



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO 216 OF 2012

GIRIAMA CENTRAL ASSOCIATION AND PROPERTY MANAGEMENT...PLAINTIFF

VERSUS

AYUB SHERO BALUCHI

OMAR MOHSEN AHMED MOHAMMED

(name struck out by order of court made on 2.4.2014)

MWAKASA LIMITED..... DEFENDANTS

RULING

1. This is the Notice of Motion dated 24th July 2017. It is brought under Section 1A, 3A of the Civil Procedure Act, Order 51 Rule 3 of the Civil Procedure Rules.
2. It seeks orders;
 - a) That the purported service of summons and plaint upon the defendant be set aside and the defendant is granted leave to enter appearance under protest and file a statement of defence, in place of the appearance and defence filed by M/s Ananda And Company Advocates.
 - b) That the pleadings filed by M/s Ananda And Company Advocates are set aside, and/or expunged from the record upon filing of necessary papers under 1 above.
3. The grounds are on the face of the application and are listed as paragraph 1-7.
4. The application is supported by the affidavit sworn by Ayub Shero Baluch, the 1st defendant herein sworn on the 24th February 2017.
5. The application is opposed. There are grounds of opposition filed by the plaintiff/respondents counsel dated 27th March 2017.
6. It was agreed between the parties that the application be disposed by way of written submissions.
7. I have considered the Notice of Motion together with the supporting affidavit. I have also considered the grounds of opposition and the written submissions of counsels.

8. I agree with the plaintiff's counsel's submissions that the application is res judicata. The 1st defendant's/applicant application dated 13th February 2017 was heard and allowed. The 1st defendant was examined in chief, cross examined and re-examined.

9. Having filed the Notice of Change of Advocates means that the present advocate took over the matter from M/s Ananda and Company Advocates.

10. This application ought to have preceded the one dated 13th February 2017. The defendant has already testified and concluded his evidence. What will happen to his evidence if this application was to be allowed?

11. I find that this application is not brought under the correct provisions of the Civil Procedure Rules. Order 51 Rule 3 deals with ex parte applications.

12. I have considered the grounds upon which this application was brought and I find that the same are not merited.

13. The 1st defendant chose to give his evidence on the strength of the defence filed by Mr. M. A. Ananda advocate. He cannot turn around and disown it.

14. I find this application is not merited and the same is dismissed. The costs be on the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at Mombasa on the 11th day of December, 2017.

L. KOMINGOI

JUDGE

11/12/2017

Nodria : I seek leave to appeal and to have certified copies of the ruling.

L. KOMINGOI

JUDGE

Court: Leave to appeal is granted, the 1st defendant to have certified copies of ruling upon payment.

L. KOMINGOI

JUDGE