



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO 766 OF 2016

FRANCIS NYAGA NJERU.....PLAINTIFF

VERSUS

CHINA ROAD AND BRIDGE CORPORATION.....DEFENDANT

ARJ CAPITAL.....PROPOSED INTERESTED PARTY

RULING

1. On 26/6/2018, the applicant, ARJ Capital, brought a notice of motion dated 28/6/2018 seeking leave to be joined in this suit as an interested party. Through an affidavit allegedly sworn by one Amina Omar, the applicant contended that it holds Grant Number IR 63990 issued on 28/1/1996 and registered on 2/2/1994 as IR Number 63978/1. The said Grant was exhibited as documentary evidence. Also exhibited by the said deponent is deed plan number 230418 dated 18/10/1997. The applicant urged the court to admit it as an interested party in this suit.

2. The plaintiff opposed the application through a replying affidavit sworn on 12/7/2018. He deposed that the applicant is engaged in fraud and criminal enterprise and is out to waste this court's valuable time through the present applicant. He added that the purported title documents exhibited by the applicant are forgeries which had been interrogated by the Lands Departments and the Directorate of Criminal Investigations and had been found to be pure forgeries. The plaintiff exhibited: (i) Certificate of Title Number IR 176998 issued to Eliud Simon Mbilu on 13/7/2016 and subsequently transferred to the plaintiff on 12/4/2017; (ii) Deed Plan Number 346655 dated 20/12/2012, (iii) Official Search; (iv) Letter dated 5/11/2013 from the Director of Survey indicating that Deed Plan Number 238416 did not originate from the Directorate of Survey; (v) Letter dated 21/1/2016 from the Directorate of Survey to the Directorate of Criminal Investigations indicating Deed Plan number 238416 is not in the records of the directorate of Survey; (vi) Grant Number 63990 issued to Wathiemo Kwihotora Company Limited on 14/10/1994 and registered on 1/12/1994; (vii) Affidavit sworn on 5/8/2016 by the same Amina Omar who swore the affidavit in support of the present application; (viii) Letter dated 28/4/2016 from the Directorate of Criminal Investigations to the Secretary of Lands; (ix) Letter dated 7/12/2015 from the Directorate of Criminal Investigations to the Chief Land Registrar; (x) Letter dated 2/7/2018 from Osundwa & Co Advocates to the Land Registrar; and (xi) Letter dated 5/7/2018 from M/s the Chief Land Registrar to M/s Osundwa and Company Limited indicating that Land Reference Number 20273 purportedly comprised in Grant Number IR 63990 does not exist in the lands records and the signatures thereon did not originate from officers in the Lands Registry.

3. I have considered the tenor and import of the application. I have also considered the materials placed before the court and the parties' respective submissions. The principle upon which the jurisdiction to grant an order of joinder is exercised is guided by **Order 1 rule 10(2) of the Civil Procedure Rules** which provides as follows:

2) 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.

4. As a principle, the court would ordinarily allow joinder if the presence of the applicant is necessary for the effectual and complete adjudication and settlement of all questions involved in the suit.

5. The present suit is a claim of trespass against the defendant. In an earlier affidavit sworn on 5/11/2016 by the same Amina Omar who swore the affidavit in support of the present application, the deponent contended that the defendant's landlord, Fleet Logistics Limited, was the registered proprietor of the suit property. She exhibited a copy of the lease between the defendant and the alleged registered proprietor. A copy of the purported lease was attached to the said earlier affidavit. The same Amina Omar has now allegedly sworn the present affidavit, this time not as a legal manager of Fleet Logistics Limited, but as a legal manager of the applicant, ARJ Capital Limited. This time she contends that ARJ Capital Limited is the registered proprietor of the suit property, effective from 19/10/2015.

6. An examination of the documents presented by the said Amina Omar in support of the application reveals disturbing elements that border

on outright criminal conduct. Firstly, the purported grant number 63990 in which Land Reference Number 20273 is allegedly comprised shows that the purported grant was signed by the Commissioner of Lands on 28/1/1996 and registered as a title on 2/2/1994. This means that it was registered as a title two years before it was signed by the Commissioner of Lands. This doesn't happen. A grant is executed before it is registered. Secondly, the purported deed plan number 230418 bearing Land Reference Number 20273 is purported to be dated 18/10/1997. This means the grant/title predates the deed plan. This again does not happen. Survey is done and a deed plan prepared before a title bearing the survey land reference number is issued. Thirdly, there is evidence from the Registrar of Titles that Grant Number IR 63990 relates to Land Reference Number 209/136/178 and does not relate to the Deed Plan presented by the applicant.

7. Evidence by the plaintiff reveals that the Department of Lands has categorically stated that the documents being waved by the applicant did not emanate from the Department of Lands and are fraudulent documents.

8. It is noted that none of the directors of the applicant company has come out to swear an affidavit and present the purported documents of title to the court. Secondly, there is no resolution of the applicant company authorizing Amina Omar to swear the affidavit in the present case. It is not lost to the court that the applicant is laying a claim of title to the suit property and is waving documents which do not add up. Those documents should ordinarily have been presented by a director of the applicant company who would explain their origin and take responsibility for uttering them to the court.

9. In my view, whereas Order 1 rule 10(2) grants this court wide discretion to issue an order of joinder, that discretion is to be exercised on the basis of *bona fide* evidence. Where the documentary evidence presented by an applicant appear to be fraudulent on its face, the court should not compromise the integrity of the court process by admitting a party whose intention is to scuttle the proceedings or use the court process to advance a criminal enterprise. For this reason, I decline to grant the prayers sought in the notice of motion dated 28/6/2018.

10. Secondly, I direct that the Director of Criminal Investigations takes immediate measures to investigate all the affidavits presented in this court as having been sworn by Amina Omar, together with all the annexures to those affidavits, to establish if the said Amina Omar committed a criminal offence under our laws. If she did, the Director of Criminal Investigations together with the Director of Public Prosecutions shall discharge their mandate as by law provided. The Registrar of this Court shall cause a copy of this ruling to be served on the Director of Criminal Investigations.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

M/s Kariuki holding brief for Mr Githinji for the Interested party

June Nafula - Court Clerk