



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

ENVIRONMENT & LAND CASE 2092 OF 2007

KENYA ANTI-CORRUPTION COMMISSION... PLAINTIFF/APPLICANT

VERSUS

**KAPSOEN ESTATES
LIMITED.....DEFENDANT/RESPONDENT**

RULING

By chamber summons dated 19.02.08 stated to be brought under Order VI rules 8 and 16 of the Civil Procedure Rules and section 22 of the Civil Procedure Act, Cap. 21, the plaintiff applied for the following orders:-

1. That the defendant is ordered to deliver to the plaintiff within seven (7) days from the date of service of the order of this court particulars dated 11.12.07 and delivered to the defendant on the same day; in default the defendant's statement of defence dated 31.01.07 is struck out.
2. That the costs of the application be borne by the defendant in any event.

The grounds upon which the application is based are that the defendant has failed to respond to the plaintiff's request for particulars under the rules of the court; that the particulars sought ought to be delivered to avoid a situation whereby the plaintiff may be taken by surprise; and that the defendant has invited the plaintiff to seek interposition of the court.

The application is supported by the affidavit of Joel Samoei sworn on 19.02.08 and filed alongside the chamber summons.

On 28.03.08 the defendant filed grounds of opposition of the same date essentially contending that the chamber summons application is a fishing expedition, not backed by Kenyan civil procedure rules and practice.

At the hearing of the application, the plaintiff/applicant was represented by learned counsel, Mr S.M. Kimani while the defendant/respondent was represented by learned counsel, Mr A.M. Murithi.

Plaintiff's/applicant's counsel said that Order VI is an order for clarity; that the principle purpose of Order VI is to ensure certainty and particularity in pleadings, having regard to each case's circumstances; and that the plaintiff Commission was seeking to know the case it has to meet at the trial. He referred in this regard to the following cases in the plaintiff's/applicant's list of authorities:-

- a) Spedding -vs- Fitzpatrick (1888) Vol. XXXVIII Chancery Division 410 essentially to make the

point that if the defendant relied on any particular acts, the defendant ought to inform the plaintiff of them.

b) Attorney – General -vs- The Corporation of London, 2 MAC. & G. 247 to make the basic point that while the plaintiff may not be entitled at the interlocutory stage to all the evidence by which the defendant company is to prove its case, the plaintiff has a right to know what the defendant's case is.

Plaintiff's/applicant's counsel pointed out that the cause of action in the present case is recovery of land; that paragraph 9 of the defence avers that the defendant company was lawfully registered as the proprietor of the subject property after making requisite payments; and that the plaintiff sought particulars of what is averred in that paragraph under Order VI rule 4 (1) and (2) which he (plaintiff's counsel) contended requires the defendant company to plead specifically every ground of defence it wishes to rely on. Plaintiff's/applicant's counsel gave the following examples of the specificity he alludes to with regard to paragraph 9 of the defence:-

Registration

That the defendant should plead the registration relied on, nature of instrument, etc.

Payment

What was paid, to whom, under what contract, etc.

Prescribed fee

Communication of the premium, etc.

Plaintiff's/applicant's counsel said that the plaintiff's request for particulars is not intended to see the defendant's brief.

With regard to paragraph 11 of the defence, plaintiff's counsel said the plaintiff needs particulars, otherwise the paragraph offends Order VI rule 8 (3).

With regard to paragraph 12 of the defence, plaintiff's/applicant's counsel said the plaintiff asked for particulars of estoppel for the defendant to set out the law and facts pertaining thereto. Plaintiff's/applicant's counsel relied in this regard on Kashibhai -vs- Sempagama [1967] E.A. 16, a judgment by the High Court of Uganda which revolved around a claim for damages for negligence. The plaintiff sought further and better particulars of paragraph 1 of the defendant's defence which read:

'1. The plaint is bad in law and does not disclose any cause of action and the action brought is out of time.'

The Judge opined that it appeared that the defendant intended to raise an objection in point of law in addition to the objection that the plaint disclosed no cause of action. The Judge was of the view that the plaintiff was entitled to know what the other objection was, otherwise he would be taken by surprise at the trial. Accordingly, the Judge allowed the application and ordered the defendant to furnish the plaintiff with further and better particulars.

As regards paragraphs 10 and 14, the plaintiff's/applicant's counsel said he adopted similar arguments and ratio.

It was plaintiff's/applicant's counsel's contention that all particulars sought by the plaintiff were within the defendant's knowledge and that justice demands that the court compels the defendant to deliver the particulars sought. Counsel added that this is litigation in public interest and that the defendant company is bound to make the disclosure sought even if such disclosure will water down its defence or elicit admissions. Plaintiff's/applicant's counsel said he relied on Waynes Merthyr Company -vs- D.

Radford & Co. (1896) 1 Ch. Div. 29, at 35 and 36. There was some debate in that case as to whether delivery of particulars should be before discovery or vice-versa and the Judge observed that there is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars; but that the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances. Plaintiff's/applicant's counsel submitted that the justice of this case requires that the defendant/respondent delivers the particulars sought, which according to plaintiff's counsel are within the defendant's knowledge. I interpose here to note that the court in Waynes' case held that since the defendants had means of ascertaining from their books whether other frauds of the kind alleged had been committed, which the plaintiffs has not, the defendants were not entitled to particulars before giving discovery.

Plaintiff's/applicant's counsel also said he relied on Millar -vs- Harper (1888) Vol. XXXVIII Ch. Div. 110 at 111 and 112 (per Cotton & Bowen, LLJ). It was Cotton L.J.'s opinion that the defendant must know of his own knowledge what furniture his wife had and that the plaintiffs, being only executors, could not be supposed to have any such knowledge. The Judge added: 'The plaintiffs put forward by their statement of claim a right to a certain class of articles, but cannot identify them. It may be right that before trial they should give particulars, but I think giving them ought to be postponed till the defendant has given discovery. Where the Plaintiffs are executors who do not know, and the defendant a person who does know, it is right that discovery should come first. Bowen, L.J. concurred in the following terms: 'I am of the same opinion. It is good practice and good sense that where the Defendant knows the facts and the Plaintiffs do not, the defendant should given discovery before the plaintiffs deliver particulars.'

Additionally, plaintiff's/applicant's counsel said he relied on Turquand & Another -vs- Fearon (1879) Vol. 48 LJQB 703 at 704, which he submitted addresses a provision equivalent to Order VI rule 3, to make the basic point that wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document, or any part thereof, are material.

Finally, plaintiff's/applicant's counsel referred to Davey -vs- Bentinck (1893) I Q.B. 185 to make the point that where a plaintiff is ordered to give particulars, one of the terms of the order may be that the action shall be dismissed unless the particulars are delivered within a certain time.

Plaintiff's/applicant's counsel submitted that this court has power to order the particulars sought to be furnished under Order VI rule 8 and urged the court to compel the defendant/respondent to deliver the particulars sought.

On the other hand, defendant's/respondent's counsel opposed the application. He relied on grounds of opposition dated 28.03.08, based on legal grounds. It was defendant's/respondent's counsel's contention that the defendant company's defence dated 31.01.07 responded to all averments in the plaintiff's plaint dated 24.11.06 to the plaintiff's satisfaction, otherwise the plaintiff/applicant would have applied to strike out the defence under Order VI rule 13 (1) as being inadequate. Counsel submitted that since the defence has not been challenged, it is an adequate and satisfactory response to the averments in the plaint and that what remains is evidence at the hearing.

It was defendant's/respondent's counsel's contention that the particulars sought by the plaintiff/applicant are actually available in the documents listed in the plaintiff's own list of documents dated 19.02.07. Defendant's/respondent's counsel pointed out that the plaintiff Commission has in its list listed documents which the defendant would ordinarily not have been able to get without facing extreme difficulty. Defendant's/respondent's counsel cited the following documents as examples:-

a) Copy of letter of allotment Ref. No. C. 381/50/13 a of 28.08.50 (No.23 on plaintiff's list).

b) Copies of general correspondence and plans exchanged between Department of Lands, City Council of Nairobi and third parties relative to L.R. No.209/13539 (No. 24 on plaintiff's list).

c) Copy of letter Ref. CCC/MMM/320/E dated 28.11.97 by Mrs Z.M. Wandera, Town Clerk Nairobi City Council to the Commissioner of Lands asking that a grant in respect of L.R. No.209/13539 be issued to Nairobi City Council (No. 25 on plaintiff's list).

d) Bound record of Minutes of the full Nairobi City Commission's meeting of 04.08.92 (No. 7 on plaintiff's list).

Defendant's/respondent's counsel said that documents such as the above would not be easily obtainable by the defendant without extreme difficulty, that obtaining them would be costly and time-consuming. Defendant's/respondent's counsel added that in any event the plaintiff Commission listed them as documents it would be relying on in this case.

It was defendant's/respondent's counsel's case that all the information sought relating to paragraph 9 of the defence vide items (a) – (e) in the plaintiff's request for particulars is in the exclusive possession of the City Council of Nairobi and apparently also in the possession of the plaintiff, as per the plaintiff's list of documents. Defendant's/respondent's counsel termed it oppressive to be asked to furnish the above documents as it seems obvious that the plaintiff has copies of the documents. Defendant's/respondent's counsel said the defendant does not have the said documents.

Defendant's/respondent's counsel described as oppressive the plaintiff's request for particulars of persons who transacted on behalf of the defendant company [vide request (g) relating to paragraph 9 of the defence] as in defendant's/respondent's counsel's view the request is an attempt to pierce the defendant company's corporate veil. According to defendant's/respondent's counsel, this is not the right forum for that. Defendant's/respondent's counsel pointed out that if the plaintiff is interested in knowing the persons behind the defendant company, all the plaintiff Commission needs to do is to refer to the following documents in its own list:-

- a) Certified copy of Certificate of Incorporation of the defendant – C. 64917 (No. 13 in plaintiff's list).
- b) Certified copies of Memorandum and Articles of Association of the defendant (No.14 in plaintiff's list).
- c) Certified copy of the Statement of Nominal Capital filed by the Advocates involved in the incorporation of the defendant company (No. 15 in plaintiff's list).

Defendant's/respondent's counsel submitted that all the information sought by the plaintiff is available in the plaintiff's own list of documents.

With regard to paragraph 10 of the defence, defendant's/respondent's counsel said the plaintiff/applicant was asking for particulars of law. It was defendant's/respondent's counsel's contention that the plaintiff can only ask for particulars of fact and that the request for particulars of law is oppressive.

As regards the plaintiff's/applicant's request for particulars relating to paragraph 11 of the defence, defendant's/respondent's counsel drew attention to prayer (b) in the plaintiff's plaint seeking a declaration that the registration of the lease instrument relating to the suit property is wrongful and illegal. Additionally, defendant's/respondent's counsel also drew attention to prayer (e) in the plaint for an order restraining the defendant company or its agents from dealing with the suit property otherwise than by delivery up or transfer to the grantee (City Council of Nairobi).

Regarding plaintiff's/applicant's request (a) for particulars relating to paragraph 12 of the defence, defendant's/respondent's counsel said there is no way the defendant could explain the actions of a third party. Defendant's/respondent's counsel submitted that the plaintiff/applicant should join the City Council of Nairobi – either as defendant to answer questions in the request for particulars or convince the City Council to come in as a plaintiff.

Finally, defendant's/respondent's counsel referred to the following authorities in the defendant's/respondent's list of authorities:-

- a) Akiba Bank Limited -vs- Rekha Chandadis & Another [2007] eKLR which makes the basic point that the requirement to give particulars reflects the overriding principle that litigation between the parties and particularly the trial should be conducted freely, openly without surprises and as far as possible to minimize costs.
- b) Aluta Holdings Limited -vs- Raj Parmar [2005] eKLR to make the basic point that where requisite particulars have been availed to enable either party to confront the opposing party's case, what remains is for the matter to proceed to trial.
- c) Mutua -vs- Anwarali & Brothers Limited [2003] KLR 415 where the High Court (Sergon, J), *inter alia*, held that an order for particulars will not be made where it is shown that it would be unreasonable or oppressive for a party to supply the particulars requested, or where the party so ordered would incur great expenses and face great difficulties.

Defendant's/respondent's counsel urged this court to disallow the request for particulars and allow the suit to proceed to trial, subject to discovery.

In reply, plaintiff's/applicant's counsel essentially made the following points. He said of Aluta's case (*supra*) that it is distinguishable as the defendant had in that case supplied a list of documents while the defendant/respondent in the present case has not done so. Plaintiff's/applicant's counsel drew attention to Order X rule 11A mandatorily requiring every party to make discovery by filing and serving on the opposite party a list of documents relating to any matter in the suit which are or have been in his possession or power within one month after the pleadings are closed. Plaintiff's/respondent's counsel said the defendant/respondent neither complied with the requirements of Order X rule 11A nor made any attempt to respond to the plaintiff's request for particulars. Plaintiff's/applicant's counsel described the defendant's statement of defence as cryptic and having concealed material facts.

Regarding Mutua's case (*supra*), plaintiff's/applicant's counsel said it is also distinguishable as that case related to a claim for personal injuries while in the present case the claim is for recovery of land specifically covered by Order VI rule 8 as read with rule 4; that the rules are intended to ensure that cases for recovery of land are dealt with on the clearest of pleadings; and that Order VI rules 8 and 4 must be given effect.

With regard to the defendant's defence, plaintiff's/applicant's counsel told the court that the plaintiff is not saying the defence does not disclose a reasonable defence but that pertinent averments therein lack particulars and that, therefore, the defendant cannot invoke Order VI rule 13.

As regards documents, plaintiff's/applicant's counsel said the plaintiff's application is not for production or inspection of documents and that, therefore, it cannot be satisfied by the plaintiff's list of documents.

On the issue of abuse of the court process, plaintiff's/applicant's counsel said the cause of action accruing to the plaintiff is statutory, provided for under section 7 of the Anti-Corruption and Economic Crimes Act, No.3 of 2003. He said the plaintiff Commission's cause of action is independent of the City Council of Nairobi and is pursued in public interest.

Plaintiff's/applicant's counsel reiterated that the court compels the defendant/respondent to furnish the particulars sought by the plaintiff.

I have given due consideration to the application before court and the opposition thereto, plus the legal precedents cited by each party.

I note at the outset that section 7 of the Anti-Corruption and Economic Crimes Act to which

plaintiff's/applicant's counsel made specific reference during his submissions to this court provides, *inter alia*, as under:

'7. (1) The Commission shall have the following functions –

(a) to investigate any matter that, in the Commission's opinion, raises suspicion that any of the following have occurred or are about to occur –

(i) conduct constituting corruption or economic crime;

(ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;

(e) to examine the practices and procedures of public bodies in order to facilitate the discover of corrupt practices and to secure the revision of methods of work or procedures that, in the opinion of the Commission, may be conducive to corrupt practices;

(h) to investigate the extent of liability for the loss of or damage to any public property and –

(i) to institute civil proceedings against any person for the recovery of such property or for compensation; and

(ii) to recover such property or enforce an order fo compensation even if the the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya'.

Plaintiff's/applicant's counsel told this court that the suit herein was instituted in the public interest. The plaintiff seeks, *inter alia*, recovery of the suit property L.R. No.209/13539/106, I.R. No. 80707 measuring about 0.1039 hectares being a portion of original L.R. No. 209/13539. I.R. No.76717 then measuring about 34.63 hectares leased to the City Council of Nairobi for 99 years, for the remainder of the term of 99 years.

