



REPUBLIC OF KENYA

High Court at Malindi

Civil Case 27 of 2012

MIRKO BLAETTERMAN (suing through

his Power of Attorney) **SHABIR HATIM ALI** .....**PLAINTIFF**

**VERSUS**

**DAVID MWANGI MUIRURI** .....**1ST DEFENDANT**

**GHOTMAN COTOVA** .....**2ND DEFENDANT**

**EMPIRES AND PARTNERS INVESTMENTS.**.....**3RD DEFENDANT**

**R U L I N G**

1. Before me are two applications, the first filed by the plaintiff on 29th February, 2012 and the second, by the 1st defendant on 2nd March 2012. The first application is brought under Order 40 rule 2 of the Civil Procedure Rules and seeks to restrain the defendants, pending the hearing of the suit, in terms stated in prayer 2:

***“THAT there be a temporary injunction restraining the 1st defendant and/or the defendants by themselves, their agents, servants, legal representatives or any other person claiming interest through them from trespassing, entering, remaining, selling, alienating and/or dealing with the suit property in (LR No. 622 Malindi) any manner whatsoever pending the hearing and determination .....*”**

2. Nineteen grounds, repeated and expanded in the supporting affidavit of Shabir Hatim Ali (Shabir) are cited on the face of the application as follows:

***“1. That the plaintiff/applicant is the bonafide and/or one of the lawful owners of the suit property having bought the same from one Wolfgang Kosing in the year 1995.***

***2. That the plaintiff has been in possession and occupation of the suit premises since the year 1995 when it was purchased.***

***3. That in the year 2004, the 1st defendant/respondent herein forged documents purporting to be proceedings of the civil suit in a fictitious suit bearing Malindi CMCC No. 18A of 2004 wherein he was the plaintiff and the registered owners of the defendants.***

***4. That the 1st defendant/respondent further proceeded to forge a judgment and a decree.***

***5. That the 1st defendant/respondent either in corroboration with the court clerks in the civil registry caused to have the said decree sealed and stamped.***

- 6. That the 1st defendant/respondent proceeded further to forge a vesting order vesting the plaintiff's property to the 2nd defendant/respondent where the 1st defendant/respondent is the director as indicated from the purported proceedings.**
- 7. That all the mentioned magistrate and court clerk whose names appear in the purported proceedings, judgment, decree and vesting order have sworn affidavits denying the signatures and knowledge of the said proceedings.**
- 8. That from the look of the purported documents that's the proceedings, judgment, decree and order, one can just tell out that from the language and grammar itself one can easily rule that the same were not prepared by a magistrate as correctly denied.**
- 9. That the 1st defendant/respondent proceeded to use the said vesting order to disposes the plaintiff with ownership of the suit premises by having the same registered in the names of the 2nd defendant/respondent something that took place between the year 2007 and 2008.**
- 10. That the suit premises is now registered in the names of the 3rd defendant/respondent which from the records held by the Registrar of companies is not a company but just a registered trade name with no capacity to hold or own property in its names as is the case herein.**
- 11. That all this process took place at the back fo the plaintiff/applicant herein.**
- 12. That some time in the cause of the year 2011, the 1st defendant/respondent communicated to the plaintiff power of Attorney that the suit premises is his and that the plaintiff had no more rights over the suit premises.**
- 13. That the plaintiff/applicant immediately reported this matter to the CID and other relevant authorities.**
- 14. That the defendant/respondent has now forcefully trespassed into the suit premises has unlawfully evicted the plaintiff's caretaker and all the plaintiff's visitors purporting that the suit premises belongs to him.**
- 15. That the defendant/respondent has since become so violent against the plaintiff/applicant and has threatened the plaintiff not to step in the said plot.**
- 16. That the defendant/respondent has got no manner of right and/or lawful title over the suit premises.**
- 17. That the court process has been grossly abused in this particular forgery.**
- 18. That it would be fair and just if the prayers sought herein above are granted as the same do not prejudice the defendant/respondent in any manner whatsoever.**
- 19. That the balance of convenience tilts towards granting an injunction to preserve the suit premises pending the determination of this suit.” (sic)**

Interim exparte orders in terms of prayer 2 were granted on 1st March, 2012.

3. The second application was filed by the defendants on 2nd March, 2012 was a response to the said orders. For purposes of this ruling that application is spent as it had sought the stay, discharge, setting aside etc of the court's order of 1st March, pending inter partes hearing of the plaintiff's application filed on 29th February, 2012. Hence this ruling is concerned only with the latter.

