REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 35 OF 2009

PAOLO SPIGA.....1ST PLAINTIFF

GIANFRANCO MARIA SANTUCCI.....2ND PLAINTIFF

VERSUS

DR. JOHN MUGALASINGA KHAMINWA.....DEFENDANT

RULING

1. By the Notice of Motion application before me dated and filed herein on 30th May, 2019, Dr. John Mugalasinga Khaminwa (the Defendant) prays for orders set out as follows: -

1. That this matter be certified as urgent and service be dispensed with in the first instance.

2. That this Honourable Court do issue a temporary injunction staying any further execution of this court's Ruling dated 9th April, 2019 pending the hearing and determination of this Application.

3. That this Honourable Court do issue a temporary injunction staying any further execution of this court's Ruling dated 9th April, 2019 pending the hearing and determination of the Applicant's intended Appeal to the Court of Appeal.

4. That this Honourable Court do transfer this suit from the Superior Court in Malindi to the Superior Court in Mombasa.

5. That the costs of this Application be in the cause.

2. The Application which is supported by an Affidavit sworn by the Defendant Advocate is premised on the grounds framed as follows: -

1. That the Applicant being dissatisfied with the Ruling of this court dated 9th April, 2019 to wit the court did by dismissing the Applicant's Amended Motion application dated 24th May, 2016 has caused to have the Applicant's counter-claim struck out. The Applicant has already intimated that he is intent on appealing against the same;

2. That the Learned Judge in his Ruling erred by failing to recognize that the issue of service was not wholly dependent on the Applicant but was also dependent on actions and steps to be taken by the Ministry of Foreign Affairs and the Italian Government and hence the delay in effecting service was not or should not fall on the shoulders of the applicant;

3. That the Learned Judge has misinterpreted the provisions of Section 1A of the Civil Procedure Act to wit the Judge held that the important issue was that of time at the cost of considering the more important issue of public interest as provided for in Article 159(2) of the Constitution;

4. That the Learned Judge in his Ruling recognised that the Applicant did take steps to effect service;

5. That the Learned Judge failed to recognize that failing the extension of time the Applicant would not be able to effect service and thus prosecute his case as presented in the counter-claim;

6. That the Learned Judge erred in failing to consider that the procedural technicalities as stated in Article 159(2)(d) of the

Constitution should not hinder the attainment of justice;

7. That the Applicant has invested heavily on the subject property and the refusal of the Learned Judge to grant the Applicant an opportunity to effect service may cause the Applicant to suffer a great loss and damage;

8. That subsequent to the Ruling of this court, this matter is set for hearing on 27th May, 2019 hence the urgency of the matter and the Applicant's Appeal shall be rendered nugatory in the event that the suit is allowed to continue;

9. That the Applicant cannot be guilty of laches for the Applicant did make a valid and honest effort to effect service and had filed his application for extension in good time and the matter was thus before the court;

10. That the Applicant cannot be guilty of laches for the matter was pending before the court; and

11. That his court has the jurisdiction to grant the orders sought.

3. The Defendant's Application is opposed. In a Replying Affidavit sworn and filed herein by their Advocate on record Tukero Ole Kina, the Plaintiffs raise issue with the fact that even though the Application was filed on 30th May, 2019, it was only served upon their Advocate on 28th August, 2019, more than 90 days after it was filed. They assert that in the meantime, more so on 8th July, 2019, the Defendant was given 30 days by the Deputy Registrar of this court to comply with previous directions of this court on filing of documents he wishes to rely on at the trial which was now scheduled for 31st October, 2019 but the Defendant had failed to do so.

4. The Plaintiffs aver that the issues raised at Paragraphs 5, 6, 7, 9, 10, 11, 13 and 14 of the Supporting Affidavit are not matters before this court any more as the court had addressed those issues in 2 separate rulings and the Defendant cannot be heard thereon again.

5. The Plaintiffs aver that the allegations raised in Paragraph 12 of the supporting Affidavit are vague and without basis and assert that the application to transfer the suit to Mombasa is but another tactical ruse to delay the upcoming trial.

6. It is the Plaintiffs' case that this matter has been in court for 10 years and the Defendant's application to injunct the court from hearing the case does not meet the conditions for the grant of such orders. They urge the court to dismiss the application with costs.

7. I have perused and considered the Defendant's application and the response thereto by the Plaintiffs. I have equally considered the oral submissions made thereon by Dr. Khaminwa and Mr. Ole Kina, the Learned Advocates acting herein.

8. This suit was filed on 8th April, 2009. The two Plaintiffs claim to be the rightful owners of the suit premises and urge the court to grant them vacant possession of the suit premises as well as an order of injunction restraining the defendant from remaining or continuing to occupy the same.

9. In his Written Statement of Defence and Counterclaim filed herein on 3rd June, 2009, the Defendant, a Senior Advocate of this court asserts that he is in occupation and possession of the suit premises situated at Casuarina area within Malindi Town. It is his case that he was put in lawful possession and ownership of the same by the previous owners thereof being the consideration in respect of professional services rendered to one Estella Dunning Furuli and Angelo Ricci in Nairobi Chief Magistrate's Court Criminal Case No. 3165 of 2004.

10. In the counterclaim, the Defendant/Applicant sought to enjoin the two individuals both of whom are of Italian decent and origin as well as a company in which the two were the Directors known as Estella Company Ltd. He also sought to enjoin another individual by the name Sergio Battisti. As it turned out, those non-citizens could not be found locally for service of summons for some time.

11. Subsequently, by a Chamber Summons application dated 5th February, 2010, the Plaintiffs/Respondents moved to court to strike out the Defence and Counter-claim on a number of grounds including the fact that no leave was sought to include non-Kenyan Defendants ordinarily resident in Italy in the Defence and Counterclaim.

12. That application was canvassed before the Honourable Justice Hellen Omondi before whom the Defendant/Applicant herein submitted that he had been that far unsuccessful in serving the Defendant in the counter-claim as they resided in Italy and had not returned to the jurisdiction of the court.

13. In a Ruling delivered on 20th July, 2011, the Learned Judge directed that the Defendant complies with the provisions of the then Order V Rules 21 – 28 regarding service within the next thirty (30) days in default of which the counterclaim would stand struck out without further reference to the court.

14. Thereafter by an application dated 19th August, 2011 as amended 5 years later on 24th May, 2016, the Defendant sought a variation of those orders as well as an extension of time to effect service of the counterclaim against the 2nd, 3rd and 5th Defendants therein. Upon consideration of the application, I did not find any merit therein and on 9th April, 2019, this court dismissed the same as a result whereof the Defendant filed this present application urging an injunction staying any further proceedings herein and an order that the court transfers the suit for hearing and determination preferably by another Judge in Mombasa.

15. Submitting his case in person before me, Dr. Khaminwa argued rather strongly that this court had made the Ruling delivered on 9th April, 2019 with a lot of commitment and that it was only fair that the matter be heard by another Judge. Those submissions are indeed replicated at Paragraphs 11 and 12 of Dr. Khaminwa's affidavit in support of his application where the Learned Counsel states: -

"11. That I verily believe that this court has acted in error for I have already served some of the Defendants in the counter-claim and by denying me the opportunity to prosecute my counter-claim the court has acted in a very draconian manner and against the ethics and spirit of my rights under the Constitution and the Civil Procedure Act and Rules.

12. That I verily believe that the actions of the court can be considered as having a whiff of biasness."

16. As was observed by the Honourable Justice M.N. Ibrahim, SCJ in his concurring decision in **Gladys Boss Shollei -vs- Judicial Service Commission & Another (2018) eKLR**: -

"A Judge who has to decide on issue of self-recusal has to do a balancing exercise. On the one hand, the Judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a Judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason."

17. Citing the United States case of **Simonson -vs- General Motors Corporation [US.DC. P. 4254 R. Spp. 574, 578 (1978)]**, the Learned Supreme Court Judge in the **Gladys Shollei** case afore cited further observes as follows: -

"Recusal and reassignment is not a matter to be lightly undertaken by a district judge. While in proper cases, we have a duty to recuse ourselves, in cases such as the one before us, we have a concomitant obligation not to recuse ourselves; absent valid reasons for recusal, there remains what has been termed a "duty to sit "…."

18. As the Supreme Court stated in **Jashir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & 4 Others (2013) eKLR**: -

"The test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law", and thus, unsubstantiated suspicion of personal bias or prejudice will not suffice."

19. An examination of the record herein will reveal that on 20th July, 2011, the Honourable Justice Hellen Omondi delivered a Ruling in regard to an application by the Plaintiffs seeking to strike out the Defendant's counterclaim. In the penultimate paragraph of that decision, commencing at page 13 thereof the Learned Judge concluded as follows: -

"My finding is that the Defendant has not complied with requirements contemplated under Order V Rule 21, 21 A and 28.

Does this warrant striking out of the counterclaim or directing that a separate suit be filed? I am most mindful of the views expressed by Newbold A.G V.P in the Karachi GAS Case and founded in the Raythen Case yet from the counterclaim, if a separate suit were to be filed it would probably end up with a request for consolidation because the matters and issues are so intertwined and so inter-related, that the outcome of the Plaintiff's case would impact on the counterclaim and vice versa. I find it prudent that this counterclaim remain as part of this suit. In so doing I am persuaded justice will be achieved and the overriding objections in terms of attaining: -

a) the just determination of the proceedings; (and)

b) efficient disposal of the business of the court.

The way to achieve this is by the court directing that the Defendant complies with the provisions of Order V Rule 21 – 28 regarding service within the next 30 (thirty) days in default of which the counterclaim will stand struck out without further reference to this court…."

20. That is the decision that guided this court when the Defendant's application was dismissed on 9th April, 2019. As I did state in the impugned Ruling, the Defendant/Applicant was required to take certain steps in serving the summons within 30 days from 20th July, 2011. That deadline expired on 20th August, 2011.

21. Some 8 years down the line those steps have not been taken and there cannot be any other conclusion in my other view than the fact that the counterclaim stood struck out, not by myself but by the deadline granted by My Learned Sister on 20th August, 2011. The averments that this court is biased against the Defendant are accordingly unfounded and without any basis.

22. In regard to the injunction sought and/or stay of proceedings, it was again my finding in the impugned decision that the Plaintiffs have not been able to set down the suit for hearing due to the applications filed by the Defendant herein one of which remained on record for more than seven (7) years.

23. While the Defendant submitted correctly that the speed of disposal of cases may not necessarily lead to justice, the period that this case has taken in court on account of the Defendant's failure to serve the parties he seeks to enjoin can no longer be justified. Article 50 of the Constitution enjoins this court to hear cases and to determine them in a manner that is just and expeditious.

24. In the circumstances, I find no merit in the Defendant's application dated 30th May, 2019. The same is dismissed with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE