



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

Civil Suit 99 of 2004

1. KALAVATI BABOOLAL MEHTA

2. KASUMBENI PRABASHNKER MEHTA

3. RAMAGAURI MANILAL MEHTA PLAINTIFFS

Versus

**THE COMMISSIONER OF LANDS
DEFENDANT**

A N D

**AGRICULTURAL INDUSTRIAL HOLDINGS
LTD**

**SILVER CROWN MERCHANTS LTD. 3RD
PARTIES**

R U L I N G

In both their plaint and amended plaint the plaintiffs have named the Commissioner of Lands as the defendant and Agricultural Industrial Holdings Limited and Silver Crown Merchants Limited as Interested Parties. In the subsequent pleadings the plaintiffs have named the two as Third Parties. Agricultural Industrial Holdings Limited (the First Third Party) has applied under Order 1 Rules 7, 10, 13 and 14 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act that its name be struck out of these proceedings on the grounds that:-

“(a) The plaintiff cannot in law join parties to the suit as Third parties.

(b) The plaint does not disclose any cause of action against the First Third Party.

(c) By wrongfully and misconceptcially joining the First Third Party as a party in this suit the First Third Party has been deprived of its right to defend the suit or take such other step as might otherwise have been available to it as a Defendant to challenge the Plaintiffs’ action herein.

(d) summons to enter appearance or Third Party Notice has been served upon the First Third Party thereby contravening the relevant Civil Procedure Rules.

The application is opposed on the grounds that it is misconceived and an abuse of the process of court; that it is frivolous, vexatious and without merit and that it is malafide and intended to frustrate or delay the prosecution of the plaintiffs' application.

Mr. Wamae for the First Third Party submitted that a plaintiff cannot sue a party as a Third Party. A party can only be made a Third Party by a defendant and after obtaining leave of the court. He said that the first Third Party has not been served with the summons to enter appearance or Third Party Notice and therefore finds itself in an embarrassing position as to how to defend itself in this suit.

Mr. Wamae further submitted that annexed to the affidavit in support of the plaintiffs' application dated the 13th April 2004 is a copy of the First Third Party's Title Deed relating to L.R. No. 209/13374 Nairobi which is not referred to in the plaint. In the circumstances, he contended, the plaint does not disclose any cause of action against the First Third Party and this application should be allowed.

Basing his argument on the grounds of opposition filed herein Mr. Weloba, counsel for the plaintiff, submitted that the application is misconceived as Order 1 Rule 9 provides that no suit should be defeated for misjoinder of parties. He also cited Order 6 Rule 12 and submitted that the plaintiffs' suit should not be struck out for want of form. He said that the summons to enter appearance have not been served upon the third parties as they are not the perpetrators of the fraud.

This is not application to strike out this suit. All that the first Third Party is seeking is that its name be struck out of these proceedings as it has not been properly sued or joined.

Third Parties are joined in suits, with leave of court, by defendants and other third parties. A plaintiff, except perhaps in a counterclaim, cannot sue a party as a third party. If he is not sure against whom he should seek redress Order 1 Rule 7 allows him to sue two or more defendants and leave it to the court to decide who is liable. In this case the plaintiffs have sued the first Third Party as an interested party and as a third party. They have not obtained any leave to join it as a third party. They have not served it with the summons to enter appearance or third party notice and they do not appear to have any intention of doing so.

The Plaintiffs have not even intimated to court that they wish to amend the plaint and properly bring the First Third party to court. It is therefore not clear how they expect the court to grant them any relief against the first Third Party and even the second Third Party without giving them an opportunity of defending themselves. A party cannot be condemned unheard. It is against the rules of natural justice. If, as the plaintiffs contend, the third parties were not the perpetrators of the fraud why drag them to court?

In the circumstances I allow this application and order that the name of the first Third Party be struck out of this suit with costs to it to be paid by the plaintiffs.

DATED and delivered this 15th day of December 2004.

D.K. Maraga

JUDGE