Rick v Chebet & another; Too (Interested Party) (Environment and Land Case Civil Suit 232 of 2023) [2024] KEELC 5936 (KLR) (16 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5936 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 232 OF 2023

JO MBOYA, J

SEPTEMBER 16, 2024

BETWEEN

BRAYAN MICHAEL RICK .... PLAINTIFF

AND

JAMES CHEPKOIYWA CHEBET .... 1ST RESPONDENT

ARNORLD MASWAI .... 2ND RESPONDENT

AND

JANET TOO .... INTERESTED PARTY

RULING

Introduction and Background

1. The Defendants/Applicants [hereinafter referred to as the Applicants] have approached the court vide the chamber summons application dated the 11th June 2024 brought pursuant to the provisions of Order1 Rule 15 of the Civil Procedure Rule; Section 1A, 3A and 95 of *Civil Procedure Act* and Article 159 [d] of *the Constitution* 2010 and wherein the Applicants have sought for the following reliefs;

   i. ....Spent.

   ii. That the period allowed by the law to apply for Leave to issue a Third-party notice be enlarged.

   iii. That the Defendants herein be granted Leave to issue a Third-party notice against the third-party herein above.

   iv. That the draft Third-party notice be deemed as duly filed.

   v. That the costs of this Application be borne by the Respondent.

2. The application beforehand is premised on various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of James Chepkoiywa Chebet, who is the 1st Applicant herein. For coherence, the supporting affidavit is sworn on the 11th June 2024.

3. The Plaintiff/Respondent filed a Replying affidavit sworn on the 15th July 2024 and in respect of which same [Plaintiff/Respondent] has contended inter-alia that the application beforehand is not only misconceived but constitutes an abuse of the due process of the court.

4. In addition, it has been contended that the issues being raised at the foot of the application had been canvassed vide a previous suit, namely, ELC No. 291 of 2012, which was dismissed for want of prosecution.

5. The application beforehand came up for hearing on the 22nd of July 2024, whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court ventured forward and circumscribed the timelines for the filing and exchange for the filing of written submissions.

6. Pursuant to the directions of the court, the Applicants filed written submissions dated the 30th July 2024 whilst the Respondent filed written submissions of even date. Suffice it to point out that the two [2] sets of written submissions are on record.

Parties'submissions:

a. Applicants'submissions:

7. The Applicants herein filed written submissions dated the 30th July 2024 and wherein same [Applicants] adopted the grounds contained at the foot of the application and thereafter reiterated the averments in the body of the supporting affidavit.

8. Furthermore, the Applicants herein thereafter proceeded to and highlighted five [5] salient issues for consideration by the court. Firstly, the Applicants have contended that the issues raised at the foot of the intended third-party notice relate to and concern the same subject dispute before the court.

9. Furthermore, learned counsel for the Applicants has submitted that the Applicants herein had previously entered into and executed a valid sale agreement with the proposed third-party over and in respect of L.R No. 21984/52 [now known as Nairobi Block 148/2036]. Besides, it has been posited that upon entry into and execution of the sale agreement with the proposed third-party, the Applicants paid to and in favour of the proposed third-party the entire purchase price.

10. Other than the foregoing, learned counsel for the Applicants has submitted that the proposed third-party also proceeded to and allowed the 1st Applicant to enter upon and take possession of the suit property. For good measure, it has been contended that the 1st Applicant has been in occupation of the suit property for more than 19 years.

11. In the premises, learned counsel for the Applicants has therefore submitted that the issues to be raised and canvassed as against the proposed third-party correspond with the issues being canvassed by the Plaintiff/Respondent as against the Defendants/Applicants herein. In this regard, it has been submitted that leave ought to be issued to take out and serve a third-party notice.

12. Secondly, learned counsel for the Applicants has submitted that the Applicants herein have established and demonstrated that same have a nexus/interest in the suit property. Besides, learned counsel has added that there also exists a triable issue between the Applicants and the proposed third-party, which

should enable the court to grant the relief sought in accordance with the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010.

13. In support of the submissions that the Applicants have raised and demonstrated the existence of a triable issue as against the proposed third-party, learned counsel for the Applicants has referenced the decisions including *Hass Petroleum Ltd v Iota Engineering Construction Ltd and White Lotus Project Ltd [third-party] HCC No. 226 of 2019*[UR].

