



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT NO. 110 OF 2012

GIANLUIGI CERNUSCHIPLAINTIFF

VERSUS

MERRY BEACH LIMITEDDEFENDANT

RULING

1. I have considered the material placed before me in respect of the notice of motion dated 8th March, 2013 and particularly the rivaling affidavits. This application arose from a consent recorded before me on 24th October, 2012 in respect of the defendant's Notice of Motion dated 15th October, 2012.
2. The following were the terms of the consent:

“By Consent:

1. **The respondent/plaintiff has deposited his Canadian passport listed above as temporary security pending his furnishing CR 12s in respect of the four companies named above, the title documents and respective searches as well as valuations. He will also furnish original share certificates in respect of the four companies. He will have 21 days to do so. The applicant/defendant can file a further affidavit and serve upon the respondent once the respondent has filed/served his supplementary affidavit.**
2. **Mention on 28th November, 2012. Prayer C is extended till then to confirm position and give further directions on Notice of Motion undertaking by Mr. Sitonik now discharged.”**
3. Then followed several mentions to confirm compliance, culminating in the order made on 19th December, 2012 in the presence of Mr. Sitonik for the plaintiff/respondent and Mr. Gekanana for the defendant/applicant. This is the verbatim record of the proceedings of 19th December, 2012.

“Mr. Sitonik: We have supplied documents and served Mr. Kinyua

Mr. Gekanana: Documents were served but the defendants want to verify the documents so that a consent can be recorded. They don't object to release of passport.”

All the while the defendant's substantive application seeking security for costs dated 15th October, 2012 remained unheard.

4. Following the court's orders made on 19th December, 2012 the suit was fixed for mention on 28th

February, 2013. Ten days before then, the plaintiff brought a Notice of Motion dated 14th February, 2013 seeking inter alia that Mr. Kinyua Kamundi advocate t/a Kinyua Muyaa & Co. Advocates be ordered to cease acting for the defendant, citing conflict of interest. The application was fixed for mention on 28th February, 2013 alongside the application filed on 15th October, 2012.

5. The court was not sitting and the parties appeared before the Deputy Registrar who stood over the matter to 24th April 2013. Again, before that date, Mr. Kinyua filed the Notice of Motion dated 8th March, 2013 which is the subject of this ruling. The Notice of Motion dated 6th March, 2013 sought two key orders as follows:

“b) The plaintiff, Mr. Gianluigi Cernuschi be ordered to return his passport or passports to the court to be held by the court until he complies with the orders made on 24th October, 2012.

c) The court be pleased to order and direct the District Criminal Investigations Officer, Malindi to investigate Mr. Gianluigi Cernuschi for perjury in relation to his affidavit sworn on 23rd October, 2012 and filed in this suit on 24th October, 2012 and if he is found to have committed perjury to arrest, charge and prosecute him for perjury in accordance with the law.”

6. The gist of this application and the supporting affidavit is that the plaintiff has failed to comply with the orders given on 24th October, 2012 and that the said plaintiff has perjured himself through his affidavit filed in court on 24th October, 2012. The supporting affidavit of Walter Kilonzi goes into great detail to demonstrate the particulars of the alleged perjury. It would seem that the defendants were unhappy with the documents delivered to them as confirmed on 19th December, 2012 and are now pressing to have the defendant's passport released to him on that date be re-deposited into court.
7. The oral hearing of the Notice of Motion of 8th March, 2013 was characterized by a back and forth between the counsel for the parties as to what documents or information was or was not furnished to the defendants. At the end of the proceedings the court reserved its ruling and ordered that the Watamu House being one of the securities proposed, not be sold.
8. Reviewing the foregoing context, it is clear in my mind that the substantive application by the defendant for security remains outstanding. All subsequent orders and consents were interim in nature and did not compromise it fully. Consequently to grant the application dated 8th March, 2013 will be tantamount to making final determination upon an unheard application, further convoluting the clouded scenario. Equally, the invocation of the criminal procedure against the plaintiff at such a stage will be premature and undesirable. Indeed the issue of perjury requires deep investigation by the court of the applicant's assertions vis-a-vis the respondents.
9. It is my view therefore that these proceedings will not be served or advanced in any meaningful way by allowing the application of 8th March, 2013. I am fully persuaded that the same should be rejected in order to pave way for the hearing of the substantive application by the defendants dated 15th October, 2012. All relevant material thereto has been filed, namely affidavits pursuant to leave granted on different dates of the proceedings.
10. The plaintiff's Notice of Motion of 15th February, 2013 should ordinarily come first. It should have been filed at the earliest opportunity or at least an indication of his objection to Mr. Kinyua Muyaa given. The stalemate can only be resolved by hearing the two pending applications on a first come first served basis. I therefore direct that a hearing date for the application filed on 15th October, 2012 be taken immediately. No party will be at liberty to file, nor will the court entertain any other application prior to the hearing and determination of the applications dated 15th October, 2012 and 15th February, 2013.

11. Meanwhile the defendant is directed to file into court an inventory of any documents of title, share certificates etc delivered to them by the plaintiff pursuant to the order of 24th October, 2012. This will be done before the application dated 15th October, 2012 proceeds to hearing.

The upshot of the foregoing is that the defendant's application filed on 8th March 2013 is dismissed with costs.

Delivered and signed at Malindi this **16th** day of **December, 2013** in the presence of Mr. Kinyua for Merry Beach Ltd.

Court Clerk – John

C. W. Meoli

JUDGE