



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

**Civil Case 65 of 2006**

**ISSAM EL AYHAM BAYZID .....1<sup>ST</sup> PLAINTIFF**

**CATHARINA PETRONELLA MARIA FLOORE .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TOSEMA INVESTMENTS LTD.....1<sup>ST</sup> DEFENDANT**

**SELINA LINDA ALWORA .....2<sup>ND</sup> DEFENDANT**

**AND**

**AGRICULTURAL FINANCE CORPORATION LTD.....THIRD PARTY**

**RULING**

The Plaintiffs herein brought an action against the Defendant on the basis of an agreement dated 18<sup>th</sup> March, 2004. It is alleged in the Plaint that the Plaintiffs and the Defendants entered into this agreement wherein the Defendants agreed to sell and the Plaintiffs agreed to buy property LR NO.7583/29 ( hereinafter referred to as the suit property). It is pleaded that the purchase price was Kshs.11.5 million. It is further pleaded that the Plaintiffs made payment in accordance with the agreement but the Defendant breached the agreement by failing to deliver the title documents free of encumbrance of the suit property to the Plaintiff. The plaintiff therefore claims a refund of the amount paid to the defendants. The Defendant in its defence denied the breach and further stated that the suit property was charged to the third party as a security and that the third party had knowledge of the agreement between the Plaintiffs and the Defendant. Subsequent to filing the Defence the Defendant obtained a court order to issue Third Party notice. On being served with Third Party notice the third party filed a defence whereby it denied knowledge of the agreement between the Plaintiffs and the Defendant. The Defendant has now come to court by way of Chamber Summons dated 19<sup>th</sup> December, 2005 whereby the Defendant seeks that third party directions be given and further seeks that the court will order that the Defendant be deemed to be the Plaintiff and the Third Party be deemed to be the Defendant as regards the Defendant's claim against the Third Party. The application was argued before me when the Defendant's advocate stated that the Defendant is seeking an indemnity from the Third Party in regard to the transaction with the Plaintiff. He stated that the claim filed by the Plaintiffs is as a result of transaction that went wrong. He however, said that the Plaintiffs entered into the present agreement knowing that the property was charged to the Third Party. That it was a condition of the agreement that the property would be discharged to enable the defendant to effect sale to the Plaintiff. That however, the defendant was unable to complete the

transaction because the Third Party failed to release the title document. He invited the court to look at the Third Party notice to get the gist of the Defendant's claim. He said the reasons that directions are sought as contained in the chamber summons is to ensure that there is no multiplicity of suits in the court. He therefore, prayed that the orders are granted.

The application was opposed and in so opposing the Defendant's counsel relied on the replying affidavit where it is deponed that the Chamber summons filed by the Defendant sought to unnecessary complicate the issues herein. It is further deponed that whilst the Defendant has a right to seek redress as they deem necessary from the Third Party that the same should not be intermingled with the Plaintiff's application against the defendant for summary judgement. The affidavit finally stated that in the action by the Third Party, the Plaintiffs found themselves strangers to the same. In oral submissions counsel for the Plaintiffs stated that what the Plaintiffs seeks by the present suit is a refund of monies paid to the Defendant on the basis of the agreement. He said that although the Plaintiffs knew that the property was charged to the Third Party the payment made to the Defendant was not tied to the discharge of the suit property. He therefore stated that there was no basis in trying the matters between the parties together. He sought dismissal of the application.

Once a third party notice has been issued and the pleadings have been filed the party issuing the third party notice is entitled to move the court under Order 1 rule 18 for the court to give directions in regard to the hearing of the matter. The directions which are sought by the defendant are that the court will order that the question of liability between the plaintiff, the defendant and the third party be tried simultaneously and that the court will direct that the third party be regarded as the defendant whilst the defendant will be regarded as the plaintiff in action. Having heard the submissions from counsel I am of the view that the orders that are sought by the defendant cannot be granted. I say this because the Plaintiffs' claim is on the basis of a sale agreement of the suit property. This agreement was between the Plaintiffs and the Defendant. On the basis of that agreement the Plaintiffs paid to the defendants money which the Plaintiff seeks refund of. That agreement has not been denied by the Defendant but the Defendant alleges in the Defence that the third party had knowledge of that agreement and having that knowledge failed or neglected to release the certificate of titles. It therefore, seems that the basis of the defendant's claim is on the alleged knowledge that the third Party is said to have as regard the transaction between the Plaintiffs and the defendants. It is pertinent to note that the third party denies such knowledge. In therefore considering the pleadings I find that there is no legal liability that can be tied to knowledge as pleaded by the defendant which is in any way connected to the agreement. The defendant does not plead that as a consequence of such knowledge the third party gave any undertaking to discharge the suit property. To my mind there is no nexus between the agreement for sale and the alleged knowledge of the third party. That being the case I am of the firm view that the Plaintiffs and the Defendant's action cannot be tried simultaneously with the Defendant's and the Third Party's action. In the case **Kariuki v Irungu [2004] 2 EA Page 108** the court found as follows:-

**“The subject matter between the third party and respondent was based on contract and was therefore different from the subject matter between the plaintiff and the respondent which was based on tort”**

Similarly in the case of **Yafesi Walusimbi - V - The Attorney General of Uganda [1959] E.A. page 223** it was held:-

**(i) In order that a third party be lawfully joined, the subject matter between the third party and defendant must be the same as the subject matter between plaintiff and defendant and the original cause of action must be the same”.**

Bearing in mind the above cases which I find to be persuasive I do also find that in this present case the subject matter between the Plaintiffs and the Defendant's action is dissimilar to the action between the Defendant and the third party. The Plaintiffs and the Defendant's action is based on contract. The Defendant's and third party's action is based on knowledge and at this stage it is not clear what legal liability that knowledge raises. I am therefore of the view that the Defendant is not entitled to the prayers that are sought. The orders that I do grant in this matter are as follows: -

**(1) That the trial between the Plaintiffs and the Defendant be separate from the trial between the Defendant and third party.**

**(2) That the prayers sought in the chamber Summons dated 19<sup>th</sup> December, 2005 are hereby dismissed.**

**(3) That the Defendant shall pay the costs of the Chamber Summons dated 19<sup>th</sup> December, 2005 to the Plaintiffs and Third Party.**

Dated and delivered this 12<sup>th</sup> October 2006

**MARY KASANGO**

**JUDGE**