



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 85 OF 2005

SILVANO CORSARO.....PLAINTIFF

=VERSUS=

1. LUIGI FORMICA

2. SAMSKIRT INVESTMENTS LTD.....DEFENDANTS

R U L I N G

1. In his Application dated 29th April, 2015, the Plaintiff is seeking for the following orders:-

(a) THAT this Honourable Court be pleased to dispense with the attendance of the Plaintiff's witness, one Leonello Andrlini at the further hearing of this suit.

(b) THAT the copy of the written declaration of Leonello Anderlini dated 27th April, 2015 attached to the affidavit of Silvano Corsoro filed in support of this Application to be admitted without calling its maker as a witness.

(c) THAT the costs of this application be provided for.

2. The Application is premised on the grounds that Mr. Leonello Anderlini, a 76 year old legal practitioner from Rome, Italy is undergoing treatment consisting of rehabilitation therapy to remedy the medical complications which came about as a result of his disease and that he has sworn an affidavit in regard to the matters in dispute herein and specifically in regard to his purported signature appearing on the Indenture of 24th September, 1997.

3. According to the Applicant, the medical condition of Mr. Leonello Anderlin is such that he cannot be able to travel to Kenya to give his evidence.

4. In his response, the 1st Respondent deponed in detail why the suit as a whole should fail; that the Plaintiff has been involved in numerous criminal activities including perjury and that Mr. Leonello's health permits his attendance.

5. The 2nd Defendant filed Grounds of Opposition in which he averred that the applicant's witness has an account constituting many disputed facts which ought to be ascertained; that the Application offends the

2nd Defendant's rights to cross examine the maker of the written declaration and that the Applicant is guilty of laches.

6. The parties filed their respective submissions which I have considered.

7. This matter was partly heard by Ouko J (as he was then) on 1st March, 2006 and 19th September, 2006. On the said dates, the evidence of the Plaintiff and Lahori Jethand advocate was taken. The matter was adjourned for one reason or the other until 13th May, 2015 when this Application was filed.

8. The Plaintiff wants this court to admit the sworn declaration of Leonello Anderlini as evidence in this matter without calling him to testify and to be cross examined by the Defence.

9. According to the Plaintiff, the medical condition of Mr. Leonello Anderlini is such that he cannot be able to travel to Kenya to give his evidence.

10. The undisputed facts of this matter are that the Plaintiff and the 1st Defendant purchased the suit property and were registered as tenants in common. On the said property, there is a hotel known as Tamani Jua Hotel.

11. The 2nd Defendant purchased the said suit property vide an Indenture dated 24th September, 1997 purportedly executed by the Plaintiff and the 1st Defendant.

12. According to the Plaintiff, the purported transfer of the suit property to the 2nd Defendant was fraudulent because she never executed the Indenture, of 24th September, 1997 before Mr. Leonello Anderlini.

13. It is the said Mr. Leonello Anderlini's sworn declaration, in which he has refuted the claim that he witnessed the Plaintiff execute the Indenture, that the Plaintiff wants admitted in evidence without calling the maker.

14. Indeed, this suit will turn on only one issue, whether the Plaintiff signed the Indenture of 24th September, 1997 and if so, if she executed it before Mr. Leonella.

15. The Plaintiff has annexed on her Affidavit the sworn statement of Mr. Leonella together with a letter by Mr. Leonella's doctor in which he stated that having operated Leonello Anderlini for a coronary angyoplasty on 23rd July, 2013, he could not authorise him to travel to Kenya for the hearing that was slated on 4th September, 2013.

16. In his letter dated 4th September, 2007, Mr. Leonello stated as follows:-

“5. That I would have loved to come to Malindi and witness in the case No. 85/2005 pending before the High Court of Kenya, but I am not in the position to attend court due to the nature of engagement.”

17. It would appear from the said letter that even before the surgery of 23rd July, 2013, Mr. Leonella was reluctant to travel to Kenya to testify on a very important issue “due to the nature of his engagement.”

18. Having gone through the doctor's letters, there is no indication that the condition of the said witness would have permanently prevented him from travelling to Kenya.

19. Considering that the evidence of Mr. Leonella is crucial to the Plaintiff's case, and prejudicial to the defence, it will be unjust, unfair and a breach of the rules of natural justice to allow the evidence of Mr. Leonella without giving the Defendants an opportunity to challenge it by way of cross examination.

20. The right of a party to cross examine a witness was emphasized in the case of **Trilolanta Bhanderi & Anoter Vs (SR Guatima (1964)EA 606 (CAM)** where it was held as follows:-

“Any party is entitled to cross examine any other party who gives evidence of his witnesses; and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross examination.”

21. The grant of the prayers in the Application will greatly prejudice the Defendants. The right to cross examine the witness where allegations of fraud and have been raised cannot be waived.

22. In the circumstances, I dismiss the Application dated 29th April, 2015 with costs.

Dated, signed and delivered in Malindi this **14th** day of **September**, 2016.

O. A. Angote

Judge