14. Thirdly, learned counsel for the Applicants has submitted that the application beforehand is by law ex-parte. In this regard, learned counsel for the Applicants has invited the court to take cognizance of the provisions of Order 1 Rule 15 of the Civil Procedure Rules 2010 which underpin the application for leave to issue third-party notice.

15. In addition, learned counsel for the Applicants has posited that to the extent that the application beforehand is ex-parte by law, the Plaintiff/Respondent herein ought not to be granted liberty to participate in the application. In this respect, learned counsel for the Applicants has thus contended that the participation of the Plaintiff/Respondent is therefore unnecessary.

16. Fourthly, learned counsel for the Applicant has submitted that the Applicants herein had hitherto filed an application seeking for leave to issue third-party notice. However, it has been pointed out that the previous Application dated the 8th December 2023 was found to have been brought under the wrong provisions of the law and thus same [application] was withdrawn.

17. Be that as it may, learned counsel for the Applicants has submitted that thereafter the Applicants herein sought for and obtained leave to file a supplementary list and bundle of documents. In any event, counsel has added that when leave to file supplementary list and bundle of documents was granted, same [learned counsel] interpretated the leave to file supplementary bundle of documents as granting a window for the Applicants to formally seek leave to issue third-party notice.

18. On the other hand, learned counsel for the Applicants has contended that in the event that the court finds that same [counsel] misinterpreted the scope of the leave to file further list and bundle of documents, then the court should find it fit to invoke the provisions of Section 1A, 3A and 95 of the *Civil procedure Act*, with a view to rendering substantive justice.

19. At any rate, learned counsel for the Applicants has also submitted that the extent of delay attendant to the filing of the instant application is neither unreasonable nor inordinate. In this regard, learned counsel for the Applicants has thus invited the court to excuse the delay and grant leave to issue the third-party notice.

20. Suffice it to point out that learned counsel for the Applicants has thereafter cited and referenced the holding in the case of Iriaini Tea Factory Ltd v Johnstone Muchai Muthanga & 4 Others [2017]eKLR where the court considered the import and tenor of Section 1A of the *Civil Procedure Act* and Article 159 of *the Constitution* and thereafter proceeded to grant leave despite a delay of three years.

21. Finally, learned counsel for the Applicants has submitted that the sale agreement that was entered into by the 1st Applicant and the proposed third-party did not have completion timelines. In particular, it has been highlighted that the same agreement was open-ended and gave unto the 1st Applicant and the proposed third-party equal rights over each respective half of the property.

22. Based on the fact that the sale agreement between the 1st Applicant and the proposed third party was open ended and not time bound, learned counsel for the Applicants has submitted that the cause of action at the foot of the intended third-party notice is therefore not barred by the doctrine of Limitation of Actions.

23. Furthermore, learned counsel for the Applicants has also submitted that even though the Defendants/ Applicants herein had hitherto filed ELC No. 291 of 2012 against the proposed third-party, the said suit was dismissed for want of prosecution. In this regard, it has been posited that the dismissal of the suit for want of prosecution did not address and or determine the claims as against the proposed third-party.

24. At any rate, learned counsel for the Applicants has submitted that the Applicants herein proceeded to and filed an appeal against the dismissal of ELC No. 291 of 2012. In this respect, it was further contended that the appeal against the dismissal of ELC No. 291 of 2012 is still pending before the court of appeal.

25. Arising from the foregoing submissions, learned counsel for the Applicants has therefore invited the court to find and hold that the Applicants have established a basis to warrant the grant of leave to issue third-party notice as against the proposed third-party.

26. In short, the Applicants have contended that the Application is meritorious.

b. Respondent's Submissions:

27. The Respondent herein filed written submissions dated the 30th July 2024 and wherein same [Respondent] has adopted and reiterated the averments at the foot of the Replying affidavit.

28. Furthermore, learned counsel for the Respondent has thereafter proceeded and highlighted four [4] salient issues for consideration by the court. First and foremost, learned counsel for the Respondent has submitted that the issues highlighted at the foot of the current application and by extension the proposed third-party notice had been canvassed by the Applicants at the foot of ELC No. 291 of 2012, which suit was dismissed for want of prosecution.

29. Additionally, learned counsel for the Respondent has submitted that insofar as a suit canvassing the same issues had been dismissed for want of prosecution, the Applicants herein cannot now seek to re-agitate/ re-litigate the same issues vide a third-party notice, either in the manner proposed or at all. In any event, learned counsel for the Respondent has posited that the cause of action to be raised vide the proposed third-party notice is barred by the provisions of Order 12 Rule 6 [2] of the Civil Procedure Rules, 2010.

