REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE 72 OF 2007

MAX`INTERNATIONAL LIMITED .....PLAINTIFF/RESPONDENT

=VERSUS=

BRUNO PEZZOTTA.....DEFENDANT/ APPLICANT

R U L I N G

Introduction

1. On 28th September 2007, the Plaintiff/Respondent moved this court by way of a Plaint claiming for Ksh.364,500/- and for damages for breach of contract which was in respect to land known as Portion Number 622 (Original number M1/7G).
2. On 20th January, 2009, the Plaintiff/Respondent filed an application seeking for summary judgement. In her Ruling dated 8th June, 2009, Omondi J allowed the Plaintiff's/Respondent's Application and entered judgement in favour of the Plaintiff/Respondent for Kshs.364,500/- and the costs of the suit.
3. The Defendant/Applicant then filed an Application dated 16th July, 2009 seeking to review the Ruling of 8th June, 2009. The Judge heard the Application and dismissed it with costs on 19th July, 2010. The record shows that the Defendant/Applicant filed a Notice of Appeal after being dissatisfied with the said Ruling on 27th July, 2010.
4. In the meantime, the Plaintiff/Respondent proceeded to tax his Bill of costs. The said Bill of costs was taxed at Ksh.195,530 and a certificate of costs was duly issued. The Plaintiff/Respondent proceeded to execute the decree which stood at Ksh.565,180 /- all inclusive as at 24th July, 2013.
5. The Defendant/Applicant has now filed an Application dated 5th February, 2014 seeking for the following orders;-

a. **That there be a stay of execution of the judgement herein together with all other consequential orders pending the hearing inter-parties of the application.**
b. **The personal cheque No.000010 of Ksh. 566,580 issued by the Defendant to the Plaintiff/Respondent's counsel be returned to the Applicant forthwith.**
c. **The orders issued herein by Justice Hellen Omondi granting Summary Judgement to the Plaintiff/Respondent be reviewed and set aside and this matter be heard viva voce.**

The Defendant's/Applicant's case

6. In a rather lengthy affidavit, the Defendant/Applicant has questioned the manner in which the process of execution was carried out. However, and more importantly, it is the deposition of the Defendant/Applicant that he was arrested pursuant to the warrant of arrest which had been issued by the court necessitating him to issue his personal cheque in favour of the Plaintiff/Respondent under duress.
7. The Defendant/Applicant has deponed that after Summary Judgment was entered in favour of the Plaintiff/Respondent, he filed an Application for review which was dismissed by Omondi J; that he has now discovered that the Plaintiff/Respondent's director has since been charged in court and that the Magistrate who purportedly issued the decree in respect to the suit property has already testified.
8. The Defendant/Applicant has also deponed that he has since discovered that the proceedings which gave rise to the Summary Judgement were conducted by an imposter by the name Abdi Abdalla who was not an advocate and that the Application for review that was filed was dismissed by Omondi J on different grounds.
9. According to the Applicant, the new grounds which have arisen necessitating the current application are that the Plaintiff's/Respondent's director has now been charged in court in respect to the suit property. The Magistrate, Hon. Joyce Manyasi has tendered her evidence in the criminal court and that the proceedings before Omondi J were conducted by unqualified person.

The Plaintiff's/Respondent's case

10. In reply, the Plaintiff/Respondent`s director has deponed that the Defendant`s current advocate has no locus to represent the Defendant; that the Defendant/Applicant filed an appeal against the Ruling of Omondi J and that the current application is *res judicata.*
11. The Plaintiff/Respondent's director has deponed in great detail why he is of the view that the execution process was carried out within the law.
12. The parties' advocates appeared before me and made oral submissions which I have considered. I have also considered all the affidavits on record.

Analysis and findings

13. As I stated at the beginning of this Ruling, the execution proceedings against the Defendant commenced after the Ruling of Omondi J. In that Ruling, the court dismissed the Defendant`s Defence and entered Summary Judgement.
14. The Defendant/Applicant then filed an Application dated 16th July, 2009 in which he sought to review the Ruling of Omondi J. The grounds on the face of that Application were principally that the proceedings and judgment in CMCC No.18A of 2004 which gave the Plaintiff/Respondent proprietary rights over the suit property were a forgery and therefore null and void. The Defendant relied on the Affidavit of Hon. Joyce Manyasi Matu to discredit the Plaintiff's/Respondent's proprietary rights over the suit property.
15. The Judge dismissed the Application for review on the following grounds;-

> **"Surely, forgery is a criminal offence, and to forge entire proceedings and judgement in my mind is the height of criminal mischief of such great magnitude, that nothing short of instituting police investigations with a view to resolving the situation would be expected....Ms Manyasi disowning the record does not make it evidence of forgery...."**

16. The Defendant/Applicant now says that the police did complete their investigations and have since charged the Plaintiff's/Respondent's director with forging court proceedings. It is the Defendant`s/Applicant's further deposition that M/s Manyasi has since testified in court and therefore this is new evidence that was not placed before Omondi J when she dealt with the first Application for review.
17. I do not agree with the Defendant`s/Applicant`s submissions on that issue. The discovery of new evidence contemplated under O. 45 of the Civil Procedure Rules is the evidence which must have been in existence as at the time of trial but which was not within the knowledge of the Applicant

as at that time. The "new evidence" for the purpose of an Application for review does not include the evidence that was not there at all as at the time of trial.

