



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 960 OF 2016**

**NYALI INTERNATIONAL BEACH HOTEL.....CLAIMANT**

**- VERSUS -**

**MPE SHINDO BUNDI AND 145 OTHERS.....RESPONDENTS**

**NYALI SUN AFRICA BEACH HOTEL AND SPA LIMITED.....INTERESTED PARTY**

(Before Hon. Justice Byram Ongaya on Friday 01<sup>st</sup> April, 2022)

**RULING**

The interested party filed on 22.06.2021 a notice of motion through Odhiambo M.T. Adala Advocates. The application invoked order 1 rule 10, order 8 rule 3, order 11 rule 3 order 51 rules 1 and 3 of the Civil Procedure Rules, 2010; sections 1A, 1B and 3A of the Civil Procedure Act; and inherent powers of the Honourable Court. The applicant prayed for orders:

1. That the Honourable Court be pleased to order that the instant suit be consolidated with **Mombasa ELRCC No.924 of 2017, Gerald Mwoja & 23 Others –Versus- Nyali Sun Africa Beach Hotel and Spa Limited** and also with **Mombasa ELRCC No. 49 of 2020 Kenya union of Domestic, Hotel, Educational Institutions and Hospital Workers –Versus- Nyali Sun Africa Beach Hotel and Spa Limited.**
2. .... (spent).
3. That upon consolidation of the said Three (3) suits, the names of all persons who have filed more than one claim as shown in the Annexure to the supporting affidavit to be struck out or alternatively accommodated in the consolidated suit and that all persons who are proved to be deceased be substituted as required by the law.
4. That upon consolidation of the three (3) suits the interested party and all other parties be granted leave to amend their replies or statements or defences in the respective suits or in such manner as may be directed by the Court.
5. The name of the interested party herein namely Nyali Sun Africa Beach Hotel and Spa Limited be struck out and or expunged from proceedings in all cases where it was sued before it came into existence as a legal entity.
6. That the Honourable Court do make such other and further orders and directions as it may deem fit, necessary, or expedient in the interests of justice.
7. That the costs of and incidental to this application be provided for and be paid by the claimant and the respondents.

The application was based on the supporting affidavit of Sanjay Kishorkumar Mashru annexed on the application and upon the following grounds:

- a. The three suits sought to be consolidated raise the same issues of fact and law.
- b. The rights and reliefs claimed in the three suits are in respect of or arise out of the same transactions or the same series of transactions.
- c. The respondents will not suffer any prejudice if consolidation is allowed.

d. The application has been made without undue delay.

e. Consolidation will cure the irregularity where the persons have filed more than one claim about the same subject matter. It will cure inconsistencies, narrow the issues for determination, save judicial time, and enable the Court arrive at a just decision in the parties' best interest.

f. The application should therefore be allowed to prevent the parallel prosecution of the suits.

The supporting affidavit is by the interested party's director. Exhibit SKM1A on the affidavit shows that the interested party was incorporated on 28.08.2017 as a private limited company. Exhibit SKM2 shows that Nyalí International Beach Hotel is a registered business name wholly owned by Nyalí Hotels International Ltd which was registered on 30.07.2009 as an International Company on 30.07.2009 by the Government of Ras Al Khaimah in the UAE per exhibit SKM3A thereof and was issued a certificate of compliance under section 366 of the Companies Act, Cap 486 on 19.08.2009 per exhibit SKM 3B. The directors of the two mentioned companies are different per exhibited records from the Business Registration Services and is urged for the applicant that the claimant and the interested party are completely different or unrelated entities in law. It is further stated in the supporting affidavit that the interested party has been erroneously been sued in ELRCC No. 49 of 2020 and in the present suit and in ELRCC No. 924 of 2017 it has been unfairly and improperly enjoined as an interested party. Further, that it has been discovered that some of the individuals named as claimants or respondents have filed more than one claim in the three suits – and exhibit SKM4 is the list of such persons.

While urging that some claimants are since deceased, the relevant certificates of death have not been exhibited at all. The suit herein is about terminal dues and benefits arising from contracts with the alleged entities. Further the interested party was a service provider of management services to the actual and legal owners of the hotel in issue and has not been an actual or subsidiary employer of the respondents or other employees of the hotel. It is not therefore liable for the claims by the employees. At paragraph 24 it is stated thus, **"24. That the Interested Party reserves the rights at the appropriate time to provide such further or additional details and documents to demonstrate its neutrality and non-partisan role in the process of engagement or provision of services to the Claimants or Respondents or such other parties as aforesaid; and the said information shall be included in the appropriate List of Documents."**

The respondents filed on 27.08.2021 the replying affidavit of Hezron Onwong á, the Chief Industrial Relations Officer appointed under section 2(e) of the Labour Relations Act, 2007 to act for the Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers, the trade union in which the respondents are members. It is urged for the respondents that the Court granted leave for the interested party to be enjoined in this case pursuant to the amended notice of motion dated 07.12.2017. Further the cause of action in the instant case is different from that in No. 924 of 2017 and No. 49 of 2020 which are already consolidated and had been fixed for hearing on 13.10.2021. Further, by the time the interested party took over management of the claimant, it was aware of the claim herein. If the application is disallowed, the interested party will not suffer any prejudice. Further the application is made to delay the hearing of the suit and the same should be dismissed with costs to the respondent.

