



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 336 OF 2008**

**BETWEEN**

**KAMLESH MANSUKHLAL DAMJI PATTNI ..... APPLICANT**

**AND**

**LAKE BARINGO LODGE LIMITED**

**GITARI T. NJEU ..... RESPONDENTS**

**CONSOLIDATED WITH**

**CIVIL APPLICATION NO. NAI. 337 OF 2008 (UR. 223/2008)**

**BETWEEN**

**KAMLESH MANSUKHLAL DAMJI PATTNI ..... APPLICANT**

**AND**

**KENYA HOTELS LIMITED**

**GITARI T. NJEU ..... RESPONDENTS**

**(Application for stay of Orders of the High Court of Kenya at Milimani Commercial Courts,  
Nairobi (Lady Justice Lesiit) dated 29<sup>th</sup> September, 2008**

**in**

**H.C.C.C. NO. 570 OF 2008)**

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**RULING OF THE COURT**

*In Civil Application No. Nai. 336 of 2008, the applicant sought orders under Rule 5(2) (b) of the*

Court of Appeal Rules for stay of execution of the order of the superior court (Lesiit, J) given on 29<sup>th</sup> September, 2008 and further, a stay of proceedings of *H.C.C.C. No. 570 of 2008* pending the hearing and determination of the intended appeal against the order. The respondent Lake Baringo Lodge on 29<sup>th</sup> September, 2009 filed *H.C.C.C. No. 570 of 2008* seeking various reliefs including a mandatory injunction compelling the removal of Gitari, J. Njeu the defendant in the suit as a Receiver of the respondent.

The respondent contemporarily filed a notice of motion seeking, *inter alia*, an interlocutory mandatory injunction compelling the removal of Gitari J. Njeu as a receiver for Lake Baringo Lodge. The application was placed before Lesiit, J. on the same day and the interlocutory mandatory injunction was granted *ex parte* pending the hearing of the application *inter partes* on 13<sup>th</sup> October 2008. Those *ex parte* orders are the subject matter of the aforesaid application for stay under Rule 5 (2) (b).

In *Civil Application No. Nai. 337 of 2008*, the applicant similarly seeks a stay of execution of the order of the superior court (Lesiit J.) given on 29<sup>th</sup> September, 2008 in *H.C.C.C. No. 571 of 2008* and a stay of proceedings in that suit pending appeal from the order.

On 29<sup>th</sup> September 2008, Kenya Hotels Ltd the 1<sup>st</sup> respondent and the owners of Lake Naivasha Country Club filed *H.C.C.C. No. 571 of 2008* seeking several reliefs including a mandatory injunction compelling the removal of Gitari J. Njeu as receiver of Lake Naivasha Country Club. The first respondent filed a notice of motion of the same date together with the suit seeking among other orders an interlocutory mandatory injunction compelling the removal of Gitari J. Njeu as Receiver of Lake Naivasha Country Club. The application was placed before Lesiit J on the same date who granted an interlocutory mandatory injunction in terms of the application until the hearing of the application *inter partes* on 13<sup>th</sup> October 2008. That order is the subject matter of the application for stay of execution.

The two applications for stay – that is *Nos. Nai. 336 of 2008* and *337 of 2008* were on 27<sup>th</sup> January, 2009 consolidated – *NAI. 336 of 2008* being the main file.

The two consolidated applications were partly heard and thereafter adjourned for further hearing. Mr. Ochieng’ Oduol of Ochieng’, Onyango, Kibet & Ohaga Advocates represented the 1<sup>st</sup> respondent in both applications. When the consolidated applications were pending for further hearing the firm of Osoro Mogikoyo & Company Advocates filed a notice of change of Advocates on 28<sup>th</sup> August, 2009 indicating that Lake Baringo Lodge Ltd and Kenya Hotels Ltd had appointed the firm in place of M/s Ochieng’, Onyango, Kibet & Ohaga Advocates.

On 23<sup>rd</sup> September 2009, the parties filed a consent letter dated 22<sup>nd</sup> September 2009 in the consolidated applications settling the application in the following terms:-

“BY CONSENT

1. THAT the Board of Directors of Kenya Hotels Limited now consisting of:

- (1) Yusuf Ebrahim Yusuf
- (2) Arif Hafirz
- (3) PanLianther, and
- (4) Changliang Luo

and as set out in the Official Search of the Registrar of Companies dated 30<sup>th</sup> April 2009, to manage the day to day affairs of Kenya Hotels Limited.

2. THAT the Board of Directors of Lake Baringo Lodge Limited now consisting of

- (1) Yusuf Ebrahim Yusuf,
- (2) Arif Hariz Panlianthe
- (3) Pan Liantine and
- (4) Zhanghang Luo

as set in the Official Search of the Registrar of Companies dated 10<sup>th</sup> June, 2009 to manage its day to day affairs of Lake Baringo Lodge Limited.

3. THAT Board of Directors of Kenya Hotels Limited, Lake Baringo Lodge Limited the companies and all parties herein hereby consent that the consolidated applications being Civil Applications No. Nai. 336 of 2008 and Nai. 337 of 2008 be and are hereby marked as settled with no orders as to costs”.

The Deputy Registrar of this Court T. S. Luvuga, Esq., (now retired) recorded the consent order on 23<sup>rd</sup> September, 2009 in each of the two applications thus:-

“ORDER

By consent this application be and is hereby marked as settled with no order as to costs”.

Later on 15<sup>th</sup> December, 2009 Mr. James Ochieng, of M/s. Ochieng’, Onyango, Kibet & Ohaga swore an affidavit opposing the recording of the proposed consent on several grounds including the complaint that he had not been served with a notice of change of advocates and that the consent is a fraud on the Court by the three firms of advocates who executed the consent letter.

Nevertheless, quite apart from the fact that the affidavit was filed long after the consent had been recorded by the Deputy Registrar, no party to the application including the first respondent in both applications has challenged the validity of the notice of change of advocates filed by the firm of M/s. Osoro, Mogikoyo & Co. Advocates. We are bound by the notice of change of advocates until the first respondent in both applications or any other party disputes the validity of the appointment.

In spite of the fact that the Deputy Registrar recorded the consent order, and the parties have extracted and approved the consent order as extracted and approved by the respective advocates has not been sealed by the Deputy Registrar apparently because it does not conform with the order recorded by the Deputy Registrar. Indeed, the Deputy Registrar did not record the consent orders in terms of the consent letter dated 22<sup>nd</sup> September, 2009.

The respective advocates have now informally applied to the Court to record the three consent orders in terms of the consent letter.

Our jurisdiction is limited in an application under Rule 5 (2) (b). We can only make orders pending appeal unlike in an appeal where we have jurisdiction to make orders that the superior court could have made.

The order, the subject matter of the first prayer in the consolidated application was an experte temporary order with a limited duration although it has been extended from time to time. It were made pending the hearing of the application, inter partes. It seems that the orders have expired by effluxion of time.

The first and second orders sought in the consent letter are final orders resolving the dispute pending in the superior court relating to the management of the 1<sup>st</sup> respondent in both applications. They are not sought pending appeal and there is no indication that an appeal from the orders made by the superior court would be filed.

Parties cannot confer jurisdiction on this Court which it does not have.

In our view, we have no jurisdiction to make orders Nos. 1 and 2 in the consent letter in an application under Rule 5 (2) (b). We return the consent letter relating to the two orders to the parties to file in the respective suits in the superior court.

In the result, we affirm the order recorded by the Deputy Registrar on 23<sup>rd</sup> September, 2009 as correct and endorse it as the order of the Court.

Dated and delivered at Nairobi this 25<sup>th</sup> day of March, 2010.

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**D. K.S. AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**