18. As at the time Omondi J entered Summary Judgement in favour of the Plaintiff/Respondent, the Plaintiff's/Respondent's director had not been charged with any criminal offence neither had Hon. Manyasi testified in the said criminal case. That evidence was therefore not there and the same cannot be used to review the judgement of Omondi J. It does not matter that subsequent to the Ruling of Omondi J, the Plaintiff's/Respondent's director was charged with an offence of forging court proceedings, which act would have influenced the mind of the Judge when she was either delivering her Ruling on the Application for Summary Judgement or the first Application for review.
19. The other ground that the Defendant/Applicant is relying on to review and set aside the judgement of Omondi J is that he has now discovered that one Abdallah was not an advocate when the Application for Summary Judgement was argued before Omondi J. Indeed, this issue did not arise in the first Application for review and the Judge never addressed her mind on it.
20. I have perused the Application for Summary Judgement dated 20th January, 2009. The said Application was drafted by George Wakahiu & Njenga Advocates and was signed by somebody "for" that firm.
21. The record shows that a Mr. Abdallah appeared for the Plaintiff/Respondent and argued the Application for summary judgement. Indeed, in the Ruling allowing the Application, the court indicated that Mr. Abdalla was acting for the Plaintiff/Respondent.
22. The Defendant/Applicant has annexed in his Further Supplementary Affidavit a letter from the Law Society of Kenya dated 10th April, 2014 stating that Abdi Abdallah is not an advocate. According to the letter from the Defendant/Applicant's advocate addressed to the Secretary, Law Society of Kenya, Abdi Abdalla practiced in Mombasa, Malindi and Lamu in the firms of Chizipha & Co. Advocates and George Wakahiu & Njenga Advocates.
23. The Defendant/Applicant has also annexed a Ruling by Meoli J in Misc. Civil Application No. 39 of 2009 in which the court found and held that Abdi Abdalla, who had represented the Applicant in that matter, was not qualified to practice as an advocate of the High Court of Kenya.
24. The Plaintiff's/Respondent's director has not denied in his Affidavit that the Application for Summary Judgement was argued by one Abdi Abdalla despite the allegations by the Defendant/Applicant that Abdi Abdalla was not an advocate.
25. While submitting, the Plaintiff's/Respondent's advocate stated that it was irrelevant whether the said Mr. Abdi was an advocate and that in any event the Plaintiff was represented by George Wakahiu.
26. However, I have already stated that the record shows that the Application for summary judgment was argued by one Abdalla and not George Wakahiu, a fact which has not been denied by the Plaintiff in its affidavit.
27. Section 2 of the Advocates Act defines the term *'unqualified person'* as *a person not qualified under section 9 to act as an advocate.* Section 9 of the Act provides as follows:

> ***Subject to this Act, no person shall be qualified to act as an advocate unless;***
>
> ***(a) he has been admitted as an advocate; and***
>
> ***(b) his name is for the time being on the Roll; and***
>
> ***(c) he has in force a practicing certificate and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).***

28. The courts have given due interpretation of the use of the conjunctive term 'and' as used in section 9 of the Act and have held that for one to be deemed to be qualified as thereunder provided, one must be in possession of all the requirements listed in section 9. In the case of ***Belgo Holdings Ltd v Esmail*** [2005] 2 EA 28, the High court rendered itself as follows:

> ***"It is instructive that these four qualifications are not to be read to the exclusion of***

each other. The use of the word 'and' means that for one to be qualified to act as an advocate, one must have all of the four qualifications above. If one does not have one or all, he is thereby rendered an unqualified person and section 34 aforesaid operates to stop him from doing any of the things therein enumerated, including drawing documents in legal proceedings."

29. In the case of ***Kenya Power & Lighting Company v Chris Mahinda T/A Nyeri Trade Centre*** *[2005]* 1KLR 753**,** the Court of Appeal in striking out the notice of appeal and memorandum of appeal signed by an advocate, who at the time of signing the documents did not have a practicing certificate, held as follows:

> "***A practicing certificate is issued for a whole year and the certificate issued in this case was for the year 2004 and it was suggested that, although it was issued on 22nd September 2004, it had retrospective effect back to the beginning of 2004. We do not accept this submission. If no practicing certificate had been issued when the act was done, the advocate was not qualified to do that act, at the time he did it."***

30. In O***bura v Koome*** [2001] 1 EA 175, the Court of Appeal struck out an appeal filed by an advocate who lacked a practicing certificate at the time that a Memorandum of Appeal was filed.
31. It is instructive from the above decisions and the provisions of the Advocates Act and Order 9 Rule 1 and 2 of the Civil Procedure Rules that where proceeding are conducted in these court by an unqualified person, such proceedings and the orders emanating therefrom are a nullity *ab initio*.
32. The fact that a Mr. Abdalla appeared before Omondi J masquerading as the Plaintiff's advocate and argued the Application for Summary Judgment was an illegality that has been brought to the attention of the court. The doctrine of *ex turpi causa non ortur actio* has been upheld by courts since time immemorial. In the case of Scott Vs Brown Dopering, MCNAB &Co (3) (1892) 2 QB 724, the court held as follows:

> "No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality."

33. The doctrine was further followed in the cases of **Mistry Amar Sigh Vs Kulubya (1963) EA 408** and **Heptulla Vs Noor Mohammed (1984) KLR 580.**
34. Where an illegality is brought to the attention of the court, the court has the inherent jurisdiction to set aside the orders that it issued pursuant to that illegality, especially where it is shown that the proceedings which led to issuance of the impugned order are a nullity.
35. Having found that the person who argued the Application for Summary Judgement was an unqualified person, I find and hold that the Ruling that arose from those proceedings is a nullity and should be set aside.
36. For the reasons I have given above, I set aside the Ruling of this court delivered on 8th June, 2009 and the subsequent execution proceedings. The money deposited in court by the Defendant/Applicant to be released to him forthwith.
37. Each party to bear its/his own costs.

Dated and delivered in Malindi this **20th** day of **June**, **2014**

O. A. Angote

Judge