



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**Civil Case 27 of 2012**

**MIRKO BLAETTERMA (*suing the Attorney* SHABIR HATIM  
ALI.....PLAINTIFF**

**-VS-**

**1. DAVID MUIRURI**

**2. G.HOTMANN**

**COTOVA**

**3. EMPIRES AND PARTNERS**

**INVESTMENT.....DEFENDANT**

**RULING**

1. Before the Defendant`s application filed on 11<sup>th</sup> May, 2012 could be heard, MR OTARA, counsel for the Plaintiff raised a preliminary objection based on four grounds which can be summarised into 3;-

(1.) The application is an abuse of the process of the court by dint of section 6 of the Civil Procedure Act as the Defendants have already placed before the Hon. Chief Justice a petition seeking orders similar to those in the present application;- namely, the disqualification of the Malindi Resident Judge from handling this matter.

(2.) That the application is scandalous, frivolous and vexatious in its content.

(3.) That the application is intended to intimidate and injure the character and dignity of the court.

MR. OTARA urged the court to strike out the application in limine.

2. In his response, the applicant, who is the 1<sup>st</sup> defendant and alleged representative of the 2 other defendants in the cause, disputed the relevance of section 6 of the Civil Procedure Act to this matter and reiterated his right to a fair hearing under Article 50 of the constitution. He contended that the demurrer is made in bad faith as the plaintiffs are the alleged beneficiaries of this court`s alleged bias. He said that he is entitled to lodge complaints with the Judicial Service Commission, the Judges and Magistrate`s Vetting Board as well as to simultaneously make the present application. He urged the court to reject the

objections and to order the application to proceed.

3. After due consideration of the matters canvassed with regard to the preliminary objection, I take the following view: Section 6A of the Civil Procedure Act provides as follows;-

***“No court shall proceed with a trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties under whom they or any of them claims litigating under the same title, where such suit or proceeding is pending the same or any other court having jurisdiction in Kenya to grant the relief claimed”***

Section 2 of the Civil Procedure Act defines “suit” as all civil proceedings commenced in any manner prescribed while section 19 provides that suits be instituted in the manner prescribed by the rules. Clearly therefore, the so called Petition to the Hon. The Chief Justice does not qualify as a suit or proceeding within the meaning contemplated in section 6 of the Civil Procedure Act. That limb of the objection has no merit.

4. Regarding the second and third limbs of the objection, it may well be that certain parts of the application are scandalous, vexatious and intended to embarrass the presiding Judge. It may also be that the application for disqualification is intended to injure the dignity of the court and to cause intimidation. In the interest of justice, transparency and the dignity of the court, however these two reasons should not be cause for the peremptory striking out of an application of the nature before the court. Rather, they are in my view compelling reasons in the circumstances of this case, to allow the application to be canvassed on merit so that all the parties can ventilate their respective positions. Thus justice will not only be done but be seen to be done to all the parties, including the Judge whose professional integrity is being called into question. Only then can the dignity of the court as well as the process of the court as contemplated by article 159-160 of the constitution and the written laws of the land be vindicated.

5. I therefore dismiss the preliminary objection and direct that the application filed on 11<sup>th</sup> May 2012 be set down for hearing. Costs will be in the cause.

**Delivered and signed at Malindi this 12<sup>th</sup> day of June, 2012 in the presence of Mr Otara for the Plaintiff, the Defendant in person, c/c-Evans/Leah.**

**C. W. MEOLI**  
**JUDGE**