



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 27 OF 2012**

**MIRKO BLAETTERMANN (Suing through his Power of Attorney**

**SHABIR HATIM ALI) .....1<sup>ST</sup> PLAINTIFF**

**PUBLIC TRUSTEE (Suing on behalf of**

**HELMUT KOSTER .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DAVID MWANGI MUIRURI.....1<sup>ST</sup> DEFENDANT**

**GHOTMAN COTOVA .....2<sup>ND</sup> DEFENDANT**

**EMPIRES AND PARTNERS INVESTMENTS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By a Plaintiff dated 29<sup>th</sup> February, 2012 as amended on 12<sup>th</sup> November, 2012, Mirko Blaettermann suing through his attorney Shabir Hatim Ali (*the 1<sup>st</sup> Plaintiff*) and the Public Trustee suing on behalf of Helmut Koster (*the 2<sup>nd</sup> Plaintiff*) pray for Judgment against the three Defendants jointly and severally for:

1. A declaration that the proceedings in the purported case being Malindi CMCC No. 18A of 2004 and all the orders thereto is null and void with no legal consequences and that the Land Registrar Mombasa do expunge entry numbers 6, 7, 8, 10 and 11 from the register in volume LT. 21 Folio 368/4 file 3853 Land Portion No. 622 (Original No. M.17G) and restore back Karl – Heinz Borner, Mirko Blaettermann and Helmut Koster as the registered proprietors of the suit premises.

2. A permanent injunction restraining the Defendants by themselves, agents, servants, legal representative assigns or anyone claiming interest through them from entering, remaining in, alienating, trespassing and/or dealing with the suit premises in any manner whatsoever;

3. General damages;

4. Costs of the suit;

5. Interest at Court rates; and

6. Any other relief that this Honourable Court may deem fit to grant in the circumstances.

2. Those prayers arise from the Plaintiffs contention that at all times material, they have been one of the registered owners of all that property being plot No. 622 (Original No. M. 17G) Malindi which property is jointly registered in the names of the 1<sup>st</sup> Plaintiff, Karl-Heinz Borner and Helmut Koster.

3. It is the Plaintiffs case that at all times material, Shabir Hatim Ali, the donee of a power of attorney from the 1<sup>st</sup> Plaintiff has been their caretaker having the power to manage, maintain, lease and take good care of the suit premises to the best interest of the registered owners since the year 1995.
4. The Plaintiffs aver that on or about the year 2004, the 1<sup>st</sup> Defendant, being a mastermind and with the intention to defraud the registered owners of the suit premises, caused to be prepared forged documents in the name of the court suit and proceedings together with a Judgment purporting to be Malindi CMCC No. 18A of 2004 filed by the 2<sup>nd</sup> Defendant against the registered owners of the suit property.
5. The Plaintiffs further accused the 1<sup>st</sup> Defendant of proceeding to obtain by unknown means a duly sealed and stamped Judgment, decree and order arising from the said Malindi CMCC No. 18A of 2004. It is their case that the effect of the purported proceedings and Judgment were to defraud and vest away the property and to have the same registered and/or unlawfully transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which Defendants are synonymous with the 1<sup>st</sup> Defendant.
6. But in the joint Statement of Defence dated 9<sup>th</sup> March, 2012 and filed herein on 12<sup>th</sup> March 2012, David Mwangi Muiruri (*the 1<sup>st</sup> Defendant*), Ghotman Cotova (*the 2<sup>nd</sup> Defendant*) and Empires and Partners Investments (*the 3<sup>rd</sup> Defendant*) deny each and every singular allegation contained in the Plaint and urge the Court to dismiss the suit.
7. The Defendants assert that the 1<sup>st</sup> Defendant is a licensed Court Process Server of the High Court authorized to effect Court process throughout the Republic of Kenya while the 2<sup>nd</sup> Defendant is a business enterprise registered under the Business Names Act (Cap. 499) in the names of Ghotman Cotova & General Merchants. It is further the Defendants case that the 3<sup>rd</sup> Defendant is equally a business name registered under the said Cap. 499 of the Laws of Kenya.
8. The Defendants aver that the 3<sup>rd</sup> Defendant is an innocent purchaser for value and the current registered owner of the said Plot No. 622 Malindi. It is further their case that the Plaintiff has no capacity to bring the suit and that as such the suit is fatally defective and a non-starter.
9. While conceding that the 1<sup>st</sup> Plaintiff was at one time a registered owner of the suit property jointly with others, the Defendants assert that the 1<sup>st</sup> Plaintiff did transfer his interest together with that of his partners to the 2<sup>nd</sup> Defendant in a consent recorded in Court in the said Malindi CMCC No. 18A of 2004.
10. The Defendants aver that following the refusal of the Registrar of Titles to effect the transfer of the suit property to the 2<sup>nd</sup> Defendant in the absence of the Court order, they were compelled to institute Miscellaneous Civil Suit No. 5 of 2007 wherein they obtained orders of transfer. The original files for the two cases have however since mysteriously disappeared from the Court Registry.
11. The Defendants further deny that Shabir Hatim Ali has been the caretaker of the property or that he has ever been on the same since its acquisition by the 2<sup>nd</sup> Defendant save on a few occasions when he trespassed thereon to harass tenants in the premises. It is further their case that the Plaintiffs have through an advertisement placed in the Daily Nation Newspaper of 15<sup>th</sup> February, 2011 categorically intimated that they are no longer owners of the property.

