



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL SUIT NO.20 OF 2015

SALAMA BEACH HOTEL LIMITED..... 1ST PLAINTIFF

HANS JUERGEN LANGER2ND PLAINTIFF

TOURISTIC AND TECHNOLOGY GMBH

(TOUR AND TECH GMBH)3RD PLAINTIFF

ACCREDO AG 4TH PLAINTIFF

VRS

KENYARIRI & ASSOCIATES ADVOCATE.....DEFENDANT

RULING

The application dated 26/6/2015 seeks to have the plaint dated 25/5/2015 be struck out for not disclosing any reasonable cause of action against the defendant. It is brought under Order 2 rule 15 and Order 51 of the Civil Procedure Rules. The respondent filed grounds of objection on 21/6/2015.

Mr. Kenyariri, counsel for the applicant entirely relied on the application. Counsel submitted that this court held that the issue of taxation was *res judicata*. Mr. Ndegwa, counsel for the respondents relied on the grounds of opposition.

The plaint dated and filed on 25/5/2015 seeks the following prayers:

- a. A declaration that the defendant is indebted to the plaintiffs with regard to payments already made to the defendant by the plaintiff.
- b. The honourable court be pleased to issue an order of stay of execution in Nairobi Misc. Application Nos.769 and 770 of 2013, Nairobi Misc. Application Nos.298, 299 and 300 and Malindi Misc. application No.16 (consolidated with Misc. Application Nos.13, 14, 15, 17, 41 and 42) pending the hearing and determination of this suit.
- c. The honourable court be pleased to order the defendant to produce an account of the monies received by the plaintiffs jointly and severally.
- d. The honourable court be pleased to apply any and all monies paid to the defendant by the plaintiffs for the satisfaction of the amounts awarded in Nairobi Misc. application Nos.769 and 770 of 2013, Nairobi Misc. Application Nos.298, 299 and 300 and Malindi Misc. Application No.16 (Consolidated with Misc. application Nos.13,14,15, 17, 41 and 42)

- e. The defendant be compelled by an order of the honourable court to pay any outstanding balance to the plaintiff together with interest thereon.
- f. Interest on (e) at the rate of ten percent (10%) per month on the lump sum interest until payment in full.
- g. General damages.
- h. Costs of the suit plus interest thereon.
- i. Such further or other relief as this court may deem fit and just to grant.

The plaintiff filed an application dated 20th May 2015 seeking stay of execution in respect of orders made in different matters. In its ruling delivered on 19th June, 2015, this court upheld the defendant's preliminary objection on that application. Basically, the plaintiff sought to stay execution against the defendant's taxed costs. Since the costs had been taxed by different courts and references determined by other judges, I did uphold the preliminary objection as the application sought to stay lawful orders granted by courts with similar jurisdiction.

The short background to this dispute is that the defendant was retained to act as an advocate by the first, second and fourth plaintiffs. The defendant was made to cease acting for the three plaintiffs and subsequently taxed his legal fees. The plaintiffs contend that the defendant did not take into account some monies that were paid to the defendant. Presumably, the unaccounted for amount was paid by the 3rd plaintiff company that was not a party to some of the cases involving the other three plaintiffs.

Order 2 rule (15) provides for the striking out of pleadings that do not disclose any reasonable cause of action or defence in law. The grounds upon which the current application is being brought are that this court held that the issue of costs is *res judicata* as it had been determined by other courts, that Justice Angote dealt with the plaintiff's claim that the defendant did not take into account the payments made by the 3rd plaintiff and that the judge held that, that issue was **“water under the bridge”** as it could have been dealt with by the taxing officer. The applicant maintains that the 3rd plaintiff has no *locus standi* to sue as it was not part of the contractual relationship between the defendant and the other three plaintiffs. It is also contended that the plaintiffs would like to impose double deductions on the amounts due to the defendant. It is also stated that Kenyariri & Associates Advocates is a business name that has no capacity to sue or be sued in that name.

I have gone through Mr. Ndengwa's grounds of objection. The grounds mainly summarises various provisions of the law including the Civil Procedure Act, the Evidence Act as well as the Advocates Act.

The record shows that M/s Kenyariri & Associates Advocates filed bills of costs and proceeded to have their bills taxed by the taxing officers. A bill of costs is technically a pleading. In such a pleading, the advocate is seeking to have the fees payable for a specific brief assessed by the court. The process of taxation is part of litigation and ends up with a decision of the taxing master. In the current situation, M/s Kenyariri & Associates Advocates pursued their legal fees and had their bills taxed. They did not raise the issue that they are a business name and could not sue or be sued. References were filed before the High Court and the firm of Kenyariri & Associates Advocates vehemently defended them. I do find that the suit herein against Kenyariri & Associates Advocates is properly sued. In any case, under Order 2 rule (15) the court can order an amendment of the plaint or the court can make an order to have the specific names of advocates trading under the name of Kenyariri & Associates Advocates be joined as parties to this suit. This ground cannot be a reason to have the suit struck out.

Prayer (a) of the plaint is seeking a declaration that the defendant is indebted to the plaintiffs. Basically this court dealt with prayers (b) and (d) in relation to the prayer for stay of execution. Prayer (c) is seeking an order of account of the monies paid by the plaintiffs to the defendant. Prayer (e) seeks payment of any excess amount plus interest by the defendant. It is clear to me that apart from the two prayers that

were affected by the preliminary objection, the rest of the prayers do disclose a reasonable cause of action. It is true that the court advised the plaintiffs to pursue their claim through a separate suit. This suit sufficiently deals with that issue. The plaintiffs can as well amend the plaint and plead the specific amount that was not taken into account by the defendant.

There is no need to strike out pleadings so that a party can file another suit. This suit is properly before the court. It is a simple claim by the plaintiffs to the effect that part of the money paid to the defendant was not accounted for. The defendant's costs were taxed. Although Justice Angote mentioned in passing the issue of these payments, there is no evidence that that issue was dealt with by the taxing master or that the costs that were taxed did include those payments. The defendant can simply file an account and show that indeed the taxed costs took into account the alleged payments or defend the suit and indicate that no such payment was made. That is a dispute which need to be resolved by the court. It cannot be dismissed at the outset.

Similarly, the fact that the 3rd plaintiff was not a party to the previous suits cannot act as a bar to the filing of this suit. The 3rd plaintiff is aligning itself with the other three plaintiffs. Once the matter is heard, the 3rd plaintiff will be expected to establish its connection with the other plaintiffs and if it made any payment to the defendant, it will be upon that plaintiff to establish the purpose and intent of those payments.

Whenever a litigant approaches the court, it is the duty of the court to hear its complaint. Striking out of pleadings is a draconian decision that can be equated to switching off the life saving machine for a patient who shows signs of recovery. For pleadings to be struck out, it should be established that the same are hopelessly hopeless and that there is no claim at all that can be resolved by the court. In the event of it being a defence, the same principles should apply. No amount of amendment should be able to give fresh life to the pleadings. The court should be able to hear the claim and determine it on its own merit. The bar is so low that any simple claim brought before the court attracts its attention and calls for a full hearing so that the court can digest the problem. The doors of justice are so wide open to the extent that any claim worth its name must be fully heard even if it will be ultimately dismissed. That is the essence of justice.

From the pleadings, it is not specifically indicated how much the plaintiffs paid the defendant. The defendant's bills of cost have been taxed. The plaintiffs know how much is due to the defendant as per the taxed bills of costs. The prayer for stay of execution is spent. With regard to the prayer for production of statement of accounts, the plaintiffs are aware of what is being claimed by the defendant and what was paid. I do find that instead of striking out the plaint, I do order that the plaintiffs do amend their plaint under Order 2 rule 15 and categorically state what the plaintiffs paid to the defendant and what has been taxed against them in form of costs. This will enable the court to know the extent of the dispute as opposed to the manner in which the plaint has been drafted. The plaintiffs to file and serve an amended plaint as directed herein above within fourteen (14) days hereof.

In the end, I do find that this suit discloses a reasonable cause of action. The application dated 26/6/2015 is hereby dismissed. Costs shall follow the outcome of the suit.

Dated, signed and delivered at Malindi this 5th day of October, 2015.

SAID J. CHITEMBWE

JUDGE