



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.30 OF 2011**

**SOFT WHITE BEACH LIMITED.....PLAINTIFF**

**=VERSUS=**

- 1. JOSEPH KASHURU MUMBO**
- 2. MASUMBUKO YERRY KOMBE**
- 3. THE HON. ATTORNEY GENERAL**
- 4. THE CHIEF LAND REGISTRAR**
- 5. THE DISTRICT LAND REGISTRAR.....DEFENDANTS**

**R U L I N G**

1. The Application by the 1<sup>st</sup> Defendant dated 14<sup>th</sup> April 2015 is seeking for the dismissal or striking out of the Plaintiff's suit with costs.
2. The Application is premised on the grounds that the 1<sup>st</sup> Defendant has never been served with Summons to Enter Appearance, Plaint or other pleadings; that sometimes in September 2014, the 1<sup>st</sup> Defendant was informed by Mr. Kenga advocate to give him instructions which he did and that later on the 1<sup>st</sup> Defendant came to realise that Mr. Kenga was also acting for the 2<sup>nd</sup> Defendant who is the 1<sup>st</sup> Defendant's adversary and who had swindled the 1<sup>st</sup> Defendant of his money and the suit property.
3. In response, the Plaintiff's advocate submitted that M/s Kenga & Co. Advocates entered appearance for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and filed a defence on 13<sup>th</sup> May 2011.
4. The Plaintiff's counsel deponed that Mr. Kenga advocate was instructed by the 1<sup>st</sup> Defendant; that Summons to Enter Appearance and the Plaint addressed to the 1<sup>st</sup> Defendant were served on the firm of M/S Kenga & Co. Advocates and that the 1<sup>st</sup> Defendant has been attending court.
5. I have considered the submissions by the 1<sup>st</sup> Defendant's counsel.
6. The Affidavit of service sworn on 20<sup>th</sup> April 2011 shows that the 2<sup>nd</sup> Defendant was served with summons through his wife on 20<sup>th</sup> April 2011. However, the process server was unable to trace the 1<sup>st</sup> Defendant.

7. On 13<sup>th</sup> May 2011, the firm of Kenga & Co. Advocates filed a Defence for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Annexed on the counter-claim is a Verifying Affidavit signed by the 2<sup>nd</sup> Defendant and the consent signed by the 1<sup>st</sup> Defendant.

8. In the consent that was filed in this court on 13<sup>th</sup> May 2011, the 1<sup>st</sup> Defendant authorised Masumbuko Yerry Kombe, the second Defendant to sue and sign an affidavit and liaise with M/S Kenga Advocates in prosecuting or defending the matter. The consent was drawn by the firm of Kenga & Co. Advocates and signed by the 1<sup>st</sup> Defendant. The consent was annexed on the Defence and counter-claim.

9. The Plaintiff has annexed on its Replying Affidavit a copy of the 1<sup>st</sup> Defendants summons to Enter Appearance that were served on the firm of Kenga Advocates on 4<sup>th</sup> April 2011.

10. In his Affidavit, the 1<sup>st</sup> Defendant has admitted that he instructed the firm of Kenga & Co. Advocates to act for him in writing in the year 2014.

11. According to the 1<sup>st</sup> Defendant, the instructions he gave to Mr. Kenga were backdated to the year 2011 by the advocate.

12. The consent that the 1<sup>st</sup> Defendant signed was filed in this court together with the Defence and counterclaim on 13<sup>th</sup> May 2011. The 1<sup>st</sup> Defendant has not denied that he signed the document. Having admitted that he signed the document, he cannot turn around and state that the document was backdated to 2011 by his advocate. How can the document be backdated by his then advocate if it has a court stamp of 13<sup>th</sup> May, 2011.

13. The firm of Kenga & Co. Advocates was served with Summons to Enter Appearance for the 1<sup>st</sup> Defendant on the basis of the instructions that the 1<sup>st</sup> Defendant gave to his advocate whereafter a Defence and Counter-claim together with a Verifying Affidavit and the 1<sup>st</sup> Defendant's consent were filed.

14. Order 5 Rule 8(2) of the Civil Procedure Rules provides that Summons may be served upon an advocate who has instructions to accept service and to enter appearance to the Summons and Judgment in default of appearance may be entered after such service.

15. I am satisfied that the 1<sup>st</sup> Defendant gave to the firm of Kenga & Co. Advocates instructions on or before 13<sup>th</sup> May, 2011 to receive summons on his behalf and the said summons were duly served on his advocates. Indeed, the 1<sup>st</sup> Defendant signed the letter of instructions on 13<sup>th</sup> May 2011.

16. If the 1<sup>st</sup> Defendant has now realised that Mr. Kenga is acting for the 2<sup>nd</sup> Defendant who is his adversary, he has the option of engaging another advocate, which he has done, and proceed with defending the suit, and nothing else.

117. For those reasons, I dismiss the 1<sup>st</sup> Defendant's Application dated 14<sup>th</sup> April 2015 with costs.

Dated and delivered in Malindi this 23<sup>rd</sup> day of **October** 2015.

**O. A. Angote**

**Judge**