#### **THE PLAINTIFFS CASE**

12. The Plaintiff called one witness who testified at the trial in support of their case.
13. PW1 – Shabir Hatim Ali Dhaha is a resident of Barani in Malindi and a businessman. He told the Court he got to know Mirko Blaettermann (*the 1<sup>st</sup> Plaintiff*) through his father Hatim Ali Dhaha at the Vasco da Gama Lodge in Malindi. His father also introduced him to Karl Henzo Borner and Helmut Koster. The three were operating the Vasco da Gama Lodge which is situated on the suit property.
14. PW1 testified that the trio thereafter appointed him as the Manager and Administrator of the Lodge. The registered owners left the Country in 1997 and left PW1 to scout for the buyer for the property. PW1 told the Court that sometime in the year 2008, he was served with a Court order emanating from Malindi CMCC No. 18A of 2004. In the said suit, the 2<sup>nd</sup> Defendant herein had sued the three registered owners of the suit property and the 2<sup>nd</sup> Defendant was declared the new owner and was required to take over possession of the same as a result of a breach of contract that the 2<sup>nd</sup> Defendant had entered into with the registered owners.
15. PW1 told the Court that the order required their eviction from the property and that the original owners were to be deregistered. The 2<sup>nd</sup> Defendant who was the Plaintiff in the said Malindi CMCC No. 18A of 2004 was to be registered as the new owner of the property.
16. PW1 testified that upon receipt of the decree, he obeyed the same and left the suit premises. The 1<sup>st</sup> Defendant then moved in and took over the suit premises. However, when PW1 followed up on the matter, he discovered that the documents were forgeries. When PW1 went to the Magistrates Court, they could not prove the existence of Malindi CMCC No. 18A of 2004. The file could not be traced and the Magistrate who was said to have made the orders disowned the same and swore an affidavit to that effect.
17. PW1 told the Court he then reported the matter to the Anti-Corruption office but was referred to the CID offices in Malindi. The CID then conducted investigations and came to the conclusion that the documents had been forged. PW1 also came across an order issued in Miscellaneous Civil Suit No. 5 of 2007 on 27<sup>th</sup> February, 2007. The order which was availed to PW1 by a Police Officer urged the Registrar of Lands to dispense with the production of original title in transferring the property to the 2<sup>nd</sup> Defendant.

18. PW1 further testified that he tried in vain to trace the Malindi Miscellaneous case No. 5 of 2007 but the file was unavailable. He traced Hon. Ogembo, Senior Resident Magistrate who was said to have issued the orders but he swore an affidavit on 4<sup>th</sup> April, 2011 stating he never signed the order.

