



Njeru v China Road & Bridge Corporation & 3 others (Environment and Land Case Civil Suit 766 of 2016) [2022] KEELC 15470 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 766 OF 2016
SO OKONG'O, J
DECEMBER 19, 2022**

BETWEEN

FRANCIS NYAGA NJERU PLAINTIFF

AND

CHINA ROAD & BRIDGE CORPORATION 1ST DEFENDANT

SIESTA INVESTMENT LIMITED 2ND DEFENDANT

TAJ MALL LIMITED 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. What is before the court is the 1st defendant's notice of motion application dated July 29, 2019 seeking the following orders;
 1. Abandoned.
 2. That the 1st defendant be granted leave to issue a 3rd party notice against ARJ Capital Limited.
 3. The costs of the application.
2. The application has been brought on the grounds set out on the face thereof and on the supporting affidavit of Wang Baogang sworn on July 31, 2019. The 1st defendant has contended that it is entitled to indemnity from ARJ Capital Limited (hereinafter referred to only as "ARJ") for any adverse judgment or decree as well as costs that may be made against it in this suit. The 1st defendant has averred that it was in occupation of the property known as LR No 20273(hereinafter referred to only as "the suit property") as a tenant of ARJ. The 1st defendant has averred that ARJ leased the suit property to it on representation by ARJ that ARJ was the registered owner of the property. The 1st defendant has



averred that as a tenant of ARJ, it is estopped from denying the title of ARJ. The 1st defendant has averred that the plaintiff would suffer no prejudice if the application is allowed.

3. Neither the plaintiff nor any of the other defendants have responded to the application. When the application came up for hearing on July 25, 2022, the 1st defendant's advocate told the court that the 1st defendant was only seeking leave to take out third-party proceedings against ARJ and that the 1st defendant had abandoned the limb of the application that had sought consolidation of this suit with other two suits. The advocate for the 2nd defendant told the court that the 2nd defendant had no objection to the application but urged the court to peruse a ruling that had been made earlier in the matter by Eboso J. that touched on ARJ. The 2nd defendant contended that in the said ruling, Eboso, J. had declined to join ARJ in the suit. The 4th defendant's and the plaintiff's advocates also urged the court to peruse the said ruling by Eboso, J. The 3rd defendant's advocate told the court that the application was not served upon the 3rd defendant. In a rejoinder, the 1st defendant's advocate argued that the ruling referred to by the plaintiff's, the 2nd defendant's and the 4th defendant's advocates was not relevant to the application before the court.
4. I have considered the 1st defendant's application together with the affidavit filed in support thereof. The application was brought under order 1 rule 15 of the [Civil Procedure Rules](#) which provides as follows:
 15. 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 the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
 - (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
 - (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of form No 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.”
5. Order 1 rule 15(1) of the [Civil Procedure Rules](#) reproduced above gives the court discretion to grant leave to a defendant in a suit to issue a third-party notice against a person not already a party to the suit. The grounds upon which such application is to be made are set out in the rule. I am satisfied that once an applicant satisfies the court that any of the grounds set out in the rule on the basis of which



such a notice can be taken out exists then he is entitled to leave. I am satisfied that the 1st defendant has made out a case for the leave sought. It is not disputed that the 1st defendant was at all material times in occupation of the suit property. It is not disputed that the 1st defendant's entry and occupation of the suit property was on the basis of a lease agreement between it and ARJ which claimed to be the registered owner of the suit property. The 1st defendant was sued by the plaintiff in this suit on the basis that it is a trespasser on the suit property. I am satisfied that if it turns out at the trial that ARJ is indeed not the owner of the suit property and as such the 1st defendant is a trespasser on the property, the 1st defendant would be entitled to an indemnity from ARJ which leased the premises to it for any judgment that may be made against it in this suit. It would therefore serve the interest of justice and prevent multiplicity of suits if the 1st defendant is allowed to take out third-party notice against ARJ.

6. On June 26, 2018, ARJ applied to be joined in this suit as an interested party. ARJ claimed that it was the registered owner of the suit property. ARJ contended that it had sufficient interest in the suit and that its joinder to the suit would enable the court to fairly and justly determine the dispute between the parties. ARJ's application for joinder was dismissed by Eboso, J. on February 6, 2019. In his ruling, Eboso, J stated as follows in part:

6. An examination of the documents presented by the said Amina Omar in support of the application reveals disturbing elements that border on outright criminal conduct. Firstly, the purported grant number 63990 in which land reference number 20273 is allegedly comprised shows that the purported grant was signed by the Commissioner of Lands on January 28, 1996 and registered as a title on February 2, 1994. This means that it was registered as a title two years before it was signed by the Commissioner of Lands. This doesn't happen. A grant is executed before it is registered. Secondly, the purported deed plan number 230418 bearing land reference number 20273 is purported to be dated October 18, 1997. This means the grant/title predates the deed plan. This again does not happen. Survey is done and a deed plan prepared before a title bearing the survey land reference number is issued. Thirdly, there is evidence from the Registrar of Titles that grant number IR 63990 relates to land reference number 209/136/178 and does not relate to the Deed Plan presented by the applicant...
9. In my view, whereas order 1 rule 10(2) grants this court wide discretion to issue an order of joinder, that discretion is to be exercised on the basis of bona fide evidence. Where the documentary evidence presented by an applicant appear to be fraudulent on its face, the court should not compromise the integrity of the court process by admitting a party whose intention is to scuttle the proceedings or use the court process to advance a criminal enterprise. For this reason, I decline to grant the prayers sought in the notice of motion dated June 28, 2018.
10. Secondly, I direct that the Director of Criminal Investigations takes immediate measures to investigate all the affidavits presented in this court as having been sworn by Amina Omar, together with all the annexures to those affidavits, to establish if the said Amina Omar committed a criminal offence under our laws. If she did, the Director of Criminal Investigations together with the Director of Public Prosecutions shall discharge their mandate as by law provided. The



Registrar of this court shall cause a copy of this ruling to be served on the Director of Criminal Investigations.”

7. The court found that the documents relied on by ARJ in support of its claim over the suit property were fraudulent. I am of the view that contrary to the contention by the respondents herein, the ruling by Eboso, J. supports the 1st defendant’s application. The finding by the court that ARJ held fraudulent documents of title in respect of the suit property means that it had no lawful interest in the suit property that it could convey to the 1st defendant by way of a lease and as such the 1st defendant’s occupation of the property was unlawful. In the circumstances, in the event that this finding by the court on an interlocutory application is confirmed at the trial, the 1st defendant would be entitled to be indemnified by ARJ for any judgment that may be entered in favour of the plaintiff against the 1st defendant. This is because ARJ would be taken to have caused the 1st defendant to enter the suit property on the fraudulent representation that it was the owner of the property which was not the case.
8. The upshot of the foregoing is that the 1st defendant’s application dated July 29, 2019 has merit. The 1st defendant is granted leave to issue a third-party notice against ARJ Capital Limited. The third-party notice shall be filed within 30 days from the date hereof. The costs of the application shall be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF DECEMBER, 2022.

S OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the plaintiff.

N/A for the 1st, 2nd and 4th defendants.

Mr Koyyoko for the 3rd defendant.

Ms J Omondi-Court Assistant.