In the supplementary affidavit by Sanjay Kishorkumar Mashru filed on 21.01.2022, it is urged for the interested party as follows. It is admitted that ELRCC No. 924 of 2017 and ELRCC No.49 of 2021 are already consolidated. Further the cause of actions must be the same as names of persons named in the three suits are duplicated. The interested party did not simply take up management of the hotel but it is a completely different entity. Further the respondents' replying affidavit is silent on exhibit SKM4, the list of duplicated persons in the suits. The duplicated names are listed in paragraph 11 of the supplementary affidavit.

The claimant did not file a replying affidavit or submissions. The respondents and the respondents filed submissions.

The Court has considered the parties' respective positions and makes findings as follows.

**First**, consolidation of suits is governed by rule 23 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which states that the Court may consolidate suits if it appears that in any number of suits:

a. Some common question of fact or law arises; or

b. It is practical and appropriate to proceed with the issues raised in the suits simultaneously.

The exhibited part of the memorandum of claim in ELRCC No. 49 of 2020 states the issue in dispute to be wrongful and unfair termination of 70 listed grievants being members of the claimant trade union and the named respondent is the interested party herein. Further the exhibited part of the memorandum of claim in cause 924 of 2017 between 24 listed claimants against the interested party herein who is the named respondent states the issue in dispute as wrongful and unfair termination on account of redundancy contrary to section 40 of the Employment Act, 2007, parties CBA clause 11 and section 15 of the Regulation of Wages and Conditions of Employment (Hotel and Catering Trade) Order. The disputed in the instant case is about industrial action by way of a strike by the respondents against the claimant in which the respondents' grievance was non-payment of salaries and service charge. By the Court's ruling on 12.06.2017, Rika J ordered and directed the claimant and the respondent on the way forward towards resolving the strike and the respondents' grievances in issue.

The Court has considered the issues in dispute in the three suits and returns that they are founded upon different transactions and the applicant has not established some common question of fact or law that arises that would justify consolidation as applied for. The Court further returns that it has not been established by the applicant that it is practical and appropriate to proceed with the issues raised in the suits simultaneously. The court has considered the issue of alleged duplicity of the persons named as respondents or claimants in the suit and returns that such does not justify consolidation of the suits as urged for the applicant. The Court finds that the applicant has not established a satisfactory case for consolidation as prayed for.

The Court has perused the Court file and on 07.02.2019, the parties addressed the Court on the issue of consolidation of the present suit with

ELRCC No. 924 of 2017 and the Court ordered that the suits shall be heard separately but simultaneously and parties were directed to comply with pre-trial procedures in both cases. In view of that Court order and direction, the Court finds that indeed, the present application to consolidate was *res judicata* and an abuse of Court process.

**Second**, as urged for the claimant, on 16.02.2018 the Court ordered that the applicant is enjoined as an interested party. To that extent, the Court finds that the prayer to expunge the interested party from the proceedings is clearly inconsistent with the order it be enjoined as given on 16.02.2018. It appears to the Court that the issue of the applicant being enjoined was conclusively decided by the Court. In any event the applicant in the supporting affidavit as earlier quoted in this ruling has designed to file further documents towards the effective, just, and complete determination of the suit. In view of that offer, it should be obvious that the applicant is a proper party in the suit and enjoined.

**Third**, the applicant urged amendment consequential to an order of consolidation and in view of deceased parties or duplicity of parties as named in the suits. The Court has already found that the transactions and issues in the suits are different as urged for the respondents and therefore the duplicity in the individuals named as parties has not been shown to be offensive in that respect. The Court considers that there is no established principle of law that the same party may not bring numerous suits against the same defendant upon different transactions; as the cause of action would be different and not the same in the separate suits. The amendment as prayed for was also speculative as consequential to consolidation and as well based upon alleged departed parties but which fact was not established at all but remained an empty allegation as no evidence by way of death certificates was exhibited. The prayer to amend as prayed for will therefore collapse.

In conclusion the application by the interested party dated 28.05.2021 and filed on 22.06.2021 is hereby determined with orders:

1. It is dismissed and the applicant to pay the claimant and the respondents the costs of the application.
2. Parties to take prompt steps towards the expeditious determination of the suit as may be appropriate.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01<sup>ST</sup> APRIL, 2022**

**BYRAM ONGAYA**

**JUDGE**