



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 324 OF 2011

BETWEEN

KAMLESH MANSUKHLAL DAMJI PATJNI.....APPELLANT

AND

1. STARWOOD HOTELS & RESORTS WORLDWIDE IN

2. DRISCOLL INVESTMENTS LIMITED

3. NYALI BEACH HOTEL LIMITED

4. BLOCK MANAGEMENT LIMITED

5. KENYA HOTELS LIMITED

6. WILDLIFE LODGES LIMITED

7. LAKE BARINGO LODGE LIMITED

8. DOLPHIN HOLDINGS LIMITED.....RESPONDENTS

*(An appeal from an Order of the High Court of Kenya at Nairobi (Ransley, Commissioner of Assize),
dated 27th August, 2001 in H.C.C.C. NO. 1305 OF 2001)*

JUDGEMENT OF THE COURT

By an agreement made in writing dated 12th March, 1999 (as amended on 1st April 1999) **Block Hotels Limited** (as borrower) entered into agreement with **Starwood Hotels & Resorts Worldwide, (inc)** for a loan of sums of money stated in the agreement. A management agreement was entered the same day between **Block Hotels Limited, Block Management Limited** and **Starwood Hotels & Resorts Worldwide Inc** on terms and conditions agreed. A guarantee and indemnity agreement was made the same day between Starwood Hotels & Resorts Worldwide, Inc (as lender) and the following companies as guarantors: **Driscoll Investment Limited, Nyali Beach Hotel Limited, Block Management Limited, Kenya Hotels Limited, Wildlife Lodges Limited** and **Lake Baringo Lodge Limited**. All these agreements were made by the respective parties in the United Kingdom.

On the issue of jurisdiction, the first agreement stated herein provided as follows, on the issue of "law, Jurisdiction and the Process Agent":

"21.1 Law. This Agreement and the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of England.

21.2 Jurisdiction. The Borrower irrevocably agrees that any legal action arising out of or relating to this Agreement may be brought in the courts of England and irrevocably submits to the exclusive jurisdiction of such courts.

21.3 Process Agent. The borrower irrevocably appoints Garetts of 180 Strand, London WC2R 2NN as its agent to receive and acknowledge on its behalf service of any writ, summons, order, judgment or other notice of legal process in England. If for any reason the agent named above (or its successor) no longer serves as agent of the Borrower for this purpose, the Borrower shall promptly appoint a successor agent [approved by the Lender] and notify the Lender thereof. Until the Lender receives such notification, it shall be entitled to treat the agent named above (or its said successor) as the agent of the Borrower for the purposes of this Clause. The Borrower agrees that any such legal process shall be sufficiently served on it if delivered to such agent for service at its address for the time being in England whether or not such agent gives notice thereof to the Borrower."

A clause in the Guarantee and Indemnity Agreement was in exact terms on the issue of law, jurisdiction and process agent.

A dispute arose on the loan advanced by Starwood Hotels and Resorts Worldwide (inc) which sued the following parties in the Queens Bench Division of the High Court of Justice of England and Wales: Driscoll Investment Limited, Nyalı Beach Hotel Limited, Block Management Limited, Kenya Hotels Limited, Wildlife Lodges Limited, Lake Baringo Lodge Limited and Dolphin Holdings Limited as defendants. - (these are the 2nd to 8th respondents in this appeal). None of those parties entered appearance and judgment was entered in default for the sum claimed, interest and costs. A certificate of judgment was issued by that court against the said defendants as there was not then any application to set aside judgement entered in default. That judgement was not satisfied within the jurisdiction of English courts and by an Originating Summons filed at the High Court of Kenya, Nairobi in H.C.C. No. 1305 of 2001 (OS) Starwood Hotels and Resorts World- Wide Inc (as plaintiff) sued the said defendants under the **Foreign Judgments (Reciprocal Enforcement) Act (Cap 43 of our laws)** where it was prayed that judgement be entered for the plaintiff against the said defendants for the sum awarded by the English Court. The summons was heard by P. J Ransley, Commissioner of Assize (he later became a Judge of the High Court of Kenya) who granted the orders prayed for in the originating summons. Those are the orders that are the subject of the challenge in this appeal. **Kamlesh Mansukhlal Damji Pattni** filed a Notice of Appeal against the whole decision of the High Court. In the Memorandum of Appeal drawn on his behalf by his advocates he says, amongst, other things that the learned Commisisoner in acting *ex parte* did so without jurisdiction; that the learned Commissioner acted contrary to the **Foreign Judgments (Reciprocal Enforement) Act**; that the learned Commissioner erred in not taking into account that the applicant did not qualify to make the application *ex parte*; that the learned Commissioner erred in certifying the application as urgent; that the learned Commissioner granted orders which were not prayed for; that the advocate for the appellant was not heard; that the learned Commissioner erred in law in proceeding to determine the summons without any directions; that the summons before the court was invalid; that the suit was a nullity and finally that the learned Commissioner erred in granting orders without considering the nature, scope and effect of the dispute between the parties. For all these we are asked to set aside the orders of the High Court.

