



**Rodrot v Salama Beach Hotel Ltd & 6 others (Civil Appeal E028 of 2021) [2024] KECA 173 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KECA 173 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E028 OF 2021  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**ISAAC RODROT ..... APPELLANT**

**AND**

**SALAMA BEACH HOTEL LTD ..... 1<sup>ST</sup> RESPONDENT**

**VENTAGLIO INTERNATIONAL SA (IN RECEIVERSHIP) .. 2<sup>ND</sup> RESPONDENT**

**ARCURI IGNAZIO ..... 3<sup>RD</sup> RESPONDENT**

**DS SA DAL MORRO MADDALENA ..... 4<sup>TH</sup> RESPONDENT**

**AVV DE CESARI PATRIZIA ..... 5<sup>TH</sup> RESPONDENT**

**STEFANO UCCELLI ..... 6<sup>TH</sup> RESPONDENT**

**HANS JURGEN LANGER ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 6th April 2021 in 2 Malindi Civil Suit. No. 10 of 2019)*

**JUDGMENT**

1. This appeal relates to a suit filed by the 1<sup>st</sup> respondent, Salama Beach Hotel Limited, in which it was claimed that, through the appellant, Isaac Rodrot’s fraudulent actions, it had suffered loss in various sums to third parties. It therefore sought to recover the sums, and an injunction to restrain the appellant and the co-respondents from interfering in its management and operations.
2. The genesis of the dispute was an alleged decree issued by a court in Milan on 14<sup>th</sup> December 2001 where a company by the name of Adinos A.G (Adinos) successfully sued another company, namely Viaggi Del Ventaglio (Viaggi) and was awarded Euros 825,000 with interest, together with costs of Euros 2,420. However, instead of recovering the sums so awarded, Adinos ceded the decree to a



third company, namely Accredo A.G to whom it owed money. Accredo took over the role of Adinos, and garnished the decree against Viaggi. Accredo was to discover later that Viaggi was to be declared insolvent, and held no attachable assets, save for those held by its Kenyan subsidiary, the 1<sup>st</sup> respondent Hotel. Consequently, it filed a suit in Kenya in Malindi HCCC No. 118 of 2009 seeking the following orders:

“An order that the judgment of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest and costs of Euros 2470 be enforced against the defendant.

1. A warrant of attachment before judgment do issue against the defendant’s plot no. 9890 Grant no. 11576 pending hearing and determination of suit.
  2. An injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/ or agents from selling, disposing off, alienating and/ or wasting plot 9890 Grant no. 11576 Watamu or in any other manner howsoever or whatsoever dealing with the said plot and the developments therein standing in a manner prejudicial or likely to defeat the process of execution of the judgment of the court of Milan given on the 14th December, 2001 pending the leaving (sic) and final determination of the suit (sic).
  3. An order that the plaintiff be allowed to take over the ownership, management, running, operation and control of the defendant and the business carried on plot known as Grant No. 11576 plot no. 9890 Watamu for such period and time as shall be sufficient to satisfy the judgment and decree of the court of Milan dated 14th December, 2001.
  4. Costs of the suit and interest thereon at court rates.”
3. Contemporaneously with that suit, Accredo also filed an application seeking warrants of attachment of the land belonging to the 1<sup>st</sup> respondent Hotel, that is, Plot No. 9890 Watamu Grant No. 11576 as well as orders allowing it to take control of the management of the Hotel, while restraining its directors from disposing of her assets pending the determination of the suit.
4. While the suit was pending, a statement of agreement and a consent dated 18<sup>th</sup> December, 2009 was recorded between the law firms of Messrs. Gunga Mwinga & Company Advocates for Accredo Ag and Fadhil Kilonzo Advocates for the 1<sup>st</sup> respondent, which was subsequently adopted by the court on 21<sup>st</sup> December, 2009. A decree was issued on 22<sup>nd</sup> January, 2010 allowing all the prayers sought in the claim with the following additional orders:

- “1. That the registrar of companies be and is hereby mandated to transfer all the shares held by the defendant (Salama Beach Hotel) shareholders to the directors of the plaintiff company, namely HANS-JURGEN LANGER & ZAHRA LANGER on equal number (50%50%) basis.
2. That one STEFANO UCCELLI the current resident director of the defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgment and decree of this court is fully satisfied and for the interest of the defendant company’s previous shareholders and directors without being a shareholder”



5. Dissatisfied with the consent and decree, Steffano Uccelli, the 6<sup>th</sup> respondent, filed an application in the High Court dated 20<sup>th</sup> November, 2014 seeking an order to set aside or review the decree on record so that parties could be heard on merit.
6. Upon hearing submissions from counsel for the parties, the learned Judge (Chitembwe, J.) delivered a ruling on the 30<sup>th</sup> April, 2015, in which he allowed the application as prayed, holding that there was no order or decree from the court of Milan in favor of Viaggi capable of enforcement. The court set aside the decree in the suit and proceeded to issue additional orders in the following terms:
  1. “The Registrar of Companies shall remove the names of the 2nd and 3rd respondents, that is to say, Hans Jürgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009;
  2. The 2nd and 3rd defendants to hand over all the properties belonging to Salama Beach Hotel Ltd within seven (7) days hereof to the 4th and 5th defendants. Counsel for both parties to participate in the transfer process;
  3. The 2nd and 3rd respondents’ names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009;
  4. In view of previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the court order is effected as hereinabove;
  5. Costs of the application to the applicant.”
7. Aggrieved by the decision of the High Court at Malindi, Accredo, the 1<sup>st</sup> respondent, Hans Jürgen Langer and Zahra Langer lodged an appeal before this Court at Malindi in *Civil Appeal No. 36 of 2015*. On 15<sup>th</sup> December 2017, this Court dismissed the appeal and upheld the ruling of the High Court.
8. Soon thereafter, on 23<sup>rd</sup> February 2018, the 1<sup>st</sup> respondent Hotel instituted a suit being Mombasa Civil Case No. 8 of 2018 through its director, Hans Jurrgen Langer, against Ventaglio International Sa, Dr. Arcuri Ignazio, D.Ssa Dal Morro Magdalena, Avv.De Cesari Patrizia, Stefano Uccelli and the appellant, and the 5<sup>th</sup> defendant. Simultaneously with the plaint, the 1<sup>st</sup> respondent filed an application seeking orders of injunction to restrain the appellant and his co- respondents from interfering with the 1<sup>st</sup> respondent Hotel. The suit was later transferred to Malindi and the case number changed to Malindi HCCC No. 10 of 2018.
9. In response to the application, on 5<sup>th</sup> March 2018, the appellant filed a Notice of Preliminary objection in which he claimed that the suit was res judicata. He also filed a replying affidavit, a Notice for the 1<sup>st</sup> respondent to act in person and a Notice to withdraw the suit. It was deponed that the suit and application of 23<sup>rd</sup> February 2018 were bad in law since no resolution to file this suit was filed since Juergen Langer and Zahra Langer, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in Malindi HCCC No. 118 of 2018 had been removed as directors of the 1<sup>st</sup> respondent Hotel pursuant to the ruling of Chitembwe, J. of 30<sup>th</sup> April 2015 and this Court’s judgment of 15<sup>th</sup> February 2017; that they cannot pass a resolution relating to the operations, ownership or management; and that any resolution passed or action taken is invalid and in contempt of the aforementioned orders of the High Court and this Court.
11. While the two issues were pending determination, Temple Point Resort Limited, through an application dated 1<sup>st</sup> August 2018, sought joinder, and the trial Judge (D. Chepkwony, J.) allowed the application for joinder and granted leave to the company to file its requisite documents.



