



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 27 OF 2012

MIRKO BLAETTERMANN (Suing through his power of Attorney

SHABIR HATIM ALI)

PUBLIC TRUSTEE (Suing on behalf of **HELMUT KOSTER**).....**PLAINTIFFS**

VERSUS

DAVID MWANGI MUIRURI

GHOTMAN COTOVA

EMPIRES AND PARTNERS INVESTMENTS.....**DEFENDANTS**

RULING

1. Before me for determination is a Notice of Motion application dated 20th August 2018. The said Motion brought by Sylvia Hildergard on behalf of the 3rd Defendant prays for orders that:-

- 1) At the 1st instance service of this application on the Plaintiffs/Respondents and 1st and 2nd Defendants be dispensed with, so that this application may be placed before Court for allocation of a hearing date on priority basis to avoid mischief;***
- 2) The Honourable Court is invited to dismiss this suit as per Order 17 Rule 2 and in compliance of Order 11 of the Civil Procedure Rules for failure of the Plaintiffs to take action as provided by law for a period exceeding six years since the suit was filed in Court;***
- 3) The 1st Plaintiff and his alleged agent one Shabir Hatim Ali the Initiator of this suit by way of Power of Attorney be condemned to pay the Defendants/Applicants costs and incurred damages in the suit property since this suit was filed and the suit property be reverted back to its original status of possession/occupation as it was at the very first date this suit was filed;***
- 4) The Honourable Court be pleased to discharge the interim Court Orders enjoining the 2nd Plaintiff/Respondent in the suit given on 6th November 2012 for in compliance(sic) for more than six years and the same be discharged henceforth;***
- 5) Due to the suspected highest level of fraud by the alleged 1st Plaintiff's agent in filing of this suit, and his involvement in destructing/vandalizing(sic) of the suit property herein(Plot No. 622-Malindi Municipality within Kibokoni Area), the Honourable Court be pleased to order the Director of County Criminal Investigation Department –Kilifi County to carry out investigation and take appropriate action of law(sic);***
- 6) The Defendant's/Applicant's Counterclaim dated 9th day of March 2012 be allowed.***

2. The application is supported by an Affidavit sworn by the said Sylvia Hildergard, a Director of the 3rd Defendant and is premised on the grounds that:-

- a) No application, statements, report, or even a single step has been taken to prove the alleged death of Helmut Koster by the 2nd Plaintiff/Respondent herein since the interim orders were given by the Court on 6th November 2012 due to sentiments/averments***

by the 1st Plaintiff's alleged agent Shabir Hatim Ali who initially filed this suit;

b) The 1st Plaintiff has never filed his Witness Statements since this suit was filed and their failure to prosecute the suit has highly prejudiced the Defendant's Constitutional rights to the property; and

c) The Applicant is convinced that the suit was filed out of a fraudulent intent to defraud the real owners of the property and hence the prayer for an investigation to be conducted.

3. The Application is supported by two other parties. In a Replying Affidavit sworn in the name of the 1st Plaintiff Mirko Blatterman and filed herein on 3rd September 2018, the 1st Plaintiff a German Citizen expresses shock at the fact that this suit was filed in his name and denies appointing an Advocate or any agent to represent him in the matter.

4. The 1st Plaintiff denies that he filed or caused to be filed these proceedings and/or that he donated any Power of Attorney to file and prosecute this matter for and/or on his behalf. He further denies that the property the subject matter of this dispute belongs to him or his previous partners Helmut Korster and Karl Heinz Borner.

5. The 1st Plaintiff avers that all the business they ever conducted in regard to the suit premises with his partners was to supply building materials for the bungalows built thereon. At that time the 1st Plaintiff were trading as Vasco Dagama Lodge with Mr. David Mwangi (the 1st Defendant) trading as Ghotman Cotova and General Commission Agency. The 1st Plaintiff and Helmut Korster left the Country in 2004.

6. The 1st Plaintiff further avers that they had some debts to clear and they left Karl Heinz and the 1st Defendant to deal and eventually they handed the property to the 1st Defendant as compensation for the debts that were owing.

