



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 167 OF 2011**

**TITOVIS REAL ESTATE ..... PLAINTIFF**

**V E R S U S**

**FESTUS MUTUNGA ..... DEFENDANT**

**RULING**

1. Defendant has brought an application by way of Notice of Motion dated 30<sup>th</sup> June 2014. Defendant seeks the following prayers-
- **That the Honourable Court do order full compliance of Order 11 by the parties and thereafter the suit be heard de novo afresh.**
- **That the Honourable Court do order the dispensation of the pending application in the suit before the suit is finalized being Plaintiff's Notice of Motion dated 12<sup>th</sup> August 2011, the Plaintiff's Notice of Motion dated 26<sup>th</sup> day of September 2011 and the Defendants Notice of Motion dated the 17<sup>th</sup> day of May 2013.**
- **That the Honourable Court do order a recall of the Plaintiff witnesses for cross examination by the Defendant.**

**BACKGROUND**

2. The Plaintiff's Company has sued the Defendant alleging that Defendant, as a Director of Plaintiff had failed to account for rental income of Plaintiff's property, namely **MN/111/43483**. As a consequence of that failure Plaintiff through its Board of Directors terminated the Defendant's services. That despite that termination it is alleged Defendant continued to act as Plaintiff's Director and failed to surrender Plaintiff's property. Plaintiff's prayers in this case are for injunction to stop Defendant acting as Plaintiff's Director; for declaration that Defendant is no longer Director of Plaintiff; and for Defendant to account for rent collected between the years 2008 and 2011.
3. The claim is defended. Defendant alleges that he, as the founder of Plaintiff's Company, is the majority share holder of that Company and that he has never resigned as a Director.
4. This case fixed for hearing on 21<sup>st</sup> November 2013 and the Defendant's Learned Counsel was served with hearing notice on 13<sup>th</sup> November 2013. The hearing notice was received under protest and the protest was as follows-

**“Received under protest as the notice is too short and we have fixed other matters for hearing that day being P & A NO. 1057 of 2011 being part heard HCC No. 17 of 2001 and Divorce Cause No. 53 of 2013 and we shall therefore be requesting for an adjournment – all matters are in Milimani Law Courts. [signed] Laichena.”**

That note is written by hand by the Learned Counsel for Defendant Mr.Laichena.

5. The first witness for the Plaintiff who was to testify on 21<sup>st</sup> November 2013 ordinarily resides in Netherlands and had travelled on that day for the hearing of this case. The Plaintiff’s case began with his testimony. The Defendant and his Counsel did not attend Court that day. Since Defendant and his Counsel were absent, the Plaintiff’s witness was not cross examined.
6. The case was next in Court on 4<sup>th</sup> June 2014. Defendant’s Counsel was again served but did not attend Court. His receipt of the hearing notice, some two months prior to the hearing date, was not under protest. While the second witness of the Plaintiff PW2 was testifying in chief the Defendant in person walked in. He was allowed to cross examine PW2 and he also gave evidence towards his defence. It is in that background the Defendant seeks the prayers in Notice of Motion enumerated above.
7. The Notice of Motion is premised on several grounds which I shall proceed to interrogate.

#### **THAT THE SUIT BEGAN PREMATURELY**

8. Defendant has argued that Order 11 of the Civil Procedure Rules, the order relating to Pre-trial Directions had not been complied with and that therefore the suit began prematurely. The records in the Court file shows otherwise. On 7<sup>th</sup> September 2012 Justice F. Tuiyott, in the presence of Plaintiff’s Counsel but in absence of Defendant’s Counsel who had been served made the following orders during pre-trial directions hearing-

#### **1. Hearing on 29<sup>th</sup> November 2012**

#### **2. The Defendant to comply with pre-trial within thirty [30] days.**

9. Defendant did not comply within the period ordered. It was not until 20<sup>th</sup> May 2013 that defence Counsel filed Defendant’s List of Documents.
10. From the above it will be seen that there is no basis for Defendant to state the case was started prematurely.

#### **THERE WERE PENDING INTERLOCUTORY APPLICATIONS WHEN TRIAL COMMENCED**

11. Defendant does not state what, if any, prejudice will be suffered by any party if the trial continues and the case is fully determined when there are pending applications. I find that argument to be a fallacy. Parties are to be commended for having proceeded to trial and assisted the Court to expeditiously deal with this case as provided under Section 1A and 1B of Civil Procedure Act Cap 21. It is fallacy because any prayer sought in an interlocutory application will be determined once judgment is delivered in this case. That ground is rejected.

#### **THE DEFENDANT WAS NOT GIVEN A CHANCE TO CROSS EXAMINE PLAINTIFF’S WITNESSES**

12. As stated above on 21<sup>st</sup> November 2013 when the first witness of Plaintiff; the one who had travelled from Netherland; testified, defence Counsel was served with a hearing notice but received it under protest. Defence Counsel mentioned cases that he was to handle on 21<sup>st</sup>

November 2013 which would prevent him attend to this case but in making this application before Court no evidence at all is attached to show firstly the existence of those cases, and secondly that he did attend Court for those other cases on 21<sup>st</sup> November 2013.

13. On 4<sup>th</sup> June 2014 Defendant attended the hearing without his Advocate who had been served and this time did not receive the hearing notice under protest. Defendant was given opportunity and did cross examine PW2. I do not understand what Defendant means by the following deposition.

**“That for justice to be done and seen to be done all parties must be given an opportunity to present their case at a conducive and convenient environment considering all the evidence and circumstances in the case.”**

If that deposition is meant to say that this case will only proceed when the Defendant is ready to be heard that would be contrary to the overriding objective of the Civil Procedure Act. Defendant cannot insist that this case do proceed at his convenience. That ground too is rejected.

#### **THE DEFENDANT BE GIVEN A CHANCE TO CALL WITNESSES**

14. When Defendant attended Court on 4<sup>th</sup> June 2014 in the absence of his counsel he testified fully in support of his defence and was cross examined. Defendant sought an opportunity to call witnesses, which witnesses had not recorded witness statements. The Court rejected, by its Ruling of that day an adjournment application to call such witnesses. That being so the issue of calling witnesses is *res judicata* and contrary to Section 7 of Cap 21. If the Defendant was aggrieved by that Ruling he ought to have either sought review or appealed against that order. He has done neither. That ground too is rejected.

#### **CONCLUSION**

15. In the end in view of the above findings the Notice of Motion dated 30<sup>th</sup> June 2014 has no merit and is dismissed with costs.

**DATED and DELIVERED at MOMBASA this 3<sup>RD</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**