



REPUBLIC OF KENYA

1. ALI NASORO

2. KHAMIS MOGUSU.....PLAINTIFFS/APPLICANTS

**[Suing on Their Own Behalf and on behalf
Of all the Residents of Mpirani Area, Miritini
Location, Mombasa Occupying C.R. 43800]**

-VERSUS-

1. GOLDEN SPARROW TRADING LIMITED

2. AFRICAN GAS AND OIL COMPANY LIMITED...DEFENDANTS

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RULING

The plaintiffs moved the Court by Notice of Motion dated 29th October, 2009 and brought under Order L of the Civil Procedure Rules and s. 3A of the Civil Procedure Act (Cap.21, Laws of Kenya).

The substantive prayer was that this Court do direct that the plaintiffs/applicants' and those whom they act for, together with a valuer duly instructed by them, be provided with security by the OCS Changamwe and/or Police Officers under him, to enable a valuation exercise to be carried out in the relation to the plaintiffs/applicants' structures standing on the suit property.

The general grounds on which the application is based are as follows:

- (i) *a valuation report in regard to the structures of the plaintiffs/applicants standing on the suit property – is a crucial piece of evidence to be relied upon by the plaintiffs/applicants at the trial;*
- (ii) *there have in the past been ugly incidents at the suit property, following the removal of some of the plaintiffs/applicants;*
- (iii) *to avoid any breach of the peace, or threat to the security and safety of the plaintiffs/applicants and their valuer, it is necessary that the OCS Changamwe Police Station and/or Police Officers under him supervise the exercise.*

Khamis Mogusu, one of the applicants, swore a supporting affidavit in which he deponed that he is a resident of Mpirani, Miritini in Coast Province. The deponent said he had been advised by advocates to make discovery of documents, with advocates for the defendants, prior to the set date for the hearing of the suit, and that among the documents required during trial is a valuation report on structures standing on the suit property. The deponent depones that he and his co-plaintiffs have approached a valuer who is ready and willing to visit the suit property to carry out a valuation; but this valuer fears for his safety, given the past history of conflicts at the scene.

Ezra J. Pakter, the Managing Director of the 2nd defendant company swore a replying affidavit on 11th November, 2009 deponing that the application is in bad faith: because “the plaintiffs’ structures are not built nor are the plaintiffs in possession of the suit premises, L.R. No. MN/VI/4737 Cr. No. 43800 Miritini, Kilindini District.”

The deponent avers that the plaintiffs are “seeking orders to trespass onto the defendants’ property which property is not the subject-matter of this suit”.

In a further affidavit dated 18th November, 2009 *Khamis Mogusu* made depositions denying the statements in the replying affidavit.

Learned counsel *Mr. Maosa*, for the applicants, submitted that in para. 6 of the defendants’ statement of defence dated 3rd March, 2009 the defendants have undertaken not to evict the plaintiffs without “having first purchased another property to settle them [on],.....as well as compensate them for their structures”. The plaintiffs/applicants have conceded that some among them, during the month of April,

2009 did receive *ex gratia* payments in settlement of their claims, and on that basis undertook to vacate the suit property; but those who declined settlement are now seeking to settle their matter.

The plaintiffs/applicants have already filed a *list of documents*; and they have exchanged with the defendants a *draft agreed statement of issues*.

Counsel urged that the purpose of the instant application is to enable the plaintiffs to obtain a piece of evidence, namely valuation reports, for their case. This piece of evidence, it was urged, is important for the purpose of ascertaining the compensation due to the plaintiffs, in respect of their structures standing on the suit property which they have to leave behind as they move out. Already, counsel urged, the defendants have done a valuation of the said structures, but there is a difference of opinion on the true value of those structures.

Counsel noted that the defendants are opposing such proposed valuation of structures that will be abandoned by the plaintiffs – as shown in the replying affidavit of *Ezra J. Parkter* of 11th November, 2009. But counsel urged that in the defence filed by the defendants (para.7), there is an admission of the plaintiffs/applicants being on the suit property – and thus the suit property is not vacant and there has been no amendment of the statement of defence to state that the suit property is not occupied by the plaintiffs/applicants. Moreover, counsel submitted, the defendants did pay out *ex gratia* payments to *some* of those in occupation, and a consent was reached, and a list of those who were parties to the consent, filed together with the consent of 7th April, 2009.

Counsel urged that the sole purpose of seeking a valuation of the plaintiffs' structures, is to engage the terms of Order X rule 11A of the Civil Procedure Rules which deals with discovery of documents; and that this is to ensure that the plaintiffs are not prejudiced at the trial.

Counsel asked for the application to be allowed with costs; and for a date to be given when the valuation exercise shall be carried out under the supervision of the OCS, Changamwe Police Station who shall provide security.

Learned counsel *Mr. Oloo*, for the defendants, contended that the applicants had come before the Court in bad faith – because the respondent's evidence shows that there are no structures built on the suit premises, nor are the applicants in possession of the suit premises.

Still relying on the affidavit evidence, counsel submitted that the orders sought are only for purposes of mischief – because the applicants are seeking to use the offices of the Police “to justify an illegal process”. Counsel contended that the applicants had not come to Court with clean hands, “as a process of such nature can only be carried out by a Government valuer”. Counsel contested the application, among other things, had not disclosed the identity of the proposed valuer; and that the applicants were merely seeking to disrupt the quiet possession by the defendants, of the defendants' property.

As counsel for the respondents has only re-emphasized the contents of the replying affidavits, he brought forward no new point of law or principle such as would resolve the dispute.

But counsel for the applicants has made reference to the admitted state of fact, as set out in the respondents' statement of defence dated 23rd March, 2009 and filed on 24th March, 2009. The relevant paragraph is No. (7), which thus states:

“The defendant ...admits the contents [of] Paragraph 6 of the Plaint, save that in good faith and through the local administration, they communicated their undertaking to relocate the plaintiffs to another property that it would purchase on the plaintiffs' behalf, and [make] payment to them in the form of compensation.....”

Now paragraph 6 of the Plaint which is thus being admitted, thus states:

“The plaintiffs aver that the 2nd defendant has, through the Local Administration, communicated.....its undertaking to relocate the plaintiffs to another property that it would purchase on the plaintiffs' behalf, and [make] payment to them of compensation to cover disturbance and the plaintiffs' investment on the suit property”.

The defendants cannot deny the content of their own pleadings. This Court takes it as a fact, that the applicants do have certain developments on the suit property, and it is conceded that the defendants are to pay compensation for the same.

It is a relevant question in the suit, *what value* is to be placed on the said developments; and so it is entirely in order for the applicants to come now before the Court, seeking orders on the modality for placing a *value* on the developments in question. This Court was informed that the principle of compensation has indeed been taken a stage further, with the defendants, on their own, undertaking a valuation; but the outcome of this valuation is not the subject of agreement – and this is precisely why the applicants are seeking to have their valuer also take stock of the said developments, and provide a valuation.

The report of such a second valuer, it is clear, would be a material document of evidence to guide the parties, and to guide the Court, and indeed, its production belongs to the pre-trial stage of discovery and inspection of documents.

Therefore, the plaintiffs' application is for allowing, on the basis of specific orders as follows:

(1) The plaintiffs/applicants shall identify and appoint a particular valuer whose particulars shall be filed in Court, and shall be supplied to the defendants, and to the OCS Changamwe Police Station – within 14 days of the date hereof.

- (2) *The plaintiffs/applicants shall report to the OCS Changamwe Police Station, for the purpose of taking a suitable date occurring within 30 days of the date hereof, for conducting a valuation of the plaintiffs' structures which they will be abandoning on the suit premises.*
- (3) *The OCS Changamwe Police Station shall, on the appointed day, provide security to the named valuer of the plaintiffs/applicants, and to the applicants as well as those whom the applicants represent, to ensure the effective conduct of the proposed valuation exercise on the suit land.*
- (4) *The costs of this application shall be in the cause.*

DATED and DELIVERED at MOMBASA this 14th day of May, 2010.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Mr. Ibrahim*

For the plaintiffs/Applicants: *Mr. Maosa*

For the Defendants/Respondents: *Mr. Oloo*