



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.)

CIVIL APPEAL NO. 55 OF 2014

BETWEEN

MIRKO BLAETERMAN (Suing through his Power of Attorney,

SHABIR HATIM ALI).....1ST APPELLANT

PUBLIC TRUSTEE

(Suing on behalf of HELMUT KOSTER).....2ND APPELLANT

AND

DAVID MWANGI MUIRURI.....1ST RESPONDENT

GHOTMANN COTOVA.....2ND RESPONDENT

EMPIRERS & PARTNERS INVESTMENTS.....3RD RESPONDENT

***(Appeal from the ruling and order of the Environment & Land Court at Malindi, (Angote, J.)
dated 10th October 2014***

in

E & L C C No. 27 of 2012)

JUDGMENT OF THE COURT

To call the proceedings giving rise to this interlocutory appeal mendacious is to pay them an underserved compliment. Lack of candor on the part of the main actors is glaring, and permeates the entire proceedings. At the center of the dispute is a property in *Malindi* described as **Plot No 622 (original No. M.17G), (the suit property)** which the 1st respondent, **David Mwangi Muiruri**, and the two outlandishly named unincorporated entities, **Ghotmann Cotova** and **Empirers & Partners Investments** claim to own. The 1st appellant, **Shabir Hatim Ali** equally stakes claim to the suit property on behalf of **Mirko**

Blaeterman of Italy, as does the Public Trustee on behalf of the Estate of **Helmut Koster**, of unknown address, who is said to be dead although no definitive evidence to that effect is available. Another person, **Karl Heinz Borner**, is alleged to have an interest in the suit property jointly with Blaeterman and Koster, but he does not feature in this litigation at all.

The appeal arises from the ruling and order of **Angote, J.** dated 10th October 2014 in Malindi **Environment & Land Court Case No. 27 of 2012**. By that ruling the learned judge dismissed, with costs, the 1st appellant's application dated 9th July 2014 seeking summary judgment and transfer of the suit property to the names of **Karl Heinz Borner, Mirko Blaeterman** and **Helmut Koster**. The learned judge was satisfied that there were weighty triable issues in dispute that could only be determined after a full trial.

The rather murky background to the dispute is as follows. By a plaint dated 29th February 2012 and amended on 19th November the same year, **Shabir Hatim Ali**, purporting to be the holder of a power of attorney from Mirko Blaeterman and the Public Trustee, on behalf of the estate of Helmut Koster, instituted proceedings against the three respondents seeking among others, a declaration that the transfer of the suit property to the respondents was illegal, null and void, an order for the cancellation of the transfer, an order for re-registration of the suit property in the names of Karl Heinz Borner, Mirko Blaeterman and Hemut Koster and a permanent injunction to restrain the respondents from trespassing into, alienating or otherwise dealing with the suit property.

The foundation of the suit was the allegation that the respondents had connived to dispossess the true owners of the suit property, namely Borner, Blaeterman and Koster, through an elaborate fraudulent scheme. The fraud, it was pleaded, entailed the "manufacture" of fictitious court proceedings, namely **Malindi Chief Magistrates Court Case No. 18A of 2004**, against the three owners of the suit property. From that fictitious suit, it was further pleaded, an equally fictitious judgment and decree was issued which resulted in the transfer of the suit property to the 2nd respondent, an unincorporated entity in which the 1st respondent claims to be a "director". Subsequently the suit property was transferred in quick succession to two other entities before ultimately being transferred to the 3rd respondent, another unincorporated entity said to be "owned" by one **Sylvia Hildergard Erna**, from whom the 1st respondent claims to hold a power of attorney. Thereafter the respondents forcefully evicted Ali, the caretaker, from the suit property, leading to the suit.

By their defence dated 9th March 2012, the respondents contested the suit on, among other grounds, that Ali had no standing in the case because the power of attorney he purported to hold from Blaeterman was a forgery. The respondents also contended that the suit property was transferred, ultimately in the name of the 3rd respondent, an unincorporated entity, pursuant to a genuine and lawful consent order entered into in Malindi CMCC No. 18A of 2004, which was filed by the 2nd respondent against Borner, Blaeterman and Koster. It was further pleaded that by a subsequent vesting order issued, not by the High Court, but by the Principal Magistrate, in Malindi Miscellaneous Suit No. 5 of 2007, the Registrar of Titles Coast Province was directed to issue a provisional title in respect of the suit property, to the 2nd respondent. It was lastly pleaded that the latter court file had mysteriously gone missing from the registry and that the suit by the appellants was an abuse of the process of court in view of various other pending or concluded civil and criminal proceedings between the parties over the same suit property.

Although it was alleged that the suit property was transferred to the 2nd respondent vide a consent order, what was produced purported to be a judgment and decree issued on 29th March 2004 after a full hearing in Malindi CMCC No 18A of 2004. That hearing was alleged to have been presided over by **Ms. Joyce Manyasi, Chief Magistrate**. As regards the vesting order in Malindi Principal Magistrates Court Misc. Suit No 5 of 2007, the same was dated **22nd February 2007** and was purportedly issued by **Mr. D. Ogembo, Senior Resident Magistrate**.

On 11th July 2014, the appellants took out a motion on notice under **Order 36 Rule 1** of the **Civil Procedure Rules** praying that summary judgment be entered in their favour as prayed in the plaint. In

short, the ground upon which the application was based was that the transfer of the suit property to the respondents was based on forged proceedings. The application was supported by two affidavits sworn by **Ms. Joyce Manyasi Matu** and **Mr. Daniel Ogembo Ogola** both of whom were alleged to have presided over the impugned proceedings leading to the transfer of the suit property.

Ms. Joyce Manyasi Matu deposed in an affidavit sworn on 2^{0th} June 2014 that she had served in Malindi as the Chief Magistrate in 2004 and that having perused the purported proceedings in CMCC No 18A of 2004, she was certain that she did not preside over them. She also contended that neither the language of the proceedings nor the signature thereon was hers, before concluding that the proceedings were a forgery.

On his part, Mr. Daniel Ogembo Ogola swore an affidavit on 26th June 2014 in which he similarly denied ever having signed or certified the proceedings in CMCC No 18A of 2004. He deposed that in Malindi he had served as a Senior Resident Magistrate while the proceedings purported to have been certified by him as a Resident Magistrate.

The respondents opposed the application vide grounds of opposition dated 15th July 2014 and a replying affidavit sworn by the 1st respondent on the same date. As far as it was relevant, the respondents maintained that there were triable issues in the suit, including, in particular the allegations of fraud and forgery made by the appellants against the respondents and vice versa.

Upon the dismissal of the Motion by Angote, J. as aforesaid, the appellants have preferred this interlocutory appeal. Although the appeal is founded on 8 grounds, the only question, in our opinion, is whether the learned judge erred by finding that there were triable issues that demanded a full hearing. With the consent of the parties the appeal was canvassed by written submissions.

In summary, the appellants' case, as argued by **Mr. Richard Otara**, their learned counsel, is that the learned judge erred by refusing to enter summary judgment in favour of the appellants. It was contended that with the affidavits sworn by Ms. Matu and Mr. Ogola denying the authenticity of the proceedings in CMCC No 18A of 2004, the appellant's case was crystal clear, unanswerable and not worthy of a full trial. Counsel submitted that the way the proceedings were recorded as well as the language used strongly suggested that they were forged. In addition, it was submitted that it was only the High Court, and not the Chief Magistrates Court, that had jurisdiction over the suit property by virtue of its registration under the former **Land Titles Act**. In the same vein, it was also submitted that the Senior Resident Magistrate lacked jurisdiction to issue a vesting order.

Lastly, counsel criticized the learned judge for requiring a supporting affidavit from the 1st appellant whilst Order 36 Rule 1 allowed an affidavit to be sworn by any person who could swear positively to the facts verifying the cause of action. In the appellants view, Ms. Matu and Mr. Ogola were such persons and no other affidavit was necessary from the 1st appellant.

The 1st respondent appeared for himself and the 2nd respondent. Not surprising, their written submissions veered off the issues in the appeal and purported to address a myriad other issues. Be that as it may, as far as the issues in the appeal are concerned, the respondents' submission was that there were many triable issues disclosed in the suit, which could only be resolved in a full trial. To that extent, it was submitted that the High Court had not erred by dismissing the appellant's application for summary judgment. It was further argued that the appellants and the respondents had made grave allegations of fraud and forgery against each other, which could only be proved or disproved after hearing evidence, including of handwriting experts.

We have carefully considered the application for summary judgment, the ruling of the High Court thereon, the grounds of appeal, the submissions by the respective parties and the law. It is now well settled that the purpose of applications for summary judgment is to enable a plaintiff to get immediate relief where it is clear and obvious that the defendant has no serious defence to the claim.

Authorities are equally clear and consistent that to justify an order for summary judgment, the matter must be plain and obvious. If the Court is not satisfied that the matter is plain and obvious, the defendant must be given unconditional leave to defend the claim, for it is not the policy of the law to deny a party his right to have his case determined in a proper trial entailing the calling of witnesses, discovery and oral evidence tested by cross examination. That is why in **OSODO V. BARCLAYS BANK INTERNATIONAL LTD (1981) KLR 30** this Court stated:

“Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally”.

(See also **INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION V. DABER ENTERPRISES LTD (2000) 1 EA** and **CONTINENTAL BUTCHERY LTD V. NDHIWA (1989) KLR 573**).

In **KENYA TRADE COMBINE LTD V. SHAH (CA No. 193 of 1999)**, this Court also emphasized that a defence that raises triable issues does not mean a defence, which must ultimately succeed at trial.

In this case the appellants as well as the respondents have pleaded in the plaint and the defence fraud and forgery against the opposite parties and the particulars of the alleged fraud and forgery have been specifically pleaded. We agree with the learned judge that such contested issues cannot be satisfactorily resolved on the basis of affidavit evidence only. In **WESTMONT POWER KENYA LTD V. FREDERICK & ANOTHER T/A CONTINENTAL TRADERS & MARKETING (2003) KLR 357**, this Court cautioned against entering summary judgment where serious allegations of fraud and other wrongdoings are alleged.

It must also be remembered that allegations of fraud must be strictly proved, so that whilst a standard of proof beyond reasonable doubt is not required, nevertheless a standard more than mere balance of probabilities is called for. (See **R. G. PATEL V. LALJI MAKANJI (1957) EA 314**). Such a standard of proof can hardly be satisfied solely by contested affidavit evidence, which has not been subjected to cross-examination.

Ultimately, like the High Court, we are satisfied that there are triable issues in this suit and that the only way to unravel the mess in this matter is to conduct a full trial with witnesses subjected to cross examination. It is a convoluted matter singularly unsuited for summary judgment. In the premises, we find that the appeal has no merit and the same is hereby dismissed with costs. It is so ordered.

Dated and delivered at Malindi this 3rd day of July 2015

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.