



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

Misc. Appli. 139 of 2008

MINT HOLDINGS LTD.....APPLICANT

versus

KENYA RAILWAYS CORPORATION & 5 OTHERS.....RESPONDENT

RULING

The application dated 30th July 2008 is brought pursuant to order 1 Rule 10 and 22, VIA Rule 1 (1) (3) (5) and (8), V R 17, Section 3A, 63 (e) and 100 Civil Procedure Act in which the Applicant Mint Holdings Ltd. seeks orders that the Plaintiff be granted leave to serve the plaint, summons and application upon the 3rd, 5th and intended 7th and 8th Defendants by substituted service by advertisement in the Local Daily Newspapers, that the court do order the name of Taarifa Gardens (Holdings) Ltd. and Sington Investments Ltd. to be added to this suit as 7th and 8th Defendants; That the Plaintiff be granted leave to amend the plaint by adding the names of Taarifa Gardens Ltd. and Sington Investments Ltd. as the 7th and 8th Defendants respectively and that costs be in the cause.

The application is premised on grounds found in the body of the application and a supporting affidavit sworn by Samson Keengu Nyamweya, a director of the Plaintiff.

The application was opposed by the 1st and 4th Defendants and 6th Defendants. Ahmed Isaack Hassan, Counsel for the 4th Defendant filed a replying affidavit dated 22nd August 2008 and also filed grounds of opposition on the same day. The 6th Defendant filed grounds of opposition on 21st August 2008. The Plaintiff claims to have bought LR 209/6440, 2.17 acres and unregistered land 2.15 acres from the 1st Defendant at Kshs.95,472,000/= in 1995. The Plaintiff 1st paid 25% of the purchase price. The receipts evidencing payment were exhibited SKNA-C. The Plaintiff agreed with Hampstead, where the 4th Respondent is a director and Matado Construction, where the late Sunil Behal was a director, that they would acquire an interest in the said land and the Plaintiff would retain 25% of the interest. The three then asked Chawla Advocate to incorporate Sington Investments Ltd to be owned by the three. The Plaintiff nominated Sington Ltd. Investment and assigned its rights as the purchaser, to Sington Ltd and authorized 1st Defendant to execute the sale agreement in the names of its nominee, Sington who was named as a purchaser in terms of the letter (SKM 5 A, B). Hampstead and Matado were not able to raise their share of the purchase price and the 1st defendant gave a 45 day extension upon request by the Applicant. Unknown to the Plaintiff, the 1st, 2nd, 3rd, 4th and 5th Defendants fraudulently colluded,

conspired and transferred the two plots which had been amalgamated into LR 209/12938, to the 3rd Defendant. On discovering the fraud, the Plaintiff lodged a caveat on 7th August 2003 but it was unlawfully removed. That Santara Holdings then lodged a surrender on 13th July 2005 seeking that the lease for 99 years be awarded to it (SK 13) yet the land was private land and not available for allocation by the Commissioner of Lands until the instrument of surrender was registered on 13th July 2005. That the new lease is unlawful as it failed to comply with S.44 of RTA. That upon obtaining the grant, the 3rd Defendant sold the land to the 6th Defendant and the Plaintiff believes that no title could have been passed. That the 6th Defendant has started erecting structures on the land and cutting down trees which will prejudice the Plaintiff's interests.

That the 6th Defendant in its defence filed on 27th May 2008 admitted transferring the property to Taarifa Gardens on 25th September 2007 for Kshs.110,936,010/= and the company is carrying out developments. That 6th Defendant holds 97 out of the 100 shares in Taarifa Gardens while others own 1% each. The Plaintiff fears that the property may be disposed off again and get out of its reach. That the Registrar of Companies had dissolved Santara Ltd. (3rd Defendant) but the Registrar of Companies gazetted notice number 3361 of 13th April 2007 reversing its dissolution. That the process server has been unable to serve the said Santara Ltd. and hence this application.

Ahmed Isaack deponed that he was instructed by four officers of Santara to protest against the Deputy Registrar's attempt to reinstate Santara whilst it had been dissolved vide G.N. 3723 of 19th May 2006, (AIH – 1). That it had been dissolved on 16th May 2006. That it is the Plaintiffs who had tried to have the reinstatement of the said Santara Ltd Co. That on 7th August 2005, the company registry confirmed that the decision to reinstate the company had been reversed. That G.N. 7279 of 8th August 2008 reversed the reinstatement of the 3rd Defendant. He annexed the gazette notice No. 7279 of 8th August 2008 AIH 4.

The 6th Defendant filed grounds of opposition on 21st August 2008 that there is no juridical basis for the joinder of the proposed Defendants as the Plaintiff has no cause of action having admitted that it assigned its interests with respect to the letter of offer relating to the purchase of the property; that the Plaintiff has not annexed a draft amended plaint showing the nature of the proposed amendments, that there is in no factual or legal basis for the Plaintiff to be granted leave to serve the Defendants by substituted service. Mr. Luseno, Counsel for the 6th Defendant added that the Plaintiff has admitted having sold the property to the 6th Defendant. That Santara Ltd. is dissolved and it is futile to continue proceedings against the 6th Defendant and introduce its subsidiary Company. That in the plaint and ground 3 of this application, the assignment to Sington is admitted and therefore cannot sustain an application and that is why they did not annex the sale agreement. That the Plaintiff are not privy to the sale agreement and cannot enforce it.