7. In his response to the application filed herein on 13th September 2018 David Mwangi Muiruri (the 1st Defendant) asserts that he is also the one sued as Ghotman Cotova in the suit. He avers that this suit was initiated by one Shabir Hatim Ali by way of a Power of Attorney allegedly donated to him by the 1st Plaintiff/Respondent.

8. The 1st Defendant asserts that he did challenge the said Power of Attorney and on 6th November 2012 the Court directed that parties do prosecute this matter in person. No action was however taken and the 1st Defendant subsequently moved the Court for the discharge of the injunction orders that were in place. The said orders were thereby vacated.

9. The 1st Defendant further avers that another suit being HC Mis Application No. 21 of 2009 was also filed by one Alex Sulubu Kitsao in regard to the suit property and the 1st Plaintiff's agent the said Shabir Hatim Ali took a prominent role therein including responsibility to settle all costs incurred by the Claimant. The said Agent had also by an Acknowledgment Note dated 31st August 2016 handed over the suit property to the 1st Defendant.

10. The 1st Defendant further avers that it is the very same agent who moved the Court in this matter and initially enjoyed the orders of injunction granted on 1st March 2012 against the 1st Defendant and the 3rd Defendant/Applicant. The said Agent even used the Police to evict the Defendants from the suit premises. It is therefore the 1st Defendant's case that there is enough evidence to demonstrate that the agent had power to deal with the property and his commitment to take care of the costs and other bills herein should be respected.

11. I have perused and considered the application and the responses thereto including the oral submissions made by the Advocates for the parties. As it were, the Application has not been drafted with precision. Nevertheless it can be discerned that the 3rd Defendant/Applicant craves three major orders from this Court.

12. The first prayer sought by the 3rd Defendant is for the dismissal of the suit for want of prosecution while the second concomitant prayer is for the Defendant's Counterclaim dated 9th March 2012 to be allowed. The 3rd Defendant in addition urges this Court to order an investigation into the circumstances under which this suit was filed by the 1st Plaintiff's agent-one Shabir Hatim Ali.

13. As it turned out there were two affidavits filed herein styled as responses to the application but which were in fact in support thereof. This Court however did allow Mr. Kilonzo Advocate who together with Mr. Otara have been appearing for the Plaintiff to make oral submissions in the matter.

14. A perusal of the record herein reveals that the issue of representation is rather jumbled up. This arises from the fact that there appears to be different interests and proxies fronting the party styled herein as the Plaintiff with each wing purporting to represent the genuine Plaintiff.

15. This suit was filed in the year 2012. As was stated in *Ivita -vs- Kyumbu(1984) KLR 441*, in an application such as this for dismissal of a suit for want of prosecution:-

“The defendant must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

16. In the matter before me, it is noteworthy that the Plaintiff had commenced the presentation of their evidence in Court on 7th May 2015 when the said Shabir Hatim Ali gave his evidence-in-chief. Thereafter by an application dated 4th January 2016 the Defendant sought to have

the Plaintiffs and/or their agents committed to civil jail on the purport that they had disobeyed some orders of injunction granted herein.

17. Dismissing the said application on 3rd February 2017, Angote J observes as follows at Paragraph 12 of his Ruling:-

“12. The issue of the suit property being vandalized can only be ascertained after full trial. All I can say for now is that the numerous Applications that have been filed by the Defendants are contributing to the delay in the prosecution of this suit. The Defendants cannot therefore be heard to say that the suit property is being vandalized when they are the ones who are delaying the finalization of the suit by filing of the numerous Applications.”

18. The Defendants did not however heed the Learned Judge’s order. Barely a year down the line, the 3rd Defendant filed the present application knowing fully well that the Plaintiffs have partially given evidence herein.

19. Similarly the 3rd Defendant urges the Court to order an investigation into the circumstances leading to the filing of this suit. From that very record it is evident to me that this matter has been the subject of a Criminal investigation whose outcome was not clear from the pleadings placed before me.

20. In the circumstances of this case I decline to grant the orders sought in the application.

21. The Plaintiff shall have 60 days from today within which to conclude his case. Otherwise the Plaintiff’s case shall stand closed upon expiry of that period and the Defendants shall be called upon to offer evidence in support of their Defence and Counterclaim.

22. I make no order as to costs.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE