



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 176 of 2007

KENYA ANTI- CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

V E R S U S

JOHN KINYUA1ST DEFENDANT/RESPONDENT

ROCKHOUND PROPERTIES LTD..... 2ND DEFENDANT/RESPONDENT

R U L I N G

Kenya Re-Insurance Corporation Limited is a public corporation. The Plaintiff brought this suit seeking to recover from the 2nd Defendant the property comprised in Land Reference Number 1160/613, off Ndege Road, at Karen in Nairobi, which belonged to the corporation but which was transferred to the Defendant following agreement of sale dated 31st August, 2005 between the two. On the land stand a residential house, amongst other developments. It is alleged by the Plaintiff that the 1st Defendant was by the time a director of the corporation and had also had an interest in the 2nd Defendant company. It is further alleged that the corporation did not authorize this transaction and that, although the agreement of sale and transfer documents show that the property was sold for KShs. 12 million, no consideration whatsoever was paid for the property. Lastly, the Plaintiff claims the sale and transfer of this property to the 2nd Defendant offended regulations regarding the disposal of public property. The 1st and 2nd Defendants were blamed in fraud for the sale and transfer. Hence the suit.

The 2nd Defendant did not enter appearance or file defence. There was therefore requested and obtained a default judgment. The 1st Defendant defended the claim by denying that he was either a director or shareholder of the 2nd Defendant. He pleaded misjoinder. Both the plaintiff and the defence pleaded the existence of **Anti-Corruption Criminal Case No. 40 of 2008 at Makadara Law Courts** in which the 1st Defendant was charged by the Plaintiff in regard to the same property. The 1st Defendant pleads that it was premature and prejudicial for the Plaintiff to file the present suit in view of the criminal charges that he faces. He pleaded that he may seek to have these civil proceedings stayed to await the outcome of the criminal case and apply to amend the defence as may be necessary thereafter to avoid a conflict of interest. This is because, he contends, he has the right to reserve his defence in the criminal proceedings.

The Plaintiff then filed a notice of motion under **Order 10 rule 7** of the **Civil Procedure Rules** seeking leave to deliver interrogatories for the examination of the 1st Defendant and for the Defendant to provide answers to the interrogatories within 10 days of service. The application was on the ground that the Defendant's defence was unclear, ambiguous and uncertain; that the answers to the interrogatories herein will clarify and/or reveal the nature of the Defendant's defence and thereby enable the

Plaintiff confront it with certainty; and that the answers to the interrogatories will assist the court to determine not only the issues between the parties but also the entire suit expeditiously. The application was supported by the affidavit of John Lol Koloi who has investigated the case relating to the subject matter. To the affidavit was annexed the questions marked “JL – 1” in respect of which the Plaintiff is seeking answers. The questions are as follows:-

- (a) Wasn't the Defendant a Director of Finance of the Plaintiff in the year 2005?
- (b) Did not the Defendant issue instructions for the transfer of the suit property to the 2nd Defendant?
- (c) If the Defendant issued instructions for the transfer of the property to the 2nd Defendant, did he have any authority from the Plaintiff or any other person for the transfer of the property?
- (d) Did the Defendant present cheques 003300 and 005319 for the sums of KShs. 11,062,461/= and KShs. 1,070,043/= as purchase price for the suit property?
- (e) In what respects does the suit herein relate to the criminal case at Makadara Court?

The 1st Defendant filed grounds of opposition in defence of the application. The grounds are that what is sought in the interrogatories amounts to evidence; they relate to new matters not subject of the plaint; they are subject of the judgment already entered against the 2nd Defendant; they are prejudicial in view of the pending criminal case; and that the 1st Defendant cannot answer questions in respect of the 2nd Defendant, a limited liability company, which is a separate legal entity.

Mr. Ngaah for the Plaintiff and Aminga, Opiyo, Masese Advocates for the 1st Defendant filed written submissions on the application which I have considered. They both referred to **Mulla on Civil Procedure, 17th Edition, Vol. II** regarding the purpose of interrogatories, what interrogatories may be allowed and what may not be allowed. Pages **632** to **637** are relevant. When summarized, the object and purpose of serving interrogatories is to enable a party to require information from his opponent for the purpose of maintaining his own case and for destroying the adversary's case. They are confined to facts relevant to the matters in question. A party seeks to know what case he is going to meet at the hearing, but he is not supposed to seek facts which exclusively constitute the evidence of his opponent's case. Interrogatories, when properly used, have the effect of shortening litigation and serve the interests of justice.

This application has to be determined while bearing in mind the criminal case filed by the Plaintiff against the 1st Defendant over the same matter. The 1st Defendant has in his favour the constitutional protection against self incrimination. It is also material that the Plaintiff has a default judgment against the 2nd Defendant in whose name the property it seeks to recover was transferred. It was the 2nd Defendant who allegedly bought the land from the corporation in question. The 2nd Defendant is pleaded to be a limited liability company registered under the provisions of Chapter 486 of the Laws of Kenya. It is a legal entity separate from the 1st Defendant. The plaintiff alleged that the 1st Defendant has an interest in the company. The interest was not disclosed in the plaint. To this, the 1st Defendant stated in his defence that he is neither a shareholder nor a director of the company. That squarely places the burden on the Plaintiff to call evidence to demonstrate the interest the 1st Defendant has in the company. In other words, the 1st Defendant is not being unclear, uncertain or unambiguous in response to the Plaintiff's claim. The Plaintiff knows exactly what case it is going to meet in relation to the claim that the 1st Defendant has an interest in the company.

The second material claim by the Plaintiff was contained in paragraph 4 of the plaint, that the 1st Defendant was a Director of Finance and Corporate Services of the Corporation. The Defendant has not denied that and it cannot therefore be an issue. The last claim was contained in paragraph 7 of the plaint, that the instructions to transfer the property to the 2nd Defendant came from the 1st Defendant. The 1st Defendant neither denied nor admitted the claim, but pleaded that his answer to the claim would prejudice him in view of the pending criminal case. It should be noted that when the Plaintiff decided to file both civil and criminal proceedings against the 1st Defendant they was bound to face such a plea. In any case, the Plaintiff states that it found out about the instructions when it was conducting investigations into the transactions. That would mean it holds evidence to support the instructions. Such evidence is in its possession and it would be unfair to fish the same from the 1st Defendant. In other words, what the Plaintiff seeks constitutes evidence of his opponent's case.

In conclusion, I find the application not merited and is consequently dismissed with costs.

DATED AND DELIVERED AT NAIROBI

THIS 30TH DAY OF SEPTEMBER 2010

A. O. MUCHELULE

J U D G E