



**Blaetermann (Suing Through his Duly Constituted Attorney Shabbir Hatim Ali Taher) & another v Muiruri & 2 others (Environment & Land Case 27 of 2012) [2024] KEELC 28 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 28 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 27 OF 2012  
MAO ODENY, J  
JANUARY 17, 2024**

**BETWEEN**

**MIRKO BLAETERMANN (SUING THROUGH HIS DULY CONSTITUTED ATTORNEY SHABBIR HATIM ALI TAHER) ..... 1<sup>ST</sup> PLAINTIFF  
THE PUBLIC TRUSTEE (SUING ON BEHALF OF HELMUT KOSTER) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVID MWANGI MUIRURI ..... 1<sup>ST</sup> DEFENDANT  
GHOTMAN COTOVA ..... 2<sup>ND</sup> DEFENDANT  
EMPIRES AND PARTNERS INVESTMENTS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 22<sup>nd</sup> November, 2022 by the Applicant seeking the following orders;
  - a. Spent
  - b. That this Honourable Court do issue an eviction order directed at the Defendants/ Respondents jointly and severally, their agents, servants, employees or any other persons whatsoever found in occupation of property known as Plot Number 622 (Original Number M. 17 G) Malindi.
  - c. That this Honourable Court be pleased to order the OCS of Malindi Police Station to give security to the Auctioneer /Court Broker duly instructed by the 1<sup>st</sup> Plaintiff/ Decree Holder to effect this Court's Order.



- d. That the Defendants be ordered to pay the costs of the eviction exercise as shall be incurred by the 1<sup>st</sup> Plaintiff/ Decree Holder.
  - e. That costs of this Application be provided for.
2. The 1<sup>st</sup> Defendant in response filed a Replying Affidavit sworn on the 20<sup>th</sup> January, 2023 where he deponed that decretal sum has been fully paid directly to the 1<sup>st</sup> Plaintiff and the decree settled.
  3. He further deponed that the transfer has been effected to third parties by the 1<sup>st</sup> Plaintiff to new owners by parties' own consent in CMCC Land Case No. E42 of 2022. It was his evidence that upon discovery of such transaction and transfer to third parties, the applicant filed an application dated 8<sup>th</sup> June, 2022 which matter proceeded on Appeal vide ELC Appeal No. 35 of 2022 and the same is awaiting determination.
  4. Further, that the ruling and the orders given by the subordinate court in his favour were stayed pending hearing and determination of the appellant's appeal and that there are no more orders allowing his accessibility into the suit property. According to him, though the Decree is fully settled, he has appealed against the whole judgment being Civil Appeal case No. 023 of 2022. He also stated that the execution has been completed and that there is no other pending execution to be performed hence the Applicant has no locus standi or any legal capacity on the suit property.
  5. The 1<sup>st</sup> Plaintiff Mirko Blattermann also responded to the application by the alleged agent through a Replying Affidavit sworn on the 26<sup>th</sup> January, 2023 where he deponed that the decree and the intended execution in this matter did not emanate from him and neither does the suit belong to him as he did not initiate the same.
  6. He further deponed that he has neither appointed any advocate nor any agent by way of Power of Attorney to initiate this matter and that he only came to know about the matter through the German Embassy and efforts to withdraw the same have been fruitless.
  7. It was his evidence that execution has already been overtaken by events since the suit property has already changed hands by parties' own consent judgment in another suit being CMCC Land Case No. 42 of 2022 which suit property is now registered in the name of third parties who are not parties in this suit. He also stated that the decision of transferring the property was entered into amicably by all parties in the subordinate court by involving the Defendants without involving Shabir Hatim Ali who has been conducting the case illegally by use of a fake power of attorney.

#### **1st Plaintiff/applicant's (shabbir Hatim Ali) Submissions.**

8. The agent Shabbir Hatim Ali filed submissions through the firm of Khaminwa & Khaminwa Advocates on the 11<sup>th</sup> day 2023.
9. Counsel submitted that the Defendants herein have planned to defeat the ends of justice at the expense of the Plaintiff herein and that the suit in the subordinate court where a consent was entered was only meant to circumvent the ends of justice and transfer the suit property to the Defendant.
10. Mr. Mwadilo also submitted that (the 1<sup>st</sup> Plaintiff) instituted this suit as an attorney of Mr. Mirko Blatterman by virtue of a power of attorney donated to him allowing him to protect and preserve the property in his absence. He also stated that the said power of attorney has never been relinquished or revoked and that the said Mirko Blattermann has never been in Kenya for the longest time.



11. Counsel submitted that the Applicant was well within his right to file the Notice to Show Cause for execution but the alleged Mirko Blattermann filed a Notice of Withdrawal of Notice to Show Cause thus defeating his attempt to finalize the suit herein.

### **Defendant's Submissions.**

12. Counsel submitted that after judgment the decree was issued and served upon the Respondents and that the Respondents have since appealed against the entire judgment and decision of the honourable court vide Civil Appeal No. E023 of 2022 at Malindi and the same is ongoing.
13. According to counsel, despite the ongoing Appeal, the decree was executed and the suit property reverted to the original owners the 1<sup>st</sup> Plaintiff and that the Respondents ceased being registered owners of the suit property pending the outcome of the said appeal.
14. Mr. Kariuki submitted that the previous registered owners of the suit property before transfer to the current owners Erich Gerald & Beatrice Wanjiku were Mirko Blattermann, Karl Heinz Borner and Helmut Koster. He stated that the applicant herein Shabir Hatim Ali continues to raise and enforce self-interest allegations by use of disputed power of attorney that has since lapsed as the suit property has changed hands.

### **Analysis And Determination.**

15. The issue for determination is whether the Applicant's application for eviction has merit.
16. This is a matter where the court entered judgment in favour of the Applicant on 17<sup>th</sup> March, 2022 after which he extracted a decree and served the same upon the Defendants. The Applicant claims that the defendants trespassed onto the suit property and employed a stranger to act as their caretaker which the application seeks to remedy by evicting the Defendants.
17. It is on record that a transfer has been effected to third parties by the 1<sup>st</sup> Plaintiff to new owners vide a consent in CMCC Land Case No. E42 of 2022 and that there is a pending Appeal vide ELC Appeal No. 35 of 2022. Further that execution has already been overtaken by virtue of the transfer to Erich Gerald and Beatrice Wanjiku who are not parties to this suit.
18. It should also be noted that the purported doner of the power of Attorney the 1<sup>st</sup> Plaintiff Mirko Blatterman filed a Replying Affidavit whereby he deponed that the decree and the intended execution in this matter did not emanate from him. He also stated that the he did not initiate the suit via the Agent Shabbir Hatim Ali Taher as he has never appointed him. In addition he stated that he only came to know about the matter through the German Embassy and efforts to withdraw the same have been fruitless.
19. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. The Applicant wanted the court to believe that the 1<sup>st</sup> Plaintiff donated the power to him which the Plaintiff denied. The burden of proof, therefore, shifted to the Applicant to prove that the Plaintiff donated the power of Attorney and it still subsisted even after Judgment had been entered.
20. In the case of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017]* eKLR, the court held that:

“Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff,



however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

21. The 1<sup>ST</sup> Plaintiff disowned the power of attorney and it was upon the Applicant to prove that he indeed still had the same at the time of filing this application after being thrown under the bus by Mirko Blatterman.
22. The 1<sup>st</sup> Plaintiff does not hold a title to the suit property as the suit property has been transferred to third parties of which the Applicant acknowledges. The Applicant save for alleging that he holds a special power of attorney which the 1<sup>st</sup> Plaintiff disowned holds no title to the land.
23. I have considered the application, the responses by the parties, and submissions by counsel together with the relevant judicial authorities and find that the application lacks merit and is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF JANUARY 2024.**

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

