



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO. 27 OF 2012**

**MIRKO BLAETERMAN (suing thr' his power of Attorney)**

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

**PUBLIC TRUSTEE (suing on behalf of Helmut Koster).....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

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

**GHOTMAN COTOVA.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**EMPIRES AND PATNERS INVESTMENTS.....3<sup>RD</sup> DEFENDANT/ RESPONDENT**

**R U L I N G**

**Introduction:**

1. Before me is the Application by the 1<sup>st</sup> Plaintiff dated 9<sup>th</sup> July 2014. In the Application, the Applicant is seeking for the following reliefs:

**a. THAT summary judgment be entered in favour of the Plaintiffs as per the prayers in the Plaint herein.**

**b. THAT thereupon the suit property be restored back in the names of KARL HEINZ BORNER, MIRKO BLATTERMANN and HELMUT KOSTER.**

**c. THAT the costs to this application and those of the main cause be provided for.**

**The 1<sup>st</sup> Plaintiff's/Applicants' case**

2. The Application is premised on the grounds that Mirko Blaetterman is the bona fide and lawful owner of the property having bought the same from Wolfgang Kosing in the year 1995 and that in the year 2004, the 1<sup>st</sup> Defendant forged documents purporting to be proceedings of a civil suit in a fictitious suit being Malindi CMCC No. 18A of 2004 and that the 1<sup>st</sup> Defendant further forged a Judgment and Decree in the said fictitious suit which he used to vest the Plaintiff's property in the name of the 2<sup>nd</sup> Defendant.

3. It is the 1<sup>st</sup> Plaintiff's case that the magistrates and the clerks whose names appear in the purported proceedings, judgment, decree and vesting order have sworn affidavits denying the signatures and knowledge of the said proceedings.

4. The Applicant has annexed on the Application the Affidavit of Daniel Ogembo Ogola who was a Senior Resident Magistrate in Malindi between February 2004 and June 2007 and the affidavit of Joyce Manyasi Metu who was stationed in Malindi in the year 2004 as the Chief Magistrate.

5. The two magistrates have denied in their affidavits that they wrote or signed the proceedings and judgment in CMCC No. 18A of 2004.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants'/Respondents' case:**

6. The 1<sup>st</sup> and the 2<sup>nd</sup> Defendants (Respondents) filed their Grounds of Opposition and averred that the power of attorney purportedly issued to Shabir Hatim Ali is a forgery; that the grounds upon which the Application is premised do not support the prayer for summary judgment and that the matter should be set down for hearing.

7. The Defendants also filed a Replying Affidavit in which they repeated the averments in their Grounds of Opposition.

8. I have considered the Affidavits on record. I have also considered the written submissions on record.

#### **Analysis and findings:**

9. Order 36 of the Civil Procedure Rules allows a Plaintiff to seek Summary Judgment for the recovery of land against a trespasser by way of an application. Order 36 Rule 1(2) provides that such an Application shall be supported by an affidavit either of the Plaintiff or of some other persons who can swear positively to the facts verifying the cause of action.

10. The law pertaining to summary judgment is now well settled. If the Defendant shows a bona fide triable issue, he must be allowed to defend the suit unconditionally. (See **Kendrical Restaurant Vs Devish & Co. (1952) EACC77 and Sonze Fiquarido & Co. Ltd Vs Moving Hotel Ltd (1952) EA 425**).

11. According to the 1<sup>st</sup> Plaintiff's Amended Complaint dated 19<sup>th</sup> November 2012, the suit property was at all material times registered jointly in the name of Karl Heinz Borner and Helmut Koster whose address is unknown, together with Mirko Blaetterman; that Shabir Hatim Ali has the power of attorney to manage the suit premises and that in the year 2004, the 1<sup>st</sup> Defendant forged documents by using a fictitious suit and had the suit property registered in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

12. The 1<sup>st</sup> Plaintiff has particularised the alleged fraud by the Defendants in the Complaint.

13. In their Defence, the Defendants have averred that the 1<sup>st</sup> Plaintiff has no locus standi to file the suit; that the 1<sup>st</sup> Plaintiff transferred the suit property to the 2<sup>nd</sup> Defendant by way of a consent in Malindi CMCC No. 18A of 2004 and that Shabir Hatim Ali has a forged power of attorney allegedly given to him by the 1<sup>st</sup> Plaintiff.

14. The Defendants have further averred that the issues raised in this suit were dealt with in Malindi HCCC No. 72 of 2007 and that the suit is therefore *res judicata*. The Defendants have also averred that there has been a conspiracy to frustrate justice by destroying court records in CMCC No. 18A of 2004.

15. The issue as to whether the 1<sup>st</sup> Plaintiff, Shabir Hatim Ali has the *locus standi* to bring this suit was argued at length when the 1<sup>st</sup> Plaintiff filed his Application for injunctive orders. Due to the mystery

surrounding the initial real owner (s) of the suit property before the Defendants purportedly acquired it through a court order, Meoli J ordered as follows:

**“In accordance with the provisions of Order 9 Rule 1 and 2 of the Civil Procedure Rules, any further applications, appearance or act required by the law shall be made or done by the following persons namely;-Mirko Blaetterman, Heinz Borner, Helmut Koster, Syliva Hilderg and Erna and David Muiruri and the prosecution of this matter shall be by the party in person, if the party is alive and not through persons holding powers of attorney albeit executed by such living parties.”**

16. It would appear that the court was not convinced, prima facie, that Shabir Hatim Ali had a valid power of attorney thus the above order.

17. Whether the said Shabir Hatim Ali has a valid power of attorney from Mirko Blattermann or any other person to bring this suit is an issue that can only be determined at the main hearing of the suit. Whether the said Shabir Hatim Ali has the *locus standi* to prosecute this suit is a triable issue. In any event, the court has already ruled that the suit can only be prosecuted by the registered owners of the suit property and not by a person holding a power of attorney. That order has not been varied or set aside.

18. The issue as to whether the 1<sup>st</sup> Defendant forged a court order in Malindi CMCC No. 18A of 2004 can only be determined at full trial, notwithstanding the affidavits by the two magistrates who have denied having wrote and signed the proceedings in that suit.

19. The 1<sup>st</sup> Plaintiff did not swear any affidavit to the facts relating to the acquisition of the suit property to verify the cause of action as required by the law.

20. There are other triable issues in the Defence that I need not go into at this stage. All I can say is that the Defendants are only supposed to show that there Defence raises a triable issue, which they have shown. Once that is shown, the Defendants are entitled to defend the suit unconditionally.

21. For the reasons I have given, I dismiss the 1<sup>st</sup> Plaintiff's Application dated 9<sup>th</sup> July, 2014 with costs to the Defendants.

Dated and delivered in Malindi this 10<sup>th</sup> day of **October**, 2014.

**O. A. Angote**

**Judge**