I have considered the application, affidavits filed in this matter, and the rival arguments by counsel, the authorities that have been cited. This being an application to amend, I would adopt the interpretation of Order I Rule 10(2) Civil Procedure Rules by the Court of Appeal in CA 222/1998 **CENTRAL KENYA LTD V TRUSTBANK LTD & OTHERS**, that the decision as to who to sue is essentially that of the Plaintiff and it is the court's duty to consider the allegations against the named Defendants and if the court considers that they are parties who should have been joined or who were improperly joined then it should make the necessary directions. The applicant herein has a right to bring into these proceedings whoever they think is a proper party and it is then the court can determine whether the allegations against the intended parties have any substance or not.

One of the reasons that the 4th Defendants opposes the substituted service on Santara Ltd. by substituted service is that Santara Ltd. was dissolved and that the Registrar has so confirmed vide a legal notice and it would be an exercise in futility to order substituted service. I have seen the annexures filed by the 4th Defendant. It seems that the said company was dissolved vide Gazette notice 3723 of 19th May

2006 but the said dissolution was reversed vide Gazette notice 3361 of 13th April 2007. Again vide Gazette Notice 7278 the same was dissolved vide Gazette notice 7279 of 8th August 2008. It seems there is a cat and mouse game being played over the dissolution of this company. The company seems to have appointed Counsel to represent them. After the court heard this application, the Applicant's Counsel availed to this court a gazette notice 8125 of 29th August 2008 a corrigenda which states "**In Gazette No. 3361 of 2007, insert '708825 Santara Developers Ltd.'**" It is dated 27th August 2008. I hope the other parties have been notified of that Gazette Notice. The Gazette Notice is a legal document to which it was necessary to draw the court's attention and the fact that by the time the Applicant was heard the Gazette was not yet published. It seems that the said company Santara has been reinstated again. There is quite some confusion caused by the Registrar's Office which seems not to be sure of the position of Santara Ltd and that being the position I will find that Santara Ltd. seems to be in existence and there would be no good reason why it cannot be served by way of substituted service by advertisement since it is deponed that it is difficult to serve their offices. There must be somebody pushing for its dissolution while another is pushing for its reinstatement and the Registrar is dancing to that music. If the position of Santara is clarified later, the Defendant can seek to have it struck off the record if necessary.

The Applicant also seeks the joinder of Taarifa Gardens Ltd. and Sington Investments Ltd. as the 7th and 8th Defendants. The 6th Defendant purchased the land from Santara and the 6th Defendant has subsequently transferred the said land to Taarifa Gardens.

There are serious allegations of fraud levelled against Santara and the other parties to the sale of the land whom the Applicant denies giving the authority to dispose off the land in question. Though the 6th Defendant claims to have acquired an absolute and indefeasible title to the land by virtue of Section 23 of the Registered Land Act, the same can be challenged on account of fraud.

In his affidavit the Applicant claims to have assigned its rights to a nominee, Sington Investments. The question is whether the Applicant made an absolute assignment of its rights to the property or did so partially. That should be determined in the main suit when the agreement will be produced and interpreted by the court.

There are also allegations that even when the Applicant filed a caveat restricting dealings with the land, it was removed without their knowledge. The annexures to the application, letters to 1st Defendant, are indicative of the fact that the Applicant has been questioning the disposition of the said land and it would be unfair for the court to shut out the Plaintiff and to deny the Plaintiff a chance to bring on Board parties who may ultimately be affected by the court's orders.

I appreciate that it is the practice that a draft amended plaint will be exhibited for the court to ascertain the extent of the Plaintiff's claim. The Applicant has not done so but failure to do so cannot in my view defeat the application before this court as it may lead to an injustice.

It was Mr. Luseno's argument that what the Applicant is seeking to do is bringing a shareholder's claim to this court whereas it should be filed at the Milimani Commercial Court under the Companies Act. The substratum of this claim is really land and not the share holding in the company. I believe that would be a different cause of action available to the applicant.

In the result, I find that it is in the interest of justice that leave be granted to the Plaintiff to serve the 3rd, 5th and 7th Respondents by way of advertisement in the 2 Local Daily Newspapers; Taarifa Gardens (Holdings) Ltd. and Sington Investments Ltd. be added to this suit as the 7th and 8th Defendants and the Plaint be amended in those terms. The amended plaint be filed and served within 7 days hereof.

Costs of the application to be in the cause.

Dated and delivered this 5th day of September 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. Ashimosi for Plaintiff/Applicant

Ahmed for 4th Defendant and holding brief for Prof Mumma for 1st Defendant and Mr. Masike for 2nd Defendant

Mr. Amoko for the 6th Defendant

Daniel: Court Clerk