



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 44 OF 2009**

**CONSTANTINO TANZI.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**OCEANIC SUN VIEW LTD.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff has filed an Application dated 2<sup>nd</sup> December, 2013 in which he is seeking for the following orders;-

**(a) That this Honourable Court be pleased to grant leave to the Plaintiff/Applicant to amend his Complaint, so as to enjoin SIMONE MANCINI as the 2<sup>nd</sup> Defendant in this suit as per draft amended complaint.**

**(b) That cost of this application be provided for.**

2. The Application is premised on the grounds that the said intended 2<sup>nd</sup> Defendant was directly involved in the agreement of 18<sup>th</sup> October, 2006; that the intended 2<sup>nd</sup> Defendant is the author of the misfortune that befell the Plaintiff and that the order being sought will not prejudice the parties herein.

3. The Plaintiff/Applicant has deposed in his affidavit that the intended 2<sup>nd</sup> Defendant admitted in his affidavit being involved in the agreement of 18<sup>th</sup> October, 2006 between the Plaintiff and the Defendant.

4. The intended 2<sup>nd</sup> Defendant, who is also a director in the 1<sup>st</sup> Defendant's company stated in his Replying Affidavit that the Plaintiff's claim is based on contract and should have been brought within six years; that the claim against him is time barred and that no ground has been adduced as to why he should be enjoined in the suit.

5. The Plaintiff's advocate submitted that the law gives the court wide discretion to add and strike out a party from proceedings for effectual and final determination of the suit and that the suit is not time barred.

6. The Defendant's advocate submitted that the impugned agreement was entered into eight years ago and the suit is therefore time barred in respect of the intended 2<sup>nd</sup> Defendant. Counsel relied on the provisions of Sections 4 (1) of the Limitation of Actions Act and Order 3 Rule 4 of the Civil Procedure Rules to buttress his arguments.

## **Analysis and findings:**

7. The Plaintiff is seeking to enjoin the 2<sup>nd</sup> Defendant who is a director in the 1<sup>st</sup> Defendant's company in the suit on the basis that the 2<sup>nd</sup> Defendant was directly involved in the agreement of 18<sup>th</sup> October, 2006. The Plaintiff is also relying on the depositions of the Defendant's director in his affidavit dated 21<sup>st</sup> May, 2009 in which the 2<sup>nd</sup> intended Defendant stated that it is the Plaintiff who breached the contract of 18<sup>th</sup> October, 2006.

8. In the draft amended Plaintiff, the Plaintiff is seeking to introduce a paragraph showing that the 2<sup>nd</sup> Defendant misrepresented himself as having full authority to transact on behalf of the company, the 1<sup>st</sup> Defendant.

9. I have perused the Plaintiff. In the Plaintiff, the Plaintiff is seeking for an order of specific performance.

10. In the draft amended Plaintiff, the Plaintiff, in addition to an order of specific performance is also seeking for an order of compensation for flagrant breach of contract.

11. The Plaintiff has pleaded in the Plaintiff that at all material times, he entered into a contract with the 1<sup>st</sup> Defendant for the sale of the suit property on 18<sup>th</sup> October, 2006 at an agreed sale consideration of 90,000 Euros and that the 1<sup>st</sup> Defendant has refused to take the installments form the Plaintiff as agreed. The Plaintiff further averred that the 1<sup>st</sup> Defendant is the registered proprietor of Kilifi/Kivulini Block 1/41(the suit property).

12. It is trite law that a company is a separate legal entity from its directors and or shareholders. In view of the admission by the Plaintiff that the company was the registered owner of the suit property and that he entered into the contract dated 18<sup>th</sup> October, 2006 with the company, he can only sue the said company for specific performance or for breach of contract and not the directors.

13. The Plaintiff has to elect the prayers that he seeks from the court. An order of specific performance cannot be granted with an order for breach of contract as pleaded in the draft amended Plaintiff.

14. In any event, the Plaintiff has not pleaded the particulars of fraud and misrepresentation as against the intended 2<sup>nd</sup> Defendant to enable the court determine if the said intended Defendant is a necessary party in these proceedings. Indeed, the Plaintiff has not even alleged that the intended 2<sup>nd</sup> Defendant was not a director in the Defendant's company and could not have signed the contract on behalf of the said company.

15. The Plaintiff is seeking to introduce a prayer for breach of contract in the draft amended Plaintiff. That prayer cannot be granted as against the proposed Defendant or at all considering that a claim for breach of contract must be filed within six years from the date on which the cause of action occurred. That prayer is therefore time barred considering that the impugned contract was entered into on 18<sup>th</sup> October, 2006.

16. In any event, the Plaintiff has admitted in his pleading that he entered into the contract for the sale of the suit property with the 1<sup>st</sup> Defendant and not the proposed 2<sup>nd</sup> Defendant. I have perused the proposed 2<sup>nd</sup> Defendant's affidavit sworn on 21<sup>st</sup> May, 2009 which the Plaintiff is relying on to enjoin the 2<sup>nd</sup> Defendant in the suit. The 2<sup>nd</sup> Defendant never admitted in the said affidavit that he participated in the signing of the contract in his personal capacity. He could only have signed that contract on behalf of the company considering that the property is registered in the name of the company. The joinder of the proposed Defendant is therefore not necessary because he was not a party to the contract

17. In the circumstances, I find that the addition of the proposed 2<sup>nd</sup> Defendant in this suit is not necessary and the proposed cause of action in the draft amended Plaintiff is time barred.

18. For the reasons I have given above, I dismiss the Plaintiff's Application dated 2<sup>nd</sup> December, 2013 with costs.

Dated and delivered in Malindi this 25<sup>th</sup> day of **July**, 2014

**O. A. Angote**

**Judge**