



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 78 OF 2018

DAVID KIPKEMBOI.....1ST PLAINTIFF

FRANCIS NDERITU.....2ND PLAINTIFF

=VERSUS=

THIKA GIRLS HIGH SCHOOL.....DEFENDANT

ELIZABETH MUTHONI HUSSEIN.....INTENDED THIRD PARTY

RULING

1. The plaintiff initiated this suit against the defendant through a plaint dated 6/3/2018. Their case was that they were the registered proprietors of **Land Reference Number 24875**, located within Thika Municipality. They contended that the defendant, Thika Girls High School, illegally encroached on the said land and erected iron sheet classrooms on it. They added that the defendant reneged on a subsequent offer to purchase the land. Consequently, they sought, among other reliefs, orders of eviction and permanent injunction against the defendant.

2. The defendant responded to the claim through a statement of defence dated 23/6/2021 in which it averred that on 20/10/2014, through its principal director, one **Gladys Achieng Omuyeka**, it entered into a lease cum sale agreement with one **Elizabeth Muthoni Hussein** who held herself as the proprietor of the suit property pursuant to a letter of allotment dated **28/6/2011**. Pursuant to the said lease cum sale agreement, they were to occupy the property as lessees for a period of three months at a rent of “about Kshs 90,000.” It was their case that after 6 months, “the sale agreement began for a consideration of Kshs 6,000,000”. They contended that they took possession of the land on the above basis.

3. The defendant subsequently brought a chamber summons application dated 8/7/2021, seeking leave to issue a third party notice to **Elizabeth Muthoni Hussein** on the ground that the said Elizabeth Muthoni Hussein sold to it the suit property at Kshs 6,000,000. The said application is the subject of this ruling.

4. The application was supported by the affidavit of **Gladys Achieng Omuyeka** in which she deposes that she is the principal of the defendant school and that on 20/10/2014, the defendant entered into a lease cum sale agreement in respect of Land Reference Number 24875, comprised in Title Number IR 180266, situated in Thika Municipality with one **Elizabeth Muthoni Hussein** and at the time of lease or sale, the said Elizabeth Muthoni Hussein was the owner of the land by virtue of an allotment letter issued to her by the Commissioner of Lands dated 28/6/2011. She further deposes that they took possession of the land by paying a consideration of Kshs. 90,000 for the lease and after the lapse of the term of the lease, “the sale agreement began for a valuable consideration of Kshs. 6,000,000”. It is her contention that it is just and fair that Elizabeth Muthoni Hussein be joined as a 3rd party in these proceedings to enable the court determine the issues between the plaintiffs and the proposed third party.

5. The Plaintiffs filed notice of preliminary objection dated 8/9/2021 in which they contend that the application offends the provisions of **Order 1 rule 15(1)** of the **Civil Procedure Rules** which stipulates that a defendant who claims as against any other person not already a party to the suit, shall apply to the court within 14 days after close of pleadings for leave to issue a third party notice. The plaintiffs’ further filed a replying affidavit dated 8/9/2021 by **David Kipkemboi** in which he deposes that the defendant has frustrated every opportunity to prosecute this suit and that Order 1 rule 15(1) of the Civil Procedure Rules stipulates that such application ought to be filed within 14 days after close of pleadings. He further deposes that the defendant has failed to seek enlargement of time or proffer substantive reasons for the delay.

6. The application was canvassed through written submissions dated 15/11/2021 filed through the firm of *Kanyi Kiruchi & Co. Advocates*. Counsel identified the following as the issues falling for determination in the application: (i) Whether the defendant is entitled to join the intended third party; (ii) Whether the application is an afterthought and intended to derail and delay the expeditious disposal of the suit; (iii) Whether the “defendant” offends the provisions of Order 1 rule 15(1) of the Civil Procedure Rules 2010.

7. On the 1st issue, counsel submitted that because the third party had a letter of allotment to the land and later sold the land to the defendant, she ought to be joined in these proceedings to assist the court adjudicate the dispute. Counsel relied on the decision in **Hass Petroleum (K) Limited V Iota Engineering And Construction Limited (2021) eKLR**. On the second issue, counsel submitted that the application was not an afterthought and the prayers ought to be granted as prayed. On the 3rd issue, counsel was of the view that the proposal to join the 3rd party was raised in the defence and was in the interest of justice. Counsel urged the court to grant the application.

8. The plaintiffs filed their submissions dated 9/9/2021 through the firm of *Kipyator Kibet & Associates Advocates*. Counsel relied on Order 1 rule 15(1) of the Civil Procedure Rules, Section 1A of the Civil Procedure Act, Order 2 rule 13 of the of the Civil Procedure Rules 2010 and Article 159 of the Constitution of Kenya 2010. Counsel submitted that the application was unmerited because it was belated and no reason had been proffered to explain the delay. Counsel relied on the decisions in **Kennedy Mwita & Another v Board of Trustees NSSF & 2 Others (2012) eKLR**, **Richard Ngatia Waweru v Arlvind Vohonda (2016) eKLR** and the case of **Wilfred Kamau Guthua T/A Githua & Associates v City Council of Nairobi(2013) eKLR**. It was counsel's submission that the applicant had not satisfied the court that its application was merited.

9. The court has considered the application alongside the parties' respective pleadings in this suit; the response to the application; the parties' respective submissions on the application; the relevant legal framework; and the relevant jurisprudence on the key issue in the application. On the face of the application, it would appear as if the question in this application is merely whether the application meets the criteria for enlargement of time within which to issue a third party notice. The court takes a broader and more critical view of the application. The critical question to be answered in this application is whether the proposed third party is a necessary party for the effectual and complete adjudication and settlement of all the questions in the suit in terms of **Order 1 rule 10(2)** of the **Civil Procedure Rules** which provides as follows:-

“10. (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 that 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

10. The plaintiffs contend that they are the registered proprietors of the suit property pursuant to a certificate of title registered on 5/6/2016 as IR No 180266/1. The defendant is in occupation of the said land and is waving an agreement dated 20/10/2014 allegedly executed between it and the proposed third party, Elizabeth Muthoni Hussein. The defendant is also waving a purported letter of allotment dated 28/6/2011, allegedly issued to the proposed third party by the Commissioner of Lands. Given the above circumstances, it is the view of the court that the said Elizabeth Muthoni Hussein is a necessary party in this suit for the effectual and complete adjudication of all the questions in this suit because the court will be obligated to pronounce itself on the validity of the letter of allotment and the sale agreement which the defendant is waving.

11. Further, given the above circumstances, the court takes the view that the said Elizabeth Muthoni Hussein should be joined as a 2nd defendant on account of the letter of allotment. The applicant [who will become the 1st defendant] will be at liberty to amend its defence and bring a counterclaim against the said Elizabeth Muthoni Hussein and any other party it may wish to counterclaim against.

12. In light of the foregoing, the defendant's chamber summons dated 8/7/2021 is disposed as follows:

(a) The plaintiff shall within 14 days amend their plaint and join Elizabeth Muthoni Hussein as a 2nd defendant and serve the amended plaint on the 1st defendant within the said period of 14 days.

(b) The 1st defendant shall be at liberty to amend its defence and bring any counterclaim they may have, clearly setting out the plaintiff and the defendant in the counterclaim within 14 days of service of the amended defence.

(c) The 1st defendant [Thika Girls High School] shall within a period of 21 days from the date of service of the amended plaint serve on Elizabeth Muthoni Hussein summons to enter appearance, copy of the amended plaint and copy of the amended defence and counterclaim. The 1st defendant shall within the same period of time file an affidavit of service confirming the above service.

(d) This matter will be given pre-trial and hearing dates at the time of rendering this ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Nyaseme for the Plaintiffs/Respondents

Mr Kanyi for the Defendant/Applicant

Court Assistant: Lucy Muthoni