



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KOOME & SICHALE, JJ.A.)

CIVIL APPEAL NO. 203 OF 2009

BETWEEN

LEISURE LODGES LIMITED.....APPELLANT

AND

PATCHAM HOLDINGS LIMITED.....1ST RESPONDENT

NUMISED A.G.....2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Warsame, J.) dated 7th July, 2008

in

H. C. C. NO. 405 OF 2002)

CONSOLIDATED WITH

CIVIL APPEAL NO. 205 OF 2009

BETWEEN

NUMISED A.G.....APPELLANT

AND

PATCHAM HOLDINGS LIMITED.....1ST RESPONDENT

LEISURE LODGES LIMITED.....2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (Warsame, J.) dated 7th July 2008

in

JUDGMENT OF THE COURT

1. The parties in this appeal are three companies: Patcham Holdings Ltd, Numised A.G. and Leisure Lodges Ltd, incorporated in the British Virgin Islands, Switzerland and Kenya, respectively. Leisure Lodges Ltd is incorporated under the Companies Act, Chapter 486 of the Laws of Kenya and owns a first class hotel, club and golf course in Diani, Mombasa in the Republic of Kenya. As at the time of filing this appeal, it's paid up share capital was Kshs. 6 million divided into 1.2 million ordinary shares of Kshs. 5.00 each.

2. At all material times, there were three shareholders in the register namely Numised A.G. (the appellant in Civil Appeal No 205 of 2009) which held 360,000 shares (30%); Vadag Establishment held 720,000 shares (60%) in trust for Zorba Ltd, a company incorporated in Jersey, Channel Islands and Y.A. Shretta who held 120,000 shares (10%).

3. Numised A.G, by virtue of its shareholding in Leisure Lodges Ltd, was entitled to appoint two members to the Board of Directors of Leisure Lodges Limited. To this end, by way of an agency agreement dated the 1st January 1995, it appointed Mr. Reto Silvani and Mr. Eduard Hilti to serve as members of the Board of Directors of Leisure Lodges Ltd.

4. Sometime later a disagreement arose, and Patcham Holdings Ltd alleged that Mr. Silvani, through various acts and omissions, had acted in a manner that prejudiced its interest. Consequently, Patcham Holdings Ltd instituted legal proceedings against Numised A.G. and Leisure Lodges Ltd by filing a plaint in the High Court of Kenya, alleging that Mr. Silvani had breached his obligations as trustee and representative by *inter alia* delegating his duties to one Virendra Ponda, a representative of Vadag Establishment, despite knowing that Vadag Establishment's interests conflicted with those of Patcham Holdings Ltd; preventing Patcham Holdings Ltd from purchasing additional shares in Leisure Lodges Ltd; and failing to attend meetings and arbitration proceedings.

5. By way of a Chamber Summons dated the 10th April 2002, Patcham Holdings Ltd applied for leave from the High Court to serve that plaint and summons to enter appearance on Numised A.G, which is domiciled outside the jurisdiction of the High Court of Kenya, by registered post. The application was heard and allowed *ex parte* by Hon. Justice Ombija on the 11th April 2002. Leisure Lodges Ltd entered appearance on the 9th May 2002, and filed a Defence on the 13th May 2002.

6. After this, several applications were filed by the parties; the two applications relevant to this appeal were:

1. A Notice of Motion application dated the 12th July 2002 by Numised A.G. seeking an order to set aside the ex parte leave granted to serve summons outside the jurisdiction by Ombija J.;

2. A Chamber Summons application dated the 28th January 2003 by Leisure Lodges seeking on order to strike out the plaint against it on the ground that it disclosed no reasonable cause of action.

7. The two applications were heard together on the 29th May 2008 and the 17th June 2008 by Warsame, J. (as he then was). In his ruling delivered on the 7th July 2008, the learned judge held that there was no basis on which to set aside the *ex parte* orders granted by Ombija, J. With regard to application by Leisure Lodges Ltd, the learned judge found no proper and just cause to strike out the plaint. He further held that the parties were guilty of laches, as they had delayed in prosecuting their applications for a period of six years. The two applications were therefore dismissed for lack of merit with no orders as to costs.

8. Being dissatisfied with the ruling, Leisure Lodges Ltd, the appellant in Civil Appeal No. 203 of 2009, and Numised A.G., the appellant in Civil Appeal No. 205 of 2009 have appealed to this Court. On the 6th July 2015, this Court directed that both appeals be consolidated and heard together because they involved the same parties and arose from the same decision of the High Court.

9. Both appellants take issue with the learned judge, claiming that he erred in finding them guilty of laches without considering the history of the matter or the proceedings that he himself had heard prior to hearing the applications. We have perused the record and note that in a ruling dated the 8th May 2003, Nyamu, J. (as he was then) ordered that the applications be heard in the following order:

3. A Chamber Summons Application by Patcham Holdings Ltd dated the 12th June 2002;

4. A Notice of Objection by Leisure Lodges Ltd dated the 28th May 2002;

5. A Chamber Summons application by Leisure Lodges Ltd dated the 28th January 2003;

6. A Chamber Summons Application by Leisure Lodges Ltd dated the 13th May 2002

7. An application dated the 23rd May 2002 by Patcham Holdings Ltd.

10. Laches is the unreasonable delay in asserting a right. It is true, as was noted by the learned trial judge, that the applications the subject of this appeal were not prosecuted until well over six years after they were filed. However, the appellants cannot be vilified for this. Bearing in mind that in earlier proceedings, Nyamu J. had set down the order in which the applications would be heard, and the fact that this order had neither been reviewed nor appealed against, the two applications which gave rise to these proceedings could only be heard after the disposal of one other application that had been filed by Patcham Holdings Ltd. It was therefore only possible to prosecute the two applications after the above mentioned application filed by Patcham Holdings Ltd had been disposed of. Based on these facts it cannot be fairly asserted that any of the appellants were guilty of laches as held by the learned judge, and we find and hold that he misdirected himself on this issue.

11. We turn now to the question of whether or not the learned judge erred in refusing to set aside the leave granted to Patcham Holdings Ltd to serve summons on Numised A.G. outside Kenya. Order V Rule 21 of the retired Civil Procedure Rules provided for service outside the jurisdiction in the following terms:

Service out of Kenya [Order 5, rule 21.] Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever—

a. the whole subject-matter of the suit is immovable property situate in Kenya (with or without rents and profits);

b. any act, deed, will, contract, obligation or liability affecting immovable property situate in Kenya is sought to be construed, rectified, set aside, or enforced in the suit;

c. any relief is sought against any person domiciled or ordinarily resident in Kenya;

d. the suit is for the administration of the personal estate of a deceased person who at the time of his death was domiciled in Kenya, or for the execution (as to property situate in Kenya) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Kenya;

e. the suit is one brought to enforce, rectify, rescind, dissolve, annul, or other-wise affect a contract or to recover damages or other relief for or in respect of the breach of a contract-

1. made in Kenya; or

2. made by or through an agent trading or residing in Kenya on behalf of a principal trading or residing out of Kenya; or

3. by its terms or by its legislation to be governed by the Laws of Kenya; or

4. which contains a provision to the effect that any Kenya court has jurisdiction to hear and determine that suit in respect of that contract, or is brought in respect of a breach committed in Kenya, of a contract, wherever made, even though such a breach was preceded or accompanied by a breach out of Kenya which rendered impossible the performance of the part of the contract which ought to have been performed in Kenya; or

f. the suit is founded on a tort committed in Kenya;

g. any injunction is sought as to anything to be done in Kenya, or any nuisance in Kenya is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

h. any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya.

12. Numised A.G. argues that the subject matter of the suit by Patcham Holding Ltd falls outside the provisions of Order V because the suit is premised on an alleged breach of trust by Mr. Reto Silvani. It further argues that a breach of trust falls outside provisions of Rule 21 (f) because it is not an action in tort. It argues in the alternative that even if the cause of action could be founded on tort, the actions complained of were not committed in Kenya, and they therefore cannot be brought under the purview of Order V Rule 21 (f).

13. Numised A.G. further submits that Order V Rule 21(e) would not apply because Patcham Holdings Ltd was not a party to any contract with it and maintains that Patcham Holdings Ltd was not party to the agency agreement entered into by Bipin Kantaria and Yashvin Shretta concerning Numised A.G. In addition, Numised A.G. submits that there is no allegation of any breach of contract. The third prong of Numised A.G.'s argument is that the agency agreement contains a clause that effectively vests any matters arising out of that agreement under the law of Liechtenstein, and therefore ousts the jurisdiction of Kenyan courts.

