



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Civil Suit 37 of 2007

FRANCI LIMITEDPLAINTIFF

VERSUS

GORDON HELLIER AND SONS LTD.....DEFENDANT

R U L I N G

By an application by way of Notice of Motion dated 25th September 2007, under Sections 3A and Section 63(c) and (e) of the Civil Procedure Act and all enabling provisions of the law, the applicant seeks orders that:

- (a) The honourable court expunges from its record the replying affidavit sworn on 14th September 2007 by DINNACI MARIANO together with the annexures and the preliminary objection dated 14th September 2007.***
- (b) The respondent be restrained by way of a temporary injunction from carrying out development, construction work or extensions on Plot No. 772 in Malindi.***
- (c) The court do make such other interlocutory orders as may appear to the court to be just and expedient.***
- (d) The costs of the application be provided.***

The application is based on the grounds that:

- (i) It is necessary to grant the orders for the ends of justice to be met or achieved.***
- (ii) It is necessary to prevent abuse of the process of the court.***
- (iii) The exhibit marked D.EX I and attached to the affidavit sworn by DINNACI MARIANO consists of a substantial number of documents which are forgeries or are in themselves fraudulent.***
- (iv) It is an abuse of the process of the court to place before the honourable court documents which are forgeries or fraudulent.***

(v) ***The honourable court's judicial authority and its dignity cannot be undermined or compromised by a fraudulent record.***

The application is predicated upon the annexed affidavit of **Paolo Tarsia Inauria** sworn on the 25th day of September 2007.

At the hearing of the said application Mr. Ole-Kina for the respondent took up preliminary objections *in limine* on the grounds that:

- 1. The affidavit of PAOLO TARSIA INCURIA sworn on the 25th of September 2007 in support of the plaintiff's application of even date is incurably defective in that it fails to comply with the provisions of Order XVIII rule 4 Civil Procedure Rules.**
- 2. The affidavit of PAOLO TARSIA INCURIA sworn on the 25th of September 2007 in support of the Plaintiff's application of even date is incurably defective in that it fails to comply with the provisions of Order XVIII rule 3 Civil Procedure Rules as the same does not disclose sources of information and grounds of belief.**
- 3. The plaintiff's application dated the 25th of September 2007 is incurably defective in that it fails to comply with the provisions of Order L rule 3 Civil procedure Rules.**
- 4. The Plaintiff's application dated the 25th of September 2007 is void *ab inito* as the same is in contravention of section 6 of the Civil Procedure Act.**
- 5. The honourable court has no jurisdiction to entertain a defective suit.**

At the hearing counsel abandoned grounds I of the preliminary objection and argued the rest.

It was argued on behalf of the respondent that the affidavit of **Paolo Tarcia Encuria**, sworn on 25th September 2007 in support of the application, is incurably defective in that it does not comply with the provisions of Order XVIII Rule 3 of the Civil Procedure Rules. The gist of counsel's complaint is that the affidavit does not disclose the source of the deponents information particularly paragraphs 5, 6, 7, 8, and 9 I was thus urged to strike out the said affidavit in its entirety. In that regard counsel relied on the celebrated authority of **PREMCHAND RAICHAND LTD VS. QUARRY SERVICES OF EAST AFRICA LTD & OTHERS [1969] E.A 514.**

Miss Aulo for the respondent strenuously resisted the application. She drew the court's attention to the grounds on which the application is based. In addition thereto she drew court's attention to the eighteen (18) annexures to the affidavit which bear the approval stamp of the officers of Malindi Municipal Council. In particular she submitted that pages 1-12 bear approval stamp of the town-clerk. Hence the source of information by necessary inference is the town-clerk of Malindi. The source of information is thus disclosed. That annexures 13-18 bear the approval signature of the town engineer, annexure 14 has signature of District Physical Planning Officer Malindi, paragraph 15 bears the signature of town Engineer, paragraph 16 bears the signature of town engineer, paragraph 17 bears the signature of town treasurer, and paragraph 18 equally the signature of town treasurer.

That the persons who signed the annexures are officers of the Municipal Council of Malindi.

That in any event at paragraph 5 of the affidavit in support the deponent avers that he went to Malindi Town Hall to verify the authenticity of the approval stamps appearing on the building plans marked exhibit "D.Ex 1" and to ascertain the identity of the persons who had signed the building plans.

By reason of the foregoing, it was Miss Aulo's ultimate contention that, the approval stamps cannot be de-linked from the person who signed them. That even where approval plan is signed for that officer, the person signing does not sign on his own behalf but on behalf of the town clerk, town engineer, town

planning officer, etc. That those officers that signed the various annexures are the appropriate officers. That the court should take judicial notice of the fact that the chief officers of Malindi Municipal Council are the appropriate officers alluded to at paragraph 5 of the affidavit. That being the case the source of the deponent's information was thus disclosed.

It was Miss Aulo's further contention that at paragraph 6 the deponent avers that on the said visit he was attended to by various officers of Municipal Council of Malindi. That the deponent specifically avers that as at January 2006 the town-clerk was one **L. G. Kidai** and that the signatures appearing on page 1-7 belong to the said town-clerk. While the signatures that appear on exhibit "**D.EX1**" does not belong to the town-clerk. In referring to the town-clerk he must be taken to mean **L. G. Kidai**. That paragraph 5 and 6 of the affidavit in support cannot be read disjunctively. Reading the same in isolation of the other would lead to absurdity. Alternatively, those paragraphs must be read in the context of the whole affidavit. If that approach is taken the sources of information of the deponent are clearly disclosed.

That paragraph 7 is a mere continuation of what has been stated at paragraph 6. The signature in the said annexure is that of **L.G. Kidai**.

That at paragraph 8 he clearly avers that he received a statement from **Enos L. G. Kidai**: That signatures appearing on exhibit "**D.Ex 1**" pages 1-12 attached to the affidavit of **Dannici Mariano's** are Kidai's signatures. The said statement is marked as exhibit "**PTI – 2**". That at paragraph 9 he clearly avers that he was informed by the officers at Town Hall that the building plans marked exhibit "**D.EX 1**" pages 1 to 12 are not in their records or archives and hence the approval could not have been under the hand of the town clerk of Malindi Municipal Council or any other person acting for and on behalf of the Municipal Council of Malindi. Based on the information obtained from the officers of Municipal Council he reached a conclusion that the building plans marked exhibit "**D.Ex 1**" are forgeries. That verily means truly.

Last but not least, Miss Aulo argued that since the applicant obtained the information from Town Hall himself it is his own knowledge. Hence the authority of **PRE MACHAND RAICHAND LTD V. QUARRY SERVICES OF EAST AFRICA LTD & OTHERS [1969] E.A 514** is distinguishable from the facts of this case. This is because in this case the deponent obtained the information personally from Malindi Town Hall from the appropriate officers while in the Premachand case (supra) the son was staying in Nairobi while Patel was residing in Bombay. No explanation had been offered why Patel himself could not have sworn an affidavit. Accordingly, it would clearly be wrong to rely on the evidence on what Patel told his son if Patel himself was not available to testify to the facts.

I have carefully analyzed and considered the application, the affidavit in support, annexures thereto and the authority quoted, on the one hand. I have equally carefully analysed and considered the preliminary points of law raised by the respondent herein.

In my considered view, the issue which falls to be decided is whether the affidavit of the applicant sworn on the 25th day of September 2007 is inadequate. That is to say whether it discloses the source of information.

The affidavit in issue has several annexures which bear the approval stamp of Malindi Municipal Council. In particular pages 1-12 bear the approval stamp of the town clerk, town engineer, District physical planning officer.

All the officers who signed the annexures are employees of the Malindi Municipal Council duly constituted under the Local Government Act save for the District Physical Planning Officer. Section 107 of the Local Government Act (Cap 165) Laws of Kenya provides *internalia*:

“Unless the Minister otherwise directs, there shall be appointed by the Public Service Commission to every municipal council a town clerk, town treasurer and town engineer, and unless the minister for the time being responsible for health otherwise directs, a medical officer of health and a public health officer, and there shall be paid to those officers salaries, emoluments and allowances as determined by

the council with the approval of the minister. An appointment under subsection (1) shall be on a full time basis unless the minister concerned directs that it be on a part time or consulting basis.

The offices of town clerk and town treasurer shall not be held by the same person or by persons who stand in relation to each other as partners or as employer and employee”.

Accordingly when the deponent talks of appropriate officers he must be taken to have meant ***inter-alia***, the town clerk, the town treasurer, the town engineer, town planner ***ejus dem generis***. The court therefore take judicial notice of the fact that the annexures were signed by the appropriate officers of the Malindi Municipal Council. Those must be the officers alluded to at paragraph 5 of the affidavit in support. Accordingly the source of the deponent’s information was thus disclosed.

This is clear in view of the fact that at paragraph 6 of the said affidavit in support the deponent specifically avers that as at January 2006 the town clerk was one **Enos L. G. Kidai**. That the signature appearing on pages 1-7 belong to the said town-clerk but the signatures appended on exhibit “**D Ex 1**” does not belong to the said town clerk. Reference to town clerk, in my view, is reference to the said **Enos L. G. Kidai**. In the regard I agree with Miss Aulo that paragraph 5 and 6 disclosed the sources of information of the deponent. That based on the information obtained from the appropriate officers of the council he reached a conclusion that the buildings plans exhibited as “**D.Ex 11**” are forgeries. That in my view is a reasonable conclusion. The applicant obtained the aforesaid information of his own knowledge and hence the affidavit meets the requirement of Order XVIII Rule 3 of the Civil Procedure Rules. The authority of **Premchand Raichand Ltd V. Quarry services of East Africa Ltd** and others (supra) is thus distinguishable.

In the result I am of the considered view that the preliminary objection as itemized hereinabove has no merit. Accordingly I disallow the preliminary objection. I dismiss the same with costs to the applicant.

DATED at Malindi this 22nd day of **October 2007**.

N. R. O. Ombija

JUDGE

Mr. Ole Kina} for respondent

Mr. Omwancha for Mr. Aulo} for applicant