30. Secondly, learned counsel for the Respondent has submitted that an application for leave to issue third-party notice is required to be filed within 14 days from the close of pleadings. However, it has been pointed out that the pleadings in respect of this matter closed on the 31st October 2023, yet the current application was filed on the 11th June 2024. In this regard, learned counsel for the Respondent has submitted that the application was filed more than 7 months from the close of pleadings.

31. Arising from the foregoing, learned counsel for the Respondent has submitted that the application beforehand has therefore been filed and/or lodged with unreasonable and inordinate delay, which has neither been accounted for nor explained. In any event, it has been contended that the reasons for the delay ought have been highlighted at the foot of an affidavit and not in submissions.

32. To this end, learned counsel for the Respondent has referenced the holding of the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi [2014]eKLR, where the court posited that submissions cannot take the place of evidence.

33. Thirdly, learned counsel for the Respondent has submitted that the reliefs at the foot of the proposed third-party notice are not related to the reliefs being sought by the Plaintiff herein. In this regard, counsel has contended that insofar as the reliefs are not related, the court is divested of the jurisdiction

to grant leave to take out third-party notice. In this regard, the court's attention has been invited to the provisions of Order 1 Rule 15 [1] [b] of the Civil Procedure Rules, 2010.

34. Lastly, learned counsel for the Respondent has submitted that the Applicants herein have neither established nor disclosed any basis for seeking indemnity at the foot of the proposed third-party notice. In the absence of basis for indemnity, it has been posited that the application for leave to take out third-party notice is therefore misconceived and legally untenable.

35. In the premises, learned counsel for the Respondent has therefore invited the court to find and hold that the application for leave to take out third-party notice is therefore misconceived and thus legally untenable. In this regard, the court has been invited to find and hold that the application is devoid of merits.

Issues For Determination:

36. Having reviewed the application beforehand, the response thereto and upon consideration of the written submissions filed by and on behalf of parties herein, the following issues do emerge [crystalise] and are thus worthy of determination;

    i. Whether application for leave to issue a third-party notice is Ex-parte by law and if so; whether the participation of the Plaintiff was unnecessary.

    ii. Whether the Application beforehand has been mounted with unreasonable and inordinate delay and if so whether such delay has been accounted for.

    iii. Whether the Applicants herein have established or demonstrated the existence of a triable issue as against the proposed third-party to warrant issuance of leave or otherwise.

    iv. Whether the intended third-party proceedings are re-judicata.

Analysis and Determination:

Issue Number 1 - Whether an application for leave to issue a third-party notice is Ex-parte by law and if so whether the participation of the Plaintiff was unnecessary.

37. Learned counsel for the Applicants has contended that the application for leave to file a third-party notice is by law Ex-parte and hence the Plaintiff herein ought not to be permitted to participate in the proceedings. In particular, learned counsel for the Applicants has drawn the attention of the court to the provisions of Order 1 Rule 15[1] of the Civil Procedure Rules, 2010.

38. Given the extent of submissions rendered by and on behalf of counsel for the Applicants pertaining to the import and tenor of Order 1 Rule 15 of the Civil Procedure Rules, 2010, it is thus common ground that same are critical and paramount to the determination of an aspect of the matter beforehand. In this regard, it suffices to reproduce same.

39. For coherence, the contents of Order 1 Rule 15 [supra] are reproduced as hereunder;

    [Order 1, rule 15.] Notice to third and subsequent parties 15.

    (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 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.

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions "third party notice" and "third party" shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.

40. It is evident and apparent that the wording of Order 1 Rule 15[1] of the Civil Procedure Rules 2010, envisaged that an application for leave to issue a third-party notice shall be by way of Ex-parte summons in chambers.

41. Nevertheless, it is worthy to point out that the fact that such an application is to be made ex-parte, does not oust, restrict and/or limit the inherent jurisdiction of the court to direct that such an application be served on the Plaintiff or such other party as the court may direct. For good measure, the court retains the discretion to either proceed Ex-parte, or direct that the application be serve, depending on the reliefs sought and the obtaining circumstances.

42. At any rate, it is also not lost on this court that when the matter came up for hearing of the said application, the advocates for the parties covenanted to dispose of same by way of written submissions. In this regard, the court thereafter circumscribed the timelines for the filing and exchange of the written submissions.

43. Suffice to note that the directions which were granted by the court on the 22nd July 2024 have neither been reviewed nor set aside. In this respect, the Applicants cannot now be heard to contend that the

application beforehand should have been heard ex-parte, without seeking to review and impeach the directions on record.

44. Other than the foregoing, it is also important to underscore that the application beforehand did not only seek leave to issue third-party notice. For good measure, the application also has sought for extension or enlargement of time to issue a third-party notice. Pertinently, the limb of the application seeking extension/enlargement of time is predicated upon the provisions of Section 95 of the *Civil Procedure Act*.

45. To my mind, where a party, the Applicant not excepted, seeks a plethora of reliefs including extension of time within which to do an act, such an application must be served on the adverse party. In any event, the provisions of Section 95 of the *Civil Procedure Act*, which have been invoked and highlighted by the Applicants do note grant the court any mandate to proceed ex-parte.

46. Suffice it to point out that insofar as the Applicant was also seeking for enlargement of time to apply for leave to issue a third-party notice, same [Applicants] was obligated to serve the application under reference.

47. In addition, the adverse party, namely, the Plaintiff/Respondent was thereafter entitled to respond to the application pertaining to and concerning the enlargement/extension of time; and to raise, whatever issues same [Respondent] deemed apposite.

48. Finally, it is important to highlight the position that the suit beforehand was filed by the Plaintiff. To the extent that the suit belongs to the Plaintiff, the Plaintiff is entitled to be served with any application or proceedings which are likely to impact upon his/her rights. To this end, it is the considered view of this court that the Plaintiff has a right to participate in the hearing of the application beforehand. For good measure, Article 50[1] of *the Constitution* 2010 underpins the right or entitlement of the Plaintiff to participate and be heard in the application beforehand.

49. Arising from the foregoing, my answer to issue number one is four pronged. Firstly, the fact that Order 1 Rule 15[1] states that an application for leave to issues and serve a third-party notice shall be by way of Ex-parte Chamber summons, does not oust, restrict and or limit the mandate/ jurisdiction of the court to direct that such an application be served.

50. Simply put, the court is seized of inherent/intrinsic jurisdiction to make any orders and/or directions towards serving the interests of justice and to avert a miscarriage of justice. [See the decision of supreme court in Narok County Government v Livingstone Kunini Ntutu [2018]eKLR].

51. Secondly, the application beforehand did not only seek for leave to issue third-party notice, but also contained a limb for enlargement of time. In respect of extension of time, such an application must be served upon the adverse party, who thereafter has the liberty to participate in the proceedings or otherwise.

52. Thirdly, the suit beforehand was filed by the Plaintiff. To the extent that the suit was filed by the Plaintiff, the Plaintiff is therefore entitled to participate in the proceedings that may affect and/or impact upon his rights. [See the decision of the Court of Appeal in the case of Standard Chartered Financial services Limited versus Manchester Outfitters Limited [now Kings Woolen Limited] [2016] eklr.]

53. Finally, the provisions of Article 50[1] of *the Constitution* 2010 are paramount. In any event, there is no gainsaying that the provisions of Order 1Rule 15 of the Civil Procedure Rules are subordinate and subservient to *the constitution*. Simply put, the participation of the Plaintiff in the application beforehand was/is underpinned by the Supreme Law.

Issue Number 2 - Whether the application beforehand has been mounted with unreasonable and inordinate delay and if so whether such delay has been accounted for.

54. The Defendants/Applicants herein were duly served with the Plaint and Summons to enter appearance. Upon being served, the Defendants/Applicants herein duly entered appearance and thereafter filed a statement of defence dated the 26th September 2023.

55. On the other hand, it is worthy to underscore that upon being served with the statement of defence by the Defendants herein, the Plaintiff deemed it appropriate to file and serve a reply to the statement of defence. In this regard, a reply to the statement of defence was filed on the 17th October 2023.

56. Arising from the foregoing, there is no gainsaying that the pleadings in respect of the instant matter closed on or about the 31st October 2023. For good measure, pleadings are deemed to close within 14 days from the date of filing and service of a statement of defence or where a reply of defence is filed, then pleadings are deemed to close 14 days from the date of service of the reply to defence. [See Order 2 Rule 13 of the Civil Procedure Rules, 2010].

