



Shepherd Catering Ltd v Nairobi Holdings Limited & 2 others; Steel Son Limited (Plaintiff to the Counterclaim); Shepherd Catering Limited & 2 others (Defendant to the Counterclaim); Kaplan & Stratton Advocates (Proposed Third Party) (Environment and Land Case Civil Suit 359 of 2004) [2025] KEELC 3642 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3642 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 359 OF 2004**

CA OCHIENG, J

MAY 8, 2025

BETWEEN

SHEPHERD CATERING LTD PLAINTIFF

AND

NAIROBI HOLDINGS LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

STEEL SON LIMITED 3RD DEFENDANT

AND

STEEL SON LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

SHEPHERD CATERING LIMITED .. DEFENDANT TO THE COUNTERCLAIM

**SALOME WANGECHI WACHIRA ALIAS SALOME WANGECHI
LENANA DEFENDANT TO THE COUNTERCLAIM**

ALFRED LENANA WAMBUGU DEFENDANT TO THE COUNTERCLAIM

AND

KAPLAN & STRATTON ADVOCATES PROPOSED THIRD PARTY

RULING

1. What is before Court for determination is the Defendants' in the Counterclaim Ex-parte Chamber Summons application dated the 17th December 2024. They seek the following Orders:



- a. This court be pleased to enlarge time within which to make this application for joinder of a third party.
 - b. The Defendants in the Counterclaim/Applicants be granted leave to issue and serve a Third Party Notice upon Kaplan & Stratton Advocates (Third Party) as per the annexed draft Third Party Notice marked “SW=4”.
 - c. The draft third Party Notice ‘SW=4’ be deemed as duly filed.
 - d. That costs of this application be provided for.
2. The application is premised on grounds on its face and on the supporting affidavit of the 2nd Defendant who is also a spouse of the 3rd Defendant and a director of the 1st Defendant in the Counterclaim. She avers that the 1st Defendant in the Counterclaim was a lawful monthly tenant in the properties known as LR No. 209/361/3 and LR No. 209/361/4. She confirms that from about November 2002 to 5th January 2012, it paid rent to the proposed Third Party which acted as agents of the landlord (Plaintiff in the Counterclaim) and it did acknowledge rent paid to them on various occasions until 5th January 2012 when rent was rejected for the first time. She explains that the Plaintiff in the counterclaim is now alleging that it was denied rent and has prayed for mesne profits of Kshs.101,161,204.3 while the Defendants in the Counterclaim have in their defence pleaded that rent was always paid to the proposed Third Party thus they seek indemnification and/or contribution from the proposed Third Party against any liability that may accrue as a result of these proceedings. She avers that in order to bring all matters in controversy before this Honourable Court, it is necessary to join the proposed Third Party.
 3. The application is opposed by the proposed Third party vide a Notice of Preliminary Objection dated the 6th March 2025 contending that the Defendants have no cause of action against it and that if it did exist, it has been extinguished by virtue of Section 4 of the Limitation of Actions Act.
 4. The proposed Third Party also filed Grounds of Opposition dated the 5th March 2025. It contends that there has been an overly inordinate delay in filing the application for leave to issue a Third Party notice and that its joinder is not necessary as allegations of payment are evidentiary in nature and if true, can be easily proven by the Defendants both at the institution of the original action and the Counterclaim herein.
 5. The proposed Third party also filed a replying affidavit sworn by its senior Partner Dr. Fred Ojiambo SC. He avers that the proposed Third Party was on record as an advocate for the 1st Defendant in the original claim. Further, that the 3rd Defendant in the suit (Plaintiff in the Counterclaim) filed its Statement of Defence and Counterclaim dated 27th February 2009, wherein it sought to recoup mesne profits alleged to have accrued from the Defendants’ in the Counterclaim’s unauthorized use of the suit premises. He explains that the main suit was dismissed vide a Ruling delivered on 12th October 2011 leaving the Defendants to contend with solely defending the Counterclaim.
 6. He avers that the Defendants have never sought to join the proposed Third Party to the suit since it was filed in 2004 and a Counterclaim lodged in 2009. Further, that the amendments made did not introduce any new claim that would justify the Defendants’ decision to seek leave for issuance of a Third Party Notice more than fifteen (15) years since the original Statement of Defence and Counterclaim was filed and no explanation has been provided for the delay.
 7. He contends that the application and documents attached thereto do not disclose any new information that the Defendants were not privy to or could not with reasonable diligence have accessed at the



institution of the original Plaint. Further, that having alleged that the proposed Third Party was an agent through whom it paid rent to the Plaintiff in the Counterclaim, nothing would stop the Defendants from adducing proof of such payment and seeking to offset any sums allegedly paid out from the sums demanded by the Plaintiff in the Counterclaim thus orders sought would serve no purpose but to further delay the resolution of the dispute.

8. The application is also opposed by the Plaintiff in the Counterclaim vide Grounds of Opposition dated the 25th February 2025. It contends that the application is belatedly brought to vex and delay the hearing and determination of the Counterclaim, which set out particulars of mesne profits in a Defence and Counterclaim filed in 2020.
9. The Plaintiff in the Counterclaim also filed a replying affidavit sworn by Joseph Muchoki Waigwa in opposition to the application. He avers that the 1st Defendant in the Counterclaim filed the suit in 2004 to block the Plaintiff in the Counterclaim from purchasing the suit properties and by an order of 21st October 2011, its case was struck out and it was ordered to vacate the suit premises. However, in blatant defiance of the said orders, it continued with its wrongful possession and let out the premises to the Party of National Unity thus the Plaintiff's in the Counterclaim cause of action is assertion of rights as a proprietor. Further, that it does not join any contestable issues with the Intended Third Party thus the application is only intended to cause undue delay and goes against the principles of the overriding objective of the administration of justice as envisaged by Section 1A, 1B, 3A of the [Civil Procedure Act](#).
10. In response to the responses filed, the Defendants filed a supplementary affidavit sworn by the 2nd Defendant. She avers that the Defendants should not be blamed for failing to file an application to join the proposed Third Party since it is only after they changed advocates in September 2024 that they were advised about the legal implications and essence of joining the proposed Third Party which received rent for the suit premises on behalf of the Plaintiff in the Counterclaim. Further, that the application was filed within fourteen (14) days of filing of the 1st Defendant's amended Statement of Defence to the Counterclaim pursuant to leave granted on 7th October 2024.
11. She reiterates that the participation of the Plaintiff and the proposed Third Party at this stage is improper as Order 1 Rule 15 of the Civil Procedure Rules contemplates that the instant application ought to be heard ex -parte.
12. The application was canvassed vide written submissions.

Submissions

13. The Defendants submit that Order 1 Rule 15 (1) of the Civil Procedure Rules affords them an opportunity to join the proposed Third party herein and that the rules contemplate that an application for joinder of a Third Party is heard ex-parte thus the participation of the Plaintiff in the Counterclaim and the proposed Third Party is irregular as issues they presented ought to be raised by filing a defence once leave is granted to join as Third Party. To this end, the case of *Mjomba v Mwabora Mkalla & 9 others (Third Party)* [2024] KEELC 1356 (KLR) was cited.
14. The Defendants also submit that they have laid sufficient basis for joinder of the Third party as the original subject matter is premised on the Defendants' occupation of the suit premises between 5th January 2003 and 15th January 2012 during which period, the Plaintiff claims that it did not receive rent and therefore claims mesne profits and to rebut the said claim, they assert that rent was paid for the entire period in dispute to the proposed Third Party as rent collection agents of the Plaintiff.
15. They rely on the case of *Kitty Njiru v Nature & Style Fun Day Events & Another; Rebecca Muriuki t/a Kahaari (Proposed third Party)* [2020] KEHC 2051 (KLR) to submit that joinder of the proposed



Third Party is integral and will enable effectual and conclusive determination of issues and avoid multiplicity of suits.

16. On its part, the proposed Third Party relies on the case of Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR to submit that the Defendants have no cause of action against it thus the application offends Order 1 Rule 15 of the Civil Procedure Rules and violates Section 4 (1) of the *Limitation of Actions Act*. Further, that the Notice of Preliminary objection dated 6th March 2025 should be upheld. It insists that it is not a necessary party to the proceedings and under Order 1 Rule 9 of the Civil Procedure Rules, the suit cannot be defeated for reason of non-joinder.
17. It contends that the matter in issue in the Counterclaim being mesne profits on account of unauthorized sub-letting of the suit premises is dissimilar to the purported cause of action, which the Defendants' seek to pursue against the proposed Third Party, which is rent allegedly paid to the Plaintiff through the proposed Third Party.
18. It also submitted that the application is filed after inordinate delay as it is filed fifteen (15) years after the suit was initiated yet Order 1 Rule 5 of the Civil Procedure Rules requires a party intending to issue a Third Party Notice to seek leave of court to issue such notice within fourteen (14) days, from the close of pleadings. It reiterates that the instant application does not meet the threshold for enlargement of time. On whether the participation of the Plaintiff and the proposed Third party in the proceedings is proper, it argued that it is appropriate as no prejudice will be visited upon the Defendants, pointing out that it transpired in court on 27th February 2025 that it is the Defendants who had served the application on the Plaintiff thus drawing out a response. It insists that it would be inappropriate for the court to ignore the responses on record as nothing bars it from hearing the instant application. To support its averments, it relied on the following decisions; Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR; Nairobi Bottlers Limited v Ndung'u & Another (Application E030, E034 & E038 OF 2023 (Consolidated) [2023] KESC 96 (KLR) (10 November 2023) (Ruling); Republic v Judicial Commission of Inquiry into the Goldenberg Affair & Another Ex parte Wilfred Karuga Koinange & 3 Others [2003] eKLR; Wilfred Kamau Githua T/A Githua & Associates v City Council of Nairobi [2013] eKLR, Maina v Wamalwa (Environment and Land Case Civil Suit E154 OF 2022) [2024] KEELC 17007 (KLR)(4 APRIL 2024) (RULING) and Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 Others [2018] eKLR.
19. In its submissions, the Plaintiff in the Counterclaim reiterates that should the Defendants consider the issue of alleged payment of rent through the proposed Third Party to be of benefit to their defence to the Counterclaim, as it is a matter of adducing proof and then submitting on its relevance but to apply at this stage for the Third Party Notice when the pleadings have closed severally offends the provisions of Order 15 Rule 1 (c) of the Civil Procedure Rules.

Analysis and Determination

20. Upon consideration of the instant Chamber Summons application including the respective affidavits, Grounds of Opposition, Notice of Preliminary Objection and rivalling submissions, the only for determination is whether Defendants in the Counterclaim should be granted leave to issue and serve a Third Party Notice upon Kaplan & Stratton Advocates (Third Party).
21. The Defendants in the Counterclaim have sought to issue a Third Party Notice upon the firm of Kaplan & Stratton Advocates claiming they received rent, which is the issue in dispute in this suit. The Defendants have argued that this application should have been heard ex parte but I note it proceeded to serve the Plaintiff in the Counterclaim with it. I note the main suit was dismissed vide a Ruling dated the 12th October, 2011 and the only issue left was determination of the Counterclaim. Further,



the Defendants only sought leave to file the instant application in 2024 and claimed they did so after changing advocates, in September 2024. The Plaintiff and proposed Third Party were served and opposed the instant application.

22. On perusal of the Court record, I note the Plaintiff in the Counterclaim alleges that it was denied rent and has prayed for mesne profits of ksh.101,161,204.3. The Defendants contend that they had always paid rent to the proposed Third Party thus they seek indemnification and/or contribution from it. In opposition, the proposed Third Party and the Plaintiff in the Counterclaim contend that joinder is not necessary since the proposed Third party is an alleged disclosed agent of the Plaintiff. Further, that evidence as to the alleged rent paid to the proposed Third Party can be adduced at the hearing of the suit. They also claim that the application for joinder is brought after inordinate delay which has not been explained. The Defendants/ Applicants insist that they filed the instant application within fourteen (14) days after close of the pleadings.

23. On close of pleadings, Order 2 Rule 13 of the Civil Procedure Rules provides that:

“The Pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with”.

24. While on issuance and service of a Third Party Notice, Order 1 Rule 15 of the Civil Procedure Rules provides that:

“(1) 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 Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit”.

25. On issuance and service of a Third Party Notice, in the case of Family Bank Limited v Mutisya & Another (Civil Appeal E076 of 2021) [2024] KEHC 5740 (KLR) (13 May 2024) (Judgment), it was held that:

“In law, a third Party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third Party is determined between the Defendant and the third Party, but of course, after the court is satisfied that there is a proper question to be tried as to



liability of the third Party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

26. While in the case of *J.P. Nathwani v Registered Trustees of the Sisters of Mercy (Kenya) T/A Mater Hospital & Another* [2017] eKLR it was held that:

“Failure to file a third party notice within the prescribed time is not only prejudicial to the intended third party but it renders such a notice incurably defective.”

27. On the issue, that Order 1 Rule 15 of the Civil Procedure Rules contemplates that the instant application should be heard *ex parte*. I wish to make reference to the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR, where the Court of Appeal (Kiage J) stated as follows:

“..it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...”

Ouko J stated as follows in the same matter;

“And while the court, in some instances, may allow the liberal application or interpretation of the rules, that can only be done in proper cases and under justifiable causes and circumstances. That is why *the Constitution* and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities....”

28. Based on the facts as presented while relying on the legal provisions cited and associating myself with the decisions quoted, I find that the Defendants have not suffered any prejudice as a result of the court considering the responses from the Plaintiff in the Counterclaim and the proposed Third Party. I opine that the defendants seek to rely on a procedural technicality which offends the provisions of Article 159 of *the Constitution*. It has emerged that it is actually the Defendants who served these parties.

29. It is my considered view that there was an inordinate delay of over a decade in seeking to issue and serve a Third Party Notice which is not explained, noting that the main suit was dismissed on 12th October 2011. Further, it emerged that the proposed Third Party earlier participated in these proceedings as Advocates for the Plaintiff in the Counterclaim and the Defendants in the Counterclaim never sought to join it, in these proceedings. In my view, I opine that the proposed Third Party as agent for the Plaintiff can always produce the accounts in court, so long as it is summoned to do so. Further, that the alleged claim against the proposed Third Party actually offends the provisions of section 4 of the *Limitation of Actions Act*.

30. In the foregoing, I find that the proposed Third Party does not meet the criteria set out for a Third Party and its involvement will not be necessary to enable the court effectually and completely adjudicate upon this suit.

31. In the circumstances, I find the Defendants’ Chamber Summons application dated the December 17, 2024 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF MAY 2025

CHRISTINE OCHIENG

JUDGE



In the presence of:

CN Kihara for Plaintiff in Counter Claim and 3rd Defendant

Ms Ndoigo holding brief for Mbaabu for Applicants/Defendants

Ms Miima holding brief for Mr. Ojiambo SC for Proposed 3rd Party

Court Assistant: Susan

