



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 322 OF 2012**

**MISTRY INVESTMENT LIMITED.....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**GOVINDA BHUSAL CHETTRI.....DEFENDANT**

**RULING**

This application is brought under **Order 1 Rule 1, and Order 1 Rule 10 of the Civil Procedure Rules**. The application is for orders that Mistry Investment Limited C. No. 16320 be joined in the suit as the 2<sup>nd</sup> Plaintiff and that the costs thereof be borne jointly by the 1<sup>st</sup> Plaintiff and the Defendant. The application is premised on grounds that the Applicant has since learnt that the 1<sup>st</sup> Plaintiff claiming ownership of Plot No. 209/404/3 Ngong Road instituted this suit on 6/6/2012 whereas the suit property actually belongs to the Applicant. The Applicant alleges that the 1<sup>st</sup> Plaintiff does not exist and is therefore fraudulently using its name to pursue its rightful interests. The Applicant avers that the

Defendant is also claiming ownership based on a forged conveyance which sale was advertised on Standard Newspaper on 29/5/2012. The Applicant contends that it shall suffer irreparable loss and damage if the prayers sought are not granted, in view of property being disposed off by the Defendant. Further that, it is in the interest of justice that the Applicant be granted leave to be joined in the suit so that the Court can make a proper determination of the rightful owner of the suit property.

The application is supported by an affidavit sworn on 28/1/2013 by Mudhusudan Gulabbhai Desai, one of the Directors of Mistry Investment Limited C. No. 16320. It was his disposition that through a conveyance dated 20/3/1978, the Applicant became the registered owner of the suit property, and the original Title Deed was deposited in Kenya Commercial Bank for safe keeping. The deponent stated that Kenya Commercial Bank informed the Applicant that it had misplaced the original Title Deed and that its efforts to trace the title have been futile. The deponent referred to a letter dated 9/10/2012 (annexed and marked "MGD2") addressed to the Applicant from the bank's lawyers M/s. Oraro & Company. The letter was to the effect that the bank had been assisting Porus Phiroze Mistry, purporting to be the Director of the Applicant, to obtain a replacement of the title. The deponent stated that the said **Porus Phiroze Mistry** misrepresented himself before the Court by swearing an affidavit verifying the Plaint, at the time of filing suit, as the Director of the Applicant, whereas he is neither a Director nor a Shareholder of the Applicant Company. It was the deponent's averments that **Porus Phiroze Mistry filed suit (HCCC No. 416/2003)** against the Applicant claiming that the appointment of its Directors was fraudulent. He sought for their nullification and the Company's shares be transferred to him. The deponent stated that the suit

was dismissed for want of prosecution on 28/6/2012, 22 days after he instituted this suit misrepresenting himself as the Director of the Applicant.

The deponent referred the Court to a letter from the Companies Registry (annexed and marked "MGD 4") stating that the office of the Registrar of Companies has confirmed that the Plaintiff does not exist and is therefore fraudulently using the Applicant's name to pursue its rightful interests. He deposed further that the Defendant has since realized that the Plaintiff is not the rightful owner of the suit property and has made an application to strike out the suit to enable him proceed with his malicious interest of disposing off the Applicant's property. The deponent reiterated that the Applicant will suffer irreparable loss and damage if the prayers sought in the application are not granted.

### **Response**

The application was opposed by the Defendant who filed Grounds of Opposition dated 30/5/2013 stating that application is grave abuse of the due process of the Court and that the Applicant inexcusably omitted to comply with mandatory provisions of the law before filing the present application. The Defendant stated that the Applicant's supporting affidavit is incurably defective for failure to comply with various substantive and procedural legal requirements and thus the same cannot be the basis for granting the orders sought. The Defendant stated that the application ought to be struck out for being grossly misconceived in law and fatally defective.

