



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1012 of 2004**

**TULIP PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**MOHAMED KORIOW NUR & FOUR OTHERS.....DEFENDANT**

**RULING**

The background information is that the plaintiff in its amended plaint amended on 22<sup>nd</sup> February, 2005 and filed the same date has averred that it is the rightful registered proprietor of land reference number 14277 the suit property by virtue of a transfer to it dated 5<sup>th</sup> June 1992 and registered at the Land Titles Registry at Nairobi as I.R.46540/2. The said title is constituted in grant number 46540 dated the 24<sup>th</sup> February, 1988 together with the original Deed Plan No.13148 dated 15<sup>th</sup> January 1988. This title is in the possession of the plaintiff. The plot is vacant.

That in or about the 15<sup>th</sup> August, 2004 the first defendants trespassed on to the suit property and started putting up a building structure fraudulently claiming ownership of the suit property by virtue of a lease purportedly contained in a grant No.I.R.46540 (forged grant issued to their names on 12<sup>th</sup> August, 1988. The particulars of fraud is that the first defendants lease of 99 years from 1<sup>st</sup> November, 1989 is a forgery and does not have a file at the land Titles Registry. The signature of Wilson Gachanja Commissioner of lands is a forgery as is the signature of V.A. Gitau for Director of Survey on a purported Deed Plan Number 131348. That the said forged grant dated 12<sup>th</sup> August 1998 granting the 1<sup>st</sup> defendants a lease for 99 years from 1<sup>st</sup> November, 1989 is a forgery and null and void and has no legal effect whatsoever in law. In consequence thereof the plaintiff seeks a declaration that the lease of 99 years purportedly effective from 1<sup>st</sup> November, 1989 is a forgery and therefore null and void an eviction to issue against the first and second defendants from the suit property, an injunction to restrain the defendants jointly and severally from any dealing in any manner whatsoever with the land comprised in grant I.R.46540 dated 24<sup>th</sup> February, 1998 in the possession of the Plaintiff, costs of this suit, any other or further relief that this Honourable Court may deem just to grant.

On the other hand the 1<sup>st</sup> do 4<sup>th</sup> defendants on record aver that they are the registered proprietors of L.R. 46540 allotted to them by the President of the Republic of Kenya

the Governments Lands act on 1<sup>st</sup> November 1989, it is registered at the lands registry and given the folio Number I.R.89556, that by virtue of this they are the registered proprietors, they have acquired absolute and indefeasible rights over the same and the plaintiffs claim of trespass are unfounded.

The defence of the 3<sup>rd</sup> and 4<sup>th</sup> defendant is not traced on the file but a copy has been annexed as an annexure to a supporting affidavit to an application filed on 30<sup>th</sup> September, 2005. It is indicated to have been filed on 25<sup>th</sup> August 2005. The averments are that the suit property L.R.14277 is categorized as government land administered under the Government Lands Act cap.280 Laws of Kenya. That in a letter of allotment there are conditions to be met before a free hold title is granted and one of them is that land must be developed. The defendants aver that failure to meet this conditions renders the plaintiff's purported title null and void. That for the foregoing reason the purported transfer of the suit land to the plaintiff and their continued ownership (if proven) is irregular as the land in question is still vacant on the ground. Further that the plaintiff's title was fraudulently obtained. That the government reserved the right to call for and a null the plaintiffs title documents on the ground that the same have issued in breach of the provisions of Government Lands Act Chapter 280 Laws of Kenya.