12. Dissatisfied with the ruling, the appellant filed Civil Appeal No. 2 of 2019 and the 6<sup>th</sup> respondent filed Civil Appeal No. 3 of 2019, which were consolidated. In a judgment dated 17<sup>th</sup> July 2019, this Court allowed the appeals and ordered as follows:

“...in this matter, we have made a determination that a court must first determine the issue of its jurisdiction before determining any other matter. With this in mind, the upshot is that the consolidated appeals in this matter have merit. The learned Judge erred in law in determining the application for joinder before determining the jurisdictional issue. For this reason, we hereby set aside in entirety the ruling and order made on 19<sup>th</sup> October 2018. We remit this matter back to the High Court for the hearing and determination of the preliminary issues of jurisdiction of the High Court to hear and determine Mombasa HCCC No. 8 of 2018. The twin issues of res judicata and validity of the Notice of Withdrawal are to be heard and determined as a jurisdictional issue. We direct the hearing of the jurisdictional question be heard by any other Judge excluding the Hon. Justice Dorah Chepkwony and Hon. Justice P. J. Otieno.”

13. Based on the decision of this Court, the High Court proceeded to determine the two issues raised in the appellant’s Preliminary Objection as to whether *Malindi Civil Suit No. 10 of 2019 (formerly Mombasa HCCC No. 8 Of 2018)* was *res judicata*, and whether the Notice of withdrawal dated 5<sup>th</sup> March 2018 and filed in the suit was valid. On 6<sup>th</sup> April 2021, the trial Judge ruled that:

- a. the Notice of Withdrawal dated 5<sup>th</sup> March 2018 was irregular and is therefore declared void. Malindi HCCC No. 10 of 2019 is properly within this Court.
- b. Malindi HCCC No. 10 of 2019 is not *res judicata*.
- c. To enable the just and expeditious determination of the central issues for determination, Malindi HCCC No. 10 of 2019 be consolidated with Malindi HCCC No. 118 of 2009 with the former being the lead file.
- d. That the consolidated suits be subject to a case conference with a view to setting them down for hearing within 30 days of the date of this Ruling.
- e. That having succeeded in its application, the Plaintiff shall have the costs”

14. The appellant was aggrieved by the ruling and filed an appeal to this Court on grounds that: the trial Judge of the High Court was in error both in fact and in law in holding that Malindi HCCC No. 10 of 2019 could proceed for hearing notwithstanding the ruling and Order dated 30<sup>th</sup> April 2015 (Chitembwe J.), in Malindi HCCC No. 118 OF 2009, and the judgment of this Court dated 15<sup>th</sup> December 2017 in Malindi Civil Appeal Number 36 of 2015; in finding that the Notice of withdrawal by the appellant of Malindi HCCC No. 10 of 2019 dated 5<sup>th</sup> March 2019 was not valid, and did not terminate Malindi HCCC No. 10 of 2019; in holding that, by virtue of the ruling and order dated 30<sup>th</sup> April 2015 (Chitembwe, J.) in Malindi HCCC NO. 118 OF 2009, and the judgment of this Court dated 15<sup>th</sup> December 2017 in Malindi Civil Appeal No. 36 of 2015, the appellant and the 6<sup>th</sup> respondent could not pass a valid binding resolution on the 1<sup>st</sup> respondent; in failing to find that on the question of management, control and the directorship and shareholders of the 1<sup>st</sup> respondent was *res judicata* by virtue of the order dated 30<sup>th</sup> April 2015 (Chitembwe J.), in Malindi HCCC NO. 118 OF 2009, and the judgment of this Court in Malindi Civil Appeal Number 36 of 2015; in holding that Hans Juergen Langer and Zahra Langer could in 2019 pass a resolution as directors of the 1<sup>st</sup> respondent and file Malindi HCCC No. 10 OF 2019 and in directing that Malindi HCCC No. 10 OF 2019 be consolidated with Malindi HCCC No. 118 of 2009 and for the two matters to proceed for hearing,



taking into account the existing ruling and order of Korir, J issued on 20<sup>th</sup> March 2018 to the effect that the order issued on 30<sup>th</sup> April 2015 had to be complied with in full before other issues, if any, can be addressed in Malindi HCCC No. 118 of 2009.

15. The appellant filed written submissions, which learned counsel, **Mr. Munyithya**, highlighted during the virtual hearing of the appeal. Counsel submitted that the Notice of withdrawal filed by the appellant pursuant to a resolution by the Board members was proper, and that the trial Judge was wrong in failing to uphold the notice.
16. It was his submission that, in the verifying affidavit, the 7<sup>th</sup> respondent described himself as a shareholder and director of the 1<sup>st</sup> respondent; that the implication of the court order dated 30<sup>th</sup> April, 2015 in *Malindi HCCC No. 118 of 2009* directed at the Registrar of Companies to remove the names of Juergen Langer and Zahra Langer, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in that suit, from the register, and that the order with effect from 30<sup>th</sup> April, 2015 removed Mr. Langar from being a director of the 1<sup>st</sup> respondent and the plaintiff in the High Court in that suit.
17. Counsel submitted that the 7<sup>th</sup> respondent, Juergen Langer's directorship was determined with finality on 30<sup>th</sup> April, 2015 and, therefore, he could not convene a board of the 1<sup>st</sup> respondent, and neither could he institute a suit as a shareholder of the 1<sup>st</sup> respondent; and that, consequently, the matter before High Court was a nullity.
18. Counsel submitted that, on account of the ruling of Chitembwe, J. in Malindi High Court Civil Suit No. 118 of 2009 and this Court's judgment in Malindi Civil Appeal No. 36 of 2015, Malindi HCCC No. 10 of 2019 was res judicata.
19. Highlighting the 6<sup>th</sup> respondent's written submissions, learned counsel Mr. Kibunja stated that his client did not oppose the appeal, but supported the appellant's submissions.
20. Learned counsel for the 1<sup>st</sup> respondent, Mr. Makambo, submitted that the suit was filed by the 1<sup>st</sup> respondent as the plaintiff in the suit and, yet, the Notice of withdrawal was filed by the appellant, a defendant in the suit; and that he was a person without proper locus standi or authority to withdraw the suit. As a defendant, he could not purport to act for and on behalf of the 1<sup>st</sup> respondent Hotel.
21. Counsel further submitted that neither Malindi HCCC No. 118 OF 2009 or the judgment of this Court in Malindi Civil Appeal No. 36 of 2015 gave directorship and/or shareholding to the appellant and, therefore, he could not act as a director and or shareholder of the 1<sup>st</sup> respondent Hotel in Malindi HCCC No. 10 of 2019 and proceed to withdraw the suit; and that, further, Malindi HCCC No.118 of 2009 is yet to be set down for hearing, and is still pending full hearing and determination. It was also asserted that the appellant is yet to file a defence in the matter. Counsel concluded that, since Malindi HCCC No.118 of 2009 is yet to be heard and determined, and that the issues in the two suits are different, res judicata did not arise.
22. In their written submissions, learned counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents Mr. Wafula opposed the appeal and submitted that the appellant was not a director of the 1<sup>st</sup> respondent as at 14<sup>th</sup> December 2009, and could not validly sit as a director on the 1<sup>st</sup> respondent's Board or pass any resolution on behalf of the 1<sup>st</sup> respondent; that further, the court is yet to settle the question of ownership and control of the 1<sup>st</sup> respondent, which issue is at the centre of this dispute. Counsel submitted that the Registrar of Companies set out clearly who the shareholders and directors of the 1<sup>st</sup> respondent were, and that the appellant was not one of them; that, therefore, the notice of withdrawal of the suit filed and signed by the appellant was invalid and void.



23. On res judicata, it was submitted that Malindi HCCC No. 10 of 2019 that is concerned with an injunction and a liquidated claim for Kshs. 63,689,464.63 cannot be res judicata Malindi HCCC No. 118 of 2009, which concerned enforcement of a foreign judgment; that the ruling of Chitembwe, J. in Malindi HCCC No. 118 of 2009 was in respect of an interlocutory application to set aside a consent judgment; and that, the consent judgment having been set aside, the suit in Malindi HCCC No. 118 of 2009 reverted to the position in which it was prior to the entry of the consent judgment. It was argued that the issues in Malindi HCCC No. 118 of 2009 are not settled with finality, that parties are required to ventilate their case at a full hearing; and that, consequently, the claim that the instant suit is res judicata is misplaced.
24. Learned counsel Mr. Ndegwa for the 7<sup>th</sup> respondent relied on and adopted Mr. Makambo's and Mr. Wafula's submissions and went on to state that the 7<sup>th</sup> respondent had not at any time been a party to the proceedings, but was mischievously included by the appellant.
25. We have considered the record, the grounds of appeal and the parties' rival submissions. Two issues fall for this Court's consideration: i) whether the suit is res judicata in relation to Malindi HCCC No. 118 of 2009; and ii) whether the Notice of Withdrawal dated 5<sup>th</sup> March 2018 was valid. In addition, we will also address the complaint that the learned Judge was wrong to order the consolidation of the two suits.
26. The appellant's Preliminary objection raised the issue of res judicata seeking to challenge the jurisdiction of the court. A court must begin by addressing such a question before proceeding to determine other matters. The issue of jurisdiction was well outlined in the case of Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 where the Court expressed itself as follows:
- "The question of jurisdiction is a threshold issue and must be determined by a Judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
27. We bear in mind that a preliminary objection raises pure points of law which are capable of determining a suit. See *Mukisa Biscuit Manufacturing Company vs. West End Distributors Limited* [1969] EA.
28. Section 7 of the [Civil Procedure Act](#) addresses the doctrine of res judicata thus:
- No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."
29. In Mulla, Code of Civil Procedure, 18<sup>th</sup> Edition 2012 p293 further clarified that:
- "The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction



is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

30. Discussing the nature of the doctrine, the Supreme Court in the case of Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & another [2016] eKLR stated that:

“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

31. The case of Luka & 3 others vs. Chairman Land Adjudication Committee, Leshuta Land Adjudication Section & 6 others (Civil Appeal (Application) E005 of 2022) [2023] KECA 1232 (KLR) citing the holding in The Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 others, [2017] eKLR), reiterated that:

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.

32. The Court in The Independent Electoral and Boundaries Commission vs. Maina Kiai (supra) considered it important to enumerate the purport of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

33. See also Registered Trustees Africa Gospel Church vs. Kamunge & 2 others; National Land Commission (Interested Party) (Civil Appeal (Application) E756 of 2022) [2023] KECA 1117 (KLR).