### **Submissions**

The application was canvassed by way of written submissions. Kairu & McCourt for the Applicant filed submissions dated 24/7/2013 wherein counsel reiterated the contents of the application. Counsel submitted that unknown to the Applicant, **Porus Phiroze Mistry** and his daughter **Ayesha Porus Mistry** filed an annual return on 28/1/2012 changing the Applicant's existing Directorship and Shareholding. Counsel submitted that the change was effected 2 days after the Court dismissed the suit instituted by **Porus Phiroze Mistry**. It was counsel's submission that this is an unlawful and fraudulent act on the part of **Porus Phiroze Mistry** and **Ayesha Porus Mistry**. Counsel reiterated that the Defendant in his affidavit in support of his application to strike out the suit states that he is aware that the Plaintiff has no authority to institute the suit, thereby corroborating the Applicant's position.

Osundwa & Company Advocates for the Defendant filed submissions dated 30/7/2013. Counsel submitted that issues of shareholding, directorship and ownership of the suit property between the Plaintiff and the Applicant do not concern the Defendant in any way and that it ought to have been determined in HCCC No. 416/2003. Counsel submitted that the fact that the suit is irregular in view of the Plaintiff lacking authority to institute the suit could not be cured by joinder of an interested party. Counsel submitted that the Applicant has legal options against the Plaintiff and **Porus Phiroze Mistry**, including reinstating the dismissed suit and not by way of joinder in these proceedings. Counsel contended that the dispute between the Plaintiff and the Applicant is commercial in nature as it relates to affairs of a company, its directors, shareholders and assets. It was counsel's submission that joining the Applicant who will introduce a new cause of action to the suit will result to prolonged and convoluted proceedings whereas the Defendant continues to be dispossessed of the suit property. Counsel submitted that the application can only be considered as a ploy between the Plaintiff and Applicant to drag the matter and steal a march on the Defendant.

Counsel submitted that the Applicant had not exhibited any proof of ownership of the property neither had he exhibited the any proof of fraud on the Defendant's conveyance for the suit property. It was counsel's submission that the Applicant is hell bent on dispossessing the Defendant of the suit property by seeking joinder in issues that do not involve the Defendant. Counsel submitted that the Applicant has failed to disclose in the application that there is another suit pending before the Court HCCC No. 85/2012 where the Defendant obtained orders granting it possession over the property. In that suit, the Applicant entered appearance through Securex Agencies Limited then made an application for substitution but that it has never prosecuted that application. Counsel submitted that there is a discernable thread from the conduct of the Applicant to use any means possible to dispossess the Defendant of the suit property.

Counsel reiterated that the Applicant is not a necessary party to the proceedings herein and the application is an abuse of the court process. Counsel submitted that the Applicant has failed to show any cause of action against the Defendant as most of its averments relate to the Plaintiff and Porus Phiroze Mistry. Counsel submitted that the Applicant seeks to raise issues distinct from the Defendant's claim and thus there is no relief that would flow from the Defendant to the Applicant. Further that the Applicant's claim, if any, solely lies against the Plaintiff. Counsel cited the case of **Supermarine Handling Services Limited v Commissioner General, Kenya Revenue Authority HCCC No. 365 of 2000** where the Court held,

*“I do feel certain in my mind much as it is necessary to bring all interested parties in a transaction in one suit to avoid numerous suits and to reduce expenses, this is not a case where the joining of interested parties as Plaintiffs will ensure that the right of the interested parties will be ensured for they are parties that strictly want to protect their right against the Plaintiff and not against the Defendants. Joining them as Plaintiffs will not enable them get their remedies against the Plaintiff who will be a co-plaintiff.”*

Counsel submitted that the Applicant had failed to annex to its application, a draft Complaint or response it intends to file. Thus, the Court cannot grant the prayer blindly without first perusing and qualifying the intended Complaint and cause of action. Counsel referred the Court to the Court of Appeal decision in **Musamarini Limited & Others v A.D.M Limited & Others Civil Application No. 171/2010** where the Court held,