4. On record is a 38 paragraph Replying affidavit sworn by the 1st defendant describing himself as director of the 2nd defendant and legal attorney of one Sylvia Hildergard Erna t/a Empires and Partners

Investments. Pertinent depositions are found in paragraphs 6, 8, 9, 10, 13, 14, 18, 35a-g the latter which appears to summarize the gist of the respondent's position.

5. On 22nd March, 2012 the respondents filed skeleton arguments raising 3 challenges against the applicant:

- locus standi of the plaintiff's legal attorney
- res judicata; and
- the validity of the court's order of 1st March, 2012. Several authorities were annexed.

6. The plaintiff's written submissions were filed four days later on 26th March, 2012. The submissions highlight the plaintiff's challenge to the bonafides of the defendants' claim and assert the locus standi of the plaintiff's while resisting the assertion of res judicata. The court was urged to find that the applicant has brought himself within the appropriate threshold for the grant of an interim injunction.

7. Contemporaneously, on 26th March, 2012 the applicants filed a Further affidavit erroneously referred to as a supplementary affidavit, which, in addition to reiterating the previous depositions annexes an affidavit allegedly sworn by the plaintiff Mirko Blaetterman on 15th March, 2012. To this further affidavit the respondent replied by filing a supplementary affidavit. The bone of contention therein remains the locus of the plaintiff's attorney Shabir Halim Ali while asserting the respondent's earlier taken position.

8. The disposal of this instant application was delayed due to the filing of an intervening application by the defendants on 22nd May, 2012 seeking that the trial judge recuse herself from hearing this matter and Petition No. 22 of 2011 both which are related as will be emerge presently. The history and background of the two matters namely HCCC 27/2012 and the Petition is set out in the court's consolidated ruling delivered on 11th September, 2012, dismissing the recusal application. The ruling forms a part of the record of both Petition No. 22 of 2011 and the present case.

9. I have painstakingly ploughed through the entire record of HCCC 27/2012 by perusing the pleadings, applications, affidavits as well as the respective submissions in light of the instant application. From this perusal, it is possible to summarize the emerging relevant depositions which are common ground:

(a) The dispute herein revolves around a land parcel LR No. 622 Malindi (referred to as Vasco Da Gama lodge, hereinafter the suit property)

(b) In the year 1995 the suit property was registered in the names of Mirko Blaetterman, Karl-Hermz Bonner or Borner and Helmut Koster.

(c) The business closed down some years later and the owners seemingly left the country.

(d) In the year 2007 or thereabouts it was alleged by the 1st Defendant that the said proprietors were sued by G. Hotman Cotova (2nd defendant) an "enterprise" owned by the 1st defendant in CMCC 18A/2004 Malindi. That further the suit determined in the 2nd defendants favor and resulted in judgment and a decree transferring the suit property to the 2nd defendant via a purported vesting order in Misc. Civil Appl. No. 5 of 2007.

(e) The two above suits are the subject matter of a criminal case brought by the State against the 1st defendant on allegations that he forged the said proceedings, judgment and decree. The criminal case which is yet to be determined is no. CR. 345/11 R -vs- David Muiruri and is subject matter of the Petitions No. 22 of 2011 filed by the 1st defendant in the High Court at Malindi to stop the said prosecution.

(f) The suit property has since the purported judgment seemingly changed hands at least three times: from

the decree holders in CMCC 18A/2004. G. Hotman Cotova and General Commission Agencies to Max International & Co. Ltd, then to White House International Ltd and finally to the current registered owners namely Empires and Partners Investments (3rd Defendant).

(g) The latter “company” is allegedly owned by one Sylvia Hildegend Erna t/a Empires & Partners Investments, who has executed a Power of attorney in the 1st defendant's favor. The 1st defendant is also a director of the 2nd defendant. The substance of these depositions especially a-f are not in dispute. It is also not in dispute that the suit property is currently registered in the 3rd Defendant's name.

10. It is the plaintiff's case through his attorney Shabir Hatim Ali (Shabir) that the defendants herein procured the said registration of the suit property through fraud via fictitious court proceedings in CMCC 18A/2004, decree and vesting order. Shabir asserts that he is the rightful representative and care taker of the true owners of the property and that he has been in constructive possession until 2007 or thereabouts when the 1st defendant made a forced entry by virtue of the 'forged' court order and subsequent registration.

11. The Court reinstated him into possession on 1st March, 2012. The Respondent's affidavit position is that having sued the original owners of the suit property over a debt, there was recorded a consent between the parties transferring the suit property to G. Hotman Cotova. The 1st defendant denies that the suit CMCC 18A/2004 was a forgery and further contests the locus standi of Shabir while asserting his own position as legal attorney of the present “owner” Sylvia Hildegard Erna t/a Empires and partners Investments (3rd defendant). He admits that he was a director of the 2nd defendant when the suit CMCC 18A/2004 was lodged against the original owners of the suit premises.

12. The principles applicable to the grant of an interim injunction have been settled since the celebrated case of **Giella vs Cassman Brown & Co. Ltd 1973 EA 358**. An applicant must demonstrate:

(a) a prima facie case with a probability of success.

(b) That he will suffer irreparable damage if the interim orders sought are denied

(c) In the event of doubt over (a) and (b) above the court will decide the case on a balance of convenience.

A prima facie case in civil cases was defined in **Mrao Ltd v First America Bank Ltd & 2 others (2003) KLR P137** as:

***“...a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***(emphasis supplied)

13. It is neither necessary nor desirable at this stage of the proceedings for the court to make any final or definite findings in the matter before it. Simply stated for purposes of this case, any claimant must show how he derives the right to the suit property or the right to sue in regard thereto and the alleged infringement.

The plaintiff has relied on a power of attorney (POA) sworn on the face of it by one of the original admitted registered owners of the suit property. The defendants attack the bona fides thereof, and, correctly point out that the POA is by only one of the three admitted original owners of the suit property. The applicant states that one, Helmut Kosler is dead although no proof is tendered.

14. The second affidavit of Mirko Blaetterman attached to Shabir's Further affidavit contains an endorsement of the impugned POA in favour of Shabir and disputes the existence and/or knowledge of the 2nd defendant's claim in CMCC 18A of 2004. The 1st respondent has also taken issue with the form of that Further affidavit and the POA and invited the court to scrutinize and compare the signatures of the deponent thereto with previous “signatures” of Mirko Blaetterman. This is a task the court is not equipped

to undertake as it lacks the necessary expertise. Besides, the issue of form if relevant and the substance of these documents will be gone into in the course of the hearing and not at a preliminary stage.

15. With regard to Sylvia Hildergard Erna the alleged donor to the 1st Respondents POA, no Further affidavit was filed in support or even to explain how she came into the “ownership” of the suit property. The 1st Respondent merely refers to transfer but not the circumstance thereof. Was it for example as a consequence of sale, gift etc? The 1st defendant apparently has no answer to paragraph 12 of Shabbir's Further affidavit filed 26th March, 2012 and annexures SHA -7, thereto to the effect that he is sole operator and signatory of the account of Max Int. Co. Ltd. held at Imperial Bank. Erna, the alleged the donor of the 1st respondents POA supposedly obtained the property through a transfer from Max Int. Ltd. via White House and G. Hotman Cotova, in that order. Are these genuine companies and the transactions the various changing faces and tack by the 1st and 2nd defendant? If the property been passed on rapidly since 2007 there is no dispute that the 1st defendant has remained a or perhaps the only key player in the background from his own admissions?

16. I think what really raises doubt as to the validity of the defendants' claim is this: the basis of their claim, namely, the suit no. CMCC 18A/2007 has been declared a fiction not only by the alleged trial magistrate (Manyasi) whose credibility the respondent attempts to disparage, but also by other court officers who have sworn affidavits as well as written statements to police disputing the suit's existence and even the vesting order – alleged in Misc. Appl. 5 of 2007.

17. I have looked at the alleged proceedings in CMCC 18A of 2004, the judgment, decree, vesting order and Warrant to court Bailiff attached as annexure SHA 4-7 OF Shabir's supporting affidavit, as well as affidavits of court officials including JOYCE MANYASI then Chief Magistrate all marked SHA 11. At this stage, I can only venture to say that the proceedings appear crude and the orders therein prima facie irregular and most unusual. Besides these proceedings do not show that the 2nd defendant recorded a consent with the alleged Defendants in that case for the transfer of the suit property as deponed by the 1st Respondent in his affidavits.

18. Although there are no pleadings attached, it appears that the matter supposedly proceeded to “hearing” and a judgement in favour of G. Hotman Cotova was given by Manyasi J, Chief Magistrate on 29/3/04 in the presence of the plaintiff's advocate Awit Omolo, now said by the 1st Respondent to be deceased. Notably, the said “judgement” towards the end refers to the ceiling of the pecuniary jurisdiction of the trial magistrate as Kshs.3 Million. It is now being stated that the value of the suit property is over 30 million. Question; Did the Magistrate have jurisdiction at all to give the declaration in the judgment inter alia that;-

***“the plaintiff G. Hotman Cotova take immediate possession of Plot 622 and all other structures fixtures and house on this parcel of land be de-registered from the Defendant and the same be registered in the name of G. Hotman Cotova as the new owner”. (sic)***

19. Even assuming the proceedings were authentic, this “decision” represents a strange jurisprudence unknown to this country. The claim as presented to the “court” is simply without any legal foundation known to the laws of Kenya. The 'judgment' itself represents a grotesque violation of known constitutional rights and freedoms especially with regard to property and would be liable for quashing if valid in as much as it purports to summarily award to a claimant for works done, the property of the adversary. Annexure SHA 8 to Shabir's supporting affidavit suggests that the “plaintiff” company itself in CMCC 18A of 2004 G.Hotman Cotova Limited could be another legal fiction. It is neither registered as a company or a business name.

20. I think in light of all the foregoing that Shabir has prima facie legal standing and the plaintiff he represents a right of ownership to the suit property, together with the original owners, which right has apparently been infringed by the Respondents, through alleged fictitious legal proceedings and subsequent transfer. I do not accept that this suit is res judicata because in terms of section 6 of the Civil Procedure Act the parties in this case and HCCC 72 of 2007 and others cited do not share the requisite legal nexus.

21. The property in question is said to be worth a substantial sum of money. In light of the circumstances of this case, it is not open to the Respondents to say that damages will be adequate to compensate the plaintiff in this case. I think a court of law must always take a dim view of any person who attempts, to deliberately subvert the law or legal process in any manner he pleases just because they are capable of paying damages (See **Mucuha vs The Ripples Ltd Civil Appl. NAI 186 of 1992**). This is not a proper case for considering the adequacy of damages, even though such would certainly not be sufficient compensation in the circumstances of this case.

22. In view of the foregoing, I will grant the Plaintiff's application filed on 29th February 2012 and make the following orders more so for the purpose of upholding the rule of law:

1. That there be a temporary injunction restraining the three Defendants herein by themselves, their agents, servants, representatives or any person claiming interest through them from trespassing into, remaining on, selling, alienating or dealing in any other manner whatsoever with suit property herein pending the determination of both this suit HCCC 27 of 2012 and (because of the clear connection) Criminal Case 345 of 2011.
2. That the orders above be registered against the suit property at the Land Registry in Mombasa in the form of an inhibition.
3. Order 1 & 2 above are made subject to the condition 3 that, within 7 (seven) days of today's date the plaintiff through his legal attorney Shabir Hatim Ali do deposit into court a bank guarantee, valid for one year and renewable annually in the sum of shs. 1Million from a reputable bank by way of undertaking for damages and/or costs.
4. The Public Trustee be enjoined as a plaintiff in this suit as the interim representative of the estate of Helmut Koster now said to be deceased, and any other deceased original proprietor of the suit property, pending the appointment and joinder of proper legal representatives of such estate.

Joinder of the Public Trustee to be effected through an amendment of the plaint and service of such amended plaint by the plaintiff on the Public Trustee within 14 (fourteen) days of today`s date.

5. The orders made herein be advertised within 7 days in a prominent page of the Daily Nation Newspaper and the Standard News paper on any week day so that any interested party may within 21 days of the advertisement apply by himself and not through proxy to be joined in the suit. The said advertisement to measure no less than 15x15cm and a copy thereof to be delivered to the German Embassy in Nairobi for the information of the said Embassy.

6. In view of the circumstances obtaining in this case and to avoid the involvement of phantom parties and busy bodies I direct that in accordance with the provisions of Order 9 rule 1 and 2 Civil Procedure Rules that any further application, appearance or act required or authorized by the law to be made or done by the following person namely;- Mirko Blaetterman, Heinz Borner, Helmut Koster, Sylvia Hildegard Erna and David Muiruri in the prosecution of this matter shall be by the party in person, if the party is alive and not through persons holding powers of attorney albeit executed by such living parties.

Costs are awarded to the Plaintiff.

**Delivered and signed this 6th November 2012 in the presence of Mr Otara for the Plaintiff, 1st Defendant present and representing the 2nd and 3rd Defendants herein.**

**Court clerk-Evans.**

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

Mr. Muiruri;- I have a query. Does it mean there will be no persons on the suit property.

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

**Court**;-The effect of Order 1 of this ruling is that the court has confirmed the earlier orders reinstating the plaintiff through his attorney into possession of the suit property pending determination of the stated cases.

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