



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**CIVIL SUIT NO. 3 OF 2007**

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT (CAP 281, LAWS OF KENYA)  
AND THE LIMITATION OF ACTIONS ACT (ACT 22, LAWS OF KENYA)**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES ENACTED THERETO**

**AND**

**IN THE MATTER OF LAND REFERENCE NUMBER PLOT NO. 503-WATAMU**

**BETWEEN**

**KASIMU SHARIFU MOHAMED.....PLAINTIFF**

**VERSUS**

**TIMBI LIMITED.....DEFENDANT**

**RULING**

1. This Ruling is in respect to the Defendant's Application dated 17<sup>th</sup> October, 2016 in which the Defendant is seeking for the following orders:-

- a. THAT this Honourable court be pleased to review, vary and/or set aside the orders for: a) Closing the case b) Written submissions.*
- b. THAT the Court be pleased to visit the suit Plot for purposes of ascertaining the factual and actual situation on the ground and take proceedings thereat on the same.*
- c. THAT the Court be pleased to order a re-opening of the case.*
- d. THAT the Court be pleased to issue such other incidental or necessary orders that the Court deems fit.*

2. The Application is premised on the grounds that the Defendant instructed his advocate to make an Application for a site visit to plot No. 503 but this instructions were never carried out; that the exhibits annexed on the Affidavits do not show the true picture on the ground and that there is an application on record which was never heard and determined.

3. According to the Defendant, the said error or omission was not within the Defendant's knowledge when the orders for closure of the case and written submissions were made; that the Application was for the court to visit the locus quo and that this court has the powers to review its orders.
  4. In response, the Plaintiff depones that the General Power of Attorney issued to the Applicant do not relate to the Defendant or the suit property; that Shabir Hatim Ali did not have the approval of the court and that the Defendant has never occupied the suit land.
  5. The Plaintiff further deponed that the Defendant's conduct is dishonest and amounts to abuse of the due process of the court.
  6. The Plaintiff also filed a Notice of Preliminary Objection in which he averred that the Application before the court has been filed in contravention of Order 9 Rules 1 (a) and 2(a) of the Civil Procedure Rules, 2010.
  7. In his Further affidavit, Mr. Shabbir deponed that he is a Director in the Defendant's Company; that he was already a Director when he filed the Application and that the trial court is supposed to subject the evidence of parties to the most rigid scrutiny, analysis and evaluation.
  8. According to the Defendant, the mistake of its counsel should not be visited on the Defendant.
  9. In his submissions, the Plaintiff's advocate submitted that while filing the Application, Shabir Hatim Ali relied on the General Power of Attorney; that Mr. Shabir did not have the approval of the court and that this Application was irregularly filed.
  10. The Plaintiff's counsel submitted that the firm of Khaminwa and Khaminwa were not the only advocates on record for the Defendant; than the Defendant has not given any reason as to why no Affidavit to controvert the Plaintiff's case was presented in court and that the power to arrest judgment should be invoked sparingly and in exceptional circumstances.
  11. Counsel relied on several authorities which I have considered.
  12. The Defendant's/Applicant's counsel submitted that the Defendant instructed its previous advocates to request the court to visit the site but the instructions were not implemented and that there are several discrepancies between what the government officers have stated in their letters and what can be observed on the ground.
- It is not in dispute that by the consent of the plaintiff and the Defendant's counsel, the parties herein agreed to have the Originating Summons herein determined by way of Affidavit evidence.
14. The counsels also agreed to file and exchange written submissions which they did. The Defendant's counsel filed his submission and the court reserved its judgment. The judgment was to be delivered on notice.
  15. The Defendant's counsel now wants to arrest the judgment, and to have the suit start de novo.
  16. According to the Affidavit of Mr. Shabir, the instructions that the Defendant gave its previous advocate was that the court should visit the locus quo; that those instructions were never followed and that it is important that the court visits the locus in quo.
  17. The first issue that I will deal with is whether the Application before the court was irregularly filed.
  18. In the Affidavit supporting the Application, the deponent has described himself as follows:-

*"1. THAT I am the registered power attorney agent of Giovanni Giafranco Vitali, a director of Timbi Limited and having being fully instructed by him, I am competent to swear this affidavit"*

19. To support that description, the deponent of the Affidavit annexed a general power of Attorney which was signed by the donor on 27<sup>th</sup> February, 2015 and registered as a document on 3<sup>rd</sup> March, 2015.

20. However, when the deponent of the Affidavit was confronted with the allegation that he does not have the locus standi to file the Application, he filed a Further Affidavit in which he deponed as follows:

*“1. That I am a Director of Timbi Limited...”*

21. The said deponent went further to annex on the supplementary Affidavit a copy of the 2016 company returns for the Defendant.

22. It is trite that under order 9 rule 2 (a) of the Civil Procedure Rules, persons holding powers of attorney can only appear on behalf of their principals with the approval of the court. In the case of **Tsuma Kenya Mwidzembe vs. Kerembo Anthony Masha (2016) eKLR**, the court held as follows:

*“16. Order 9 Rule 1 of the Civil Procedure Rules allows an act to be done by a party in person or by his recognized agent. However, where a recognized agent is a holder of a power of attorney, Order 9 Rule 2(a) requires that the person gets the approval of the court.”*

23. Having deponed in the Supporting Affidavit as an Attorney of Giafranco Franco vitali without the leave of the court, the Plaintiff’s Affidavit and the Application are irregular.

24. In any event, the Defendant in this matter is Timbi Limited and not Mr. Gianfranco. Consequently, the deponed of the Affidavit in support of the Application did not have the authority of the company to commence the Application. The Application should therefore fail on that ground alone.

25. Even if it is assumed that the Application was regularly filed, there is no evidence before me to show that the former advocate for the Defendant acted contrary to the instructions he had.

26. I say so because this suit has been pending since the year 2007 and the letters that the Defendant is now relying on to convince the court to review the consent order have always been in its possession.

27. In the case of ***Gate Insurance Co. Ltd vs. Jimmy Kiemba, Treasurer Nairobi County Government and 2 others (2016) Eklr, Odunga J*** held as follows:

*“ 20 It was however contended tha the mistake herein was that of counsel. The record however does not reflect this fact. From the record, not once was there an indication that the respondents had furnished the advocate with the necessary facts to enable the advocate respond to the application.....”*

*21 Whereas counsel’s mistake may on occasion justify favourable exercise of discretion, the nature of the mistake ought to be sufficiently brought home to the court”*

28. I am in agreement with the above holding. Having been represented by counsel, the Defendant’s counsel was well aware of the dispute that was before the court, and opted to proceed with the matter by way of Affidavit evidence and written submissions.

29. There is no indication that the Defendant furnished its advocates with instructions that are contrary to what he did. I am not satisfied that any injustice or hardship will result from the alleged mistake of the Defendant’s counsel, which, in any event, has not been proved.

30. In view of the overriding objective of the court to handle civil disputes effectively and expeditiously that court will be failing in its duties if it keeps on varying its orders just because a party, on advice of another counsel is of the view that his initial advocate did not advice him appropriately. That is unacceptable.

31. For those reasons, I dismiss the Application dated 17<sup>th</sup> October, 2016 with costs.

**DATED AND SIGNED AT MACHAKOS THIS 2<sup>ND</sup> DAY OF MAY, 2017.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 12<sup>TH</sup> DAY OF MAY, 2017.**

**J.O. OLOLA**

**JUDGE**