

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 20 OF 2015

SALAMA BEACH HOTEL LIMITED 1ST PLAINTIFF

HANS JUERGEN LANGER 2ND PLAINTIFF

TOURISTIC & TECHNOLOGY GMBH(TOUR&TECH GMBH).....3RD PLAINTIFF

VERSSUS

KENYARIRI & ASSOCIATES ADVOCATESDEFENDANT

RULING

The application dated 11.11.2015 seeks to have the plaintiffs' suit struck out with costs to the defendant. The application is premised on the grounds that the suit offends legal provisions, it is contrary to the orders of this court issued on 5.10.2015 and that the suit is bad in law. The application is supported by the affidavit of Mr. Christopher Orina Kenyariri sworn on 11.11.2015.

The plaintiffs filed grounds of opposition on 7.12.2015. Parties agreed to determine the application by way of written submissions.

The applicant maintains that the suit does not comply with the provisions of Section 15 of the Civil Procedure Act. Counsel submit that the above section stipulates that suits should be filed within the local limits of whose jurisdiction the defendant resides or carries on business or personally gain. The intention of the law was to protect litigants from unnecessary costs. The defendant resides in Nairobi and this suit ought to have been filed in Nairobi.

Secondly, the applicant contends that the suit does not comply with Order 8 of the Civil Procedure Rules on amendment of pleadings. This court directed the plaintiffs to amend their plaint. Under rule 7 of Order 8, amendments are done by way of striking out in red ink all deleted words and underlying in red ink all added words. The plaintiffs have not complied with the above requirement. Initial plaint was dated 25.5.2015. This date is not included in the amended plaint. Further, the colour used in the amended plaint is not red required. Colours other than red are supposed to be used in further amendments.

On their part, the plaintiffs maintain that this suit involves a dispute between the defendant who was retained to offer legal services and his client. The defendant filed eleven bills of costs against the plaintiffs. The bills were taxed at Kshs.5,034,095/=. The suit has been brought by the plaintiffs on the basis that the plaintiffs paid the defendant Kshs.7,874,799 which amount was not included in the taxed bills. This gives a balance of Kshs.2,840,703/= due and payable to the plaintiffs by the defendant.

The plaintiffs further submit that the plaintiffs filed their amended plaint on 19.10.2015 as directed by the court. The defendant was granted leave to file an amended defence but has not done so. Instead, the defendant has filed the application seeking to strike out the suit. The plaintiffs contend that the suit need to be heard and determined on merit.

The main issue for determination is whether this suit should be struck out. The first objection relates to

the suit having been filed in Malindi instead of Nairobi where the defendant resides. Section 15 of the Civil Procedure Rules gives different scenarios as to the place of institution of a suit. One of the explanations is that where the suit arises from a contract, a cause of action arises at the place where the contract was made, or where the contract was to be performed or where money relating to the contract was payable. The defendant was retained by the plaintiffs to render legal services. From the pleadings, it is established that the services were rendered both in Malindi and Nairobi. The plaintiff indicates that the 3rd and 4th plaintiffs are based in Germany. It is common knowledge that the 1st plaintiff is based in Watamu, Kilifi County. In his verifying affidavit sworn on 25.5.2015, the 2nd plaintiff, Hans Juergen Larger states that his postal address is from Nairobi. The defendant has not filed any defence. In essence therefore the defendant is raising objection to the jurisdiction of the court to handle the matter. That objection cannot be the reason for striking out this suit. The best way is for the defendant to file his defence and object to the jurisdiction of this court. Once that is done, the defendant can apply to this court for the transfer of the suit to Nairobi where he resides. Regard should be placed on the explanation under Section 15 of the Civil Procedure Act as to the place of contract or payment of the fees.

The second issue relates to the manner in which the amendments have been done. Mr. Kenyariri contends that the amendments do not comply with Order 8 rule (7) of the Civil Procedure Rules. I have seen the amended plaintiff filed on 19.10.2015. I have also seen the original plaintiff dated 25.5.2015. The plaintiffs used a colour printer to highlight the new amendments. The new amendments are in red according to my opinion. The defendant can easily see what has been introduced as an amendment. Two paragraphs 17A and 17B have been introduced and duly highlighted in red. The red colour can appear in different form. It can be dark red or light red. What has been used is ink from a cartridge. It is not a red biro pen which has been normally used to cancel deleted words and underline new words. The very essence of amendment is to correct the party's pleadings and show the court and the other party what has been introduced in the amended pleadings. Parties should not be seen to dwell so much in technicalities to the extent of forgetting that the other litigant is in court seeking substantive justice. The overriding objective is to hear the parties and make a final decision but not to engage in minor issues such as the colour used in amending the pleadings. The colour is clearly red and that should not be an issue. Paragraph 24 of the amended plaintiff shows what has been deleted and what has been introduced by way of amendment. The date when amendments were done can as well be indicated with leave of the court.

From the time the suit was filed in May 2015 this court has dealt with two applications. The main suit is still pending. The plaintiffs' claim is simply that they paid some money over and above the amount of taxed costs due to the defendant. This is a simple claim. The defendant can simply file his defence and let each party tell the court its side of the dispute. Parties should not make it difficult for their adversaries to be heard in court. It is quite prudent to let disputes determined on merit as opposed to having pleadings struck out on technicalities. That does not solve the dispute.

In the end, I do find that the application dated 11.11.2015 lacks merit and is hereby dismissed with costs to the plaintiffs.

Dated and delivered in Malindi this 7th day of April, 2016.

S. CHITEMBWE

JUDGE