There can be no question that the plaintiff Commission has an important mandate to discharge in the public interest. That mandate has, of necessity, to be discharged within the established law.

I shall address the request for particulars under its various segments:-

1. Of Paragraph 9 of Defence

(a) Request for particulars showing how and when defendant was identified as a beneficiary of the suit property L.R. No. 209/13539/106:

In the court's view this request should be addressed to the public functionary who or public institution which did the identification. The defendant need not comply with the request.

(b) – (e) Request for particulars of offer, tender, acceptance, adjudication, demand and invoicing by the City Council of Nairobi:

The court agrees with defendant's counsel that these matters do not arise in the pleadings so far. The defendant need not comply with the request.

(f) Request for particulars of when and how defendant's application or tender for the suit land was considered and adjudicated upon:

In the court's view, this request should be addressed to the public functionary or public institution supposed to have considered the application or tender alluded to.

(g) Request for particulars of person(s) who made remittances and transacted business for and on behalf of defendant company with regard to receipt of letter of offer or preparation of tender for suit land:

The court is of the view that this is a matter of evidence for the trial. The defendant need not comply with the request.

(h) & (i) Request for particulars of date(s) of payment of dues said to have been prescribed by the City Council of Nairobi and Commissioner of Lands plus particulars of mode of payment therefor; and whether a demand or invoice was raised before payment by the defendant of the requisite consideration plus particulars of such demand or invoice:

While it is true, as argued by plaintiff's/applicant's counsel, that a case for recovery of land, as the present case is, ought to proceed on the clearest of pleadings [as indicated by Order VI rule 4 (2)], the court is of the view that the details sought vide these two requests fall in the realm of evidence for the trial. The defendant need not comply with these requests.

2. Of Paragraph 10 of Defence

(a) Request for particulars of fact and/or law relied on by defendant company for its averment that the subject titled is infeasible and guaranteed by the Government:

Order VI rule 3(1) essentially provides that every pleading shall contain only a statement in summary form of material facts on which the party pleading relies for his claim or defence but not the evidence by which those facts are to be proved. However, rule 4(1) enjoins a party to plead specifically any relevant statute of limitation or any fact showing illegality. Paragraph 10 of the defence herein refers to the registration of defendant company as proprietor of the subject land (alluded to at paragraph 9 of the defence) as having made the defendant's title infeasible and guaranteed by the Government. Since the registration law has not been disclosed either at paragraph 9 or paragraph 10, the plaintiff/applicant Commission has been put at a disadvantage in that it would not know where to check and verify the correctness or otherwise of the defendant's/respondent's company's averments at paragraph 10 of its defence. Here the plaintiff/applicant Commission has a genuine cause for its apprehension that it would be taken by surprise at the trial without the specificity it calls for in the averments at paragraph 10 of the defence. The defendant/respondent company must within 14 days of service specify the law on which the averments at paragraph 10 of the defence are based and how the guarantee alluded to therein arises.

(b) – (e) Request for : supply of particulars of fact and/or law on which defendant company relies for its averment that it is the owner of suit land; supply of particulars of the undertaking given by defendant company to the City Council of Nairobi regarding occupation of suit land; specification of facts and law relied on by defendant company for claiming validity of the long term lease in respect of suit land; and for supply of particulars of when defendant company took possession of suit land:

The court holds that the arguments advanced in relation to (a) of paragraph 10 of the defence apply *mutatis mutandis* to these requests and directs that the defendant/respondent company must within 14 days of service provide the particulars and specifications sought vide (b) – (e) of paragraph 10 of the defence.

3. Of Paragraph 11 of Defence

(a) Request for particulars of knowledge co-operation, consent and approval on the part of the Government and the City Council of Nairobi relative to registration of defendant's proprietary interest in the suit land:

Order VI rule 8(2) & (3) provides:

'8. (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may

be made on such terms as the court thinks just.

(3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of sub-rule (2), the court may, on such terms as it thinks just, order that party to serve on any other party –

- (a) where he alleges knowledge, particulars of the facts on which he relies; and
- (b) where he alleges notice, particulars of the notice.’

In view of the provisions of Order VI rule 8(2) & (3), the plaintiff/applicant is entitled to the particulars sought and the court directs that the defendant/respondent must within 14 days of service provide the said particulars.

(b) Request for particulars of formation of defendant company indicating date of incorporation, particulars of directors and details of last annual returns filed with the Registrar of Companies:

The court notes that the plaintiff/applicant has in essence requested for a statement of relevant facts in summary form as permitted by Order VI rule 3 (1). In view of the pleadings on record, *ex-facie* there seems to be no valid reason for objecting to the furnishing of the facts requested for and the court directs that the defendant/respondent must within 14 days of service provide the facts requested for.

(c) Request for particulars of any communication between defendant, City Council of Nairobi and Commissioner of Lands alluded to in paragraph 11 relative to the alienation of the suit land, indicating mode of communication, date(s) of such communication and officials involved at each stage:

The court notes that whereas the plaintiff Commission has filed its list of documents, there is no corresponding list by the defendant company as required by Order X rule IIA and that there is no replying affidavit to the effect, *inter alia*, that any documents constituting the communication allude to are not in the defendant’s/applicant’s possession. As is the case in item (b) above, *ex-facie* the plaintiff/applicant has requested for a statement of relevant facts in summary form. For reasons similar to those advanced in (b) above, the court directs that the defendant/respondent must within 14 days of service provide the facts sought vide this request in summary form.

4. Of Paragraph 12 of Defence

(a) Request for particulars of action(s) and facilitation on the part of City Council of Nairobi and Commissioner of lands leading to legal recognition of defendant’s title to the suit land, including dates of each act of facilitation, nature of action or facilitation, officials involved and form of recognition by each such official:

As this court understands paragraph 12 of the defence, all the defendant company is saying is that by virtue of the actions of the City Council of Nairobi and Commissioner of Lands in registering the defendant company as proprietor of the suit land, the City Council of Nairobi and Commissioner of Lands recognized the defendant company’s title to the suit land, which the defendant company deems indefeasible, sacrosanct and protected under the law and that, therefore, the City Council of Nairobi and Commissioner of Lands are estopped from denying the defendant’s legal and valid title to the suit land. The court holds that the only information the defendant/respondent can be legitimately required to furnish at this interlocutory stage is specification of the law under which registration of the defendant company as proprietor of the suit land was effected, when such registration was done and the nature and/or term of the title. Accordingly, the court directs that the defendant/respondent must within 14 days of service provide those facts only.

(c) & (d) Request for particulars of facts and/or law on which defendant company relies for the averment that its title is indefeasible and sacrosanct under the law; and request for particulars of facts and/or law on which defendant relies for its averment that the City Council of Nairobi and Commissioner

of Lands are estopped from denying defendant's title to suit land:

These two requests seem to be subsumed in request (a) above. The court holds that the analysis of request (a) above and the answer given to the said request (a) also address these two requests fully and that the aforesaid analysis and answer are equally applicable to these requests as well and similar orders are hereby made.

5. Of Paragraph 14 of Defence

(a) Request for particulars of facts and/or law on which defendant company relies for its averment that plaintiff has no cause of action against defendant:

Paragraph 14 of the defence is not a substantive and independent averment but a mere conclusion drawn from the facts or law averred before it. The fate of the averment rests on the findings to be made on the averments preceding it and requires no substantiation of its own. The defendant/respondent may safely ignore the request for particulars relating to paragraph 14 of the defence.

Orders accordingly.

Delivered at Nairobi this 24th day of November, 2008.

B.P. KUBO

JUDGE