*“.....I think to enable the Court know what new thing is being asked to give leave to introduce and consider whether indeed the amendment for which leave is sought would be within the requirements of the law whether for instance it would introduce a completely new matter into the case and thus would be irrelevant.”*

### **Determination**

The main issue for determination is whether the Applicant can be joined to these proceedings, first, as a Plaintiff, and secondly, without having attached a draft Complaint to enable the Court to determine the cause of action it intends to bring. The application as stated is brought under **Order Rules 1 & 10** which provides:

#### **Order 1 Rule 1**

*“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”*

#### **Order 1 Rule 10**

*“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

In respect to whether the Applicant can be joined as a Plaintiff, the provision of Rule 10 gives the court discretion to join any person whether as Plaintiff, Defendant or howsoever provided that his/her presence will enable the court to effectually and completely determine the matter. On the second issue, the Defendant submitted that the Applicant failed to attach a draft Complaint or pleading to enable the Court to first peruse and qualify the intended Complaint and cause of action. I have perused the Court of Appeal decision, to wit, **Musamarini Limited & Others v A.D.M Limited & Others Civil Application No.**

**171/2010** referred to me by the Defendant. The said authority is in respect to amendment of pleadings and not joinder of parties, and is therefore inapt to the issues herein. It is my view that a pleading is a prerequisite in an application for joinder. My finding is based on the provisions of Order 1 Rule 10(4) provides as follows:

***“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants”***

The wording of this provision is conditional upon an event occurring, that is, in the event a party is joined. Notably, the wording is in respect to joinder of a Defendant, which in my view is applicable vice versa.

Having found as above, the question that remains is whether the Applicant has satisfied the requirements set out **under Order 1 Rules 1 and 10(2) of the Civil Procedure Rules**. The Defendant has availed to this Court a series of authorities on this subject and on each occasion, the Court declined to issue an order of joinder. The authorities, though not all cited in this ruling, is greatly appreciated as they are informative. Imperatively however, the provisions outlined hereinabove are discretionary in nature which therefore calls upon the Court to determine each case on their merits, and in doing so, to exercise its discretion judiciously. **Order 1 Rule 1** is to the effect that the Plaintiff is entitled to be joined where the right to relief alleged to exist in each Plaintiff is in respect of or arises out of the same transaction, and there is a common question of fact or law. Undoubtedly, there is a dispute as to the shareholding and directorship of Mistry Investment Limited C. No. 16320 with the Applicant claiming that the Plaintiff is fraudulently using its name to pursue its rights. This dispute is not one for determination before this Court. The issue before this Court is the ownership of the suit property which the Plaintiff and Applicant on the one hand and the Defendant on the other, are both claiming.

The Applicant has also annexed a letter from the Office of Registrar of Companies to show that indeed it is the Applicant's shareholding and directorship is proper together with an authority to authorizing Mudhusudan Gulabbhai Desai to swear affidavits on behalf of the Applicant. On the allegation that there is a discernable thread by the Plaintiff and the Applicant to deprive the Defendant of the property is an issue that the court shall decipher at trial.

It is my finding that the Applicant has established that it is a necessary party to the suit and I therefore exercise my discretion and allow the application, as follows:

- a. **The Applicant is hereby joined as the 2<sup>nd</sup> Plaintiff.**
- b. **For good order, and so as to enable the Court and the parties distinguish between the Plaintiff and the Applicant, the latter shall be referred to as Mistry Investment Limited C. No. 16320.**
- c. **The 2<sup>nd</sup> Plaintiff is granted leave to file and serve a Plaint within 14 days from the date of this ruling and the Defendant to file and serve a Defence within 21 days of service.**
- d. **Costs of this application shall be in the cause.**

Dated, signed and delivered this 6<sup>th</sup> day of March 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the Applicant

.....For the Defendant

.....Court Clerk

**L.N. GACHERU**

**JUDGE**