



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.94 of 2014**

**GEORGE PHILLIPH INVESTMENT LIMITED**

**T/A ROCK MOTEL .....PLAINTIFF**

**VERSUS**

**DAVIS & SHIRLIFF LIMITED.....1<sup>ST</sup> DEFENDANT**

**INTICON AFRICA LIMITED.....2<sup>ND</sup> DEFENDANT**

**HARISH K. PATEL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. **Davis & Shirriff Limited**, the 1<sup>st</sup> Defendant, filed the notice of motion dated 15<sup>th</sup> June 2016 seeking to have the suit filed by **George Philliph Investment Limited T/A Rock Motel**, the Plaintiff, struck out with costs. The notice of motion is based on three grounds on its face and supported by the affidavit of Beatrice Ndungu, the credit controller with 1<sup>st</sup> Defendant, sworn on the 15<sup>th</sup> June 2016.
2. The application is opposed by the plaintiff through the grounds of opposition dated 6<sup>th</sup> July 2016.
3. The notice of motion came up for hearing on the 21<sup>st</sup> November 2016 when directions on filing of submissions were given. The counsel for the 1<sup>st</sup> Defendant and the Plaintiff filed their written submissions dated 13<sup>th</sup> February 2017 on the same date.
4. The following are the issues for the determination by the court;
  - a) Whether the plaint discloses any reasonable cause of action against the 1<sup>st</sup> Defendant.
  - b) Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, grounds of oppositions, the pleadings filed, counsel's submissions and come to the following conclusions:
  - a) That from the pleadings filed by the Plaintiff, the prayers are for the refund of Kshs.1,300,000/=, costs of new pool being Kshs.2,692850/=, general damages for breach of contract and loss of business costs and interests.
  - b) That the pleadings further show that the 1<sup>st</sup> Defendant was the one who recommended the 2<sup>nd</sup>

and 3<sup>rd</sup> Defendants to the Plaintiff as entitles who could do the swimming pool project for them. That though the 1<sup>st</sup> Defendant statement of defence and supporting affidavit is to the effect that they did not pray any further role, the Plaintiff's position is that the 1<sup>st</sup> Defendant were also to supervise the works to completion and therefore are a necessary party in these proceedings.

c) That among the documents in the list of documents filed by the Plaintiff is the 1<sup>st</sup> Defendant complimentary slip with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants names, copy of a page of the Plaintiff's visitors book signed by among others three persons with the 1<sup>st</sup> Defendant's address, daily work sheet carrying the 1<sup>st</sup> Defendant's heading and receipt dated 6<sup>th</sup> January 2014 issued by the 1<sup>st</sup> Defendant to the Plaintiff.

d) That the existence of the three documents in (c) above confirms that there was some level of interaction between the Plaintiff and the 1<sup>st</sup> Defendant over the swimming pool project and it is only fair that the Plaintiff's suit be allowed to continue to hearing for a decision on issues raised to be decided on merit. The 1<sup>st</sup> Defendant is a necessary party for the issues in this suit to be determined conclusively.

e) That in the event the Plaintiff will fail to establish any claim against the 1<sup>st</sup> Defendant to the standard required, an award of costs will suffice to compensate the 1<sup>st</sup> Defendant in addition to any other legal recourse the 1<sup>st</sup> Defendant may deem necessary to pursue.

6. That flowing from the foregoing, the court finds that the 1<sup>st</sup> Defendant notice of motion dated 15<sup>th</sup> June 2016 is without merit and the same is dismissed with costs to the Plaintiff.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF OCTOBER 2017

In presence of;

Plaintiff        Absent

Defendants      Absent

Counsel        M/S Nyakyeume for Kimanga for Plaintiff.

Mr Rugalo for Ogenjo for Defendants 2 & 3.

**S. M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

4/10/2017

4/10/17

S.M. Kibunja Judge

Oyugi court assistant

M/S Nyakyeume for Kimanga for Plaintiff.

Mr Rugalo for Ogenjo for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents

Order: ruling dated and delivered in open court in presence of M/S Nyakyeume for Kimanga for the Plaintiff and Mr. Rugalo for Ogenjo for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

4/10/2017