



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 23 OF 2020

JACK MATHENGE GITURWA.....1ST PLAINTIFF

MARY MAKUNGU OKANGA.....2ND PLAINTIFF

VERSUS

CITIMARK INVESTMENT LIMITED.....DEFENDANT

R U L I N G

What is before Court for determination is the Defendant's Chamber Summons application dated the 21st December, 2020 brought pursuant to Order 1 Rule 14(1) of the Civil Procedure Rules. The Defendant seeks the following orders:

- 1. That the Defendant/ Applicant be granted leave to issue and serve a Third Party Notice upon the Administrators of the Estate of Mwangangi Muvu Nganga, as per the annexed draft Third Party Notice marked 'A'.**
- 2. The costs of this Application be provided for.**

The application is premised on the grounds on the face of it and the supporting affidavit of HASSAN NYAMAI MUSA who is a Director to the Defendant. He deposes that on 21st October, 2016 the Plaintiffs' instituted a suit against the Defendants seeking various order. He contends that on 10th March, 2015 the Defendant entered into a Sale Agreement with Third Party who are the Administrators of the Estate of Mwangangi Muvu who at all material times were beneficial owners of land parcel number Donyo Sabuk/ Komarock Block /1/ 28136 hereinafter referred to as the 'suit land'. Further the purchase price was Kshs. 7, 040,000/= out of which, it paid a deposit of Kshs. 704,000/= on execution of the said agreement of sale. He confirms that on or about January, 2016, the Defendant made a further payment of Kshs. 2,000,000/= which sum was acknowledged by the Third-Party Advocates. He avers that the Defendant's Advocates issued a completion notice dated the 16th May, 2016 to the Administrator of the Estate of Mwangangi Muvu Nganga but the Vendor did not comply with the said notice. Further, they made several attempts to complete the transaction as they wrote to the Third Party requesting for bank account details to facilitate payment of the balance of the purchase price vide letters dated the 26th June, 2016, 26th September, 2016 and 18th October, 2016 respectively. He insists the Agreement for Sale between the Plaintiffs is invalid as it was signed by all the Administrators of the estate of Mwangangi Muvu Nganga therein named but the same did not create any property rights. Further, completion was contingent upon the Vendor obtaining a confirmed Grant of Letters of Administration to the Estate of the said Mwangangi Muvu Nganga (deceased). He reiterates that if the Plaintiffs are entitled to the suit land (which is denied), then the purchase price paid at market value and interest is recoverable from Third Party as provided in the Sale Agreement dated 10th March, 2015. Further, that it is hence necessary to have the administrators of the estate of the late Mwangangi Muvu Nganga joined as Third Party to enable the court adjudicate effectively as to whether they had a right to sell to the Plaintiffs and who is entitled to the suit land. He denies that the Defendant has trespassed or illegally taken possession of the suit land and insists the Plaintiffs are the trespassers thereon. He states that the issues to be resolved between the Defendant and the proposed Third Party are substantially the same issues arising between the Plaintiffs and Defendant.

The Plaintiffs opposed the application by filing a replying affidavit sworn by the 1st Plaintiff JACK MATHENGE GITURWA where he confirms they filed a suit against the Defendant. He denies knowledge of the Agreement in respect to the suit land and avers that he was informed by the Vendors that the Defendant failed to adhere to the obligations in the Sale Agreement between the Administrators of the estate of Mwangangi Muvu Nganga and itself, even after being issued with the notice to pay the balance, hence the transaction was rescinded. He refers to the deponent's affidavit sworn on 23rd January, 2017 where the Defendant admitted that it was indeed issued with a completion notice dated 16th May, 2016 and the Agreement was rescinded after they failed to comply. He contends that they are bona fide purchasers for value and acquired a good title from the Administrators of the estate of Mwangangi Muvu Nganga hence entitled to the suit land. He avers that the Defendant cannot purport to join a Third Party to this suit at this time as this offends the provisions of Order 1 Rule 15 of the Civil Procedure Rules. He reiterates that the Defendant has trespassed on the suit land and continue to do so despite the Plaintiff's title. Further, that the Defendant does not have a claim against them and any rights it may have against the proposed Third Party can be litigated severally as enjoining them would complicate issues as well as delay this suit.

The application was canvassed by way of written submissions but it is only the Plaintiffs who filed theirs.

Analysis and Determination:

Upon consideration of the Chamber Summons application dated the 21st December, 2020 including the respective affidavits and the Plaintiffs' submissions, the only issue for determination is whether the Defendant should be granted leave to issue and serve a Third Party Notice upon the Administrators of the Estate of Mwangangi Muvu Nganga.

