



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

Civil Case 240 of 2006

MAGITUANITEKI SELF GROUP.....PLAINTIFF

VERSUS

BONIFACE NJIRU T/A

NJIRU BONIFACE & CO. ADVOCATES & KENDONG RANCH LTDDEFENDANT

R U L I N G

Boniface Njiru t/a Njiru Boniface & Co. Advocates (hereinafter referred to as the Defendant) has been sued by Magituaniteki Self Help Group (hereinafter referred to as the Plaintiff) who are seeking judgment for KShs. 5,000,000/= being amounts given to the Defendant to hold as stakeholder in an agreement for sale of land between Kendong Ranch

Limited and the Plaintiff which agreement did not go through.

The Defendant entered appearance on 22nd May 2006. Subsequently on 29th May 2006, the Defendant came to this court under certificate of urgency and was granted leave to issue a 3rd Party notice against Kendong Ranch Limited against whom Defendant claimed indemnity or contribution in respect of the Plaintiff's claim.

Kendong Ranch Limited has entered appearance and the Defendant has now come to this court under Order I Rules 18 and 22 of the Civil Procedure Rules and Section 3A Civil Procedure Act seeking orders that this court do direct that there is a proper question of liability to be tried between the Defendant and the third Party and that the same be tried at the hearing of this suit.

In his supporting affidavit sworn on 24th August 2006, the Defendant depones that He has served the 3rd Party with a Bill of Costs and that there is an issue between him and the 3rd Party relating to his professional charges. The Defendant maintains that He is entitled to full indemnity or relief from the 3rd Party in respect of the claim by the Plaintiff as He was simply acting as an agent of the 3rd Party. Mr. Mbaabu for the Defendant submitted that there is an issue as to whether Defendant had authority from the 3rd Party to

act for the 3rd Party in respect of the sale and whether Harrison Charles

Kimeria who was a Director of the Third Party had authority to instruct the Defendant or act on behalf of

the 3rd party and that these are issues which can only be canvassed and determined at the trial when the issue of liability can be determined.

The 3rd Party maintains that there is no proper question to be tried as to the liability of the 3rd Party. In an affidavit sworn by Francis Gichamba Maina a Director and Chairman of the 3rd Party, it is contended that H.C. Kimeriah ceased to be a director of the 3rd party and did not therefore have any authority to retain, employ or instruct the Defendant on behalf of the 3rd Party, nor did the 3rd Party intend to sell nor have they accepted any offer to sell LR No. 8396/1 at a consideration of Kshs. 274,626,000.00.

In a further affidavit sworn on 31st October 2006, Francis Gichamba Maina has annexed a letter from the Registrar of Companies confirming who are the Directors of the 3rd Party and confirming that H. C. Kimeriah ceased to be a Director of the Third Party from 29th June 2000.

Mr. Kimani who appeared for the 3rd Party submitted that the Defendant's claim against the 3rd Party for professional fees cannot not subsist in this cause and that the 3rd Party was a stranger to any contract entered into between the Plaintiff and the Defendant and that the Defendant has therefore no basis to seek indemnity or contribution from the 3rd Party.

I note from the court file that the Defendant has not filed any defence to the Plaintiff's claim even though He entered appearance on 22nd May 2006. This makes it very difficult for the court to appreciate the issues between the Defendant and the 3rd Party. Be that as it may, from the submissions, the affidavit in support and in reply and the plaint filed herein, I find that the Plaintiff's claim against the Defendant is not in any way linked to the Defendant's relationship with the 3rd Party. The Defendant is

alleged to have been given Kshs. 5 million by the Plaintiff to hold as

stakeholder in respect of a land transaction. Any other arrangement or transaction that the Defendant may have had with the 3rd Party is independent and separate from the agreement the Defendant had with the Plaintiff to hold the KShs. 5 million as stakeholder. That is to say that the Defendant's cause of action against the 3rd Party if any is not the Kshs. 5 million or the Defendant's role as stakeholder which is the subject matter of the Plaintiff's suit against the Defendant, nor can the issue of professional fee claimed by the Defendant be said to be substantially the same question at issue as between the Plaintiff and Defendant. It is evident that although all the claims arise from agreements for sale of land, the transactions are different and relate to different people and different subject matter. I find that although it appears that there are triable issues as between the Defendant and the 3rd Party, they do not substantially involve the same subject matter as the Plaintiff's suit against the Defendant such as to justify a claim for contribution or indemnity by the Defendant against the 3rd party. It would not therefore be appropriate to have the issues determined in this cause.

Further the motion before the court is defective as Order I rule 18 of the Civil Procedure Rules clearly provides that an application for directions should be made by Chamber Summons.

For these reasons I dismiss the 3rd Party from the proceedings and direct that the Defendant should pursue his claim against the 3rd Party in a different suit.

These shall be the orders of this court.

Dated Signed and Delivered this 15th day of March 2007.

H. M. OKWENGU

JUDGE

