



**REPUBLIC OF KENYA**

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

**CAUSE NO. 12 OF 2017**

**MOSES S. MWATEMO..... CLAIMANT/DECREE HOLDER**

**- VERSUS -**

**SALAMA BEACH HOTEL LIMITED.....RESPONDENT/JUDGMENT DEBTOR**

**NCBA BANK (K) PLC (FORMERLY NIC BANK.....1<sup>ST</sup> GARNISHEE**

**DIAMOND TRUST BANK KENYA LIMITED.....2<sup>ND</sup> GARNISHEE**

**TEMPLE POINT RESORT LIMITED.....OBJECTOR**

(Before Hon. Justice Byram Ongaya on Friday 12<sup>th</sup> March, 2021)

**RULING**

The Court delivered judgment on 31.10.2019 for the claimant and the respondent, Salama Beach Hotel Limited, for orders:

- a) It is declared that the claimant was constructively dismissed by the respondent, and dismissal was unlawful and unfair.
- b) The respondent shall pay to the claimant leave at Kshs. 135,079; severance at Kshs.853.135; and compensation at Kshs. 2,218,152 – total Kshs. 3,206,366.
- c) The claimant shall pay the respondent a total sum of Kshs. 1,185,000.
- d) There be an offset, resulting in the total sum payable to the claimant at Kshs. 2, 021,366.
- e) Costs to the claimant.
- f) Interest granted at 14% per annum from the date of the judgment till payment is made in full.

The claimant filed a notice of motion on 22.10.2020 through Matata & Mwabonje Advocates LLP. The application was against Temple Point Hotel (formally Salama Beach Hotel Ltd) as the respondent (judgment debtor) and against the 1<sup>st</sup> garnishee and the 2<sup>nd</sup> garnishee. The application was under rule 32(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 23 Rule 1, 2, 3, 4, 5, & 10 of the Civil Procedure Act, Cap 21, Laws of Kenya. The claimant prayed for orders:

- 1) That the Honourable Court be pleased to make a garnishee order nisi against the NCBA BANK (K) PLC formerly NIC BANK against account No. [xxxx] domiciled at Watamu Branch and DIAMOND TRUST BANK KENYA LTD against account number [xxxx] domiciled at Watamu Branch ordering that all monies held to the credit of Temple Point Hotel formerly Salama Beach Hotel Ltd, the respondent/judgment debtor herein, be attached to answer a decree for the sum of Kshs.2, 021, 366.00 together with costs of Kshs. 317, 940.25 and interest of Kshs. 282,991.24 making a total of Kshs.2, 622, 297.49.
- 2) That the Honourable Court be pleased to order the above named garnishees and the judgment debtor to attend before the Court on a date to be appointed, to show cause why the said garnishees should not pay to the decree holder the decretal outstanding sum of Kshs.2, 622, 297.49.
- 3) That upon the inter partes hearing of the application, the Honourable Court be pleased to issue a garnishee order absolute in terms of prayer 1 hereinabove.

- 4) That costs of the application be borne by the judgment debtor.

The application was based upon the annexed supporting affidavit of Shukran Mwabonje Advocate and upon the following grounds:

- a) The judgment debtor owes KShs.2, 622, 297.49 as flowing from the judgment herein. The judgment sum continues to accrue interest at 14% per annum.
- b) The 1<sup>st</sup> garnishee and the 2<sup>nd</sup> garnishee are holding funds in the stated respondent's accounts as prayed for.

Temple Point Resort Limited (objector) filed on 16.12.2020 a notice of appointment of Makambo Makabila & Company Advocate to act in the suit. The objector filed the notice of objection to attachment under order 22 rule 51 objecting to the attachment and issuance of a garnishee order nisi on 15.12.2020 against NCBA Bank (k) PLC Bank Account No. [xxxx] at Watamu Branch and Diamond Trust Bank Limited Bank Account No. [xxxx] also at Watamu Branch. The objector concurrently filed an urgent notice of motion under section 3A of the Civil Procedure Act, Order 22 Rule 51 and 52 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The objector prayed for stay of execution herein in view of the order nisi issued on 15.12.2020 and for the order to be discharged. The objector further prayed that an order be issued restraining the claimant herein or his servants or agents or employees from interfering with, attaching, proclaiming and or auctioning assets of the objector in execution or relation to the decree issued herein; and costs of the application be provided for. The application was based on the annexed affidavit of Jan Ramin Langer and upon the following grounds:

- a) The objector is not a party to the suit leading to the decree subject to the execution proceedings herein.
- b) The suit and decree was in fact against Salama Beach Hotel Limited and not the objector.
- c) The objector's bank accounts are being attached without any justification.
- d) The objector learned about the proceedings upon the order nisi of 15.12.2020 being served upon the garnishees.
- e) Salama Beach Hotel Limited owes the objector a sum of 6, 907, 801.89 Euros from a decree in **Milimani HCCC No. E034 of 2018, Temple Point Resort –Versus- Salama Beach Hotel Limited**. Further the objector filed Milimani HCCC Insolvency Petition No. E016 of 2018 In the Matter of Salama Beach Hotel Limited and the Court granted the objector orders on 26.02.2019 to take over management of the claimant in execution of its debt and the objector cannot therefore in the circumstances be called upon to beat obligations or settle debts of third parties or other creditors.
- f) The claimant and his agents are misguided in attaching the objector's accounts or other property in purported execution of the decree herein. Such execution against the objector is mischievous and will occasion the objector irreparable harm. No prejudice will be suffered by the claimant if the application is allowed and the application has been made without unreasonable delay.

The claimant opposed the objector's application by filing on his replying affidavit sworn on 14.01.2021 and also his further affidavit sworn on 15.01.2021. The claimant urged as follows:

- a) He was employed by an entity called Salama Beach Hotel Ltd (Temple Point Resort) as per the exhibited letter of appointment dated 28.09.2010. The Court notes that the clause on confidentiality in the letter stated partly, "**You will not disclose classified company information within and after the end of your employment to anybody without the authority of the Management of Salama Beach Hotel Limited (Temple Point Resort).**" The Court considers that by that contractual clause the objector and the respondent herein contracted to the claimant that they were one and the same person, the employer.
- b) By the letter dated 26.05.2013 the claimant was promoted by Salama Beach Hotel Ltd to the position of Resident Manager.
- c) By the letter dated 04.11.2015 on the letterhead of Temple Point Resort Ltd, the claimant was demoted to the position of Head Accountant.
- d) Salama Beach Hotel Ltd and Temple Point Resort Ltd use the same postal address, P.O. Box 296 – 80202, Watamu (Kenya) and the two use the same letterheads with the same addresses interchangeably.
- e) In the memorandum of appearance, it was stated thus, "**Please Enter Appearance for the Respondent herein TEMPLE POINT HOTEL (FORMALLY) SALAMA BEACH HOTEL LTD.**" Further in the statement of response to claim and counterclaim, the respondent is titled as, Temple Point Hotel (Formally) Salama Beach Hotel Ltd and paragraph 1 thereof states, "**1. The Respondent is SALAMA BEACH HOTEL LTD (Temple Point Hotel) ....**"
- f) In the circumstances, the claimant states that Salama Beach Hotel Ltd, the respondent, herein and Temple Point Resort Ltd, the objector, were jointly his employers.

Jan Ramin Lannger filed a supplementary affidavit to further support the objector's application and stating that the decree nisi issued on 15.12.2020 cited a bank account at the 1<sup>st</sup> garnishee bank that did not in fact belong to the objector and the 1<sup>st</sup> garnishee had since informed the objector about that fact. The bank account as stated in the order nisi with respect to 2<sup>nd</sup> garnishee belongs to the objector. The objector and the respondent in the suit are distinct persons in law and the claimant had been employed and paid salaries by the respondent and not the objector.

The claimant has also filed his supplementary affidavit on 22.02.2021 exhibiting pleadings and judgment delivered on 23.02.2018 in **ELRC Cause 189 of 2016 at Mombasa, Robert M. Mwachengo –Versus- Salama Beach Hotel T/A Temple Point Resort Limited [2018] eKLR** in which Temple Point Resort Limited had denied employing the claimant therein and urging that the employer had been Salama Beach Hotel Limited but the Court (Onesmus Makau J) found thus, “**10. However, in my view the two entities are related closely because, the Letter Heads for the Respondent bear the name Temple Point Resort on the logo, they use the same telephone, postal and email addresses with Temple Point Resort Limited. From the list of staff members produced as exhibit, it would also appear that the two entities used the same staff in their businesses. The foregoing view is fortified by the copy of the cheque for terminal dues to the Claimant dated 19.08.2015 produced as defence exhibit, which was drawn by Temple Point Resort Limited. The said payment was in furtherance to the certificate of payment dated 15.8.2015 between the Claimant and the Respondent and which was produced as defence exhibit. 11. The question that arises is whether the Respondent was trading as Temple Point Resort Limited. From the foregoing analysis it obvious that she did so. Although the defence alleged that Temple Point Resort Limited is a limited company with separate legal personality from the Respondent, no evidence in form of certificates or otherwise has been adduced to verify that allegation by the defence. Consequently, I find and hold that the suit is properly before the Court and I will proceed to determine it on merits.**”