14. Numised A.G. also contends that the manner in which it was served was improper because it was served before Leisure Lodge Ltd was. Citing Order V Rule 21 (h) which provides that **“any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya,”** Numised A.G. argued that the court should only have granted leave to serve outside the jurisdiction after satisfying itself that Leisure Lodges Ltd had been properly served, which they had not been.

15. Numised A.G. further argues that the mode of service of summons employed by Patcham Holdings Ltd was improper and not in accordance with Order V Rule 27. Service of the summons was effected by registered post whereas the relevant Order requires that service of summons in countries outside the Commonwealth be made through diplomatic channels. Numised A.G. therefore contends that since Liechtenstein is not part of the Commonwealth, the service of summons by Patcham Holdings Ltd through registered post is a nullity.

16. In response, Patcham Holdings Ltd submitted that the learned judge properly refused to set aside the leave granted by Ombija, J. It contended that there is pending, a winding up petition in respect of Leisure Lodges Limited, and should that petition succeed, the assets of the company, both moveable and immovable, will have to be shared between the shareholders according to their respective shareholding. In

addition, the orders arising out of that petition, just as those which will be made after the determination of the suit, will have an effect on Leisure Lodges Ltd which is governed by the Companies Act, Chapter 486 of the Laws of Kenya. This, according to Patcham Holdings Ltd, brings the suit squarely under the ambit of Order V Rule 21 (b) and (e).

17. Patcham Holdings Ltd further submitted that the suit seeks orders to enforce a trust, as seen from the references to the trusts between various companies in the plaint, thus bringing it under the ambit of Order V rule 21 (d), and that the orders sought will amount to a mandatory injunction bringing it under Rule 21 (g). Lastly, Patcham Holdings Ltd submitted that Numised A.G. was a proper party to the suit, and the court therefore had power to order the service of summons upon it as provided by Rule (g).

18. Leisure Lodges Ltd submitted that the suit is based on a breach of trust by Mr. Reto Silvani who was appointed by way of the agency agreement dated the 1st January 1995. That agreement provides that any dispute or legal proceeding arising therefrom will be determined under the laws of Liechtenstein with exclusive jurisdiction vested in their courts.

19. It is clear from the plaint that the actions that Patcham Holdings Ltd complains of arose out of what it claims is a breach of trust by Mr. Reto Silvani. The suit will therefore not fall under the provisions of Order V Rule 21 (e). Similarly, the suit will not fall under the purview of Rule 21 (f) because the suit is not founded on tort. It is also clear that this Court dismissed the winding up petition that Patcham Holdings Ltd refers to on 16th February 2001 and therefore the question of the distribution of the immovable property of Leisure Lodges Ltd does not arise.

20. The agency agreement provides at clause VI that:

“The parties hereto agree to the exclusive jurisdiction of the FL Landgericht, Vaduz, over any disputes or

legal proceedings regarding this agreement, and all matters arising therefrom or out of the Directorship. This agreement shall be governed by the laws of Liechtenstein.”

21. As the cause of action herein concerns a breach of trust arising out of the agreement, then it appears that such a cause can be sustained only in the courts in Liechtenstein. In *Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited [2005] eKLR (Civil Appeal 29 of 1999)* this Court held that:

“The general rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non-contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum.”

22. In our view, Patcham Holdings Ltd has not demonstrated any compelling reasons that show that the suit can be sustained in Kenya despite the foreign jurisdiction clause.

23. In addition, we find that the mode of service that was used by Patcham Holdings Ltd to effect service on Numised A.G. was improper. Order V Rule 27 (a) provides that:

“the notice to be served shall be sealed with the seal of the High Court for use out of Kenya, and shall be forwarded by the Registrar to the Minister for the time being responsible for Foreign Affairs together with a copy thereof translated into the language of the country

in which service is to be effected, and with a request for the further transmission of the same through the diplomatic channel to the Government of the country in which leave to serve notice of the summons has been given;”

24. Switzerland is not part of the Commonwealth. Patcham Holdings Ltd could therefore only apply to serve Numised A.G. under Rule 27 above, and not Rule 23 which provides for service of summons within the Commonwealth and on British Protected persons. In **Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited (supra)** the Court pronounced itself on this issue as follows:

“The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under order V rule 23 and after such summons are served in accordance with the machinery stipulated therein. In this particular case, as USA is not a Commonwealth country, service on the first appellant if leave was given could only have been through diplomatic channel under Rule 27 of Order V.”

25. Clearly therefore, Ombija J. erred in granting leave to Patcham Holdings Ltd to serve Numised A.G. by registered post, and Warsame, J. (as he then was) erred as well in declining to strike out that leave.