There is a reply to the 1<sup>st</sup> to 4<sup>th</sup> defendant's defence. The Plaintiffs maintain that it became the registered owner of the suit land on 6<sup>th</sup> June 1996 by virtue of a transfer for valuable consideration executed by the previous owner after full payment of stamp duty do the Government of Kenya, the previous owner having obtained his grant on 24<sup>th</sup> February, 1988. The defendant's purported claim to having had the suit land allotted to them on 1<sup>st</sup> November 1989 by the same previous owner is a fiction and the plaintiff puts the defendants to strict proof thereof. That the purported grant number I.R. 89556 dated the 12<sup>th</sup> August, 1998 issued in the name of the defendants is a forgery and purported deed plan number 131348 dated the 10<sup>th</sup> February, 1989 annexed thereto is also a forgery. That the defendants have failed to make disclosure in their defence that they also hold an additional second purported title made out to their names to the same suit land also dated the 12<sup>th</sup> August 1998. That the second title as well as the deed plan annexed there to are also forgeries.

It is against the foregoing background information as gathered from the pleadings of both sides that the Plaintiff has filed the application dated 18<sup>th</sup> January, 2007 and filed on 22<sup>nd</sup> January 2007 seeking interrogatories attached from the persons named.

The grounds advanced by the Plaintiffs in supporting the application are that the suit is about who owns the disputed plot hence the filing of these interrogatories to assist in quickening the trial and which interrogatories are all relevant to the action herein.

The defence have opposed the application for interrogatories on the basis of the grounds set out in the replying affidavit sworn by Simon Kiprono Laboso on behalf of himself and others though there is no authority to dipone so on behalf of the others annexed to that affidavit. It is therefore deemed to refer to him alone. No harm will be suffered as it is indicated that any one of them could answer them and Laboso can be deemed to be so responding. The major grounds relied on by them are that.

- (1) The list of documents filed by them in Court answers all the interrogatories.
- (2) The Plaintiff is adducing evidence prematurely instead of waiting for the trial.
- (3) The Plaintiff aims at discovering the defence case and he should not be allowed to do so.
- (4) The Plaintiff is fishing out evidence in order to construct his own case.
- (5) The request is oppressive.
- (6) No special circumstances have been stated to warrant the orders sought.

In response to the defence submission Counsel for the Plaintiff submitted that they have demonstrated that the interrogatories are relevant and this court should not allow a blanket avoidance of the interrogatories by the defence. That the defence counsel should have gone through each interrogatory and explained why it should not be allowed. They should have shown how each interrogatory is irrelevant.

Turning to the law the application cited order X rules 1,2,4 and 7 of the Civil Procedure Rules. These rules enjoin the court to take note of the following.

- (1) interrogatories, which do not relate to any matters in question in the suit shall be deemed irrelevant.
- (2) The court is to take into account any offer which may be made by the party sought to be interrogated to:-
  - (i) deliver particulars
  - (ii) make admissions
  - (iii) to produce documents relating to matters in question.
- (3) Interrogatories to be in the prescribed form. With variations as circumstances may require.
- (4) They are to be answered by affidavit within 10 days or such a time as the court may allow.

Further assistance can be derived from leading legal texts as well. In Odgers Principles of Pleadings and Practice by W.Blake Odgers and B.A. Haywood, London Stevens and Sons Limited 1939 Chapter XVI page 270 Paragraph 2 it is stated “*As a general rule, interrogatories will be allowed whether the answers to them will serve either to maintain the case of the party, administering them or destroy the case of his adversary ..... they constitute a process which might become oppressive, and be used for improper purposes, and therefore that the allowance or disallowance of interrogatories is a matter for discretion, and they should be allowed or disallowed on the merits of the particular case*”

This text goes further to classify the nature of interrogatories to be allowed. Such as:

- (1) . Interrogatories must be relevant to the matters in issue.
- (2) . Questions which are put to test the credibility of the witness will not be allowed.
- (3). No question need be answered which is not put *bona fide*. It must be for the present action not with a view to future litigation.
- (4). Interrogations will not be allowed if they are oppressive. That is if they put an undue burden on the party interrogated.
- (5). They should and generally are directed to the evidence by which the party interrogating desires to establish such facts at the trial.
- (6). The party interrogating may ask anything to support his own case or answer his opponents case; he is entitled to know precisely what is the charge made against him, and what is the case which he will have to meet. But he is not entitled to discover in what way his opponent intends to prove his case.
- (7). The questions asked must not be “*fishing*” that is they must refer to some definite and existing state of circumstances and not be put merely in the hope of discovering something which may help the party interrogating to make out some case. They must be confined to matters which there is ground for believing have actually occurred.
- (8). In the Kings Bench Division interrogatories are not allowed as to the contents of written documents unless it is proved or admitted that such documents have been lost or destroyed.
- (9) Questions which tend to criminate may be asked if they are relevant.
- (10). The Court has a wide discretion as to interrogatories and such interrogatories will be allowed as the

court shall consider necessary either for disposing fairly of the cause or matter for saving costs.

(11) Objection may be taken to answering an interrogatory on the ground that it is unreasonable, vexatious, or scandalous unreasonable or vexatious is taken to refer to the time at which the interrogatories are exhibited and construed to mean “*premature*”. Scandalous refers to an insulting or degrading question which is irrelevant or impertinent to the matters in issue.

Mulla the code of Civil Procedure Act V of 1908 sixteenth Edition. In this text the principles on interrogatories are set out between pages 2120 – 2133. They are not different from those set out in Odgers above. In summary form they are:

1. The object and purpose of serving interrogatories is to enable a party to require information from its opponent for the purposes of maintaining the case of the adversary.
2. Answering the interrogatories might often shorten the trial proceedings and save the time of the court and parties besides saving expenses for summoning witnesses. It should be invoked in order to shorten litigation and save the interests of justice. It is to be exercised with great care and caution so that it is not abused by any party.
3. Every party to a suit is entitled to know the nature of his opponents case but he is not entitled to know the facts which constitute exclusively the evidence of his opponents case to avoid tempering with the opponents witnesses and manufacture evidence in contradiction to shape his cases to defeat justice.
4. In determining whether leave should be granted, the court should consider whether it is a fit and proper case for administering interrogatories.
5. Questions that may be relevant during cross-examination are not necessarily relevant as interrogatories.
6. Objection to interrogatories will be upheld on the following:-
  - (i) Scandalous interrogatories.
  - (ii) Irrelevant interrogatories. No party is to be compelled to produce documents whose relevance is denied.
  - (iii) Not exhibited *bone fide for the purposes of the suit*. This arises where the interrogatory is put to serve an ulterior object beyond the scope of the suit.
  - (iv) Not sufficiently material at that stage. This arises where discovery may be injurious to the defendant and will only be useful to the plaintiff if he establishes his title to the relief.
  - (v) On the ground of privilege such as communications from a legal adviser for purposes of obtaining legal advise.
  - (vi) Or any other ground this. This arises where the interrogatory is prolix, oppressive, unnecessary or scandalous.
  - (vii) Fishing interrogatories are not allowed. A fishing interrogatory is one which does not relate to definite existing and relevant circumstances but one made in the hope of discovering some flaw in the opponents case or with the object of finding a loophole.

The foregoing principles have been tested in case law whose rulings will go along way in providing further guidance in this matter. In the case of **PLYMOUTH MUTUAL CO-OPERATIVE AND INDUSTRIAL SOCIETY LTD VERSUS TRADERS PUBLISHING ASSOCIATION LIMITED (1900) 1 KB 403. At page 417 line 8** from the top. Sterling L.J. made findings to the effect that

interrogatories by one party are therefore generally admissible if they are directed to matters which would tend to destroy the other party's case.

In the case of **ROFE VERSUS KEVORKIAN (1936) A.E.R 133L** at page 1337 paragraph 1 Greer L.J. made these observations. *"It does not seem to me right that the plaintiffs should have, by answering interrogatories, to expose to the defendant the kind of evidence he is going to put before the judge or jury at the trial"* At line 3 from the bottom *"I have decided that interrogatory 3 also ought to be disallowed as being a fishing interrogatory by a man who is trying to make a case and has not already the evidence which would justify him in making the case"*

In the case of **SEBASTIAN R D SOUZA AND OTHERS VERSUS CHARLES CLEMENTE FERRAO AND OTHERS [1959] 1000.**

In this case **GOULD J.A.** at page 1002 paragraph 1 line 3 from the bottom had this to say *"A Plaintiff has a right to deliver the particular interrogatories in respect of which he has applied for and obtained the leave of the court. That leave is given in the discretion of a judge and his discretion is to be guided by the two factors mentioned in order X rule 2 which are – whether they are necessary for disposing fairly of the suit, or for saving costs"*. In this same case it was held inter alia that

(i) even though a judge takes the view that the proposed interrogatories would not save costs, he should allow them if he considers them necessary for disposing fairly of the suit.

(ii) The concepts of necessity and reasonable, extend to the number of persons who are required to answer particular interrogatories as well as to the material sought to be included.

(iii) The judges view that interrogation to such an extent was not necessary for disposing fairly of the suit was fully justified.

(iv) Per in curium it is clear that the judge has a discretion and that where a first set of proposed interrogatories has been disallowed it is competent to make an application for leave to deliver a new set.

In the case of **AGGARWAL VERSUS THE OFFICIAL RECEIVER [1967] E.A.585 DUFUS J.A. at page 588** paragraph E had this to say *"The general principle followed is to allow such interrogatories as may be necessary either for disposing fairly or move expeditiously of the case or for the purposes of saving costs and this is a matter in the discretion of the court"* At paragraph 1 *"It is not the duty of the judge to redraft or frame interrogatories for the parties"*.

In the same authority **SIR CLEMENT DELESTANG V.P. at page 589** paragraph B-C had this to say *"I think that there are probably a few matters which could properly have been the subject of interrogatories but they are so mixed up with such a mass of irrelevant and indeed in some instances, objectionable matter as to justify the learned judge's decision that they were oppressive and unnecessary in the circumstances, in a case which raised a relatively simple issue, namely whether the parties were partners or co-owners in regard to the farm"*.

In the same authority **SIR CHARLES NEWPOLD** page 590 paragraph A-C had this to say *"I may say here that certainly the main reason for granting leave to issue any particular interrogatory in respect of which leave is sought is if the judge is satisfied that the answer to this interrogatory would bring the suit to an earlier close and result in a saving of costs. Interrogatories are not intended to provide a substitute for evidence in a suit. As both of my brethren have said it is possible that there is hidden within the cumbrous Oyster of these interrogatories a pearl. But it is not part of the functions of the judge from whom leave is sought to go through the interrogatories himself, separate the good from the bad and give leave in respect of the good parts only. This is something which he cannot properly do and which he should not be called upon to do. I suppose that there may well be some parts of these interrogatories which are good and which if they had stood alone either originally or as a result of amendment made by the applicant, the judge might have allowed"*.

The holdings in this case are that:

- (i) The general principle followed is to allow such. Interrogatories as may be necessary either for disposing fairly or more expeditiously of the case or for the purposes of saving costs.
- (ii) Although there would appear to have been certain questions which could have been properly the subject of interrogatories a great number of the interrogatories were not relevant or necessary and the judge had exercised his discretion properly in refusing leave to deliver them; it not being the duty of the judge to redraft interrogatories for the parties.

Last to be considered is the case of **TRUST BANK VERSUS PARTWAY STORES LTD AND 4 OTHERS MILIMANI COMMERCIAL COURTS NAIROBI HCCC NO.413 OF 1997**. At page 4 of the ruling A.G. Ringera J. as he then was at paragraph 2 after setting out the relevant rules under order X rules and 2 Civil Procedure Rules had this to say *“From those rules themselves, it is quite clear that where interrogatories are to be delivered is a matter within the discretion of the court and that such discretion is to be exercised only whether the court considers that the interrogatories are necessary either for fair disposal of the suit or the saving of the costs.*

It is also clear that the interrogatories must relate to the facts in issue or facts relevant to the facts in issue. And of course in deciding whether the interrogatories are necessary account should be taken of offers if any either to admit certain facts or to supply particulars, or produce documents pertinent to the matters in question”

On the courts assessment of the facts herein it is clear that a reading of the rules under which the application is brought the principles on the subject as derived from the two legal texts cited as well as principles set by decisions referred to this court on the subject are in agreement as to what principles this court is to bear in mind when deciding whether to allow or not to allow the interrogatories filed herein. The principles are expansive but for purposes of consideration of the interrogatories herein this court will bear in mind those it considers to be salient. These are:

- (1) The court has a discretion to allow service of interrogatories within the principles and disallow those not within the principles. The discretion of course has to be exercised judiciously.
- (2) It is not the business of the court to redraft the interrogatories for the parties. This means that they stand or fall as a whole. A court has no right to mutilate them and order portions which are in compliance with the principles to be answered and those that are not within the rules not to be allowed or answered.
- (3) Jurisdiction exists for the court to disallow and determine that those interrogatories meant to test the credibility of the witnesses or those that can be answered in cross-examination should not be allowed.
- (4) Jurisdiction exists to disallow interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary.
- (5) The court is to allow only those that aim at shortening the trial proceedings, save time of the court and parties and save on costs.
- (6) Those that may not save costs may nonetheless be allowed if the court considers them to be necessary for disposing fairly of the suit and should not be aimed at serving some other ulterior motive beyond the scope of the suit.
- (7) They must refer to some definite and existing circumstances.
- (8) The court is also to take into consideration any offers made by the persons to whom those interrogatories are to be directed and generally the state of affairs concerning the proceedings at that point in time.

This court has applied the above salient principles to the proceedings herein generally and found that:-

- (1). The proceedings are closed. Each side has filed their list of documents to be relied on at the trial and there is no indication that any party intends to amend their pleadings further.
- (2). The defendant to whom the interrogatories are to be directed have not offered to answer any of them and have instead stated that the list of documents given by them is sufficient and further evidence can be tendered at the trial.
- (3). The defence lawyer opposing service of the said interrogatories chose to object to them in a blanket form thus leaving it to this court to deal with each one of them one by one to determine which one to allow and which one to disallow.
- (4). The subject matter is a parcel of land, each side is claiming to be the rightful owner.
- (5). It is apparent from the pleadings and the interrogatories that the case largely rests on documentation.

When the salient features of the principles, on interrogat as well as the general findings on the proceedings stated above the findings on each interrogatory are as herein under stated:-

1. In or about 1998 did the Commissioner of Lands issue your with a purported grant number I.R.89556 for L.R.14277 in the names of MOHAMMED KERIOW NUR, SIMON KIPRONO LABOSO, MACDONALD LIJOODI MARAKA AND NOOR MOHAMED HASSAN all of Box 69196 Nairobi. This is disallowed because it will not save the costs as the documents will be required to be produced in evidence on the question can be answered in cross-examination.
2. In or about 1998 did the Commissioner of Lands issue you with a purported grant Number 46540 for L.R.14277 in the names of **MOHAMED KORIOW NUR, SIMON KIPRONO LABOS, MACDONALD LIJOODI MARAKA AND NOOR MOHAMED HASSAN** all of P.O. Box 69196 Nairobi. This too is disallowed because it will require production of the document in court and it can also be answered in cross-examination.
3. On or about 12<sup>th</sup> September, 1998 did you pay stamp duty amounting to Kenya 3170 in respect of the said grant Number I.R. 89556. This disallowed as it can be answered in cross-examination and required for product it can in evidence.
4. On or about 12<sup>th</sup> September, 1998 did you pay stamp duty amounting to Kenya \$3170 in respect of the said grant. Number 46540. This too is disallowed as it will require production in evidence and it can be answered in cross-examination.
5. Did you not acquire grant number I.R.8955 6 without any letter of allotment having been issued to you by the Commissioner of Lands. This is disallowed because it seeks to test the credibility of the witness.
6. Did you not acquire grant Number I.R.46540 without any letter of allotment having been issued to you by the Commissioner of Lands. This too is disallowed as it seeks to test the credibility of the witness.
7. Did you not present grant number I.R.89556 on 16<sup>th</sup> September, 1998 at 11.20 hours under Day Book Number 104 at the Central Registry, Lands office. Nairobi for registration.

This is disallowed as it can be answered in cross-examination it is also seeks to test the credibility of the witnesses.

8. Did you not present grant Number I.R.46540 on 15<sup>th</sup> September, 1998 at 14.20 hours under Day Book Number 588 at the central registry, Lands Office Nairobi for registration. This too is disallowed as it can be answered during cross-examination and it also seeks to test the credibility of the witness.

9. Did you pay stand premium to the Commissioner of Lands in respect of Grant number I.R.89556.

This is disallowed because it of little Relevance to the dispute over ownership. This is so because the Agency concerned has power to sue for recovery. It can also be answered in cross-examination.

10. Did you pay stand premium to the Commissioner of Lands in respect of grant Number 46540.

This too is disallowed as it is not relevant as it cannot be used to fault ownership of a title. The Agency concerned can also sue for recovery of the same. It can also be answered through cross-examination.

11. For which years between 1998 and 2006 have you paid land rent on grant number 46540.

This is disallowed as it can be answered through cross-examination. It is not relevant for purposes of faulting a title. It also goes to test the credibility of a witness.

12. For which years between 1998 and 2006 have you paid land rent on grant Number 46540.

This too is disallowed as it can be answered through cross-examination. It is not relevant for faulting ownership of a title it also goes to test credibility of a witness.

13. For which years between 1998 and 2006 have you paid rates to the Nairobi city council on grant number 89556. This too is disallowed as it can be answered through cross-examination. It cannot be used to fault a title as the authority concerned can recover it through some other means other than these proceedings. It also goes to test the credibility of the witness.

14. For which years between 1998 and 2006 have you paid rates to the Nairobi City Council on grant Number 46546.

This too is disallowed as it can be answered through cross-examination. It cannot be used to fault a title as the agency concerned can recover the rates through some other means other than through these proceedings more so when the plaintiff is not litigating on their behalf as far as the claim of rates and rent are concerned. Further where none payment of such rates and rents or concealment of the same amount to criminal offences that can be taken care of by the appropriate agency dealing with the investigation and prosecution of offences arising from such non payment. The interrogation is further disallowed because it goes to test the credibility of the witness.

In conclusion all the interrogatories filed and sought to be served herein have been disallowed because:-

(1) For the reasons indicated against each

(2) Though a some were necessary, answering them would not assist in shortening the proceedings and cutting on costs as they require evidence to be adduced on them. where forgeries are alleged they call for expert opinion from 3<sup>rd</sup> parties.

(3) Most of them could be answered in cross-examination and they will be answered in cross-examination anyway.

(4) Others could easily be answered through discovery by asking the parties to file and serve copies of the documents they intend to rely on both in court and in the opposite party.

(5) Some went to test the credibility of the witnesses which is not allowed.

(6) Others were in criminating in nature.

(7) Those targeting none payment of rent and rates are not relevant as none payment of those dues cannot be used to fault the title being contested over. More so when the Plaintiff is not litigating on behalf of those Agencies. Further those Agencies have their own procedures for recovering them.

In view of what the court has stated above the way forward is that since pleadings are closed and parties have partially complied with discovery by filing lists of documents they intend to rely on, they should each file and serve on the other side copies of the documents within a specified time to be agreed upon in court and there after take priority dates to have the case heard and determined to establish the ownership of the suit property and put the matter to rest.

(2) The Respondent to the application for interrogatories will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JUNE 2007.

**R. NAMBUYE**

**JUDGE**