



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO.98 OF 2011

A K ABDULGANI LTD.....PLAINTIFF

VERSUS

COAST WATER SERVICES BOARD.....DEFENDANT

COUNTER-CLAIM

COAST WATER SERVICES BOARD.....PLAINTIFF

VERSUS

A K ABDULGANI LIMITED.....1ST DEFENDANT/APPLICANT

REGISTRAR OF TITLES MOMBASA.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

AND

1. THE ATTORNEY GENERAL

2. CHIEF LAND REGISTRAR

3. CABINET SECRETARY, MINISTRY OF LAND

& PHYSICAL PLANNING

4. CABINET SECRETARY, NATIONAL

TREASURY & PLANNING

5. CABINET SECRETARY, MINISTRY

OF WATER, SANITATION & IRRIGATION

6. THE DIRECTOR OF SURVEYS.....THIRD PARTIES

RULING

The application is dated 28th October 2021 and is brought under Order 1 Rule 18 and Order 1 Rule 24 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya seeking the following orders;

1. That the National Land Commission (the 3rd Defendant in the counter claim) be deemed to have admitted the validity of any decree obtained against A.K. Abdulgani Limited, the 1st Defendant/Applicant in the counter-claim, whether obtained by consent or otherwise and its liability to contribute or indemnify the 1st Defendant/Applicant in the counter-claim in respect to any lodgement

that may be made against it, to the extent claimed in the notice to the defendant dated 16th June 2021.

2. That all of the 1st to the 6th third parties in the counter-claim be deemed to have admitted the validity of any decree obtained against the 1st Defendant/Applicant in the counter-claim, whether obtained by consent or otherwise and their liability to contribute or indemnify the 1st Defendant in the counter-claim in respect to any judgment that may be made against it, to the extent claimed in the notice to the 1st Third Party on behalf of the 1st, 2nd, 3rd, 4th, 5th and 6th Third Party.

3. That the costs of this application be provided for.

It is based on the grounds that on 11th July 2021, the National Land Commission was served with a Notice to Defendant dated 16th June 2021, claiming for indemnity and/or contribution in respect to any judgment that may be made against the 1st Defendant/Applicant. That the National Land Commission failed to enter appearance within the time frame prescribed in the Notice to Defendant dated 16th June 2021 and the procedure requires that judgment only be entered upon application to court for an order to that effect. That on 18th June 2021, the 1st Third-Party was served with a Notice to Third- Party dated 16th June 2021 on behalf of the 1st to 6th Third Party, claiming for indemnity and/or contribution in respect to any judgement that may be made against the 1st Defendant/Applicant. That the 1st to the 6th Third Party have failed to enter appearance within the time frame prescribed in the Notice to 1st to 6th Third Party Notice dated 16th June 2021 and the procedure requires that judgment only be entered upon application to court for an order to that effect. That it is only fair that the orders sought herein be granted. That this application has been filed at the earliest time possible and without any unreasonable delay. That the other parties to this suit suffer no prejudice if the orders sought herein are granted.

This court has considered the application and submissions therein. A more relevant and crucial basis for the third party's counter-claim and defence can in my view be found in Order 1 Rule 17, which provides as follows:

“If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the “third party”) desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained by consent or otherwise, and his own liability to contribute or indemnity, as the case may be, to the extent claimed in the third party notice: provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit”

It is crucial here that the rules foresees a situation where the third party may wish to dispute the plaintiff's claim against the defendant. In the case of Commissioner for Transport vs FO Boero (1954) KLR it was decided that;

“Third party procedure is a means for trial of questions between the defendant and the third party of the liability of the third party to make a contribution or indemnity and not for the joining of the third party as a co-defendant.”

In the Civil Procedure Rules, 2010, Order 15 (1)(a) requires that a party who wishes to issue a notice to a third party apply to court within fourteen (14) days after the close of the pleadings for leave to do so. It states as follows:-

“Where a defendant claims as against any other party not already a party to the suit (hereinafter called the third party) that he is entitled to contribution or indemnity...he shall apply to the court within fourteen (14) days after the close of pleadings for leave of the court, to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

A party who proceeds to take out third party proceedings looks up to the third party for indemnity or contribution. I have perused the documents attached to the Defendants' Supporting Affidavit and note that they were not seeking indemnity or contribution from the proposed 3rd Defendant. Their case was hinged on the premise that 1st Defendant/Applicant the National Land Commission failed to enter appearance within the time frame prescribed in the Notice to Defendant dated 16th June 2021 and the procedure requires that judgment only be entered upon application to court for an order to that effect. I find that the application is not opposed and I grant it as prayed against the 1st Defendant/Applicant the National Land Commission only. No orders as to costs as it was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE