



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, J. MOHAMMED & ODEK, J.J.A)

CIVIL APPEAL NO. 2 OF 2019

BETWEEN

STEFANO UCCELLI.....APPELLANT

AND

SALAMA BEACH HOTEL LIMITED.....1ST RESPONDENT

VENTAGLIO INTERNATIONAL SA.....2ND RESPONDENT

Dr. ARCURI IGNAZO.....3RD RESPONDENT

D. SSA DAL MORO MAGDALENA.....4TH RESPONDENT

AVV. DE CESARI PATRIZIA.....5TH RESPONDENT

ISAAC RODROT.....6TH RESPONDENT

TEMPLE POINT RESORT LIMITED.....7TH RESPONDENT

HANS JUERGEN LANGER.....8TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL No. 3 of 2019

BETWEEN

ISAAC RODOT.....APPELLANT

AND

SALAMA BEACH HOTEL LIMITED.....1ST RESPONDENT

VENTAGLIO INTERNATIONAL SA.....2ND RESPONDENT

DR. ARCURI IGNAZIO.....3RD RESPONDENT

D. SSA DAL MORO MAGDALENA.....4TH RESPONDENT

AVV. DE CESSARI PATRIZIA.....5TH RESPONDENT

STEFANO UCCELLI.....6TH RESPONDENT

TEMPLE POINT RESORT.....7TH RESPONDENT

HANS JUERGEN LANGER.....8TH RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa

(D.O. Chepkwony, J.) dated 19th October 2018

in

HCCC No. 8 of 2018)

JUDGMENT OF THE COURT

1. The camouflaged central dispute in these consolidated appeals is ownership and control of **Salama Beach Hotel Limited**, the 1st respondent herein. The contestation has taken a long and winding journey from the High Court to the Court of Appeal, back to the High Court and now once again to the Court of Appeal.

BACKGROUND FACTS

2. Originally, the dispute between the parties was heard and determined in **Malindi High Court Civil Suit No. 118 of 2009** by Hon. Justice Said Chitembwe. Aggrieved by the judgment of the High Court at Malindi, an appeal was lodged before this Court sitting at Malindi in **Civil Appeal No. 36 of 2015**. This Court delivered its judgment on 15th December 2017.

3. Subsequent to the delivery of the judgment by this Court, a new and separate civil suit was filed in Mombasa being **HCCC No. 8 of 2018**. The suit was filed in the name of **Salama Beach Hotel Limited** against all the other parties in this appeal. While the new suit was pending before the Mombasa High Court, the 7th respondent in this appeal (**Temple Point Resort Limited**) applied to be enjoined in the suit as an interested party. The application for joinder was by Notice of Motion dated 13th March 2018.

4. On 22nd March 2018, the suit was listed for hearing before the court. However, there were several interlocutory issues and a preliminary objection on record. One of the issues related to validity of a Notice of Withdrawal of suit filed by the 1st respondent and plea of res judicata raised in the matter. One of the applications on record was for joinder of the 7th respondent. The application was listed before the Hon. Justice P. J. Otieno. The learned Judge gave directions on how the Motion and other interlocutory issues were to be heard. The Judge directed that two preliminary issues were to be dealt with and that any party opposed to the application for joinder could file a replying affidavit. It is manifest that the issue of validity of the Notice of Withdrawal of the suit and res judicata were to be determined later.

5. On 1st August 2018, the application for joinder came up for hearing before the Hon. Lady Justice D. Chepkwony. Of relevance to this appeal is the submissions made by the appellant as follows:

“We urge the court to dismiss the application and uphold our submissions that the issues before court touches on issues that have been decided and the suit does not exist. There is nothing to join.....

My learned colleague has also said that a similar matter has been dealt with before. This is HCC No. 118 of 2009 in

Malindi...These are the same parties that went to the Court of Appeal at Malindi..... Consequently, we have demonstrated that the suit was determined in the High Court and decision upheld by the Court of Appeal...

The parties went back to Malindi. The parties were told jurisdiction had ended. Instead of being satisfied they ran to this court and filed a suit against the same parties.....”

6. Upon hearing the parties on the application for joinder, the learned judge (Chepkwony, J.) delivered a ruling dated 19th October 2018 allowing the joinder of **Temple Point Resort Limited** as an interested party. In allowing the application, the learned Judge expressed herself as follows:

“Counsel for the 5th and 6th respondents did not file replying affidavits in response to the motion application dated 13th March 2018 and they indicated as much orally before this court.

In view of this, I find the said application for joinder unopposed and grant prayers 2 and 3 of the same. The interested party is enjoined as a party in this suit and is granted leave to file its papers, if any in support or in opposition in line with the directions...given on 22nd March 2018.”

GROUNDS OF APPEAL

7. Aggrieved by the ruling dated 19th October 2018, two appeals were filed namely **Civil Appeal No. 2 of 2019** and **Civil Appeal No. 3 of 2019**. The two appeals were consolidated and this judgment determines and disposes the two appeals.

8. The grounds of appeal as stated in the consolidated memoranda of appeal are that the learned Judge erred in law in failing to decide the preliminary issue of jurisdiction; the learned Judge erred in failing to make a finding that jurisdiction should have been determined before the application for joinder was heard; the learned Judge erred in failing to find that Mombasa HCCC No. 8 of 2018 had been withdrawn and there was no suit for the interested party to join; the learned Judge erred in failing to determine the issues of jurisdiction of the court and *res judicata* which were canvassed before the court; the learned Judge failed to appreciate that **Malindi HCCC No. 118 of 2009** and **Malindi Civil Appeal No. 36 of 2015** had determined the dispute between the parties; and that the ruling by the judge is against public policy where litigants should be discouraged from forum shopping.

9. At the hearing of the instant appeal, learned counsel **Mr. Stephen Kibunja** appeared for the appellant. Learned counsel **Mr. Stanley Manduku** appeared for the 1st respondent. Learned counsel **Mr. Jacob Auma Okoth** held brief for **Mr. Paul Wafula** for the 2nd, 5th and 8th respondents. Learned counsel **Mr. Joseph Munyithia** appeared for the 6th respondent and learned counsel **Mr. Jacob Auma Okoth** appeared for the 7th respondent. The parties filed written submissions and list of authorities in the matter.

APPELLANT and 6th RESPONDENT'S SUBMISSIONS

10. Learned counsel, **Mr. Kibunja**, for the appellant adopted the written submissions filed in this matter. Counsel faulted the learned Judge for not considering or referring to submissions made by counsel during the hearing of the application for joinder. It was urged the issue of *res judicata* and want of jurisdiction on the part of the High Court was canvassed; that the learned Judge in the impugned ruling never considered and determined the issue of the court's jurisdiction to hear and determine the application that was before it. Counsel emphasized that the learned Judge lacked jurisdiction to entertain any application or suit arising from **Mombasa HCCC No. 8 of 2018** because the dispute between the parties had been finally determined by the Court of Appeal in **Civil Appeal No. 36 of 2015**. It was also urged that **Mombasa HCCC No. 8 of 2018** had been withdrawn and there was no suit in which to enjoin the 7th respondent as an interested party. Counsel submitted the learned Judge erred in law in failing to consider jurisdiction as a preliminary point of law.

11. Learned counsel **Mr. Munyithia**, for the 6th respondent, made submissions in support of the instant appeal. He focused on the issue of withdrawal of **Mombasa HCCC No. 8 of 2018**. Counsel submitted that the 6th respondent does not per se oppose joinder of the 7th respondent; however, the gravamen is that the learned Judge erred in failing to consider the issue of jurisdiction before considering the application for joinder. It was that submitted the learned Judge erroneously joined the 7th respondent to a suit that had already been withdrawn; that a Notice of Withdrawal of **Mombasa HCC No. 8 of 2018** dated 5th March 2018 was filed in court by **Salama Beach Hotel Limited**. That the suit having been withdrawn, there was no pending suit before the learned Judge in which a party could be enjoined. Counsel submitted the learned Judge erred in failing to determine the validity of the Notice of Withdrawal of the suit as a preliminary point of law that goes to the jurisdiction of the court and existence of the substratum and subject matter of the joinder application. It was submitted Mombasa HCCC No. 8 of 2018 was incompetent as having been withdrawn and the issues raised were *res judicata*.

1st RESPONDENT'S SUBMISSIONS

12. Learned counsel **Mr. Manduku** in opposing the appeal submitted that the learned Judge did not err in failing to determine the issue of validity of the Notice of Withdrawal of **Civil Suit No. 8 of 2018** and the jurisdiction question premised on alleged *res judicata*. It was submitted the Judge correctly and simply followed the directions that were given by Hon. Justice P. J. Otieno on 22nd March 2018. That pursuant to the directions given, the application for joinder was to be heard and determined and thereafter all other applications were to be subsequently heard. Counsel submitted that the issue of withdrawal and the jurisdiction of the court are matters that are still pending before the High Court. Counsel took issue with the record of appeal as filed; it was contended the 8th respondent was not party to the proceedings before the High Court and it was wrong for the appellants to join the 8th respondent as a party in this appeal.

2nd to 5th RESPONDENTS SUBMISSIONS

13. Learned counsel **Mr. Okoth** holding brief for **Mr. Wafula** submitted that the 2nd to 5th respondents do not wish to participate in the instant appeal on the issue of joinder.

7th RESPONDENT'S SUBMISSIONS

14. The 7th respondent through learned counsel **Mr. Okoth** made submissions opposing the instant appeal. Counsel cited **Article 50** of the Constitution on the right to be heard. It was submitted that any party aggrieved by a court's decision has a right to be heard. That the 7th respondent is a party likely to be affected by the proceedings in **Mombasa HCCC No. 8 of 2018** and it is only fair and equitable that it must be given a right to be heard in the suit. Relying on **Article 50** of the Constitution, it was submitted that the learned judge did not err in making an order enjoining the 7th respondent to **Mombasa Civil Suit No. 8 of 2018**.

ANALYSIS AND DETERMINATION

15. We have considered submissions by counsel, the record of appeal, authorities cited and we have analyzed the impugned ruling of the High Court dated 19th October 2018. As this is a first appeal, as was said in **Peters -v- Sunday Post Ltd [1958] EA 424, at P 429** by

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.”

16. The pivotal contestation in this appeal is that the learned Judge erred in failing to consider and determine at first instance the issue of jurisdiction of the court. It was submitted that the issue of jurisdiction of the court revolves around two contested issues namely: *res judicata* and validity of the Notice of Withdrawal of **Mombasa HCCC No. 8 of 2018**.

17. The appellants contend that the Judge did not have jurisdiction to hear and determine the application for joinder because the issue of jurisdiction had to be determined upfront as a preliminary point of law. Conversely, the respondents concede that the issue of jurisdiction of the court and validity of the Notice of Withdrawal of the suit had been raised. However, the respondents assert that these are issues pending before the trial court. The respondents’ submitted that the learned Judge did not err in failing to determine the issue of jurisdiction because directions had already been given on the order and priority on how the issues in dispute had to be resolved. Citing the directions given by Hon. Justice P.J. Otieno, the respondents submitted that the Judge did not err in considering and determining the application for joinder before determining the jurisdictional question and the contestation on *res judicata*.

18. We have considered the rival submissions by the parties. Jurisdiction is the cornerstone of the competence of a court to hear and determine any matter. The issue of a court’s jurisdiction takes precedence and priority over any other issue that is pending before the court. A court must upfront and first determine if it has jurisdiction before determining any other issue before it. The starting and entry point that determines the competence of a court is its jurisdiction. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

“I think that 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. 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.”

19. In the instant matter, the record shows that the issue of jurisdiction was raised before the learned Judge. The issue of *res judicata* and validity of the Notice of Withdrawal of the suit were raised during the hearing of the application for joinder. The determination of the issue of *res judicata* and validity of the Notice of Withdrawal may or may not dispose of the suit before the court. These two issues fall squarely in what is known as a preliminary point of law that can determine the suit.

20. In our considered view, the determination of the issue of *res judicata* and validity of the Notice of withdrawal have a bearing on the competence, existence or non-existence of the **Mombasa HCCC No. 8 of 2018**. It was thus incumbent upon the learned Judge to hear and determine the jurisdictional question before hearing and determining any other matter that was pending before the court. It is not enough for the court to find that directions had already been given on 22nd March 2018. Whereas a court is competent to give directions on the manner in which a case is to be conducted and the order of hearing, such directions *per se* cannot confer jurisdiction where non-exists. Jurisdiction is not conferred by directions or case management given by the court. Jurisdiction is conferred by the Constitution, Statute and relevant judicial decisions. In the instant matter, the issue of *res judicata* and validity of the notice of withdrawal go to the root of the competence of **Mombasa HCCC No. 8 of 2018**. We find the learned Judge erred in law in failing at a preliminary stage and upfront to determine whether the court had jurisdiction in the matter.

21. Before us, the appellants made extensive submissions on the issue of *res judicata*. The respondents submitted the issue is jurisdiction and *res judicata* are pending determination by the trial court. We have examined the impugned ruling dated 19th October 2019. Indeed, the learned Judge did not consider and determine the issues of its jurisdiction, *res judicata* and validity of Notice of Withdrawal of **HCCC No. 8 of 2018**. In the memorandum of appeal, the appellants have invited us to make a determination on the issue of *res judicata* and validity of the Notice of Withdrawal. We decline the invitation. It is the duty of the trial court, in the first instance, to determine if the court has jurisdiction. This being an appellate court, we are of the considered view the trial court is best placed to hear and determine the jurisdictional issues raised in this matter. The impugned ruling of the court did not determine the issue and there is no basis for us an appellate to court to hear an appeal on an issue that has not been determined by the lower court.

22. 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 19th 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.

23. We allow the consolidated appeals with costs.

Dated and delivered at Malindi this 17th day of July, 2019

R. N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR