



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Suit 22 of 2008

CLAUDIO FUSCOLO PLAINTIFF.

VERSUS.

FABIO MARELLI

SONGHAI INVESTMENTS LTD DEFENDANTS.

R U L I N G.

By a Chamber Summons application dated 17th April, 2008, pursuant to the provisions of order XXXVIII Rules 1, 2, 9 and 12 and order XXXIX Rules 1 (a) (b) and 7 of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act and all enabling provision of the law the applicant seeks orders:

- 1.The application be certified urgent and be heard in the first instance.
- 2.Service of the application dated 17th April, 2008, summons to enter appearance, plaint and hearing notice to be served by way of substituted service in the Daily Nation, Kenya Times or the East African Standard on any working day.
3. That the costs of this application be in the cause.

The application is based on the grounds:

- (i) The defendants have not been served with the application, summons, and plaint dated 17th April, 2008.
- (ii)The defendants are not available in their normal residences and places of work are now closed down.
- (iii)The plaintiff has made efforts to serve them but they have not been found despite diligent effort.

The application is predicated upon the annexed affidavit of **CLAUDIO FUSCOLO** sworn on the 17th day of April, 2008.

On behalf of the applicant, it was argued that by an agreement dated 13th September, 2007, between the plaintiff/applicant and the 2nd defendant/respondent through the 1st defendant/respondent, the 2nd respondent undertook to transfer to the plaintiff/applicant the ownership of the 150 shares of **Songhai Kilifi/Jimba 391** after the construction of a hotel. The agreement is Exhibited "CFI".

That it was further agreed that the works could be completed by the 15th of November, 2007 now past, and that there could be no legal sub-division and transfer of ownership of the plot to him.

That it was also agreed that failure to complete the work within the time frame fixed in the agreement – 15th November, 2007, would attract a penal charge of contractual fees for each day of the delay amounting to Ksh. 22,500/= per day commencing from 16th November, 2007.

It was the contention of the applicant that pursuant to the said agreement, he paid a deposit of Ksh. 11,650,000/= for the property and construction. To date the construction has not been completed. The problem is compounded by the fact that the property has neither been transferred to his name nor subdivision done in contravention of the terms of the agreement aforesaid.

It was further contended by the applicant that he has information that the defendant/respondent has left the country for Italy outside the jurisdiction of this court. That the first defendant is bound to come into the country any time now and leave secretly before meeting his obligations in terms of the agreement.

That he is further apprehensive that the 1st defendant/respondent may sell the property and/or transfer the same to a third party. As at present he has placed strangers on the said property to continue with construction without involving him.

That the first defendant/respondent is planning to secretly leave the country and in that event he will lose the subject property if the said construction is not stopped.

The application was served upon the respondent who failed to file grounds of opposition or replying affidavit within the time prescribed by law. The application thus proceeded ex-parte courtesy of order L Rule 16 (3) of the Civil Procedure Rules.

On the premises, I have evidence on the part of the applicant in support of the application but no evidence in rebuttal. Accordingly the evidence of the applicant stands unchallenged.

Accordingly, the only orders which commend itself to me are as follows:

(a) An order of arrest before judgment of the 2nd defendant/respondent **FABIO MARELLI**, do issue. That the said **FABIO MARELLI** be brought before the court to show cause why he should not furnish security for his appearance.

(b) The order of this court be served upon the OCPD Malindi to assist in the execution thereof.

Dated and delivered at Malindi this 7th day of May, 2009.

N.R.O. OMBIJA.

JUDGE.

Mr. Michuka for Nyakaye for plaintiff.

Mr. Ole Kina for Defendant.