34. What becomes apparent is that, in order for a court to reach a finding as to whether or not a suit is res judicata, it should apply the criterion laid down in the above cited authorities to the circumstances of this case.
35. In the instant case, the learned Judge addressed the first criteria of whether the matter directly and substantially in issue in the instant suit was directly and substantially in issue in the former suit, by comparing the pleadings in Malindi HCCC No. 118 of 2009 with those in Malindi HCCC No. 10 of 2019, the Judge found that the pleadings in Malindi HCCC No. 118 of 2009 disclosed that the dispute involved the ownership, management and control of the 1<sup>st</sup> respondent Hotel, while the instant suit is concerned with a claim for liquidated damages, and seeks an injunction to restrain the appellant and the co-respondents from interfering with the 1<sup>st</sup> respondent's management and operations. Our analysis of the pleadings brings us to a similar conclusion as did the Judge, that the two suits are different.
36. Secondly, as to whether the parties were the same, upon considering the pleadings in both suits, the Judge found that the parties were different. Our assessment leads us to similarly conclude to wit: Accredo Ag was the plaintiff in Malindi HCCC No. 118 of 2009 and, in this suit, the 1<sup>st</sup> respondent who was the 1<sup>st</sup> defendant in the earlier suit is the plaintiff in this suit. It is also distinctive that the respondents in the two suits are markedly different. More particularly, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are new entrants to the dispute, and were not parties in Malindi HCCC No. 118 of 2009.
37. Third, the Judge found that the title of the parties differed in the two suits. A comparison of the pleadings clearly shows that the parties, that is, both the plaintiff and the defendants in the two suits differ and, further, it is evident that they appear in different capacities.
38. On the fourth and fifth conditions as to whether the court, which decided the former suit was competent to try the subsequent suit, and whether the matter in issue was heard and finally decided in the former suit, we have no hesitation in finding that the courts were competent insofar as Malindi HCCC No. 118 of 2009 is concerned. We agree with the learned Judge that what was rendered by Chitembwe J.'s ruling dated 30<sup>th</sup> April 2015 was an interlocutory application seeking the withdrawal of a Consent order. The orders subsequently issued had the effect of setting aside a decree earlier issued and reinstated the suit. This being the position, it becomes evident that Malindi HCCC No. 118 of 2009 is yet to be determined with finality.
39. Having reevaluated the pleadings and the proceedings that were before the court below, we are satisfied that the learned Judge properly applied the aforesaid criterion to the circumstances of the case and, after so doing, rightly concluded that the instant suit was not res judicata Malindi HCCC No. 118 of 2009.
40. Next, we consider the Notice of withdrawal. The appellant's complaint is that the learned Judge wrongly found that the Notice of withdrawal by the appellant of Malindi HCCC No. 10 of 2019 dated 5<sup>th</sup> March 2019 was not valid, and that neither did it terminate the suit. In this regard, the learned Judge stated thus:

The current suit is yet to be set down for hearing. Drawing from the cited authorities, the Plaintiff ideally ought to have an absolute right to withdraw the case. However, the contestation in this matter is whether the 5<sup>th</sup> Defendant had the authority to withdraw the suit on behalf of the Plaintiff while purporting to be a director of the Plaintiff. As already mentioned, the 5<sup>th</sup> and 6<sup>th</sup> Defendants maintain that they derive their authority from the ruling of this Court delivered by Chitembwe, J. in Malindi HCCC 118 of 2009 on 30<sup>th</sup> April 2015 and subsequently affirmed by the Court of Appeal in Malindi Civil Appeal No.



36 of 2015. The plaintiff on the other hand is of the view that these rulings did not give directorship of the Salama Beach Hotel, Limited to the 5<sup>th</sup> and 6<sup>th</sup> defendants, but only reverted the directorship of the company to the position as at 14<sup>th</sup> December 2009. Without a doubt, the matter of the shareholding and directorship of the plaintiff company is a hotly contested subject.”

41. The law and procedure governing withdrawal or discontinuance of suits, in the lower courts is to be found in order 25 of the Civil Procedure rules, headed “Withdrawal, Discontinuance and Adjustment of Suits”.
42. Order 25 rule 1 provides for discontinuance of the whole or any part of the Claim where a suit has not been set down for hearing as is the case in the instant suit. It states:
  - 1) At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”
43. This Court in the case of Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR distilled the import of rule 1 of order 25 held:

