertion that the Applicant is indebted to them in excess of Kshs. 7.8 million. In an amended plaint filed on 19th October, 2015 in Malindi HCCC No. 20 of 2015, the plaintiffs, who are the respondents herein, pray for various orders including an order compelling the Defendant, who is the Applicant herein to pay the plaintiffs an outstanding balance of Kshs.2, 840, 703.05. The assertion by the respondents that the Applicant owes them in excess of Kshs. 7.8 million is therefore not supported by the pleadings.

14. Is this matter *res judicata* or an appeal against the decision of this Court? I do not think so. In my view, the orders given in the two rulings are subject to the review of the Court from time to time depending on the circumstances prevailing at the time an application is made. The Applicant needed not seek for a review or variation of the order as suggested by the respondents. An appeal was also not necessary. Indeed, the order the Applicant seek is one that should be directed at the inherent jurisdiction of the Court. The respondents' opposition to the application on those grounds therefore fails.

15. As for the fact that the files in Nairobi H.C. Commercial and Admiralty Division Misc. Civil Application No. 298 of 2013 and Malindi HCCC No. 20 of 2015 are not before this Court, I do not think that fact makes any difference. The relevant rulings have been exhibited through the respondents' replying affidavit. Those rulings are self-explanatory and they will sufficiently guide this Court in

reaching its decision. In short, I find no merit in any of the grounds of opposition raised by the respondents.

16. I now turn to the merits of the application. My understanding of the rulings delivered separately and in different cases by Said Chitembwe, J and Fred Ochieng, J is that the respondents are indeed indebted to the Applicant. The learned judges have, however, stayed execution in order to give the respondents an opportunity to prosecute their claim against the Applicant who is the Defendant in Malindi HCCC No. 20 of 2015. In that suit, the respondents contend that they no longer owe the Applicant any money but it is the Applicant who is indebted to them.

17. The orders issued in this matter and in the case at Nairobi were meant to make the money easily available to the Applicant should the respondents' case fail. On the other hand, if the respondents succeed in their claim against the Applicant then they will not have to undergo the hassle of seeking to recover money already paid to the Applicant.

18. Said Chitembwe, J. in his ruling clearly expressed the purpose of the order thus:

“My considered view in the entire dispute and in line with the act of balancing each party’s rights is that the applicants should pursue their pending civil suit to its utmost and without the fear of looming execution. While the applicants pursue their suit, the respondent should rest assured that should the applicants’ suit be dismissed, he shall not be subjected to another execution process. That calls for the deposit of the decretal sum in court so that it would be easy for each party to access the deposited sum. That way each party will be the winner. The applicants won’t be harassed through constant execution while pursuing their suit while the respondent will not be pondering on his next move to effect his decree.”

19. If indeed the rulings issued by the two judges were meant to serve the same purpose, as alluded to by the Applicant, then there is no reason why the Applicant’s application should not be allowed. It is not disputed that the proceedings in Malindi and in Nairobi were in respect of different bills of costs. The two rulings show that the Applicant is entitled to Kshs. 5, 287, 072 but, as already pointed out, the respondents’ claim against him is for Kshs. 2, 840, 703.05. This claim is almost fully taken care of by the Kshs. 2,836,698/= deposited in a bank account in the joint names of the advocates for the parties herein as directed in the Nairobi case. There is therefore no good reason for holding onto the money deposited in this Court in compliance with the order of 1st December, 2016. Allowing the application ensures that the respondents’ interests remain fully secured by the order issued in Nairobi even as the Applicant partially enjoys the sweat of his brow. The application is therefore allowed with costs to the Applicant.

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

W. KORIR,

JUDGE OF THE HIGH COURT