



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 139 of 2008

MINT HOLDINGS LIMITED..... PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

HAMPSTEAD HOLDINGS LIMITED.....2ND DEFENDANT

SENTARA DEVELOPERS LIMITED

(Originally Sentara Holdings Ltd).....3RD DEFENDANT

MUKESH JAMNADAS GOHIL.....4TH DEFENDANT

JAMES KIMUTAI CHERONO.....5TH DEFENDANT

LAXMANBHAI CONSTRUCTION LTD.....6TH DEFENDANT

R U L I N G

Mint holdings Limited (hereinafter referred to as the plaintiff) has come to this court by way of a chamber summons dated 30th July, 2008 said to be brought under Order I rule 10 & 22, Order VIA Rule 1(1), 3, 5 & 8 and Order V Rule 17 Section, 3A, 63(e) and 100 Civil Procedure Act. The plaintiff seeks the following orders: -

- (1) That this application be certified as urgent and service thereof be dispensed with in the first instance.
- (2) That the plaintiff be and is hereby granted leave to serve the plaint, summons and this application upon the 3rd, 5th and the intended 7th and 8th defendant by substituted service by advertisement in local Daily Newspaper and/or as the Court may deem fit.
- (3) That this Honourable Court do hereby order that the name of Taarifa Gardens (Holdings) Limited and Sington Investments Ltd be and is hereby added to this suit as the 7th and 8th defendants.
- (4) That the plaintiff be and is hereby granted leave to amend the plaint by addition of the names of Taarifa Gardens Ltd and Sington Investments Ltd as the 7th and 8th defendants, respectively.
- (5) That the costs of this application be in the cause.

(6) That the costs of this application be awarded to the plaintiff/applicant.

The application was served on the defendants Kenya Railways Corporation, Hampstead Holdings Limited, Sentara Developers Limited, Mukesh Jamnadas Gohil, James Kimutai Cherono and Laxmanbhai Constructions Ltd, (who are the 1st, 2nd, 3rd, 4th, 5th and 6th defendants respectively). The application was apparently not served on Taarifa Gardens Holdings Ltd and Sington Investments Ltd who are the intended 7th and 8th defendants.

At the hearing of the application preliminary objections were raised on behalf of the 2nd defendant and the 6th defendant. For the 2nd defendant it was contended that the application is defective and bad in law as it was drawn by a firm who was not properly on record. It was submitted that the advocates who prepared and filed the application were not originally on record. Although a notice of appointment of advocates had been filed, the same was defective as no notice of intention to act in person was served on the defendants before the notice of appointment was filed as required under Order III Rule 7 and 9. It was therefore maintained that the application was filed by advocates who are strangers to the suit. Secondly, it was maintained that the supporting affidavit is defective as it was sworn in support of an injunction and not joinder of the parties. The preliminary objection taken on behalf of the 6th defendant is that the plaintiff has no legally enforceable interests in the suit property and there is therefore no legal basis upon which any additional parties can be joined in the proceedings. It was contended that the plaintiff having assigned his rights to Sington Investments Limited as deponed in Paragraph 6 of the supporting affidavit, the plaintiff no longer has interests or cause of action relating to the suit property. It was maintained that there was therefore no juridical basis upon which a cause of action can be disclosed. Counsel for the 6th defendant relied on the case of ***Telemetrix Plc vs Modern Engineers of Bristol (Holdings) Plc and Others (1985) 1 BCC 417, 420*** wherein Peter Gibson J. stated that there must be juridical basis for joining a party. It was submitted that in this case there was no cause of action disclosed upon which a joinder can be sustained.

For the 1st defendant it was submitted that Order I Rule 10(2) of the Civil Procedure Rules allows the court at any stage either *Suo motto* or the application of either parties to order for the joinder of a party who is necessary to the suit. It was submitted that the defence of the 6th defendant, brings in the intended 7th defendant as the person to whom the suit property has been transferred and who is now developing the suit property. It was therefore submitted that the intended 7th defendant is a necessary party to the suit. The intended 8th defendant is also a necessary party as paragraph 10 and 11 of the plaint avers that the rights in the sale agreement relating to the suit property have been transferred to the 8th defendant. It was submitted that the issue of the cause of action was not for demonstration at that stage but may be reconsidered later.

For the plaintiff it was submitted that the court has no jurisdiction at this stage to look into the merits or demerits of the proposed amendments. In this regard the court was referred to ***Milimani HCCC No.66 of 2005 Elegant Freighters vs Oriental Commercial Bank***. Counsel for the plaintiff maintained that the only issue the court should look at, at this stage is whether the intended party is a necessary party. The court was referred to ***Civil Appeal No.222 of 1998 Central Kenya Limited vs Trust Bank Ltd and Others***, wherein the court of Appeal stated that the paramount consideration in an application under Order I Rule 10(2) of the Civil Procedure Rules, is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit. It was submitted that the issues being raised in the preliminary objection could be addressed in an application for striking out. In this regard the case of ***Civil Appeal No. 118 of 1999 Jane Muthoni Mungai & Another vs Texcal house service station*** was cited. Regarding the issue of representation it was contended that the plaintiff had filed a notice of intention to act in person which was duly served on Amolo and Co. Advocates. It was contended that the plaintiff's advocates have complied with Order III Rule 9 but there has been no complaint from the plaintiff's previous advocates.

I have considered the preliminary objections which was raised and the submissions made by the parties' advocates. It is evident to me that in arguing the preliminary objection the parties crossed the line and

proceeded to submit on the actual application to enjoin the 7th and 8th defendants. At this stage however, the court is not concerned with the merits of that particular application. The court is only concerned with the preliminary objection. Regarding the preliminary objection raised by the 2nd defendant, I have perused the record and it is evident that the notice to act in person was filed by the plaintiff on the 21st July, 2008. Under Order III Rule 8 of the Civil Procedure Rules the plaintiff was required to serve the notice not only on his former advocates but also on every other party to the cause or matter. No affidavit of service has been availed by the plaintiff confirming such service. To that extent the plaintiff has not complied with the provisions of Order III Rule 8 of the Civil Procedure Rules.

I have considered whether this failure makes the notice to appear in person filed by the plaintiff null and void, and the subsequent notice of appointment filed on 25th July, 2008 and served on the parties advocate on the 29th July, 2008 also null and void. In my considered view, the plaintiff substantially complied with Order III Rule 8 of the Civil Procedure Rules by filing in court the notice of intention to appear in person and the notice of appointment of an advocate. The omission to serve the parties' advocates is an irregularity which has not caused any prejudice to the parties. It is a defect which can be cured. As regards the supporting affidavit, it is true that paragraph 28 and 29 supports a prayer by the plaintiff for an injunction against the 7th defendant. That averment does not make the affidavit defective. To the contrary, it supports the application to enjoin the 7th defendant as a necessary party to the suit.

With regard to the preliminary objection taken on behalf of the 6th defendant, while I do concur with the 6th defendant's advocate that there must be a juridical basis for enjoining a party to a suit, that is essentially what the court will have to consider in dealing with the substantive application to enjoin the proposed defendants. It would be premature at this stage to go into the merits of the plaintiff's suit. The court's only concern at this stage is who are the necessary parties to the suit.

For these reasons I find no merit in the preliminary objection and do therefore overrule it. Parties shall take a date before the vacation judge for the hearing of the chamber summons dated 30th July, 2008.

Dated and delivered this 13th day of August, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ashimosi for the plaintiff

Advocate for the defendants absent