



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 19 OF 2013

(Consolidated with Malindi ELC Civil case No. 8 of 2009)

MOMBASA AUTO CARE LTD.....PLAINTIFF/RESPONDENT

=VERSUS=

1. JAPHET PAIS KILONGA

2. ONESMUS MBOGA KIMERA.....DEFENDANTS/APPLICANTS

R U L I N G

Introduction:

1. On 25th July 2014, I allowed the Plaintiff's claim in the two consolidated matters.
2. The firm of Richard O. & Co. Advocates, for the 2nd Defendant, has now filed an Application dated 26th August 2014 seeking for the following orders:

(a) THAT judgment entered herein on the 25th July, 2014 be varied, reviewed and or set aside

(b) THAT upon setting aside of the judgment herein, the Plaintiffs' suit be dismissed with costs.

(c) THAT the costs of this application and those of the main suit be provided for.

The Applicant's case:

3. According to the affidavit of Onesmus Mbogo Kimera, the 2nd Defendant in HCCC No. 19 of 2013, after going through the power of attorney and the Indenture that was produced in evidence by the Plaintiff, he has discovered that the power of attorney by Mohamed Saif Humaid Alkhaled and Ahmed Ali M. Yahya Barhaji gave Mansur Satchu the power to deal with only their two thirds of the suit property and not the whole suit property.
4. Consequently, it was deposed, there is an apparent error on the face of the record and which error ought to have been pointed out by the Plaintiff who had the knowledge of the same.
5. It is the Applicant's deposition that the Plaintiff misled the court; that the Plaintiff has already started threatening the Defendants and that the judgment of this court should be reviewed.

The Respondent's case:

6. The Plaintiff's/Respondent's director swore an affidavit and deponed that the prayers sought in the Application cannot be granted because there is no suit to be dismissed; that the issues raised now ought to have formed part of the cross-examination and that the Applicants were given an opportunity to raise the issues being raised in the current application.

Submissions:

7. The 2nd Defendant's/Applicant's advocate submitted that the testimony tendered in court by the Plaintiff's witnesses confirmed that the Plaintiff was entitled to only 2/3 of the suit property and that the language used in the power of attorney is unknown to the court contrary to the provisions of the Civil Procedure Rules.
8. The Plaintiff's/Respondent's advocate did not file any submissions.

Analysis and findings:

9. The only ground upon which the 2nd Defendant's Application for review of the court's judgment is premised on is that there is an apparent error on the face of the record because the whole suit property was registered in favour of the Plaintiff when they were only entitled to 2/3 of the suit property.
10. In support of that ground, the 2nd Defendant has relied on the power of attorney dated 29th September, 2008.
11. On that basis, the 2nd Defendant is praying that this court should review its judgment and dismiss the suit.
12. What the Defendants/Applicants are asking this court to do is to review the evidence that was tendered in this court, and in particular the power of attorney of 29th September, 2008 and overturn its own judgment. That, in my view, is not in the province of this court. It is only the appellate court that can review the evidence that was tendered by the witnesses and make a finding as to whether this court arrived at a sound judgment or not.
13. In any event, the 2nd Defendant has only looked at the Power of Attorney dated 29th September 2008 which dealt with the 2/3 share in the suit property. The said 2/3 share in the suit property was held by Mohamed Saif Humaid Alkhaled and Ahmed Ali M. Yahya Barhaji. The said power of attorney was produced in evidence as PEXB 4.
14. However, the 2nd Defendant has conveniently not referred to the other power of attorney dated 4th August 2008 which dealt with the remaining 1/3 share in the suit property, otherwise known as plot number 123, Malindi. The said 1/3 share was owned by Abdi El-Salam Said Moustafa Mohamed El-Shirbini who appointed Mansur Satchu as his attorney in respect to the said share. The power of attorney was produced as PEXB 5.
15. Indeed, the Defendants were represented by two counsels when the said documents were produced in evidence and exhibits. The Defendants' counsels cross-examined the Plaintiff's director on the contents of the said two powers of attorney and the Indentures.
16. Having evaluated the two powers of attorney and the two Indentures in respect to the suit property, the court arrived at its judgment based on that evidence. There is therefore no error apparent on the face of the record as alleged by the Defendants.
17. For those reasons, I dismiss the Application dated 26th August 2014 by the firm of Richard O. & Co. Advocates on behalf of the 2nd Defendant in Malindi HCCC No. 19 of 2013 with costs to the Plaintiff.

Dated and delivered in Malindi this 7th day of **November**, 2014.

O. A. Angote

Judge