



**Gudka & another v Roitei (Environment & Land Case
E008 of 2022) [2025] KEELC 1364 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1364 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E008 OF 2022**

MN MWANYALE, J

MARCH 20, 2025

BETWEEN

NEEL ASHWIN GUDKA 1ST PLAINTIFF

AKASH K. GUDKA 2ND PLAINTIFF

AND

OSIKA OLE ROITEI DEFENDANT

RULING

1. This Ruling relates to the Chamber Summons application dated 19.12.2024 filed by the Defendant/Applicant seeking for joinder of Stephen Partareto Barta and Nakuyiet Nooretet Kura as third parties. The Application have been made pursuant to Order 1 Rule 15 of the Civil Procedure Rules.
2. The grounds in support of the application are interalia, that both the Plaintiff and the Defendant purchased the suit property they are claiming from the Intended 3rd parties Stephen Partareto Barta and Nakuyiet Noorelet Kura.
3. The portions claimed by the plaintiff and portion claimed by the Defendant is a subdivision of Transmara/Kerinkani/9.
4. There is no privity of contract between the parties and the Intended third parties being the vendor in both transactions is a necessary party to the proceedings for just and final determination of all disputes between the parties.
5. Thus the 3rd party Notice is warranted in the circumstances of this case.
6. The application is further supported by the supporting affidavit of the Applicant Osika Ole Roitei, who deposes interalia, having purchased two portions from the Intended third parties vide two separate agreements made on 13th July 2012 ad 23rd September 2013 the two portions measuring 15 acres and



- 22 acres within Transmara/Kerinkani/9, which property had been registered initially in the name of Oloishuro Ole Barta who upon his death the property was inherited by the intended third parties.
7. That the original Transmara/Kerinkani/9 was subdivided severally into 397 and 530 and eventually 772 registered in the plaintiffs' names.
 8. That the parties are filing over the same parcel on the ground, which parcel was sold to the parties by the same persons, hence the need for joinder of the intended parties.
 9. The Applicant has annexed copies of the searches, the Agreements for Sale as well as copy of survey report.
 10. Grounds of opposition were filed in respect of the application, the same were dated 17th January 2025, are interalia
 - i. Application is premature mischievous misconceived and bad in law.
 - ii. That the intended third parties are witnesses of the Defendant/Applicant.
 - iii. That the Defendant is not entitled to indemnity as there is no express and or implied contract between him and the intended third parties.
 - iv. That the Defendant/Applicant ought to have lodged a separate suit against the intended third parties
 11. The suit herein being a suit for recovery of land and/or ownership joinder of the intended third parties in the suit will introduce a new cause of action which can be litigated between the Defendant/Applicant and the intended 3rd parties in a separate suit.
 12. The application offends the provisions of Order 1 Rule 15 as the plaintiff is not claiming any claim pegged on itself and the intended 3rd parties but seeks to recovery their land pursuant to Section 7 of the limitations of Actions Act.
 13. The application proceeded by way of oral submission; Mr. Shira argued the application on behalf of the Applicants while Mr. Mulisa opposed the application on behalf of the Respondent.
 14. In his submission Mr. Shira submitted that during the site visit, the intended 3rd party had confirmed that he sold the Defendants where he has possession but the same is now registered in the Plaintiff's name. Thus, the intended 3rd party is a necessary party so as to conclude the disputes arising from the transaction; and that the inclusion of the 3rd parties could only be don vide Order 1 Rule 15 by issuance of a 3rd party Notice.

In support of the submissions the Applicant placed reliance on the decision in the case of

- i. Baruthi Bundi vs Domitira Obal Ouma eKLR 2022,
 - ii. Gachango vs A.G 1981 eKLR as well as
 - iii. Hass Petroleum Vs. Lota Engineering and Construction Ltd (KEHC 427 eKLR).
15. In opposition to the application Mr. Mulisa learned counsel submitted that this suit had partially proceeded and the plaintiff had closed his case and the matter was for defence hearing hence the application was an afterthought. That the Applicant is not entitled to indemnity by the 3rd party as per the Sale Agreement, and the new cause of action will be prejudicial to the plaintiff who has closed his case and the new cause of action based on contract while the current cause of action is based on recovery of land. That if two titles exist then the Defendant was at liberty to take action against the 3rd party.



16. On the basis of the above Mr. Mulisa argued that court to dismiss.
17. Upon analysis of the application the submission and the authorities as well as the consideration of the law; the court frames the following as issues for determination?
 - i. Whether there exist grounds for issuance of a third party notice?
 - ii. Whether or not the application is merited?

Analysis And Determination

18. It is the Respondents case that there was no contract of indemnity so as to give rise to the third (3rd) party Notice and the ensuing proceedings. I have perused the third (3rd) party Notice the same is founded on the Agreements of Sale dated 13th July 2012 and 23rd September 2013 and the said Notices alleges that the intended third (3rd) party sold to the Defendant the same portion of land that he sol to the plaintiff and resulting to this current litigation over the said portion of the property.
19. Black law dictionary defines indemnity as
 - “(1) A duty to make good any loss or damage or liability incurred by another party.
 - (2) The right of an injured party to claim reimbursement for its loss or damage or liability from a person who has such a duty.
 - (3) Reimbursement or compensation for loss, damage or liability in tort.”

For purposes of this 3rd party notice the 2nd definition suffices, indemnity may be contractual indemnity, where it is expressly provided for in a clause or implied contractual indemnity, defined in Blacks law dictionary as follows; -

“Indemnity that is not expressly provided for by an indemnity clause in an Agreement but is nevertheless determined to be reasonable intended by the parties based on equitable considerations”.

20. I have perused the Agreements for sale the foundation of the 3rd party Notices and the same do not provide for a contractual indemnity and I agree with the Respondents Advocates on their submissions in this regard.
21. There is a clause in the Agreement for Sale dated 13th July 2012, which provides as follows
 - “That the vendor is hereby restrained from entering into any contract of sale with the third party in respect of his sold portion of land.”
22. By forbidding the sale of the portion bought by the purchaser, the parties intended to have consequences on breach of the said provision.

Would this clause form an implied contractual indemnity? I am persuaded that the parties to the Agreement for sale dated 13th July 2012, intended to have consequences of the breach of the said provision and that intention would be an implied contractual indemnity and/or claim for restitution by the plaintiff.
23. Having found that an implied contractual indemnity existed on the Agreement for sale the Applicant has proven that the 3rd party Notice is well founded on indemnity as provided for in the Agreement for sale the foundation of the 3rd party (Notice is well founded on indemnity). In Chase International



Investment Corporation and Another Vs. Laxman Keshra the court held inter alia, “that if the contract was one for indemnity, it is enforceable without being in writing” The above decision confirming that indemnity could be oral and inferred. The Applicant has thus proven that the 3rd party Notice is valid under the provisions of Order 1 Rule 15 (1) (a) of the Civil Procedure Rules, there is therefore a legal basis for the Intended 3rd party Notice to issue.

In answer to issue 1, the court finds that they are grounds for issuance of the 3rd party Notice on whether the Application is merited.

24. The Applicant submitted that the joinder of the 3rd party would enable the court to determine all matters in controversy.
25. The court finds that the joinder of third party would not alter the cause of action but bring to the fore all the issues for determine and thus the application is merited.
26. The upshot is that the application is allowed with costs, in terms that
 - i. The Defendant shall issue and serve the 3rd party Notice to the intended 3rd parties in accordance with Order 1 Rule 15 (2)
 - ii. The Plaintiff/Respondent shall be at liberty to re-open their case should they deem it necessary once the 3rd party enters appearance and direction in relation to the third party case are issued.
27. Orders accordingly.

DATED AND DELIVERED AT KILGORIS THIS 20TH DAY OF MARCH 2025.

HON. M.N. MWANYALE

JUDGE

In the presence of

C/A Emmanuel/Slyvia

Mr. Shira for the Defendant/Applicant

Mr. Onyango for the Plaintiff/Respondent