19. PW1 told the Court he did a search at the Land Registry from where he learnt from an indenture dated 20<sup>th</sup> April, 1995 that the three white men who had left him in possession were the registered owners of the land. That position was changed following the registration of the order made in Malindi CMCC No. 18A of 2004. The 2<sup>nd</sup> Defendant had thereafter become the owner before the same was acquired by the 3<sup>rd</sup> Defendant at Kshs.1,770,000/- and thereafter by another company known as Max International Limited and yet another company known as White-House International.

20. PW1 told the Court that when he checked with the Registrar of Companies, he discovered that the 1<sup>st</sup> Defendant was a director of the said companies.

21. PW1 testified that after the investigations, the 1<sup>st</sup> Defendant was charged in criminal case No. 345 of 2011 with forgery of Judicial documents. He was however acquitted and the DPP appealed. PW1 told the Court when he was evicted, the suit property was developed with some 10 Villas. All the villas were furnished. There was also a bigger house and casuarina trees. There was also a swimming pool, a well and a lounge that was fully furnished.

22. On cross-examination by the 1<sup>st</sup> Defendant, PW1 conceded that he is the one who initiated the suit on account of a power of attorney given to himself by Blaettermann. Mr. Korster is deceased but the other two proprietors were alive in Germany. He conceded he had no power of attorney from the other two owners and that since 1997, the owners had not visited the County.

23. PW1 further conceded that the 1<sup>st</sup> Defendant was acquitted under Section 210 of the Criminal Procedure Code. He told the Court the advertisement appearing in the newspaper on 15<sup>th</sup> November, 2011 claiming the three white men were no longer the owners of the property was paid for by the Defendants and not the 1<sup>st</sup> Plaintiff. He further told the court the 1<sup>st</sup> Plaintiff was aware of this case.

#### **THE DEFENCE CASE**

24. The three Defendants also called a single witness who testified at the trial in support of their case.

25. DW1 – David Mwangi Muiruri is the 1<sup>st</sup> Defendant herein and a resident of Malindi. Relying on his recorded statement dated and filed herein on 9<sup>th</sup> March 2020, DW 1 told the Court that he is a businessman and hotelier by profession and that he is also the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

26. DW1 testified that sometimes in the year 2001, he met Karl Heinz Borner, Mirko Blaetterman and Helmut Koster at a hotel in Malindi where he worked. The three were the owners of Vasco da Gama Lodge that was operated on the suit property. In 2003, the trio told DW1 that they wanted to construct more bungalows at the Lodge but they did not have funds for the intended development. They told DW1 that they needed to be supplied with building materials on credit.

27. DW1 told the Court he was then running a business under the 2<sup>nd</sup> Defendant's name. He then entered into an agreement to supply the materials to the three owners of the property in the name of the 2<sup>nd</sup> Defendant. DW1 testified that the contract required that he be paid immediately after the completion of the buildings and cottages which period was estimated not to be over eight (8) months. The owners of the Lodge breached the agreement and DW1 then instructed Messrs Awiti Omolo & Company Advocates who instituted Malindi CMCC No. 18(A) of 2004.

28. DW1 told the Court that his Advocate informed him that despite being served with the said case, the three registered owners of the suit property failed or refused to enter appearance. On 11<sup>th</sup> March 2004, one of them – Karl Heinz Borner called DW1 and requested for an urgent meeting. DW1 met him and he offered to give an acknowledgement dated the same date handing over the property to DW1 to offset the debt they owed and to settle the on-going case in Court.

29. DW1 testified that although he accepted the acknowledgment, he decided to proceed with the case to conclusion upon consultation with his advocate Lilian Jean Omolo. Later on, the Advocate advised him that Hon. Joyce Manyasi who was hearing the case had rendered Judgment in DW1's favour. The Advocate further informed him that they needed to file an application to have the suit property transferred to him.

30. DW1 told the Court he was unable to raise the money required to file the application for sometime. In the meantime the said Advocate fell ill and died in the year 2005. On 2<sup>nd</sup> February 2007, DW1 went to Court and applied for certified copies of Court documents in Malindi CMCC No. 18(A) OF 2004. He thereafter filed the application for transfer of the property through his new Advocate Mr. Kinyanjui.

