



**Ethics and Anti-Corruption Commission v Gacanja & 2 others; Machakos County Government
(As successor of the County Government of Masaku) & another (Intended Third Parties)
(Environment & Land Case 127 of 2019) [2023] KEELC 18102 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18102 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 127 OF 2019
CA OCHIENG, J
JUNE 19, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

WILSON GACANJA 1ST DEFENDANT

JOSEPH MUTUKU MUIA 2ND DEFENDANT

FAMILY BANK LIMITED 3RD DEFENDANT

AND

**MACHAKOS COUNTY GOVERNMENT (AS SUCCESSOR OF THE COUNTY
GOVERNMENT OF MASA KU) INTENDED THIRD PARTY**

NATIONAL LANDS COMMISSION INTENDED THIRD PARTY

RULING

1. What is before the court for determination is the 2nd defendant's notice of motion application dated the February 21, 2023 where he sought for the following orders:
 1. Spent.
 2. That the honourable court do enlarge time within which to issue a third-party notice against the Machakos County Government as the successor of the County Council of Machakos and the National Lands Commission.
 3. That further to prayer 2 above, leave be granted to the 2nd defendant to issue third-party notice to the said Machakos County Government as the successor of the County Council of Machakos and the National Lands Commission.



4. That parties herein be at liberty to amend their pleadings in as so far as is necessary.
 5. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it and supported by the affidavit of Mutuku Muia where he deposes that the 2nd defendant is the lessee of the suit land with the defunct Municipal Council of Machakos (*now County Government of Machakos*) being the Lessor which still holds the reversionary interest in the lease. He states that from the suit documents, the plaintiff herein seeks to have the lease title issued to him revoked, while the reversionary interest is held with the 1st intended third party. He avers that the allotment and title issuance process was undertaken by the 1st intended third party. He explains that it was the Commissioner of Lands who issued the lease title and the said office was succeeded by the 2nd intended third party. He reiterates that once the lease expires, the land shall revert back to the head lessor, the 1st intended third party and he will have been deprived the use of the lease interest and the intended third parties shall indemnify him in the event the matter proceeds to full trial and judgment is delivered in favour of the plaintiff. He insists that it is in the interest of justice that the court grants the orders as sought.
 3. The plaintiff opposed the instant application by filing grounds of opposition where it stated that the applicant has not established the basis for the issuance of a third-party notice and the evidence adduced does not warrant the discretionary power of this court to enjoin the proposed third parties to the suit. It contends that there lies no linkage between the claim for indemnity by the 2nd defendant from the proposed third parties and the plaintiff's cause of action. Further, that there is no basis for determination of liability between the defendants and the proposed third parties. It explains that the 2nd defendant as early as November 29, 2019 when he entered appearance and filed his responses, was aware of the need to issue third party notices but failed to act promptly hence the application is an afterthought. It reiterates that the application was filed with inordinate delay which has not been explained and urged the court to dismiss it with costs.

The application was canvassed by way of written submissions.

Analysis and Determination

4. I have considered the instant notice of motion application, grounds of opposition and rivalling submissions and the only issue for determination is whether the 2nd defendant should be granted leave to issue and serve a third-party notice upon the Machakos County Government as the successor of the County Council of Machakos and the National Land Commission.

The 2nd defendant in his submissions referred to order 1 rule 15(1) of the *Civil Procedure Rules* on indemnity and contribution and stated that the delay in filing this application was not inordinate as the ruling for joinder of parties' application dated the June 2, 2020 was delivered on February 1, 2023 necessitating the filing of this application. He relied on the provisions of order 1 rule 15 of the *Civil Procedure Rules* on leave to issue third party notice and argued that the 1st and 2nd intended third parties are crucial to these proceedings. To support his arguments, he relied on the following decisions: *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR; *Hass Petroleum (K) Ltd v Iota Engineering and construction Limited (formerly Iota Exavations and Rentals Ltd) White Lotus Projects Limited & Another v Equity Bank Limited & 2 others* (2016) eKLR; *Yafwesi Walusimbi v Attorney General of Uganda* (1959) EA 223; *Oceanfright (EA) Ltd v Technomatic Ltd & Another* and *Gachago v Attorney General* [1981] KLR 232.

6. The plaintiff in its submissions argued that the instant application is merely an attempt to obfuscate the real issues for determination before the court. It contended that the 2nd defendant seeks to enjoin



the third parties for purposes of indemnifying him should the court deliver judgment in favour of the plaintiff and therefore he seeks to be indemnified and or compensated upon an illegally and/or fraudulently acquired title which is against public policy. It argued that the 2nd intended interested party, the National Land Commission was formed in 2012 way after allocation of the suit property to the 2nd defendant. Further, that the 2nd defendant had therefore not established the basis for issuance of a third-party notice to the intended parties. It insisted that the inordinate delay is inexcusable and there are no justified reasons to seek leave to issue third-party notice within the prescribed timeline. To buttress its averments, it relied on the following decisions: *Leo Investment Limited v Mau West Limited & another* [2019] eKLR; *E.K Kagwa v Costa* [1963] EA & *Sango Bay Ltd v Dresdner Bank Ltd* [1971] EA 307; *Festus Ogada v Hans Mollin* (2009) eKLR; *Scott v Brown, Doering, Mc Nab and Company* (3) [1892] 2 QB 724; *Republic v Land Registrar Mombasa & 2 others ex parte Bhangra Limited* [2012] eKLR; *Scott v Brown* [1892] 2QB 724; *Moraho Limited v Sinohydro Corporation Ltd* [2014] eKLR and *Richard Ngatia Waweru v Arivind Vohora* [2016] eKLR.

7. The legal provisions governing joinder of third parties is contained in order 1 rule 15 of the *Civil Procedure Rules* which provides that:-

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)- (a) That he is entitled to contribution or indemnity; or (b) That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or (c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

8. From a perusal of the court records, I note the plaintiff filed its plaint on November 19, 2019 seeking various orders against the defendants in respect to land parcel number Machakos Block 1/623 currently registered in the name of the 2nd defendant but charged to the 3rd defendant. Further, from the documents produced by the plaintiff, the alleged allotment of the disputed plot was done by the defunct Masaku County Council which has been succeeded by the County Government of Machakos and the certificate of lease was issued by the 1st defendant who was the Commissioner of Lands by then. The 2nd defendant filed his defence and counter-claim on November 29, 2019. While the 1st defendant filed his defence on January 23, 2020. The plaintiff filed a reply to defence and defence to counter-claim on November 29, 2021 while the 3rd defendant filed its statement of defence on January 26, 2022. I note the 2nd defendant has not explained the cause of delay in seeking leave to institute third party proceedings. Be that as it may, from perusal of the various pleadings filed by the respective parties herein, it is clear that the County Government of Machakos indeed participated in the process of allocation of the suit land to the 2nd defendant but not the National Land Commission which had not been formed by them. In the case of *Thachmaanz Ltd v Pride Inn Ltd* [2016] eKLR the court while dealing with an application for leave to institute third-party notice which was filed late held as follows:-

As correctly pointed out by the plaintiff the delay is not explained by the defendant and had it been inordinate then the court would have outrightly declined to entertain the application out of time. However because the application was filed about 60 days late and before the date set for case management conference this court is of the view that the delay is not inordinate.



An explanation of delay is of vital importance when the delay is extensive. The delay here not being extensive, is excused for the sake of considering the application on merit. Justice may be better served in that way.”

9. While in the case of *Cheruiyot Edwin Mutai v Cyrus Ngaruiya* [2020] eKLR the court observed as follows:-

It is plain from the foregoing that third party proceedings are not solely about contribution or indemnity by the third party to the defendant. That is only one aspect of it. Subrules (b) and (c) of order 1 rule 15 (1) of Civil Procedure Rules, 2010, envisage other scenarios. Subrule (c) thereof is particularly instructive. It foresees issues that may arise not only between the third party and the defendant but between all the three parties in the suit viz: the plaintiff, defendant and third party. Strange as it may seem, Subrule (c) envisages a situation where an issue may arise between the third party and the plaintiff, with the defendant not necessarily being centrally involved (emphasis mine). This becomes clearly manifest when one considers the language used in Subrule (c), which, in the relevant part, is as follows:

“...determined not only as between the plaintiff and the defendant and the third party or between any or either of them.”

10. See the cases of *Gachago v Attorney-General* 1981] KLR 232 and *Yafesi Walusimbi v Attorney General of Uganda* (1959) EA 223.

Based on the facts before me while relying on the legal provisions I have quoted and associating myself with the decisions cited, insofar as the 2nd defendant filed this application late and has not explained the reason of delay, i note the plaintiff has not demonstrated what prejudice its stands to suffer if the two third parties are joined in these proceedings. I find that there is indeed a correlation between the dispute herein and the County Government of Machakos but not the National Land Commission which was formed after the 2nd defendant had already obtained his letters of allotment as well as certificate of title. In the interest of justice, I opine that it would be pertinent if only the County Government of Machakos was brought on board to provide certain answers in respect to the dispute herein. I hence find that the County Government of Machakos indeed meet the criteria set out for a third party and its involvement will be necessary to enable the court effectually and completely adjudicate upon this suit. I further find that no prejudice will be suffered by the plaintiff if the County Government of Machakos is joined in these proceedings.

11. In the circumstances, I will proceed to partially allow the 2nd defendant’s notice of motion application dated the February 21, 2023 and direct that the County Government of Machakos be served with third-party notice within seven (7) days from the date hereof. I further direct that upon service, the County Government of Machakos do file its response within 14 days from the said date.

Costs of the instant application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF JUNE, 2023

CHRISTINE OCHIENG

JUDGE