The Court directed that the claimant’s and objector’s applications be heard together. The Court has considered the material on record and the parties’ respective submissions and makes findings as follows:

1) The 1<sup>st</sup> garnishee states that account No. [xxxx] does not exist. The claimant in his further affidavit sworn on 15.01.2021 in reply to the 1<sup>st</sup> Garnishee replying affidavit sworn by Stephen Atenya and filed on 13.01.2021 states that he believes his banker’s advice that account no. [xxxx] is not precise but that any reasonable banker has the ability to interpret it that 147 represent the bank code and [xxxx] represent the account number. The claimant further states that he knows that the 1<sup>st</sup> garnishee holds account No. [xxxx] on behalf of the respondent or judgment debtor. Nevertheless, despite that knowledge, the claimant did not seek and obtain an order to amend the application. As submitted for the 1<sup>st</sup> garnishee, it is trite law that parties are bound by their own pleadings. However, the Court considers that the 1<sup>st</sup> garnishee has not denied the claimant’s advisory that the account number is in fact [xxxx] and the Court finds that the prayer made for the claimant and the order nisi herein will be construed as such, especially that the 1<sup>st</sup> Garnishee has not offered evidence to disturb or dispute the claimant’s explanation and knowledge that the account exists as duly identified. While making that finding the Court has been guided by the provisions of Article 159 to prioritise substantive justice as opposed to procedural technicalities and section 3 of the Employment and Labour Relations Court Act, 2011 on the principal objectives guiding the resolution of disputes before the Court. In that regard, the prayer made for the claimant will be construed to reflect the correct account number so that justice is not further delayed or defeated in the matter.

2) On 26.01.2021 counsel for the 2<sup>nd</sup> garnishee submitted that the 2<sup>nd</sup> garnishee maintained an account for Temple Point Resort Ltd and not Salama Beach Hotel Ltd, the respondent in the suit. As exhibited for the claimant, in the memorandum of appearance the respondent in the suit stated thus, “**Please Enter Appearance for the Respondent herein TEMPLE POINT HOTEL (FORMALLY) SALAMA BEACH HOTEL LTD.**” Further and as submitted for the claimant, in the letter dated 04.11.2015 done on the letterhead of Temple Point Resort Ltd at paragraph 1 it was stated, “**.... This letter confirms your employment as an employee of Temple Point Resort Ltd on contract basis for 2 months.**” The addresses indicated on the letterheads and voucher heads also show that the two companies shared the addresses and the branded documents were used interchangeably. Thus, some vouchers on Temple Point Resort have been used to pay the claimant. The Court has already observed and found that the respondent and the objector contracted with the claimant per the contract of service as one and the same person. The parties are equally bound by their pleadings and in the statement of response to claim and counterclaim the respondent confirmed that it was Salama Beach Hotel Ltd (Temple Point Hotel). Thus despite exhibiting records of Temple Point Resort Limited as a company as at 16.12.2020 and that there have been legal proceedings between the objector and the respondent, for purposes of the present suit and the execution proceedings, the Court returns that the objector and the respondent are one and the same entity that was the respondent in the suit, had employed the claimant and are equally or similarly liable to satisfy the decree herein. In that regard the Court follows the holding by Onesmus Makau J. in the earlier case of **Robert M. Mwachengo –Versus- Salama Beach Hotel T/A Temple Point Resort Limited [2018] eKLR** as quoted earlier in this ruling. Accordingly, the objection application will fail in that respect and the claimant’s application will succeed to that extent.

In conclusion the application filed for the claimant, the notice of objection to execution herein, and, the application filed for the objector are hereby determined with orders:

1) The objection proceedings and the objector’s application is dismissed with costs.

2) That the garnishee order absolute is hereby issued against the NCBA BANK (K) PLC formerly NIC BANK against account No. [xxxx] domiciled at Watamu Branch and DIAMOND TRUST BANK KENYA LTD against account number [xxxx] domiciled at Watamu Branch ordering that all monies held to the credit of Temple Point Hotel (formally) Salama Beach Hotel Ltd, the respondent/judgment debtor herein, be attached to answer a decree for the sum of Kshs.2, 021, 366.00 together with costs of Kshs. 317, 940.25 and interest of Kshs. 282,991.24 making a total of Kshs.2, 622, 297.49.

3) The respondent to pay the claimant’s costs of the application.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 12<sup>th</sup> March, 2021.**

**BYRAM ONGAYA**

**JUDGE**