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed...”
44. The above is clear that, where a suit had not been set down for hearing, as is the position in the instant suit, only a plaintiff has the prerogative to withdraw the suit. In this case, it is the 1<sup>st</sup> respondent, Salama Beach Hotel Ltd, that instituted the suit being Mombasa Civil Case No 8 of 2018 on 23<sup>rd</sup> February 2018 through its director Hans Juergen Langer against the respondents, Ventaglio International Sa, Dr. Arcuri Ignazio, D.Ssa Dal Morro Magdalena, Avv.De Cesari Patrizia, Stefano Uccelli and the appellant. In the plaint, the 1<sup>st</sup> respondent pleaded fraud on the part of the appellant, and claimed he had illegally transferred its money to various third parties. Simultaneously with the suit, the 1<sup>st</sup> respondent sought an injunction against the appellant, an employee of the 1<sup>st</sup> respondent Hotel, to restrain him from purporting to be its representatives and shareholder. The trial Judge granted a temporary injunction against the appellant and co-respondents in the terms prayed.
45. The appellant did not file a defence challenging the allegations. Instead, he opposed the suit in a replying affidavit sworn on 5<sup>th</sup> March 2018 where he purported to be a director of the 1<sup>st</sup> respondent. He also filed the Notice of withdrawal of suit dated 6<sup>th</sup> March 2018, a Notice of intention to act in person, and a resolution to act on behalf of the 1<sup>st</sup> respondent.
46. It cannot be gainsaid that the appellant filed a withdrawal notice in a suit instituted directly against him for fraud and interference with the operations of the 1<sup>st</sup> respondent, which is contrary to the stipulations of **order 25 rule 1**. As a defendant in the suit, he clearly had no right so to do.
47. But the appellant has argued that, by virtue of the ruling dated 30<sup>th</sup> April 2015, and this Court’s decision in Malindi HCCC No. 118 of 2009, he had been named a director of the 1<sup>st</sup> respondent, and that the 1<sup>st</sup> respondent, through a Board resolution, agreed to have the suit withdrawn. Appreciating



that the matter of the shareholding and directorship of the 1<sup>st</sup> respondent company was a “... hotly contested subject,” the trial Judge reasoned that:

...Malindi, HCCC No. 118 of 2009 has not been finally determined. Being a matter that is still being actively prosecuted in Court, and the Court takes judicial notice of this fact, I am inclined to the position that the Ruling of 30<sup>th</sup> April 2015 by 2 Chitembwe, J did not conclusively determine the matter. I say so, because my understanding of that Ruling related to an interlocutory application seeking the withdrawal of a Consent order”.

48. We have been through the record and agree with the learned Judge that the appellant’s arguments attempting to support the filing of the Notice of withdrawal squarely revolved around the shareholding and directorship of the 1<sup>st</sup> respondent Hotel, which matters are still to be ventilated by the parties and determined with finality. It is also of significance that, save for the appellant and the 6<sup>th</sup> respondent, the other parties in the suit are aligned with the fact that Chitembwe, J’s ruling of 30<sup>th</sup> April 2015 was with respect to an interlocutory application to set aside a consent, essentially reinstating the shareholdings and directorships of the 1<sup>st</sup> respondent to 14<sup>th</sup> December 2009, and that nothing stated in the ruling made him a director. Furthermore, the ruling reinstated Malindi HCCC No. 10 of 2009, which is yet to be determined with finality. In the result, what remains is that the appellant is a defendant in the instant suit and, as stated above, he had no right to file the Notice to withdraw the suit. Consequently, the Notice of withdrawal is null, void and of no legal effect.
49. Finally, on consolidation of the parties’ suits, the appellant complained that the trial Judge was wrong to order that the two suits be consolidated. We have been through the appellant’s submissions and find no arguments advanced in support of this ground. This being the case, we have no basis upon which to address the issue and, for this reason, this ground is dismissed.
50. The appellant having failed to establish res judicata Malindi HCCC No. 118 of 2009, and the appellant’s Notice of withdrawal having been found invalid and of no legal effect, and that the Preliminary Objection dated 5<sup>th</sup> March 2018 was rightly dismissed, we find and hold that the appeal is without merit and is hereby dismissed with costs to the 1<sup>st</sup> respondent.
51. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

**DEPUTY REGISTRAR**

