



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 27 OF 2012**

**MIRKO BLAETTERMANN (suing through his power of attorney**

**SHABIR HATIM ALI.....1<sup>ST</sup> PLAINTIFF**

**PUBLIC TRUSTEES (suing on behalf of**

**HELMUT KOSTER.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**DAVID MWANGI MUIRURI.....1<sup>ST</sup> DEFENDANT**

**G. HOTMANN COTOVA.....2<sup>ND</sup> DEFENDANT**

**EMPRIRES AND PARTNERS INVESTMENTS.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. The Application before me is dated 27<sup>th</sup> June, 2013. In the Application, the Public Trustee is seeking for the following orders:

**(a) That there be a stay of any further proceedings herein pending the final determination of Malindi Chief Magistrate Criminal Case number 345 of 2011.**

**(b) The costs to the Application be provided for.**

2. The Application is based on the grounds that the Judgment in criminal case number 27 of 2012 may have a bearing on this suit.

**The Applicant's case:**

3. According to the Affidavit of the Assistant Deputy Administrator General, who is the interim personal representative of the Estate of Helmut Koster, there exists a criminal case number 345 of 2011 in which the 1<sup>st</sup> Defendant has been charged with the forgery of proceedings in Malindi CMCC No. 18A of 2004 whose outcome will have a bearing on the disposal of this suit.

4. It is the Applicant's deposition that he needs time to investigate and trace the known relative or next of kin of Helmut Koster who purportedly died in Germany.
5. The 1<sup>st</sup> Plaintiff has not opposed the Application.

### **The Respondents' case**

6. The 1<sup>st</sup> Respondent, who is also a director of the 2<sup>nd</sup> Defendant deponed in his Replying Affidavit that the Applicant has not shown the nexus between the party he represents and criminal case number 345 of 2011 to warrant the stay of these proceedings.
7. It is the Respondents' deposition that the Public Trustee informed this court that he shall not be filing any papers in this matter and that all along, the court has been acting and relying on unsubstantiated allegations of the death of Helmut Koster.
8. The Respondent finally deponed that civil suits are independent of criminal cases and that in any event, it is the criminal case in the lower court that should be stayed and not this matter.
9. It is the Respondents' case that the 2<sup>nd</sup> Plaintiff is being used as a proxy by the 1<sup>st</sup> Plaintiff in this particular case with a view of continuing to enjoy the interim injunctive orders that were issued in his favour by this court.
10. The parties filed their respective submissions which I have considered.

### **Analysis and findings**

11. This suit was commenced by way of a Plaint by the 1<sup>st</sup> Plaintiff. In the Plaint, the 1<sup>st</sup> Plaintiff has averred that the 1<sup>st</sup> Defendant, with the intention to defraud the 1<sup>st</sup> Plaintiff, the registered proprietors of the suit property, forged court proceedings and a Judgment in a fictitious suit number Malindi CMCC No. 18 A of 2004.
12. According to the 1<sup>st</sup> Plaintiff, the effect of the forged court proceedings, judgment, decree and order was meant to defraud and vest away the property and have the same unlawfully transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by the 1<sup>st</sup> Defendant.
13. The penultimate prayer in the Plaint is for a declaration that the proceedings in the purported Malindi CMCC NO. 18A of 2004 and all the orders therein are null and void and that the Land Registrar, Mombasa do expunge entry numbers 6,7,8, 10 and 11 from the register.
14. The 1<sup>st</sup> Plaintiff's claim, as I see it, is that he was dispossessed the suit property vide a dubious and forged court order.
15. During the hearing of the 1<sup>st</sup> Plaintiff's Application for injunctive orders, the court posed several questions which included the authenticity of the proceedings in CMCC No. 18A of 2004 and whether, if at all, the lower court in CMCC No. 18A of 2004 had jurisdiction to deliver a judgment in favour of the 2<sup>nd</sup> Defendant on 29<sup>th</sup> March 2004. The court proceeded to grant an interim order of injunction in favour of the 1<sup>st</sup> Plaintiff. The court went further and ordered that the Public Trustee be joined in these proceedings to represent the interests of the Estate of Helmut Koster who was said to be dead.
16. It would appear that Meoli J, on the basis of the evidence that was before her, was not convinced that even if the 1<sup>st</sup> Plaintiff succeed in his claim, he will be entitled to the entire suit to the exclusion of Helmut Koster or his Estate thus the order to enjoin the Public Trustee in these proceedings.
17. The 1<sup>st</sup> Plaintiff having complied with the order of court to join the Applicant, It was incumbent upon the Applicant to investigate and report to the court whether the said Helmut Koster is still alive or he is dead.
18. However, such investigations cannot go on forever. In the event that Helmut Koster or his Estate is not found, and the court finds that he is entitled to the suit property, the Constitution provides at Article 62(1)(d) that the land shall revert to the public. This suit can therefore not be stayed on the grounds that the Public Trustee, one year down the line, is still investigating to find out the legal representatives of Helmut Koster. The suit must proceed with or without the said party.
19. On the issue as to whether I should order for a stay of this suit on the ground that there is an ongoing criminal case in the lower court, I am of the view that the law allows this suit to proceed

- alongside the criminal matter. In any event, it will still be in order for any party to rely on the evidence that may or has been produced in the criminal case in this suit and vice versa.
20. The suit before me is a civil claim whose standard of proof is on a balance of probability unlike in the criminal proceedings where the standard of proof is beyond reasonable doubt. This suit was filed on the basis of the evidence that was in the 1<sup>st</sup> Plaintiff's possession and not on the basis of the outcome of the criminal case. I therefore do not see the effect that the criminal case will have on the outcome of this suit considering that the criminal case is in the lower court.
21. In the circumstances, and for the reasons I have given above, I dismiss the 2<sup>nd</sup> Plaintiff's Application dated 27<sup>th</sup> June 2013 with costs.

Dated and Delivered in Malindi this 6<sup>th</sup> Day of **March 2014**

**O. A. Angote**

**Judge**