



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Environment & Land Case 75 of 2008**

**MARIA ROSITA CARDOZO suing through her appointed agent**  
**MASAI MARA SOPA LODGE LIMITED.....PLAINTIFF**  
**VERSUS**  
**ROBERT KIBAGENDI OTACHI.....1<sup>ST</sup> DEFENDANT**  
**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By a plaint filed on 3<sup>rd</sup> March 2008 by the Plaintiff against the Defendants, the Plaintiff sought the following orders:

- (a) A declaration that a transfer of the suit land **LR No NAIROBI/BLOCK 90/235** to the 1<sup>st</sup> Defendant was and is null and void.
- (b) An order directing the 1<sup>st</sup> Defendant to deliver the certificate of lease improperly issued to the 1<sup>st</sup> Defendant for cancellation.
- (c) An order directing the 2<sup>nd</sup> Defendant to cancel the certificate of lease improperly issued to the 1<sup>st</sup> Defendant in respect of **LR No. NAIROBI/BLOCK 90/235**.
- (d) An order directing that the title to the suit property being **LR No NAIROBI/BLOCK 90/235** does revert to the original and right owner namely **MARIA ROSITA CARDOZO** the Plaintiff herein.

The Plaintiff also sought costs of the suit and interest thereon.

The Defendant upon being served with summons filed a defence denying the whole claim of the Plaintiff and averred that he is the registered proprietor of the suit property. In paragraphs 6 and 8 of the statement of defence he stated:

**“6” The 1<sup>st</sup> Defendant further states that he has been responsible for the payment of land rent over the suit property and puts the Plaintiff to strict proof of the allegations thereof.**

**“8” The 1<sup>st</sup> Defendant denies paragraph 6 of the plaint and avers that he is a purchaser for value**

**without Notice and any defects if any at all did not vitiate his acquired legal rights in the suit premises.**

The Plaintiff upon being served with the statement of defence wrote the Defendant requesting for particulars as follows.

1. Paragraph 6

Of the allegation that the 1<sup>st</sup> Defendant has been responsible for payment of all land rents and rates over the suit property.

- (a) (i) State the dates of all the land rent demand notices addressed to the 1<sup>st</sup> Defendant and receipts for payment if any.
- (ii) Produce copies of demand notices and receipts
- (b) (i) State the dates of all the rates demand notes addressed to the 1<sup>st</sup> Defendant and receipts if any.
- (ii) Produce copies of demand notices and receipts.

2. Paragraph 8

Of the allegation that the 1<sup>st</sup> Defendant is a purchaser for value without notice and that any defect if any or at all did not vitiate his legal rights acquired in the suit premises,

- (a) (i) Identify the Sale Agreement
- (ii) The date of the Sale Agreement
- (iii) The names and address of the vendor in the sale agreement.
- (iv) The purchase price
- (v) The date of registration of the Sale Agreement
- (b) (i) Identify transfer document.
- (ii) The date of execution of the transfer.
- (iii) The names and address of the transferor
- (iv) The date of registration of the transfer.

Dated at Nairobi this 28<sup>th</sup> day of May 2008.

The Plaintiff upon being served with request for particulars replied as follows:

PARTICULARS UNDER ORDER VI RULE 8:

The Defendant in answer to the request for particulars dated 28<sup>th</sup> May 2008 gives particulars as follows:-  
1 of paragraph 6.

(a) (i) and (ii) to be produced during discovery and inspection.

(b) (i) and (ii) to be produced during discovery and inspection.

(2) Of paragraph 8

(a) (i) (ii) (iii) and (iv) During discovery and inspection.

(v) Not necessary

(b) (i) (ii) (iii) and (iv) During discovery and inspection

Dated at Nairobi this 11<sup>th</sup> day of June 2008.

The plaintiff upon receipt of the particulars from the Defendant wrote on 16<sup>th</sup> June 2008 as follows:

**“We acknowledge receipt of the particulars you filed in court.**

**We regret that the particulars are not sufficient and we need to see the documents you allude to and which you say will be disclosed during discovery and inspection.**

**Unless those documents are supplied to us within the next 14 days, we will apply to court so that your client is compelled to produce those documents to us.”**

On 16<sup>th</sup> July 2008 the Plaintiff brought this Chamber Summons under Order VI Rule 8 of the Civil Procedure Rules seeking orders:

1. That the 1<sup>st</sup> Defendant do within 14 days from the date of the order herein deliver to the Plaintiff further and better particulars of the defence in terms of the Request for particulars dated 28<sup>th</sup> May 2008.

2. That in default the defence to strike out.

3. That the Defendant do pay to the Plaintiff the costs of this application.

The application is premised on the ground that the Defendant has failed to provide the further and better particulars requested.

The application is also supported by an affidavit sworn by George Gitonga Murugara Counsel for the Plaintiff.

The Respondent upon being served with the Chamber Summons filed a replying affidavit in which he averred that he had complied with the request for particulars.

Mr. Gitonga learned Counsel appearing for the Plaintiff submitted that the alleged particulars filed by the 1<sup>st</sup> Defendant on 11<sup>th</sup> June 2008 are not particulars at all. The particulars requested for are necessary to enable the Plaintiff to meet the 1<sup>st</sup> Defendant’s defence. For the 1<sup>st</sup> Defendant to say that he will produce the documents during discovery is not proper. The only answer the Plaintiff has is that the 1<sup>st</sup> Defendant does not have those documents and urged the court to compel the 1<sup>st</sup> Defendant to supply

proper and better particulars.

While Mr. Oyugi learned Counsel for the 1<sup>st</sup> Defendant in opposition to the application first submitted that the particulars supplied by the 1<sup>st</sup> Defendant were sufficient as copies of documents could only be availed during discovery and inspection stage. This was confirmed by the Plaintiff in his letter dated 16<sup>th</sup> June 2008 in which he sought to be supplied with copies of documents within 14 days.

In conclusion he urged the court to dismiss the Plaintiff's application with costs.

It is strite that the function of particulars is:

- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved.
- (2) to prevent the other side from being taken by surprise at the trial.
- (3) to enable the other side to know what evidence they ought be prepared with and to prepare for the trial.
- (4) to limit the generality of the pleadings.
- (5) to limit and define the issues to be tried and to which discovery is required and
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

In every pleading, a certain amount of detail, is necessary to ensure clearness and to prevent surprise at the trial. Each party must state his case with precision; otherwise his opponent will not know for certain what is the real point in dispute and therefore will not be able to properly prepare his evidence for the trial. But what particulars to be stated must depend on the facts of each case.

After considering the application in light of the affidavit evidence on record and submissions by Counsel I am satisfied that what is contained in the request for particulars can be dealt with during discovery and inspection. It is a clear principle of law that he who alleges must prove. If the 1<sup>st</sup> Defendant alleges that he is a purchaser of the suit property for value without notice he must prove that. If he alleges that the suit property was transferred to him he must prove that. If he alleges that he has been responsible for the payment of land rent and rates over the suit property since the land was transferred to him he must prove that. And that he cannot do without discovery of the documents he intends to use to prove his case.

It is the duty of the Applicant to persuade the court to exercise its discretion in his favour. This he has failed to do.

Accordingly the Plaintiff's application is dismissed with costs to the 1<sup>st</sup> Defendant.

Dated and delivered at Nairobi this 12th day of June 2009.

**J. L. A. OSIEMO**

**JUDGE**