31. DW1 testified that in March 2007, Mr.Kinyanjui Advocate called him and notified him that his application had been granted in Miscellaneous Civil Suit No. 5 of 2007 and the suit property had been transferred in his favour.

32. DW1 told the Court he then got a business partner one Bramuchi Mercimullano and they formed Max International & Company Limited where he transferred the suit property. He told the Court that he later sold the property to one Bruno Pezzola who was introduced to him by PW1. When the said Bruno failed to pay the agreed purchase price, DW1 instituted Malindi HCCC No. 72 of 2007 against him.

33. DW1 told the Court it was only then that the allegations of forgery were made against him. During the hearing, the Court files being

Malindi CMCC No. 18(A) of 2004 and Miscellaneous Civil Suit No. 5 of 2007 were produced before Justice Hellen Omondi who was hearing the matter. The Court confirmed the validity of the Judgment in Malindi CMCC No. 18(A) of 2004.

### ANALYSIS AND DETERMINATION

34. I have carefully perused and considered the pleadings filed herein, the rival testimonies of the two witnesses and the evidence adduced at the trial. I have similarly considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

35. The dispute herein relates to a parcel of land known as LR No. 622 Malindi. It was common ground that in the year 1995, the suit property was registered in the names of Mirko Blaettermann, Karl – Heinz Borner and one Helmut Koster. The three registered owners operated a business on the suit property known as Vasco Da Gama Lodge. The business appears to have closed down some years after the said owners apparently left the country and returned to their home country, Germany.

36. According to the Plaintiffs, before the registered owners left the country, they had employed Shabir Hatim Ali as their Manager and Administrator of the Lodge. The said Shabir is said to have continued operating the said business until sometime in the year 2007 or thereabouts when the 1<sup>st</sup> Defendant herein served him with a Court order said to be emanating from Malindi CMCC No. 18A of 2004.

37. That suit was apparently instituted against the three registered owners of the suit property by the 2<sup>nd</sup> Defendant which is a business enterprise operated by the 1<sup>st</sup> Defendant. It was contended by the Defendants that the said suit was determined in favour of the 2<sup>nd</sup> Defendant and that it resulted in a Judgment and decree transferring the suit property to the 2<sup>nd</sup> Defendant consequent upon a vesting order issued in Malindi SRM Miscellaneous Civil Application No. 5 of 2007.

38. Upon being served with the said orders, the said Shabir Hatim Ali who would later institute this suit on the authority of a Power of Attorney said to have been donated to himself by the said Mirko Blaettermann handed over the property to the 1<sup>st</sup> Defendant – David Mwangi Muiruri. Since then, the suit property has seemingly changed hands at least three times. It first changed hands from the 2<sup>nd</sup> Defendant as decree holders in the said Malindi CMCC No. 18A of 2004, Ghotman Cotova & General Merchants to Max International & Company Limited. It was then transferred to White House International Limited before finally ending up in the hands of the current registered owners Empires and Partners Investments (*the 3<sup>rd</sup> Defendant*) who is described in the Statement of Defence as an innocent purchaser for value without notice.

39. While the suit was instituted in the names of Mirko Blaettermann suing through his attorney Shabir Hatim Ali as the 1<sup>st</sup> Plaintiff and following an order of this Court the Public Trustee apparently suing on behalf of Helmut Korster as the 2<sup>nd</sup> Plaintiff, it was clear to me from the long and winded proceedings herein that the suit was solely prosecuted by the 1<sup>st</sup> Plaintiff and that the Public Trustee did not take part in the same.

40. It is the sole Plaintiff's case through his attorney that the Defendants herein procured the said registration of the suit property through fraud achieved via fictitious proceedings allegedly conducted in Malindi CMCC No. 18A of 2004. Shabir as the donee of the power of attorney from Mirko Blaetterman asserts that he is the rightful representative and caretaker of the true owners of the property and that he was in constructive possession of the property until the year 2007 when the 1<sup>st</sup> Defendant made a forced entry thereto under the guise of a "forged" Court order and the subsequent fraudulent registration.

41. On the other hand, the Defendants assert that Shabir Hatim Ali has no capacity to bring this suit and that as such the suit as filed is fatally defective and a non-starter. It is the Defendants case that the 2<sup>nd</sup> Defendant had sued the original owners of the suit property for a debt in Malindi CMCC No. 18A of 2004 which case they assert was in existence and is not a forgery as contended by the Plaintiff.

42. While conceding that Mirko Blaettermann was together with two others, the previous owners of the property, the Defendants aver that Mirko did transfer his interest together with that of his partners to the 2<sup>nd</sup> Defendant in a consent that was recorded in Court in the said Malindi CMCC No. 18A of 2004.

43. The Defendants further told the Court that following the refusal of the Registrar of Titles to effect the transfer to the 2<sup>nd</sup> Defendant's name on the basis of the decree issued in Malindi CMCC No. 18A of 2004, they were compelled to institute another case being Malindi SRM Miscellaneous Civil Application No. 5 of 2007 wherein they obtained orders of transfer of the suit property to the 2<sup>nd</sup> Defendant before the same was subsequently transferred to the 3<sup>rd</sup> Defendant.

44. From the outset, it was clear that while the suit property was said to have changed hands a number of times, the same essentially remained in the hands of the 1<sup>st</sup> Defendant. That much is clear from the opening paragraph in the 1<sup>st</sup> Defendant's statement filed herein on 9<sup>th</sup> March, 2020 in which he boldly asserts that he is a businessman and hotelier by profession and that he is "also the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant". Indeed at page 3 of their closing submissions herein on the brief progress of the Defendants' suit, the Defendants do submit that David Mwangi Muiruri is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

45. From the very beginning, the Defendants have attacked the suit filed against them as being fatally defective and a non-starter. It is their submission that Shabir Hatim Ali commenced this suit by way of a power of attorney donated to himself by Mirko Blaettermann and that Shabir did not seek the authority of this Court to continue the prosecution of this suit, an omission that according to the Defendants, offends the provisions of **Order 9 Rule 2 of the Civil Procedure Rules**. From a perusal of the file that issue had been raised severally by the Defendants and had been ruled on by the Court.

46. Be that as it may and in order to appreciate the tenor and purport of the said provision, one ought to start from **Order 9 Rule 1 of the**

Rules which provides as follows:

**“1. Applications, appearances or acts in person, recognized agent or by advocate.**

**Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:**

**Provided that-**

**(a) Any such appearance shall, if the court so directs, be made by the party in person.”**

49. **Order 9 Rule 2 of the Civil Procedure Rules** on the other hand describes categories of recognized agents to include:

**“(a) Subject to approval by the Court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of the parties.”**

50. Considering the purpose for the requirement for prior approval in **Jack J. Khanjira & Another -vs- Safaricom Limited (2012) eKLR**, Mwongo J observed as follows:

**“Clearly, the essential characteristic of a person acting as a recognized agent is that he or she acts, appears or makes any such applications, acts or appearances subject to the approval of the Court.**

**The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in Court, they must periodically obtain the approval of the Court to do such acts. It is for the Court to oversee the scope and extent of the functions of a recognized agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognised; it is the extent or scope of their agency that is recognised. That is to say, a recognised agent can perform only that which he is recognised or authorized to do in law.”**

51. Considering the effects of the failure of the Plaintiff to seek prior approval of the Court before filing suit in **Edmund Mwangi Waweru -vs- Gabriel Wanjohi Waweru & Another (2017) eKLR**, Waithaka J held as follows:

**“... failure to seek approval of the Court to do the acts specified in that section of the law does not necessarily render the act or appearance fatally defective.**

**I begin by pointing out that the Power of Attorney granted to the Plaintiff authorized him to sell, make legal claims, maintain and exercise all of her rights as owner of the property in all capacities ...**

**...**

**Despite the fact that the approval of this Court was not sought before the Plaintiff instituted this suit, there being no prejudice caused on the defendant on account of that failure, I find and hold that the failure did not affect the respondent’s capacity to sue on account of the general power of attorney given on him by his sister.”**

52. In the matter before me, although the power of attorney was not produced by Shabir Hatim Ali, it was produced by the Defendants in their bundle of documents. A perusal thereof reveals that the power granted to Shabir was not limited. He had power to recover and maintain possession of the suit property and to protect the same from wastage, damage or trespass.

53. In my view, the mandate given to him to recover the land could only be done by way of a suit. Shabir was indeed in possession of the suit premises before the Defendants took over the same and given the circumstance in which he was dispossessed of the property, I did not think that the failure to seek prior approval of the Court before seeking to recover the land would render the suit fatally defective. At any rate, I would not find any prejudice caused to the Defendants on account of that failure.

54. The basis upon which the 1<sup>st</sup> Defendant deprived the Plaintiff of possession of the suit property was the contention by the Defendants that the 2<sup>nd</sup> Defendant had filed Malindi CMCC No. 18 A of 2004 seeking payment of a debt owed to itself by the original owners of the suit property and that a consent order had been recorded in the said case following a meeting between the 1<sup>st</sup> Defendant and Mirko Blaettermann in the year 2004, by which consent the Plaintiffs’ interests in the property were transferred to the 2<sup>nd</sup> Defendant.

55. As it were the existence or otherwise of the said Malindi CMCC No. 18A of 2004 was a major bone of contention in these proceedings.

According to the 1<sup>st</sup> Defendant, the said suit was instituted by his Advocate one Lilian Jean Omolo who informed him that the Defendants failed to enter appearance. Later on, the said Advocate who is said to have passed away shortly thereafter in 2005, informed the 1<sup>st</sup> Defendant that Honourable Joyce Manyasi, Chief Magistrate who was hearing the case had rendered Judgment in his favour.

56. As it turned out, the Court file for Malindi CMCC No. 18A of 2004 has never been traced to-date. Similarly, the Court file in Malindi SRM Miscellaneous Civil Application No. 5 of 2007 through which the Defendants claim to have obtained orders vesting the suit property on the 2<sup>nd</sup> Defendant has never been traced.

57. In support of their case, the 1<sup>st</sup> Defendant produced what were said to be extracts of the proceedings as Dexh 2. A perusal thereof reveals a rather interesting scenario. While this was an undefended suit, all the Plaintiffs witnesses were apparently cross-examined by the now deceased Counsel for the Plaintiff. And while the Defendants insisted that a consent was recorded therein wherein the Plaintiffs relinquished their interests in the suit property, the Judgment attributed to Honourable Joyce Manyasi makes no reference to such a consent. In this respect, I cannot but be in agreement with the sentiments of the Honourable Lady Justice Meoli expressed in her Ruling herein dated 7<sup>th</sup> November, 2012 that the proceedings arising from the said case were “Crude, irregular and most unusual.”

58. While Hon. Joyce Manyasi, Chief Magistrate did not get a chance to testify in these proceedings due to all manner of procrastination and dithering on the part of both parties herein, it was clear that at some point, the 1<sup>st</sup> Defendant was charged with forgery of Judicial proceedings in Malindi CMCR No. 345 of 2011. A perusal of the proceedings produced by the Defendants in their bundle of documents reveals that the Honourable Chief Magistrate and the then Malindi Senior Resident Magistrate Honourable Daniel Ogembo who was said to have issued orders in Miscellaneous Civil Application No. 5 of 2007, both testified and disowned the existence of the said proceedings and/or that they presided over the same.

59. Even where one was to assume that the proceedings in the said Malindi CMCC No. 18A of 2004 were regular and valid, it was difficult to see how the net effect of the same would result in the transfer of the suit property to the 2<sup>nd</sup> Defendant's name. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant had filed the suit claiming a debt of Kshs.1.7 Million from the original owners of the suit property. He has produced in evidence bundles of invoices purporting to demonstrate that the 2<sup>nd</sup> defendant supplied construction materials to the suit land.

60. A breach of contract would in my view only entitle a party to damages for the loss suffered. Such damages are designed to compensate for the damages, loss or injury the claimant has suffered through that breach. Such damages, especially in a case such as this one would entail monetary compensation. The defendants themselves describe the suit property as a multimillion shilling beach property and I was unable to understand how a debt of Kshs.1.7 million could lead to the transfer of the property as an alternative to damages.

61. In the course of the trial which commenced before the Honourable Justice Angote, the defendants were asked to avail a copy of the original consent recorded in Court and/or the decree emanating therefrom. None was produced and even though the 1<sup>st</sup> Defendant was acquitted of the criminal case of forgery, I am not persuaded that the said Malindi CMCC No. 18 A of 2004 and Miscellaneous Civil Application No. 5 of 2007 ever existed in the Court's record or at all.

62. Having failed to demonstrate the existence of the two cases, it follows that there was no basis upon which the 1<sup>st</sup> Defendant took possession of the suit premises from the Plaintiffs. The 2<sup>nd</sup> Defendant never acquired the suit property and it was therefore not possessed of the capacity to transfer the same to the 3<sup>rd</sup> Defendant.

63. It was also interesting to note that while the 1<sup>st</sup> Defendant had readily concealed that he was a director of the 2<sup>nd</sup> Defendant it was initially his position that he was merely a legal attorney of one Sylvia Hildergard Erna who was said to be the one trading as Empires and Partners Investments (*the 3<sup>rd</sup> Defendant herein*).

64. In their pleadings, the said 3<sup>rd</sup> Defendant is said to have acquired the suit property for value without notice. It is interesting to note that in his testimony before the Court, the 1<sup>st</sup> Defendant now asserts that he is not only the 1<sup>st</sup> but also the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. What that means is that the suit property never exchanged hands as purported and that the same remained at all times in the hands of the 1<sup>st</sup> Defendant having irregularly dispossessed the Plaintiffs of the same.

65. It was also clear that the supposed transfers to dummy businesses under the control for the 1<sup>st</sup> Defendant were nothing but a fraudulent attempt by the 1<sup>st</sup> Defendant to put the suit property out of reach of the true owners thereof.

66. The actions of the 1<sup>st</sup> Defendant amounted to trespass to property as he had no basis for his entry thereon. That being the case, the Plaintiff is entitled to general damages for trespass. As it turned out however, the exact value of the land before and after the trespass was not given. It was also evident that the Plaintiffs were reinstated onto the suit land some four years after the trespass by an order of this court. Arising from the circumstances, I am of the view that a sum of Kshs.4,000,000/- will suffice as compensation for general damages.

67. In the premises I hereby enter Judgment for the Plaintiff as follows:

1. *A declaration is hereby issued that the proceedings in the purported case being Malindi CMCC No. 18A of 2004 and all the consequential orders thereto is null and void with no legal consequences and that the Land Registrar Mombasa do expunge entry numbers 6, 7, 8, 10 and 11 from the register in Volume L.T 21 Folio 368/4 file 3853 Land Portion No. 622 (original No. M.17G) and restore back Karl – Heinz Borner, Mirko Blaettermann and Helmut Koster as the registered proprietors of the suit premises;*

2. *A permanent order of injunction is hereby issued restraining the Defendants by themselves, their agents, servants, legal representatives, assigns or anyone claiming interest through them from entering, remaining in, alienating, trespassing and/or dealing with the suit property in any manner whatsoever;*

3. *General damages of Kshs.4,000,000/-;*

4. *Costs of the suit to the Plaintiff; and*

5. *Interest on 3 at Court rates.*

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 17TH DAY OF MARCH, 2022.**

**IN THE PRESENCE OF:**

**MR. ORUENJO AND MR. MWADILO FOR THE PLAINTIFFS**

**MR. KARIUKI FOR THE DEFENDANTS**

**COURT ASSISTANT - KENDI**

.....

**J. O. OLOLA**

**JUDGE**