



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 216 OF 2012**

**GIRIAMA CENTRAL ASSOCIATES & PROPERTY**

**MANAGEMENT LIMITED.....PLAINTIFF**

**-VERSUS-**

**1. AYUB SHERO BALUCHI**

**2. OMAR MOHSEN AHMED MOHAMED (Name struck out by Order of 2.4.2014)**

**3. MWAKASA LIMITED.....DEFENDANTS**

**RULING**

1. This ruling is in respect of a preliminary objection raised by the plaintiff on whether or not the 1<sup>st</sup> defendant has a defence on record and therefore entitled to participate in the hearing by calling witnesses. The basis for the objection is that during the 1<sup>st</sup> defendant's testimony de benese, the 1<sup>st</sup> defendant disowned his statement of defence filed by Ananda & Co advocates on 24<sup>th</sup> November 2015.

2. The preliminary objection is opposed by Mr Kimani for the 1<sup>st</sup> defendant. Mr Kimani submitted that the plaintiff was drawing inference that the pleadings have been struck out yet the taking of evidence on February 2017 and dismissal of the 1<sup>st</sup> defendant's application on 11<sup>th</sup> December 2017 are not synonymous with striking out pleadings. That the prayers sought are a direct affront to the provisions of article 50 of the Constitution.

3. I have taken into consideration the objection raised and the submissions rendered in support of and against it. This matter is yet to be fully heard as only the 1<sup>st</sup> defendant has given his testimony. In the ruling rendered on 11<sup>th</sup> December 2017, Komingoi J while dismissing the application seeking to expunge the contentious statement of 1<sup>st</sup> defendant's defence stated thus at paragraph 9 of her ruling:

*“Having filed the notice of change of advocates means that the present advocates took over the matter from Ms Ananda & Co advocates.”*

4. My understanding of this phase is that the documents filed by Ananda & Co advocates were deemed to have been properly on record. This Court was not made aware of any appeal filed against this decision. Therefore the statement made by the 1<sup>st</sup> defendant during his testimony disowning such a defence can only be determined at the final stage i.e. at judgment writing on whether the 1<sup>st</sup> defendant has raised a reasonable defence to the plaintiff's claim.

5. It is thus premature for the plaintiff to ask the Court to make such a determination at this stage before all the parties to the suit have presented their evidence. Consequently on the basis that there is a defence on record, the 1<sup>st</sup> defendant cannot be barred from calling witnesses in support of his case. Consequently I find the objection raised to be premature, devoid of merit and is hereby dismissed with costs ordered in the cause.

**Dated, signed & delivered at Mombasa this 15<sup>th</sup> February 2019**

**A. OMOLLO**

**JUDGE**