



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Environmental & Land Case 446 of 2008

GARDEN ESTATE COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

GULBANU D/O HUSSEIN JAN MOHAMED.....1ST DEFENDANT/RESPONDENT

AMIRALI AKBARALI GULAM HUSSEIN NANJI.....2ND DEFENDANT/RESPONDENT

FIROZ AKBARALI GULAM HUSSEIN NANJI.....3RD DEFENDANT/RESPONDENT

RULING

0. The Defendants filed a Chamber Summons dated 21st February 2011. This application was supported by the affidavit of Firoz Akbarali Gulamhussein Nanji deponed on the 22nd February 2011 and the affidavit sworn by the same deponent dated 6th October 2008. The defendants are seeking orders that, leave be granted to the defendants to deliver the interrogatories in the terms of an annexed draft of proposed interrogatories. This is based on the grounds that:
0. The plaintiff's claim against the defendants relates to ownership of land Reference Number 209/2069/5 (the property) which is registered in the name of the defendants.
 1. The plaintiff claims to be the owner of the property.
 2. The validity of the documents relied upon by the plaintiff to assert ownership of the property has been questioned by the defendants.
 3. The court compelled the plaintiff to produce documents for inspection by an order made on 9th June 2010. This included the documents whose validity has been questioned by the defendants. The inspection which was conducted on 28th June, 2010 revealed certain discrepancies.
 4. The defendants have by letters dated 8th July 2010, 5th August 2010 and 11th August 2010 asked the plaintiff to produce certain other documents they are entitled to inspect pursuant to the order of 9th June 2010. The plaintiff has failed to produce the documents.
 5. It is therefore necessary to deliver interrogatories to the plaintiff in order to determine the genuineness or otherwise of the documents of the documents relied upon by the plaintiff.
 6. The proposed interrogatories relate to the subject matter of this suit, are necessary for the fair disposal of this matter and will save costs.

0. This application was opposed by the plaintiff. It filed its grounds of opposition on 11th March 2011 stating that this application has been filed as an afterthought and that the application is meant to circumvent the order made on the 9th June 2010. The plaintiff further went on to state that it fully complied with the said order of 9th June 2010 and therefore the present application is *Res-Judicata*. The plaintiff in its grounds of opposition also raised the grounds that this application is meant to seek evidence before the full trial is conducted and therefore it is prejudicial to it and finally the purported interrogatories are irrelevant as there are no agreed issues filed which makes it almost impossible to ascertain in their relevance.

0. Both parties filed written submissions and authorities which I have read.

During the hearing on 22nd May 2012, the defendants/applicants highlighted the five points namely; That both parties claim ownership of the property, that the Respondents did not file an answer to the affidavit and therefore the contents of the Applicants application are admitted and accepted, that there is no criticism in the interrogatories which are decided and set out, that the defendants/applicants have to get courts assistance to inspect the plaintiff's/respondents documents of title, that the discrepancies were discovered in the plaintiff's/respondents documents of title. The applicants/Defendants' advocates relied on the case of **Aggarwal –vs- Official Receiver (1967) E.A 585** where it stated that the general principle is to allow such interrogatories as are necessary either for disposing fairly or more expeditiously of the case or for the purpose of saving costs.

0. Counsel for the Plaintiff/Respondent stated that this court is being asked to make an order for the defendants to administer interrogatories to the plaintiff, he sought that the Court to be guided by the principle of the law and authorities. He also stated that the application is *Res-Judicata* maintaining that the court had previously made an order for the plaintiff to produce certain documents for inspection there was also an order to supply particulars. He argued that if there was no compliance the applicants /defendants would have come to court to complain about noncompliance of the order but instead the Defendants/applicants have disguised this application to cover up on what they did not attain in their earlier application which gave rise to the order of June 9th 2010. Counsel went further to explain that interrogatories were supposed to be questions but his contention was that the defendants were seeking evidence and opinion in the documents in existence. He asked me to look at Clause 1, 1(a), 1(b), 1(c), 1(d), and 1(e) of the draft proposed interrogatories. He concluded that the applicants could seek information on the documents they claim are not genuine from companies' registry and city council of Nairobi.

0. The Plaintiffs/ Respondents counsel also used the case of **Aggarwal –vs- Official Receiver (1967) E.A 585**. He said that the court has no duty to separate the interrogatories for the parties. He stated that the interrogatories are mixed, not comprehensive and will therefore not achieve any purpose. His contention was that they are fishing for evidence they cannot argue and that the applicants are saving time.

He was of the opinion that since there is a counterclaim, they will demonstrate the elements of fraud and pointed out Paragraph 5 of the counterclaim they say they said they have no knowledge of the building and at paragraph 8 they seek to demolish the building they have no knowledge of.

0. Counsel for the Defendants/Applicants stated in reply that an affidavit is evidence and insisted that a ground of opposition is not evidence but a summary of facts.

On the issue of the application being *Res- Judicata* he stated that it was wrong for three reasons being firstly they needed to show the same subject matter to argue so and said that the order given on 9th June 2010 to produce documents for discovery is distinct from delivering documents for interrogatories. Secondly, the issue should have been between the same parties .He stated that they were trying to grant admissions having looked at the documents and are not fishing for evidence.

0. I have read the pleadings and the supporting affidavits filed by the parties cautiously. I have also

considered the submissions of both counsels during the hearing in court. The issue before me is whether this court should grant leave to the Applicants to deliver interrogatories as couched in the annexed draft of proposed interrogatories. I have analyzed the case of Aggarwal –vs- Official Receiver (1967) E.A 585 which has been extensively referred to by both parties which is clear; the granting of leave interrogatories is a matter of discretion of the judge. At page 589 of this Case, the court cannot grant leave to deliver interrogatories if the interrogatories are mixed up and with objectable issues which could end up being oppressive and unnecessary in the circumstances.

1. I have noted that there was an order from this court dated 9th June 2010 directing the plaintiff to produce for inspection to the defendants any or all other relevant documents in its power and control relating to the issue in the suit within 21 days. There are also particulars filed and served upon the defendants advocates on 28th June 2010 pursuant to the said order of 9th June 2010 asking the defendants to deliver to the defendants particulars of the plaintiff in terms of the requested for particulars. The Defendants have not disputed that they did not inspect the documents, what the defendants want now is answers to the interrogatories they have annexed in the application. The applicants have actually acknowledged the fact that documents were produced for their inspection and their issue now is the validity and genuines of the documents they inspected. The applicants' contention is that the documents they inspected seemed not to be authentic and that is the reason they want interrogatories.

The issue of genuineness of a document is a matter of the court to determine and not for the applicants and I will therefore ask the applicants to wait for the full hearing where witnesses will be called to testify for and against this suit. That is when the court will determine which documents are genuine and which ones are not. There are also other avenues in government institutions that can be used by either party to determine the genuines of documents. I therefore find that the interrogatories will serve no useful purpose. Interrogatories are not intended to provide a substitute for evidence in a suit and therefore the court will not sanction an attempt to serve interrogatories under the guise of seeking evidence. The interrogatories annexed to the application also sums up the particulars and some of the questions have been objected to by the Respondents and if I were to grant the orders as sought one party would end up feeling oppressed which will defeat the intention of interrogatories.

0. I order the parties to comply with Order 11 of the Civil Procedure Rules before the full hearing as it is not the duty of the court to go through the interrogatories to separate the good from the bad and give leave in respect of good parts only. In the upshot, this court finds that there is no merit in the defendants' application dated 21st February 2011 and the same is dismissed with costs to the Respondents.

Order accordingly.

Dated, Signed and delivered this 26th day of July, 2012

**R. OUGO
JUDGE**

In the Presence of:-

.....For the Applicant

.....For the Respondent

.....Court Clerk