In submissions before us when the appeal came up for hearing on 27th June, 2016 Mr. Kalove learned counsel for the appellant submitted that the appellant had properly filed the appeal although he was not a party in the suit in England. In any event, submitted counsel, the appellant was a party affected by the judgement in England. Learned counsel contended that under the **Foreign Judgements (Reciprocal Enforcement) Act** the High Court is empowered to register a judgement delivered by a court outside

Kenya. According to counsel, such an application which is made *ex parte* may be allowed where defendants were personally served with court process in the original suit. Learned counsel submitted that the respondents were not personally served with process and because service must be personal that judgement was a nullity and not enforceable in Kenya. Learned counsel challenged the way the suit was instituted stating that the originating summons was not properly before the learned Commissioner of Assize. Learned counsel also attacked the way the Commissioner of Assize granted orders which were final without hearing all parties affected. For all these the appeal should be allowed, counsel submitted.

Senior Counsel Fred Ojiambo appeared for the first respondent. There was no appearance for the other respondents but we allowed the appeal to proceed because all the respondents had been properly served with a hearing notice. According to Mr Ojiambo, no material had been placed before the courts in England, the High Court of Kenya or before us to show that the appellant was the owner of the 2nd to 8th respondents or was connected to those respondents at all. Learned counsel challenged the institution of the appeal submitting that the appellant lacked the necessary *locus standi* to do so.

Learned counsel submitted that the 2nd to 8th respondents agreed in writing to submit to the jurisdiction of the courts in England. According to counsel, the 2nd to 8th respondents as borrowers had expressly agreed in writing that service of process be through an appointed agent. The parties having chosen a particular mode of service the 2nd to 8th respondents could not avoid the process they had appointed, stated counsel. Mr. Ojiambo in response to the attack on the manner the suit in the High court was brought submitted that technical objections were not allowed on the issue of form. According to him there was notice and whether the suit was brought by Originating Summons or Chamber Summons did not matter.

In a brief reply, Mr. Kalove insisted that the procedure on service of process in the Act had to be strictly followed.

We have considered the record of appeal, submissions of learned counsel and the law and we take the following view of the matter.

There is no dispute, it is actually common ground, that a suit was instituted in the High Court in England by the 1st respondent against the 2nd to 8th respondents where a sum of money was claimed in respect of the agreements we have referred to in this judgement. The court in England being satisfied that process had been properly served upon the 2nd to 8th respondents entered default judgement against the said respondents who had been served. As we have also stated in this judgement none of the 2nd to 8th respondents applied for setting aside of that judgment at all. The 1st respondent obtained a certificate of judgement and moved the High Court to register the same in accordance with the **Foreign Judgements (Reciprocal Enforcement) Act**.

Learned counsel for the appellant submits that the appellant is properly before us as he is a person affected by the said judgement.

In the Notice of Appeal lodged in the High Court of Kenya the appellant merely says that he is dissatisfied with the decision of the High Court but does not disclose his relationship with any of the respondents in the appeal. Learned counsel for the appellant is right in saying that a person affected by orders of the High Court may participate by filing an appeal to this Court.

We note, in this appeal, that all the respondents' are corporate bodies with power to sue or be sued. The appellant, acting in his individual capacity filed a Notice of Appeal and the Appeal without disclosing in any way how he is connected to the respondents or how the orders of the High Court affect him. Even as we heard the appeal there was no material before us to show such connection and Mr. Ojiambo may very well be right in his complaint that the appellant instituted the appeal without the necessary *locus standi* to do so.

The main complaint by the appellant, as we understood Mr. Kalove, is that the 2nd to 8th respondents

were not properly served with court process in England because such service was not personal but was effected through an appointed agent. Learned counsel for the appellant submits that without personal service the resulting judgement would be a nullity not registrable in Kenya.

Section 5 of the Foreign Judgements (Reciprocal Jurisdiction) Act allows a judgment creditor to apply for its registration through the High Court of Kenya by an *ex parte* application where the judgement debtor was personally served with court process. Where such an application is made *ex parte* notice of registration of the judgment shall be served to a judgment debtor in accordance with the Civil Procedure Act and Rules. As already stated the 2nd to 8th respondents are corporate bodies. What, then, is personal service on a corporation?

Order 5 rule 3 Civil Procedure Rules on “Service on a Corporation” declares that such service be:

- “(a) on the secretary, director or other principal officer of the corporation; or**
- (b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) –**
 - (i) by leaving it at the registered office of the corporation;**
 - (ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or**
 - (iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or**
 - (iv) by sending it by registered post to the last known postal address of the corporation.”**

So such summons may be served on the principal officer of the corporation, secretary, or be left at the registered office of the corporation or be served by registered post.

In the matter before us the 2nd to 8th respondents, while executing agreements in England freely and irrevocably submitted to the exclusive jurisdiction of English Courts and further irrevocably appointed an agent who they authorized to receive any process be it by writ, summons, orders, judgement or other notice of legal process on their behalf. That agent was duly served with process but did not enter appearance to the claim. Even after judgement was entered in default none of the said respondents moved the English court that had entered judgement to have it set aside and the judgment remained properly on record and the 1st respondent was entitled to move the High Court of Kenya for registration of that judgment in Kenya. We think that it is rather late in the day for the issue of service of process in the original suit to be taken here. We note, also, that the learned Commissioner of Assize was exercising a discretion when he gave the orders and we cannot detect any error in the way he did so to enable us interfere. The appeal has no merit and we dismiss it with costs to the 1st respondent who participated and opposed this appeal.

Dated and delivered at Nairobi this 30th day of September, 2016.

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRA