



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO. 28 OF 2014**

**GABRIELA SUSAT.....PLAINTIFF/APPLICANT**

**VERSUS**

**COSIMO ROSAFIQ.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**BAY OCEAN LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. I have before me for determination two applications both filed by the 1<sup>st</sup> Defendant Cosimo Rosafiq. In the 1<sup>st</sup> Notice of Motion application dated 2<sup>nd</sup> October 2019, he prays for a stay of execution of the orders issued herein on 24<sup>th</sup> September 2019 and urges that the Warrants of Arrest issued against himself be set aside.

2. In the second Notice of Motion dated 31<sup>st</sup> October 2019, the 1<sup>st</sup> Defendant urges in addition to the orders sought in the first application; that this Court be pleased to declare that he had complied fully with the consent order in May 2019 and that this Court is functus officio and has no power or jurisdiction to order his arrest. He also urges the Court to declare that it has been used as an instrument of extortion in an attempt to force him to pay Kshs 501,627.45/- when there is no order or decree requiring him to make that payment.

3. The grounds upon which the two motions are brought are listed inter alia in the second application as well as in an Affidavit sworn by Kinyua Kamundi Advocate on behalf of his Client as follows:-

*i) The Police are looking for the 1<sup>st</sup> Defendant to arrest him in execution of the warrants. The 1<sup>st</sup> Defendant is bedridden. He is a sick old man;*

*ii) The Warrants of arrest are an extortion tool used by this Court to force the 1<sup>st</sup> Defendant to pay Kshs 501,627.45/- when there is no decree or order requiring the 1<sup>st</sup> Defendant to make any payment. The process of Court must not be used for Commission of Criminal Offences. The Court and the Plaintiff are aware that the matter was settled and any monies payable under the terms of the consent are payable by the Plaintiff;*

*iii) Warrants were issued in a suit that no longer exists. The Court being aware that the suit was settled ought to have recalled and cancelled the warrants of arrest. The Plaintiff being aware that the suit was settled ought not to have attempted to execute those warrants;*

*iv) The consent order given on 19/9/2017 provided that upon compliance with order 1 in the same consent, the matter be marked as settled. Order 1 required the 1<sup>st</sup> Defendant to transfer ten shares in the 2<sup>nd</sup> Defendants to the Plaintiff. The 1<sup>st</sup> Defendant transferred those shares in May 2019.*

*v) This Court is functus officio and it was erroneous for the Plaintiff to obtain Warrants from the Deputy Registrar or from the Court in a matter which was marked as settled upon orders recorded by the same Court. The Court is not a party and has no interest in the matter and therefore had no power or jurisdiction to issue warrants of arrest in a matter that was settled;*

*vi) It is oppressive and (an) abuse of the Court process to seek to arrest a sick, bedridden old man in execution of orders in a suit that was long settled. The Plaintiff seeks to force the 1<sup>st</sup> Defendant to pay moneys that are not covered by the consent and she does so without setting aside or reviewing the said consents; and*

*vii) Unless the application is allowed, the 1<sup>st</sup> Respondent will suffer severe loss of his liberty and his health. The Court will also*

***expose itself to embarrassment and to accusations that it continues to interfere in a matter that is settled.***

4. The application is opposed. In a Replying Affidavit sworn and filed herein on 2<sup>nd</sup> December 2019 by Ms Gabriella Susat (the Plaintiff), she asserts that the applications as filed are baseless, misconceived, unmentorious and legally defective as they do not raise any legal or factual issues to warrant the exercise of this Court's discretion in the Applicant's favour.
5. The Plaintiff avers that the 1<sup>st</sup> Defendant only partially complied with the orders of 19<sup>th</sup> September 2017 by transferring the ten shares in the 2<sup>nd</sup> Defendant long after the application for contempt of Court dated 22<sup>nd</sup> May 2018 was filed.
6. The Plaintiff further asserts it is the 1<sup>st</sup> Defendant's duty or obligation to pay the outgoing service Charge of Kshs 501,627.45/- before the same could be transferred to the Plaintiffs as the same accrued during a period when the 1<sup>st</sup> Defendant was the one in possession of the suit property.
7. I have perused and considered the two applications by the 1<sup>st</sup> Defendant as well as the response thereto by the Plaintiff. I have equally perused and considered the oral submissions made before me by Mr. Kinyua Kamundi, Learned Counsel for the 1<sup>st</sup> Defendant/Applicant and Mr. Kelvin Mbura, Learned Counsel for the Plaintiff.
8. The two applications were precipitated by a Ruling delivered by this Court in this matter on 26<sup>th</sup> June 2019. That Ruling arose from an application filed herein by the Plaintiff dated 22<sup>nd</sup> May 2018. Having heard the application including a response thereto filed by the 1<sup>st</sup> Defendant on 18<sup>th</sup> June 2018, this Court determined in the impugned Ruling that the Defendant had not complied with the terms of the consent Judgment as endorsed on 25<sup>th</sup> September 2017 and allowed the Plaintiff's application as prayed.
9. Subsequently and in accordance with Prayer No. 2 of the Plaintiff's application, summons were issued against the 1<sup>st</sup> Defendant requiring him to appear before the Court to show cause why he should not be jailed as sought by the Plaintiff.
10. A Notice to Show Cause was thereafter served upon the 1<sup>st</sup> Defendant. When the Notice came up for hearing on 24<sup>th</sup> September 2019 there was no appearance for the 1<sup>st</sup> Defendant despite an Affidavit of Service filed by the Plaintiff indicating that he was served. Having satisfied itself that the Notice was served upon the 1<sup>st</sup> Defendant, this Court issued a Warrant of arrest against him to be effected by the OCS Kilifi Police Station.
11. By the two applications before me, the 1<sup>st</sup> Defendant now urges this Court to reconsider the Ruling and the Orders issued thereafter and to set them aside altogether as a matter of right. It is the 1<sup>st</sup> Defendant's position that the Warrants of arrest are an extortion tool issued by this Court to force the 1<sup>st</sup> Defendant to pay Kshs 501,627.45/- when there is no decree or order requiring the 1<sup>st</sup> Defendant to make any payment.
12. The 1<sup>st</sup> Defendant further asserts in a supporting Affidavit sworn by his Counsel Kinyua Kamundi that this Court and the Plaintiff are aware that the matter was settled and any monies payable under the terms of the consent are payable by the Plaintiff.
13. The Counsel for the 1<sup>st</sup> Defendant deposes at paragraph 9 of his Affidavit that the Court should set aside the orders and warrants *which it issued when it had no power to do so as the matter had been marked as settled and that the Court does not have any interest in the matter and should not go against consent orders recorded by the parties and endorsed by the Court.*
14. From my perusal of the 1<sup>st</sup> Defendant's application herein, it is clear to me that he and his Counsel consider this Court to have made a grave error on the facts and the law in regard to the matter that was before the Court. That must explain the vain attempts by the Counsel to scandalize the Court in the Supporting Affidavit.
15. That being the case, it is my view that the only option that was open to the Applicant herein was to file an Appeal to the Court of Appeal and not to come to this Court purporting to seek a review and/or setting aside the orders before the same Court.
16. Indeed, a perusal of the two Affidavits filed in support of the two applications do not attempt in any way to advance the 1<sup>st</sup> Defendant's case. As it were, It was clear to me that when the Plaintiff filed the application for contempt on 22<sup>nd</sup> May 2018, the 1<sup>st</sup> Defendant had not complied with the terms of the consent order. From his applications before me, it is indeed clear that he did not attempt any compliance therewith until May 2019, some one year after he filed a response to the Plaintiff's application aforesaid and a month before this Court delivered the impugned Ruling.
17. In the premises, I did not find any merit in the two applications filed herein by the 1<sup>st</sup> Defendant. The same are dismissed with costs to the Plaintiff.

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of February, 2020.**

**J.O. OLOLA**

**JUDGE**