The Plaintiffs in their submissions insist the Defendant did not file the instant application to join a third party in a timely manner as they did so, more than two years after close of pleadings. Further, that the Defendant has not presented a legitimate reason to warrant the grant of leave to issue and serve a Third-Party Notice. To support their arguments, they have relied on the following decisions: **Richard Ngatia Waweru V Arvind Vohora (2016) eKLR** and **Lucy Njeri Mwangi V John Irungu Murigi (2019) eKLR**.

Through a Complaint dated the 21st October, 2016, the Plaintiffs have sought for

judgement against the Defendant for:

- i. A declaration that the Plaintiffs are the sole joint owners of ALL THAT parcel of land being Title No. Donyo Sabuk/ Komarock Block 1/28136.**
- ii. An order of permanent injunction restraining the Defendant by itself, its servants, agent and or whomsoever in any means howsoever from continuing fencing, subdividing, placing new beacons, constructing, trespassing, encroaching, alienating and/or disposing off and in any other way interfering with the parcel of land being Title No. Donyo Sabuk/ Komarock Block 1/ 28136.**
- iii. An order that any structure and/or development made by the Defendant and/or any other person in Title No. Donyo Sabuk/Komarock Block 1/ 28136 be demolished at the Defendant's cost and the Defendant evicted therefrom.**
- iv. Cost and interest of this suit.**
- v. Any other relief that this Honourable Court may deem fit and just to grant.**

The Plaintiffs claim to be the proprietors of the suit land which they purchased from the previous owners on 23rd June 2016 and paid the full purchase price. Further, following the due process they obtained their title to the suit land. It is their claim that they recently visited the suit land and found the Defendant had trespassed thereon, dug holes to place a perimeter wall and was in the process of subdividing the said land as well as placing beacons therein.

The Defendant vide its Defence dated 3rd May, 2018 denied the Plaintiffs' claim and insists it purchased the suit land from the Administrators of the Estate of Mwangangi Muvu Nganga vide a Sale Agreement dated the 10th March, 2015 and paid Kshs. 704, 000/= upon its execution. Further, that the parties were unable to complete the transaction in 90 days as the said Administrators had not obtained a Certificate of Confirmation of Grant which they did on 4th February, 2016 and thereafter the completion date was extended. The Defendant avers that it paid a further Kshs. 2,000,000/= before they obtained the Certificate of confirmation of Grant and sought to pay the balance of the purchase price on 26th June, 2016. Further, it has an interest in the suit land as it was not informed by the Vendors that they sold it. It intimated that it would seek leave of court to join the Vendors as Third Party in the proceedings herein.

The instant application has been vigorously opposed by the Plaintiffs who contend it was filed more than two years after close of pleadings and offends the provisions of Order 1 Rule 15 of the Civil Procedure Rules. Further, the Defendant has not provided any reason for the delay. Order 2 Rule 13 of the Civil Procedure Rules on close of pleadings provides that:- **"The Pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with"**.

While, Order 1 Rule 15 of the Civil Procedure Rules 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"**.

From a perusal of the records, I note the Defendant filed its Defence on 3rd May, 2018 but the Plaintiffs never filed a Reply to Defence. It is hence my opinion that pleadings ought to have closed before end of May, 2018. I note the Defendant has not explained the cause of delay in seeking leave to institute Third Party proceedings. Be that as it may, the Plaintiffs' in the replying affidavit have not denied that the Defendant had indeed purchased the suit land earlier from the same Vendors but they failed to finalize payment of purchase price after which the said Vendors sold them, the land. I note in the Court Record the Defendant's Agreement for Sale is dated 10th March, 2015 while the Plaintiffs' got their title on 2nd September, 2016. From the Plaintiffs' replying affidavit at paragraph 4, they confirm having been informed by the Vendors that the Agreement between the Defendant and themselves in respect to the suit land had been rescinded.

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.**'

Further, in the case of **Yafesi Walusimbi -vs- Attorney General of Uganda (1959) EA 223**, the Court emphasized that: ***"In order to join a third party the subject between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same."***

Insofar as the Defendant filed this application late and has not explained the reason of delay, noting that this matter has not been set down for hearing, and the Plaintiffs have not stated what prejudice they stand to suffer if the vendor is joined in these proceedings, I find that in the interest of justice, it would be pertinent if the aforementioned Administrators who sold the suit land to both the parties herein were brought on board to provide certain answers in respect to the dispute herein. It is against the foregoing and in relying on Order 1 Rule 15 (1) of the Civil Procedure Rules as well as associating myself with the judicial authorities cited above, I find that the proposed third party indeed meets the criteria set out for a Third Party and their 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 Plaintiffs if the proposed Third Party are joined in these proceedings since this matter has not proceeded for hearing.

In the circumstances, I will proceed to allow the Defendant's Chamber Summons application dated the 21st December, 2020 and direct that the Third Party be served within 14 days from the date hereof. I further direct that upon service, the Third Party do file their response within 14 days.

The costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10TH DAY OF FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE