



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 53 OF 2017

ABDALLA MBARUK MWAROPHA PLAINTIFF/APPLICANT

-VS-

1. REHEMA SULEIMAN HASSAN

2. MWANAISHA ALI KHERI

(Sued as the Representatives of Mohamed Mbaruk

and Ali Mohamed Kheri - Deceased) RESPONDENTS/DEFENDANTS

AND

ALLIANCE HOTELS LTD APPLICANT (INTERESTED PARTY)

RULING

1. Coming for determination are two preliminary objections one by the Plaintiff and the other by the Defendants. By a Notice of Motion dated 14th September 2017 brought under Section 1A, 1B, 3A, 68, and 80 of the Civil Procedure Act, Order 45 Rule 1, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, the Interested Party seeks the following orders:

1. Spent

2. Spent

3. THAT upon inter partes hearing the Honourable Court be pleased to review the order and decree issued herein on 6th March 2017 and to recall, quash, vacate, annul and cancel the said order/decree and all other consequential orders and/or decrees.

4. THAT the Honourable Court be pleased in the exercise of its inherent jurisdiction to grant and issue other further appropriate order/declaration and to punish and censure the Plaintiffs and the Defendants herein for gross abuse of the court's process and integrity as may be just and appropriate in the circumstances.

5. THAT the costs of this Application be provided for.

2. The Application is supported by the Affidavit and Supplementary affidavit of Raymond David Victor Njindo Matiba sworn on 14th September 2017 and on 19th January 2018 respectively, and on the grounds on the face of the motion.

3. The Application is opposed by the Plaintiff and the Defendants. The Plaintiffs filed Grounds of Opposition and a Notice of Preliminary Objection both dated 29th September 2017 while the Defendants filed a Replying Affidavit sworn by Rehema Suleiman Hassan, the 1st Defendant on 24th November 2017, and a Notice of Preliminary Objection dated 24th November 2017.

4. On 29th January 2018, the Court directed that the Preliminary Objections be heard first. The Preliminary Objections were canvassed by way of Written Submissions which were duly filed and highlighted by the parties Advocates.

5. The Plaintiff raised objection to the hearing of the Interested Party's Application dated 14th September 2017 on the following grounds:

i. THAT the Interested Party herein is not a party to this Suit as it has not sought the leave of this Honourable Court to be enjoined as a party.

ii. THAT this Honourable Court is functus officio having marked the matter as settled on 6th March, 2017.

iii. THAT the Application is brought and the Affidavit sworn by an individual without any authorization and/or resolution of the Interested Party which is a Limited Liability Company thereby offending the provisions of the Companies Act No.17 of 2015.

6. The Defendants' Preliminary Objection seeks to have the Interested Party's Application struck out on the following grounds:

a) It was filed without the due authority from the affected/aggrieved party.

b) There is no resolution or valid resolution of the aggrieved/affected party approving the filing of the Application.

c) There is no resolution or valid resolution of the affected/aggrieved party appointing M/s Asige Keverenge & Company Advocates to file this Application for and on behalf of the affected Party.

d) The filing of the suit by the said firm of Advocates is invalid for want of authority from the aggrieved/affected party.

7. It was submitted by the Plaintiff that the Suit herein was between the Plaintiff and the Defendants who entered into a consent agreement. The Plaintiff submitted that the Interested Party was not a party to these proceedings and is improperly before this Court as it has not sought leave of the Court to be enjoined, hence the Application is defective and should be dismissed. The Plaintiff added that under Order 1 Rule 10 (2) of the Civil Procedure Rules, addition of parties to a suit may only be done during the pendency of the proceedings and not after judgment has been entered, and relied on the case of Zephir Holdings Limited –vs- Mimosa Plantation Limited.

8. The Plaintiff further submitted that the Court having adopted the consent of the Plaintiff and the Defendants as judgment of the Court, became *functus officio*. Relying on the case of Telkom Kenya Limited –v- John Ochanda (2014)eKLR, the Plaintiff added that the Interested Party has not demonstrated that the expectations in that case apply to this case as there was no slip in drawing the decision and there was no error in expressing the manifest intention of the Court.

9. The Plaintiff further submitted that Application is brought and the Affidavit sworn without the authority and/or resolution of the Interested Party which is a Limited Liability Company. The Plaintiff added that the resolution attached did not have the Company seal as provided under Order 4 Rule 1 (4) of the Civil Procedure Rules. The Plaintiff relied on the case of Kenya Commercial Bank -v- Come-cons Africa Limited and Another (2013)eKLR and urged the Court to uphold the Preliminary Objection and dismiss the Interested Party's Application. The Defendants' Objections were also in the same line as those of the Plaintiff.

10. On the part of the Interested Party, it was submitted that the Objections raised were not pure points of law as contemplated in the case of Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Limited (1969)EA 697 as they are contesting what is pleaded by the Interested Party in the Application and further that the objections are asking the court to ascertain facts and exercise judicial discretion.

11. I have considered the Preliminary Objections, the submissions filed and authorities cited. In the case of Mukisa Biscuits Co. –v- West End Distributors Limited (1969)EA Sir Charles Newbold P. stated:

“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.”

In the same case, Law J.A. stated:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

12. Do the Preliminary Objections raised herein raise points of law? In my considered view, they do. The first point raised is that the Interested Party is not a party to the suit and therefore the Application is incompetent. There is no doubt that prior to the filing of the Application by the Interested Party, the suit herein was between the Plaintiff and the Defendants. However, Order 1 Rule 10 (2) of Civil Procedure Rules provides that:

“The Court may at any stage of the proceedings, either upon, or without the Application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon or settle all questions involved in the suit, be added.”

13. The Interested Party was not a party to the suit. It did not seek leave to be enjoined in these proceedings. Even in the Application dated

14th September 2017, there is no prayer for its joinder as party to the suit. Further, the Court did not order *suo moto* for the joinder of the Interested Party. It is my considered view therefore that the Interested Party is not properly before Court. It ought to have sought the leave of the Court to be enjoined in the suit first before moving the Court for the orders in the Motion dated 14th September 2017.

14. The second ground of objection is that the Application has been brought and the affidavit in support sworn without any authorization and/or resolution of the Interested Party which is a Limited Liability Company thereby offending the provisions of the Companies Act No.17 of 2015. Order 4 Rule 4 of the Civil Procedure Rules provides that:

“Where a Plaintiff is a corporation the verifying affidavit shall be by an officer of the company duly authorized under the seal of the Company to do so.”

15. At the time of filing the Application dated 14th September 2017, there was no resolution filed to show that the Interested Party had authorized the deponent, Raymond David Victor Njindo Matiba to swear the Affidavit in support of the Application on behalf of the Company. I note however, that in the Supplementary Affidavit sworn on 19th January 2018, there is annexed thereto a resolution dated 5th June 2017 marked “RM1” authorizing the deponent to institute legal proceedings. In my view, the purported resolution ought to have been filed together with the Application dated 14th September 2017. Moreover the same lacks the seal of the company which is a mandatory requirement under Order 4 Rule 4 of the Civil Procedure Rules. I therefore find that on this ground, the Application is incompetent.

16. The other Ground of Objection raised is that this Court is *functus officio* having marked the matter as settled on 6th March 2017. Is this Court “functus officio”? It is a general principle in law that litigation must come to an end. Ordinarily a suit would come to an end when a Court has rendered a decision and that decision has been acted upon or executed. At that point the Court is said to be “*functus officio*” and any party who is aggrieved must now pursue the course of appeal or review to a higher court. In this case the Court did adopt as judgment of the Court the consent entered into between the Plaintiff and the Defendants on the 6th March 2017 and marked the matter as settled. The order has already been extracted. As such judgment has been perfected in this case and the matter is now out of the hands of this Court. I am of the view that in circumstances this Court is in fact “functus officio” and is not entitled to revisit the matter.

17. Accordingly, I find that the Preliminary Objections herein are merited and the same are upheld.

The upshot is that the Interested Party’s Notice of Motion dated 14th September 2017 is struck out with costs to the Plaintiff and the Defendants. It is so ordered.

Ruling dated, signed and delivered at Mombasa this 23rd day of July 2018.

C. YANO

JUDGE