26. We now turn to the issue of whether the learned judge should have dismissed the suit for disclosing no reasonable cause of action. Leisure Lodges Ltd submit that the High Court lacked jurisdiction to hear and determine the question of shareholding in Numised A.G., which is a foreign company incorporated in Zug, Switzerland. In any event, the issue of shareholding in Leisure Lodges Ltd has already been determined by this Court in **Vadag Establishment v Y. Shretta & 10 Others** Civil Appeal No. 83 of 2000 (**Gicheru, Omolo and Akiwumi JJ.A**). In addition, Leisure Lodges Ltd contends that the remedies sought by Patcham Holdings Ltd offend the provisions of section 119 of the Companies Act which provides that ***“No notice of any trust, expressed,***

implied or constructive, shall be entered on the register, or be receivable by the registrar.”

27. Leisure Lodges Ltd further contends that Patcham Holdings Ltd is not one of its shareholders and even if it was, it cannot claim a share in the assets of the company. Patcham Holdings Ltd on the other hand argues that Leisure Lodges Ltd has failed to satisfy the requirements for interfering with the discretion of the judge of the High Court. It submits that the learned judge properly considered all the facts before him and applied correctly the principles governing applications to strike out pleadings.

28. The power to strike out pleadings for not disclosing any reasonable cause of action was provided for under Order VI of the retired Civil Procedure Rules. As was stated in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR**, ***“the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence ... it should be used sparingly and cautiously.”***

29. The power to strike out can therefore be exercised where it is apparent that a pleading or claim, on the face of it, is obviously unsustainable. See **Francis Kamande v Vanguard Electrical Services Ltd [1998] eKLR (Civil Appeal 152 of 1996)**. A reading of the plaint shows that the grievances that Patcham Holdings Ltd complains of arise out of the agency agreement through which Mr. Reto Silvani was appointed. Exercising his power as a member of the board of directors of Leisure Lodges Ltd, it is claimed that he acted in a manner that altered the shareholding of Leisure Lodges Ltd, and that was to the detriment of Patcham Holdings Ltd who by way of a trust, holds some shares in Leisure Lodges Ltd.

30. As we have stated above, that agency agreement contains a clause that ousts the jurisdiction of Kenyan courts. On that basis, it is clear that the suit cannot be entertained in Kenya. In addition, Patcham Holdings Ltd seeks declarations and orders which would, in effect, amount to recognising its status as a shareholder, yet its shares are held in trust by Numised A.G. Section 119 of the Companies Act, which we have reproduced herein above, prohibits the entry of a notice of trust in the register. This much was held in **Vadag Establishment v Yashvin Shretta & Others LLR No 2410 (CAK) where Akiwumi, J.A stated that “Vadag Establishment, it was alleged by Yashvin Shretta, held its shares in trust for Zorba Ltd, whilst Numised AG held half of its shares in trust for Zorba Ltd and the other, half in trust for Patcham Holding Ltd. The point to be made here is that the fact that Vadag Establishment and Numised AG held shares in trust for Zorba Ltd and Patcham Holding Ltd, who were not contributories**

to the Company did not make them shareholders of the Company as to qualify them to be parties not only, to the petition but also, to the alternative remedy that were adopted in place of petitions and whereby, the petition as such was rejected. ... Similarly, S.119 of the Companies Act reiterates the lack of legal standing of the beneficiaries of trusts for the purpose of the Companies Act, under which the petition was instituted and the order for the alternative remedy....”

31. The plaint therefore discloses no reasonable cause of action, and we hold that the learned trial judge ought to have struck it out and dismissed the suit.

32. In view of our findings, we find these appeals meritorious and make orders as follows:

- a. The ruling and orders of Warsame, J. dated the 7th July 2008 be and are hereby set aside;
- b. The Notice of Motion application dated the 12th July 2002 by Numised A.G. seeking an order to set aside the *ex parte* leave granted to serve summons outside the jurisdiction by Ombija, J. be and is hereby allowed with costs;
- c. The Chamber Summons application dated the 28th January 2003 by Leisure Lodges Ltd. seeking an order to strike out the plaint against it on the ground that it disclosed no reasonable cause of action be and is hereby allowed;
- d. The appellants will have the costs of the appeals.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of February, 2016.

P. KIHARA KARIUKI, (PCA)

JUDGE OF APPEAL

M. KOOME

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR