



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 337 OF 2001**

**TOBS LIMITED .....PLAINTIFF**

**VERSUS**

**HOLIDAY INN NAIROBI MAYFAIR COURT..... DEFENDANT**

**R U L I N G**

1. Before the Court is an application by the Plaintiff dated 28<sup>th</sup> April, 2014. The Amended Notice of Motion brought under the provisions of **Order 1 Rule 3, 10 (2)** and **Order 51** of the *Civil Procedure Rules* seeks the following prayers *inter alia*:

- “1. THAT this Court be pleased to enjoin Southern Sun Hotels Ltd as a Defendant in this suit as a party from whom the Plaintiff seeks relief in this matter;**
- 2. THAT this Honourable Court be pleased to enjoin & Beyond Kenya Limited as a Defendant from whom the Plaintiff seeks relief in this matter;**
- 3. THAT this Honourable Court grant the Plaintiff/Applicant leave to amend the Plaintiff to include Southern Sun Hotels Ltd and & Beyond Kenya Limited to the proceedings as co-Defendants;**
- 4. THAT this Honourable Court substitute the name of the Defendant herein with the names of the proposed Defendants;**
- 5. THAT the Plaintiff/Applicant may file and serve a further amended Plaintiff upon all intended Defendants abovementioned if the above prayers are granted;**
- 6. THAT the costs of this application be provided for”.**

2. The application is supported and predicated upon the grounds that the proposed co-Defendant, Southern Sun Hotels Ltd bought the Defendant Company, Lavado Holdings Holiday Inn Nairobi Mayfair Court Hotel from & Beyond Kenya Limited in a Sale Agreement dated 28<sup>th</sup> July, 2012. It is contended that they are thus liable as owners under the acquisition for any actions instituted

- against them before the sale. It has also been contended that & Beyond Kenya Limited, as the former owners of the Defendant Company, are liable for the discharge of creditors and other liabilities and should thus also be enjoined as co-Defendants to the Plaintiff's claim. Further, it is contended that the claim as against Southern Sun Hotels Ltd and & Beyond Kenya Limited stems from the terms of the Sale Agreement and that they both ought to be held liable and be enjoined as co-Defendants in the suit.
3. The application is further supported by the Affidavit of **Tob Cohen**, the Director of the Plaintiff Company, sworn on even date. It is averred therein that despite the change in ownership of the Defendant Company, the former owners viz & Beyond Kenya Limited, and the new owners, Southern Sun Hotels Kenya Ltd, are culpable, liable and accountable to the creditors and actions filed against them. It is further contended that the failure to enjoin the two parties would be prejudicial to the Plaintiff as they ought to be held jointly and/or severally liable for the Plaintiff's claim.
  4. The application is opposed through Grounds of Opposition dated 15<sup>th</sup> November, 2012 filed on behalf of Southern Sun Hotels Kenya Ltd (hereinafter "Southern Sun"). It is contended therein that the application lacks merit as against it as the proposed Defendant to be enjoined and further that the Southern Sun cannot be liable for actions and debts of the Defendant merely because it was referred to as agents of the Defendant in the Sale Agreement. It is further contended that under **Clause 2.3**, Southern Sun is not liable for any debts payable or claims in respect of the Defendant.
  5. No Replying Affidavit or Grounds of Opposition have been filed on behalf of & Beyond Kenya Limited in objection to the Amended Notice of Motion.
  6. The provisions under **Order 1 Rule 3** of the *Civil Procedure Rules* gives to the Court the power to enjoin any party against whom a claim is made against, and against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative. Further at **Rule 10(2)**, the Court may enjoin and add a party whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.
  7. Under **Clause 2.3** of the said Sale Agreement, it is provided that & Beyond Kenya Limited would discharge the creditors and liabilities for all debts payable by and claims in respect of the former business. The term "**former business**" is defined under **Clause 1.1.6** of the Sale Agreement to construe and mean:

**"The former hotel business (including operating restaurants, bars, convention facilities and other ancillary facilities) operated under the Holiday Inn brand from the Hotel located on the premises".**

The term "liabilities" is defined under **Clause 1.1.8** as:

**"The outstanding liabilities of the former business (net of creditors) (whether actually or contingently)".**

Pursuant to **Clause 2.3** therefore, it would seem therefore that & Beyond Kenya Limited, as the former owners of the business, were laible for the discharge of creditors and liabilities that were outstanding in the former business. This line of argument was presented on behalf of Southern Sun, and further it was reiterated that & Beyond Kenya Limited had indemnified Southern Sun against any previous liabilities.

8. **Clause 2.3** of the Sale Agreement reads:

**"& Beyond shall timeously discharge the creditors and liabilities and shall be responsible for all debts payable by and claims in respect of the former business including all wages, taxation, rent, claims by third parties and other expenses of the former business. & Beyond indemnifies SSHKL and Lavado Holdings from and against any liability for such creditors and liabilities".**

Under the said agreement and clauses therein, Southern Sun contends that there is no provision that they were to act as an agent for & Beyond Kenya Limited. It claimed that the only agent appointed under **Clause 2.1** was a company known as Lavado Holdings BV. However at **Clause 3**, it is provided

that:

**“In consideration of SSHKL collecting the book debts on behalf of & Beyond as provided in Clause 2.1, & Beyond hereby covenants with SSHKL that it will refer any inquiries from prospective customers and travel agencies with respect to travel to Nairobi to SSHKL”.**

9. On the face of it, the consideration under **Clause 3** was to be mutually beneficial to both parties to the agreement. Southern Sun was to act as collecting agent on behalf of & Beyond Kenya Limited, who would in turn refer inquiring customers to them. Southern Sun were, therefore, and in consideration of **Clause 2.1** of the Sale Agreement, collecting agents for & Beyond Kenya Limited, having appointed Lavado Holdings BV as their agent.
10. As enunciated in **Order 1 Rule 10(2)** the purpose of adding a party to a suit is to ensure that all questions involved in the suit are effectually and completely adjudicated upon. By adding the proposed co-Defendants to the suit, the Court may determine the question of liability and culpability of the parties to the claim instituted by the Plaintiff. This would go towards fulfilling the Court’s mandate and obligations under *Article 159(2)* of the *Constitution* as read together with **Sections 1A and 1B** of the *Civil Procedure Act*. The Court has a duty to ensure that matters are dealt with in a fair, equitable, cost effective and expeditious manner, and as such would engage all parties that may be included in a suit to achieve this mandate. From my reading of the Sale Agreement, Southern Sun was appointed as the collecting agent of the Defendant, as distinct from the paying agent. In my view, Clause 3 of the Sale Agreement cannot be interpreted in any different way. This is all the more so when one takes into account the provisions of Clause 2.3 of the Sale agreement which clearly details & Beyond Kenya Limited as responsible for all debts of the business including claims from third parties, which the Plaintiff so obviously is.
11. As a result, I find that the Application of the Plaintiff to enjoin Southern Sun fails with costs to Southern Sun. The Plaintiff’s Application to enjoin & Beyond Kenya Limited is allowed but with no order as to costs.

**DATED and delivered at Nairobi this 17<sup>th</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**