



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 100 OF 2007

SAMVO LIMITED.....PLAINTIFF

=VERSUS=

DELTA HAULAGE SERVICES LIMITED.....1ST DEFENDANT

CATHAM PROPERTIES LIMITED.....2ND DEFENDANT

CHRISTOPHER MUGONYE WAMAE.....1ST INTERESTED PARTY

ALEXANDER KUNGU MAINA.....2ND INTERESTED PARTY

RULING

1. This is a Ruling in respect of two separate applications. The first application is dated 28th February, 2019. It is brought by the second Defendant. The application seeks an order of the Court directing the first Defendant to grant the second Defendant's valuer M/s Muchuku access to the suit properties for purposes of carrying out a valuation which shall be used in Court.

2. The second application is dated 4th March, 2019. It is brought by the Plaintiff. The application seeks the following orders **THAT:-**

1. Spent

2. Pending the hearing and determination of this application the hearing of this suit is adjourned and will continue on a date to be determined by the Court thereafter.

3. Pending the hearing and determination of the suit the Court shall inspect the suit property namely LR No. 2/75 (Original 2/35/1) under the Government Lands Act which is claimed by the Plaintiff, Samvo Ltd, at Ndemi Road to ascertain if any person, and who, is using the property during the pendency of the suit and while the injunction orders of the Court directing that the suit land should not be used by any one and during the pendency of the order for status quo by Hon. Mr. Justice Osiemo of 19th April, 2007.

4. The Plaintiff and its agents, servants or other authorised personnel is permitted to enter the suit property namely LR No. 2/75 (Original 2/35/1) under the Government Lands Act which is claimed by the Plaintiff, Samvo Ltd, at Ndemi Road and within 15 days of the date of this order to take such still and video photographic evidence of the use to which the property may be being put and as may be necessary for the purposes of the suit.

5. The Plaintiff and its agents, servants or other authorised personnel is permitted to conduct a survey and make such documented observations and recordings of the persons using, occupying or otherwise being on the suit property and to record details of any licences or permits issued by any licensing or other authority or other person for the activities carried on or conducted at the premises by the persons using, occupying or otherwise being on the suit property.

6. The Plaintiff and its agents, servants or other authorised personnel is permitted to apply to join any person to this suit who is found using, occupying or otherwise being on the property contrary to the orders of this Court that the suit land should not be used by any one and the status quo of 19th April, 2007 be maintained, so that appropriate proceedings in the suit against such persons may be taken before the hearing and determination of the suit.

7. Pending the hearing and determination of the suit and of this application the Plaintiff and its agents, servants or other authorised personnel with the assistance, if necessary, of the Officer Commanding Police Station, may secure the suit property with such fencing or other security to preserve the suit property so that there may be a fair trial over the issues in the suit and to enable the Court to make an independent and fair determination for the main issue on ownership of the suit premises and to avoid any wastage, alienation or disposal of the suit property.

8. Such other order as the Court deems fit to grant in the circumstances of the case.

9. The costs of the application shall be costs in the cause.

The First Application

3. The second Defendant/Applicant states that its Advocate wrote to the first Defendant's Advocates seeking that its valuer be granted permission to access the suit property for purposes of compiling a valuation report. The Applicant's letter was not responded to by the Counsel for the first Defendant. This is what necessitated the Applicant to move to Court.

4. The Applicant contends that it has filed a counter-claim in which it is seeking indemnity in case the Court holds that the suit property belongs to a party other than itself. The Applicant therefore argues that a valuation report is necessary for it to prosecute its counter-claim.

5. The Applicant's application is opposed by the first Defendant through grounds of opposition dated 11th March, 2019. The first Defendant contends that the Applicant's application is incurably defective; that the application is an attempt to introduce new evidence; that the first Defendant is a stranger to the two properties being claimed by the Applicant and that Applicant's interest in the suit property was extinguished when its title documents were expunged from the lands office records.

6. The Applicant's application is opposed by the Plaintiff through grounds of opposition dated 6th March, 2019. The Plaintiff contends that if the prayers sought by the 2nd Defendant are granted, it will amount to endorsing the 1st Defendant's occupation of the suit property and that this will eventually be used to argue that the Court endorsed the position by the 1st Defendant. The Plaintiff further contends that the affidavit in support of the application is valueless.

7. The Applicant's application is also opposed by the third Defendant on the grounds that the same is frivolous, vexatious and an abuse of the process of the Court and that the application seeks to introduce new claims.

8. I have considered the Applicant's application as well as the opposition to the same by the Plaintiff and the first and third Defendants. I have also considered the submissions by Counsel for the parties during the hearing of the application. The only issues for determination are whether the Applicant's application is incurably defective and whether the order sought should be granted.

9. As regards the competency of the application, Mr. Mwenesi argued that the affidavit in support of the application was sworn before the application was filed and that therefore, the affidavit is valueless and that the application should be dismissed. Mr. Mwenesi also argued that the affidavit in support of the application was notarized in China by a Notary Public who did not indicate his name or seal the affidavit and that there is no translation from Chinese into English.

10. Mr. Owang for the first Defendant associated himself with submissions by Mr. Mwenesi. As regards the affidavit being sworn before the application was filed, Mr. Mwenesi relied on the case of ***Wahinya Vs Wahinya [1976-1980] IKLR*** where Justice Chesoni as he then was held that an affidavit sworn in support of an injunction before a suit was filed was valueless.

11. The decision by Justice Chesoni as he then was is not relevant to the present case. In the instant case, there is already a counter-claim filed by the Applicant. The affidavit in support of the application was sworn on 25th February, 2019 and was filed on 28th February, 2019. There is therefore nothing wrong in this.

12. The affidavit was drawn in Kenya but signed in China by a Notary Public who duly appended his signature. There was nothing to be translated from Chinese to English. I therefore find that application is not defective.

13. On the issue as to whether the orders should be granted, the dispute herein is as to ownership of a property which is described through various descriptions depending on the party claiming it. The Applicant has raised a counter-claim in which it seeks indemnity in case it turns out that the disputed property belongs to a different party other than the Applicant. A valuation report is necessary in determining the amount to be paid as indemnity. The grant of the order sought will not amount to endorsement of the position by the first Defendant. It is the Court which will finally determine who the true owner is based on evidence adduced. It is therefore important that a valuation be carried out. I therefore allow the application with the result that an order is hereby given directing the first Defendant to grant the second Defendant's valuer M/s Muchuku access the disputed property which is variously described as **L.R No. Nairobi Block 17/557, L.R 2/75, L.R 2/694, L.R 2/695 or L.R 17/338**. The costs of this Application shall be in the cause.

It is so ordered.

The Second Application

14. The Applicant in this application is seeking various orders as shown in paragraph 2 hereinabove. The application is premised on the ground that the Applicant's Counsel asked his process server to go and ascertain what was happening on the suit property. When the process server went to the suit property he found out that there was a lot of activity going on. There was a garage on it among other activities.

15. The process server went and asked his friend who is involved in property business to accompany him to the suit property for more investigations. The process server then proceeded to the suit property in the company of Moses Jumba Munyasa who posed as a person seeking to purchase motor vehicle spare parts. Once the said Jumba was allowed in, he took some photographs and later posed as a potential buyer of the suit property. He was informed that the property was up for sale and that the asking price was 1.6 billion shillings. The investigations revealed that there was even a lodging on the suit property besides other businesses such as garage. It is out of these preliminary investigations which were carried out secretly that the Applicant is now seeking orders herein.

16. The Applicant's application was opposed by the first Defendant based on grounds of opposition dated 4th March, 2019 and a Replying Affidavit sworn on 11th March, 2019. The first Defendant contends that the application is an attempt to delay the hearing of the main suit; that the persons who have sworn the affidavits in support of the same have no *locus standi*; that the Applicant has severally made attempts to derail the hearing of the suit and that the first Defendant was the one in the suit property as at 2007 and has not wasted the same as there are orders that it is the first Defendant who is to remain in the suit pending determination of the dispute herein.

17. The first Defendant further contends that the Applicant's application is an attempt to amend the orders which were given in 2007 regarding the *status quo*. The first Defendant further contends that the Applicant has always wanted to delay the hearing of the main suit by failing to comply with directions of the Court and by filing many applications some of which are still pending unprosecuted.

18. I have considered the Applicant's application as well as the opposition to the same by the first Defendant. I must say at the outset that this application is an abuse of the process of the Court which is meant to delay the conclusion of this suit. This application was filed on the day when the case was set for hearing. The case had been listed for hearing on 4th, 7th and 12th March, 2019. Because of this application and the one by the second Defendant, the case could not proceed on the three days set aside.

19. The deponents of the supporting affidavits are not associated to the Applicant. They have no authority to act for the company. The dispute herein is on who owns the disputed property. If the Applicant had co-operated this suit should have been determined a long time ago. The record shows that the Applicant has failed to comply with directions of the Court. At times, the Applicant has filed applications which are not prosecuted to conclusion like the application dated 27th October, 2017 where directions were given but the Applicant never bothered to comply. The application remains unprosecuted but the Applicant is coming up with more of such applications like the present one.

20. Whereas a party is entitled to ask the Court to visit the suit property, such an application has to be made at an appropriate time and when it is necessary to do so depending on the circumstances of the case. The dispute herein started in 2007. This application is being made in 2019, twelve years later. The Applicant who is the Plaintiff has not availed its witness to start off so that if appropriate, the Court can then be moved to visit the site.

21. The Applicant is seeking to be allowed to go and take photographs of the suit property and ascertain the persons operating there with a view to enjoining them in this suit so that appropriate proceedings can be taken against those persons. The Applicant is also seeking orders that Police Officers do assist in securing the suit property.

22. There are already orders securing the property. There were orders given by Justice Osiemo in 2007. The other orders were given by Justice Gacheru in 2014. There is no need for any further orders to secure the suit property.

What the Applicant should be doing now is to ensure that it avails its witnesses so that the case can be concluded. I do not find any merit in this application which is dismissed with costs.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 4th day of April, 2019.

E.O.OBAGA

JUDGE

In the presence of Dr. Kamau Kuria for 2nd Defendant, Mr. Mwenesi for Plaintiff,

Mr. Rapando for Interested Parties, Mr. Owang for 1st Defendant and Mr. Moturi for 3rd Defendant.

E.O.OBAGA

JUDGE

4.4.2019