



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 4162 of 1994

GEOFFREY JOE MOMAMNYI &

**MRS. FELLGONA AKOTH MOMANYI T/A MASABA
HOSPITAL....PLAINTIFF**

VERSUS

**NATHAN KAHARA.....1ST
DEFENDANT**

GICHURU MATHENGE ADVOCATE T/A

**GICHURU MATHENGE & CO.ADVOCATES2ND
DEFENDANT**

RULING NO. 1

The 2nd defendant herein has presented an application by way of chamber summons under order 1 rule 18, 19 and 21, Order L rule 1 and 3 of the CPR section 3A and 63 (e) of the CPA.

Three prayers are sought namely:-

1. *The Honourable court, be pleased to give direction that there is a proper question to be tried as to the liability of the 3rd party to be determined at the trial.*
2. *The Honourable court, be pleased to give direction that there is a proper question to be tried as to the liability of the 1st defendant to be determined at the trial of the suit.*
3. *The costs of this application be provided for.*

The grounds in support, are set out in the body of the application and supporting affidavit. The sum total of the same is that the 2nd defendant sought leave of court, to serve a 3rd party notice which leave was granted and the 3rd party notice was served.

- That it is their stand that there are issues to be tried between the 2nd defendant and the 3rd party which

should be done at the same trial.

- That the 3rd party was duly served and has entered appearance and filed a defence.
- That the application is simply meant to comply with the rules which require that after leave to issue 3rd party notice is granted, and the 3rd party enters appearance and files a defence, directions be given by the court, as to whether the issues between the defendant and 3rd party are to be taken at the same trial or separate trials are to be held.
- It is their stand that in view of the fact that the transactions between the defendants and the 3rd party are inter related a joint trial is appropriate and directions should be given to that effect.

There is a replying affidavit to the application deposed by one Mary Ngechi Ngetha for the 3rd party on the 19th day of January 2009 and filed the same date. The sum total of the same is that the 3rd party direction are not necessary as there is no cause of action against them as they were not party to the sale agreement. Neither did they receive any of the purchase price.

On the courts assessment of the facts herein, the court, is satisfied that leave to join a 3rd party was granted by Kuloba J on the 25/5/2001. In pursuance of that leave, notice was duly issued and what they seek from the 3rd party is an indemnity for the reliefs the plaintiff seeks from them as well as costs. The court, has schemed through the amended plaint, amended on the 5th day of December 1994 and filed on the 6th day of December 1994 and found that the claim arises from a transaction where the second defendant handled in his professional capacity between the 1st defendant and the plaintiff whose subject matter had been allocated by the 3rd party.

The court, as also schemed through the 2nd defendants Defence dated 16th day of December 1991 and filed the same date, and discovered that there is pleading to the effect that the same transaction was conducted through the 2nd defendant which transaction was on the basis of a letter of allotment issued to a company whose Director the 1st defendant was.

There is also a defence of the 1st defendant dated 22nd December 1994 and filed on 6th January 1995. there is an averment that the property sold by the company whose Director the first defendant was had an allotment letter from the 3rd party.

Perusal of the 3rd party's defence reveals that there is a denial by the 3rd party in the sale transaction and by reason of this, claims that it is a stranger to those transactions and as such it has been misjoined.

Due consideration has been made of this, in the light of the cited provision of the law, and the court, is satisfied that the issue of the allotment letter issued by the 3rd party is central in the transaction between the plaintiffs and defendants. It is averred in the plaint that the transaction was fraudulent, because the allocation cited property belonging to another party. It therefore follows that the legality of the allotment letter which gave rise to sale transaction, between the plaintiffs and first defendant handled by the second defendant will be a central issue for interrogation at the trial. In the 3rd party's defence, other than stating that it is a stranger to the transaction between the plaintiffs and the defendants, there is no denial of issuance of the allotment letter complained of. This being the case, the 3rd party, is a necessary party and was rightly brought into these proceedings. The court, is satisfied that a joint trial will be appropriate to settle issues between the plaintiff and defendants on the one hand and the 2nd defendant and the 3rd party on the other hand.

For the reasons given in the assessment the application dated 4/12/2008 and filed the same date be and is hereby allowed on the following terms:-

1. The trial of issues between the 3rd party and the 2nd defendant be held at the same time as trial of issues between the plaintiffs and the defendants.

2. Costs in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE