



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.410 OF 2012**

VENTAGLIO INTERNATIONAL S. A. LUXEMBURG.....1ST PETITIONER

ISAAC RODROT.....2ND PETITIONER

VERSUS

THE REGISTRAR OF COMPANIES.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

**RULING ON A PRELIMINARY OBJECTION**

1. On 9th October 2012, certain parties herein namely, M/s Salama Beach Hotel Ltd, Hans Juergen Langer and Zahra langer filed a Notice of Preliminary Objection and the grounds are the following;

***“1) The Chamber Summons Application dated 13th September 2012 together with the Petition of even date are both an abuse of the Court process and should be struck out.***

***2) The Application and the Petition as filed offend the Provisions of Section 6 of the Civil Procedure Act.***

***3) The Petitioner have no Locus Standi to commence the Petition or any other suit touching on Salama Beach Hotel Limited. The 1st Petitioner is in Receivership and the 2nd Petitioner is a busy body.”***

2. Before I even reproduce the Submissions by counsel, I should state that ground (a) above cannot be a pure point of Law which would attract the tag of a proper Preliminary Objection. I say so because vague as it, I cannot see any point of law arising out of it and “*abuse of Court Process*” cannot *per se* be a point of law. In fact, in Submissions by the advocate for the parties named above, the issues regarding the manner in which the Petitioners have abused the Court process all turned on facts relating to prior Court proceedings at the High Court in Mombasa and Malindi (Petitions Nos.2 of 2012 and 69 of 2011) and prior suits including HCCC No.118 of 2009 in which similar issues as in the present Petition were ventilated.

3. For this Court to enter into these contested facts and determine their import to the present proceedings

ten it would be acting against the edict of Sir Charles Newbold in Mukisa vs Westend Distributors Ltd [1969] E.A 696 where the learned judge boldly held as follows;

***“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”***

4. I am wholly guided by the above reasoning and will quickly overrule the first objection as not meeting the threshold of a Preliminary Objection.

5. Regarding objection (b), the argument by the named parties is that **Section 6** of the **Civil Procedure Act** should be invoked and a finding made that this Petition be struck off and **Section 6** of the **Civil Procedure Act** should be invoked because Petitions Nos.410 and 437 of 2012 which are substantially similar and which relate to the same subject matter, do exist and remain undetermined. That the Petition should therefore be stayed until those suits are resolved. **Section 6** aforesaid should be invoked and the present Petition stayed. **Section 6** aforesaid provides as follows;

***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.***

6. The intention of a Preliminary Objection is that the issue of law raised, if upheld, should put the whole matter to rest – see Mukisa (supra). It is obvious to me that even if I were to accept that Section 6 above should be invoked, the end result would be that this suit would not be brought to an early end but that it would merely be stayed and await determination later. Further, for me to determine that **Section 6** should be invoked, I would have to conduct an inquiry as to whether the issues of fact raised in the named suits are the same. Once such an inquiry is necessary, then the test for a proper preliminary objection would not have been met.

Like objection (a), objection (b) must also fail.

7. On objection (c), the issue raised so far as I can see is that the 1st Petitioner is in receivership and the 2nd Petitioner is a busy body and collectively have no locus to institute the Petition herein. The point may at a glance look like a point of law but it is not a “*pure point of law*”.

8. For this court to determine the objection, it must inquire into the alleged receivership of the 1st Petitioner and the exact place and position of the 2nd Petitioner in relation to the 1st Petitioner. That inquiry will delve into matters of fact and not law. It is obvious therefore that I cannot enter into such a venture by way of a preliminary objection.

9. Objection No.(c) must fail for the above reasons and that being the case, I will rule all the objections raised and the Petition should go to trial.

10. As to costs, let the same await the determination of the Petition.

11. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF APRIL, 2013**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Irene – Court Clerk*

*Mr. Kanyariri for Interested Parte*

*Mr. Nyandieka holding brief for Mr. Kabwe for Interest Parte*

*No appearance for Petitioners*

*Miss Kahoro for DPP*

*Mr. Ojwang for Attorney General*

**Order**

*Ruling duly delivered.*

**ISAAC LENAOLA  
JUDGE  
5/4/2013**