



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 52 OF 2016

(FORMERLY MISC. NO.667 OF 2009)

1. HANAS KENYA LTD

2. GUNFIELD GERLINDE.....PLAINTIFFS

-VS-

DHIREY MOHAMLAL SHAH.....DEFENDANT

RULING

1. The Application for consideration is the Chamber Summons dated 17th October 2017 in which Wilfred Guenther Herbert Oser mainly seeks to be enjoined in the suit as a Plaintiff. The application is brought under Article 50 (1) of the Constitution, Order 1 Rule (1) and Order 1 Rule 10 (2) of the Civil Procedure Rules.

2. The Application is based on the grounds that the proposed Plaintiff is a director of the 1st Plaintiff and a former husband to the 2nd Plaintiff. He avers that he took possession of subject suit property known as subdivision **NUMBERS 2108/MN** and **2124/MN BAMBURI** on 1st August 1986 vide a lease agreement dated 1st August 1986 which was signed by the Applicant and the 1st Plaintiff. That the lease was for three years and expired on 31st July 1989. It is the Applicant's contention that if he was to file a separate suit, common question of law and fact would arise because since 31st July 1989, the Applicant and the 1st and 2nd Plaintiff have been possession of the Suit Property for over 28 years without the consent and/or interruption from the Defendants. The Applicant further contends that he has developed the Suit Property by constructing a holiday resorts known as Papillion Garden Villa and accordingly, his possession and use of the Suit Property has been inconsistent with the enjoyment of the soil by the owners who are entitled to title, use and possession, and in view of the foregoing the proposed Plaintiff is entitled to adverse possession. The Applicant avers that it is necessary to enjoin the proposed Plaintiff in order to enable the Court to effectively and completely adjudicate and settle all the questions in this matter especially the question of whether the proposed Plaintiff should be registered as the owner of the suit properties by way of Adverse Possession; whether the Court should order the Registrar of Titles to rectify Title and register the names of the Plaintiffs as joint owners; and whether an injunction should be issued as against the Defendants restraining them from interfering with the Plaintiffs' possession. It is the Applicant's contention that no party will suffer any prejudice if the proposed Plaintiff is enjoined.

3. The Application is supported by the Affidavit of Wilfred Guenther Herbert Oser, the Applicant, in which he reiterates the grounds in support of the motion. In addition, he has annexed a copy of the Affidavit in support of the Originating Summons in which the 2nd Plaintiff admits that the Applicant was a director of the 1st Plaintiff and former husband to the 2nd Plaintiff.

4. The Plaintiff filed grounds of opposition dated 12th January 2018. It is the Plaintiff's contention that the Application is wholly misconceived, is of no legal basis, is without merit and is frivolous. The Plaintiff further contends that the Application has been overtaken by events as the proceedings are deemed to be closed as the matter has been heard and notice of judgment has been issued for delivery on 16th January 2018. The Plaintiff avers that the Application is otherwise an abuse of the Court Process and that the Applicant is deliberately misleading the Court by stating on oath that he is a director of the 1st Plaintiff without disclosing any evidence in support. According to the Plaintiff, the Applicant has always been aware of these proceedings from the inception and was the only witness who has given oral evidence at the hearing on behalf of the Plaintiff.

5. The Plaintiff also filed a Replying Affidavit by Ronny Patric Herbert Oser, a director of the Plaintiff and son to the proposed Plaintiff sworn on 2nd February 2018 in which he depones *inter alia* that the Applicant has no valid claim for Adverse Possession in his own right in law as after expiry of the leases on 31st July 1989, he ceased to reside on the suit property. He depones further that the Applicant resigned as a director and transferred his one share in the company on 14th July 2005. That the Applicant was no longer a director or shareholder of the

Plaintiff with effect from 14th July 20105 and did not come to reside on the property until 20th January 2013 when the deponent's late mother passed away and that he is occupying the rooms in which the deceased was staying in the hotel without consent and without paying rent despite demand. That the Plaintiff is in possession of the Suit Properties and both Ronny Patric Herbert Oser and his sister are managing its affairs through a manager and staff employed by the Plaintiff.

6. The Defendant has filed grounds of opposition dated 1st February 2018. It is the Defendant's contention that he Application lacks merit and that the proposed Plaintiff has not legal or equitable interest as to be enjoined in the suit because he is not a director of the 1st Plaintiff; at all material times he was not in possession of the subject matter of the suit; he has no claim on Adverse Possession over the suit property, the purported lease agreement having expired; he has not filed for letters of administration in the estate of the 2nd Plaintiff. That as the alleged director of the 1st Plaintiff, the proposed Plaintiff was all along aware of the case and delayed for 9 years in filing his Application without explanation. That the proceedings have been deemed closed as a notice of judgment has been issued and allowing the application will prejudice the Defendant because the pleadings will have to re-open hence delay in justice. It is the Defendant's contention that the Application is an abuse of the Court Process, is an afterthought and has been brought after the matter had been set done for judgment with sole aim of delaying the disposal of the suit. According to the Defendant, the proposed Plaintiff will not be prejudiced if he is not joined because he is at liberty to pursue his claim, if any, against any person in independent proceedings.

7. The Applicant filed a Supplementary Affidavit on 16th April 2018 in which he depones *inter alia*, that he never resigned as a director of the 1st Plaintiff company as alleged and that he never transferred his shareholding to Ronny Patric Herbert Oser or Jeanine as alleged and avers that Ronny Patric Herbert Oser acquired possession of the Suit Property through the Applicant as a father vide the lease agreement dated 1st August 1986. He denied signing any transfer documents in 2005 and states that he became aware of the alleged documents on 5th February 2018 when he read the affidavit of Ronny and believes his signature was forged. He states that he reported the matter to Bamburi Police station vide **OB No.28/10/3/2018**. The Applicant depones that the company has not issued any valid share certificates to the alleged shareholders and that as a director, if such certificates if any have been forged and or obtained through unlawful means, and further that the Respondents have not adduced any admissible documentary evidence from the Registrar of Companies.

8. The Applicant filed skeleton submissions dated 16th April 2018 which Mr. Kariuki advocate who held brief for Mr. Kimani for the Applicant relied on. Mr. Khanna, learned Counsel for the Plaintiffs relied on the grounds of opposition and Replying Affidavit filed and also made oral submissions outlining the Plaintiffs' opposition to the application. He argued *inter alia* that the Applicant has not shown any evidence of his directorship of the 1st Plaintiff or that he has been in adverse possession for over 12 years. He added that the proposed Plaintiff's interest, if any will be taken care of by the company. On his part, Mr. Sitonik learned Counsel for the Defendant argues that the Applicant has failed to demonstrate that he has been in occupation for the requisite period and pointed out that when the Applicant testified under oath on 20th May 2014, he indicated that he moved out of the suit property in 1989 and it was his ex-wife, the 2nd Plaintiff who remained in the property until her demise in 2013. He added that if his claim is as a director or shareholder, then his rights have been taken care of by the 1st Plaintiff Company.

9. I have carefully considered the arguments advanced by all the parties in this matter and the relevant law as well as the authorities cited. Order 1, Rule 1 and 2 of the Civil Procedure Rules provides as follows:

1. All persons may be joined in one suit as Plaintiffs in whom any right or 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.

2. Where it appears to the Court that any joinder of Plaintiffs may embarrass or delay the trial of the suit, the Court may either on the application of any party or of its own motion put the Plaintiffs to their election or order separate trials or make such other order as may deem expedient.

Order 1 Rule 10 (1) and (2) of the Civil Procedure Rules provides as follows:

(1) Where a suit has been instituted in the name of the wrong persons as Plaintiffs, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any person to be substituted or added as Plaintiff upon such terms as the Court thinks fit.

(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 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 effectively and completely to adjudicate upon and settle all questions involved in the suit, be added.

10. In the Originating Summons dated 12th November 2009, the Plaintiffs claim that they are entitled to the Suit Properties known as **SUBDIVISION NUMBERS 2108/I/MN and 2124/I/MN** by Adverse Possession. The 1st Plaintiff is a Limited Liability Company while the 2nd Plaintiff was a director of the 1st Plaintiff. The 2nd Plaintiff is now deceased, having passed away on 20th January 2013. The record shows that on 4th December 2013, counsel for the Plaintiffs' informed the Court that they shall be proceeding with the suit on behalf of the 1st Plaintiff only. Directions were taken where the parties by consent agreed that they be allowed to adduce evidence in addition to affidavits. On 20th May 2014, Herbert Wilfred Guenther who is the proposed Plaintiff/Applicant testified on behalf of the Plaintiffs. On 17th October 2017, the Applicant filed this Application seeking to be enjoined in the suit as a Plaintiff. The Applicant is seeking to be enjoined as a Plaintiff because he is a director of the 1st Plaintiff and a former husband to the 2nd Plaintiff who is now deceased.

11. In my view, the cause of action herein arises from the expiry of a Lease Agreement which was entered between the 1st Plaintiff Company and the Defendant. The Applicant may have signed the Lease Agreement in his capacity as a director of the 1st Plaintiff Company. The proposed Plaintiff has already given evidence on behalf of the Plaintiff Company. The Applicant all along knew the existence of this suit. In my considered view, the Applicant's rights if any, can adequately be covered by the Plaintiff Company.

12. Indeed the Applicant has already given evidence in support of the claim of the Plaintiff Company. He cannot now turn around and apply to be enjoined as a Plaintiff. It is apparent that the Application is an afterthought. In my view, the question of who is a director or shareholder of the Plaintiff Company is not an issue for determination in this suit. I think that is an issue that may be properly taken in a separate suit.

13. In this case, both parties had closed their cases. What was left is the delivery of judgment. In my view, the joinder of the Applicant as a Plaintiff will embarrass and delay the finalization of the suit. Under the provision of Order 1 Rule 2 of the Civil Procedure Rules, where it appears to the Court that any joinder of Plaintiff may embarrass or delay the trial of the suit, the Court may make such order as the Court may deem expedient. In my view, disallowing the application herein is the most expedient thing to do in the circumstances of this case.

14. Accordingly, I find no merit in the Application and the same is hereby dismissed. Considering the circumstances of this case and the relationship of the parties, I order that each party to bear their own costs.

Delivered, signed and dated at Mombasa this 17th September, 2018.

C. YANO

JUDGE