57. Taking into account the import and tenor of the provisions of Order 1 Rule 15[1] of the Civil Procedure Rules, 2010, it was incumbent upon the Applicants herein or their learned counsel to file the application for leave to take out a third-party notice within 14 days from the close of pleadings. In this respect, there is no gainsaying that the application for leave to take out third-party proceedings, if any ought to have been filed on or about the 15th November 2023.

58. Be that as it may, the application beforehand was only filed on the 11th June 2024. Quite clearly, the application was filed long after the lapse of the statutory duration envisaged under the provisions of Order 1 Rule 15[1] of the Civil Procedure Rules, 2010.

59. Arising from the fact that the application was filed long after the lapse of the statutory timelines, it was incumbent upon the Applicants to account for an/or explain the delay attendant to the filing of the application. Furthermore, any reason and/or explanation relative to the delay ought to be contained in the body of the affidavit and not otherwise.

60. Nevertheless, despite the Applicants conceding and acknowledging the delay in the filing of the instant application, same [Applicants] have neither found it appropriate nor expedient to explain the delay in the body of the supporting affidavit.

61. In the absence of any explanation or plausible reasons why the application was not filed timeously and with due promptitude, the court is left without any basis upon which to exercise discretion. Instructively, the discretion of a court can only be exercised on the basis of plausible and cogent reasons, if any, tendered by the party at fault. In the absence of explanation, the court is deprived of the basis for exercising discretion.

62. To this end, it suffices to take cognizance of the decision in the case *Njoroge v Kimani (Civil Application Nai E049 of 2022*) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court held as hereunder;

> 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay.
>
> An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mereasking. An applicant is required to make out a case entitling him to the court's indulgence

by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

63. Before departing from the issue beforehand, it is also important to underscore that an Applicant chargeable with the obligation of explaining delay like in the instant case must avail the reasons in the affidavit. To the contrary, such an Applicant cannot seek to advert to reasons and explanations in the body of the written submissions.

64. Suffice it to underscore that submissions are quite distinct from affidavit. Without belabouring the point, affidavit constitutes and comprises of evidence in line with the provisions of Order 19 of the Civil Procedure Rules, 2010. [See also the decision in Stephen Boro Githua v Family Finance Building Society & 3 Others [2015]eKLR].

65. On the other hand, submissions constitute and comprise of the legal arguments being propagated by a party and which essentially highlight issues of law. For coherence, submissions do not constitute and/or comprise of evidence. In any event, submissions can also not take place of evidence.

66. To this end, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, where the court held thus;

> Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do.

67. To my mind, the application beforehand, which has been filed more than seven [7] months from the date when pleadings closed, has certainly been filed with unreasonable and inordinate delay. Furthermore, no attempt was made to account for or explain the delay.

68. Based on the foregoing, it is my humble finding and holding that the application by the Applicants has been filed and mounted with unreasonable and inordinate delay. In addition, the inordinate delay has not been accounted for. In this respect, the application beforehand is defeated by the Doctrine of Latches. [See the decision of the Court Appeal in the case of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR].

Issue Number 3 - Whether the Applicants herein have established or demonstrated the existence of a triable issue as against the proposed third-party to warrant issuance of leave or otherwise.

69. The Applicants have approached the court with a view to procuring and obtaining leave to issue and serve third-party notice. It is imperative to underscore that the issuance of such leave is predicated upon and underpinned by the demonstration that there exists a triable issue or better still, sufficient cause as between the Defendants/Applicants and the proposed third-party, which is capable of being determined alongside the dispute between the Plaintiff and the Defendants.

70. Furthermore, it is important to underscore that where the law provides for the granting of leave like in the case, leave to issue third party notice, the grant of such leave is not mechanical. Besides, the granting of such leave must not be taken perfunctorily.

71. Put differently, where a party seeks leave of the court to do an act, such party is obligated to place before the court plausible, credible and cogent basis to enable the court exercise discretion in determining whether the leave sought ought to be granted or otherwise.

72. Further and at any rate, it is not lost on this court that before leave can be granted for purposes of taking out third-party proceedings, the Applicant must demonstrate that there exists sufficient cause and triable issue to be canvassed as against the proposed third-party.

73. As pertains to the meaning and import of what constitute[s] sufficient cause, proof of which, is critical before granting of leave, it suffices to highlight the holding in the case of Wachira Karani v Bildad Wachira [2016] eKLR, where the court held as hereunder;

> " The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9] discussing what constitutes sufficient cause had this to say:-
>
> > "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" [Emphasis added]
> >
> > In Daphene Parry vs Murray Alexander Carson[10] the court had the following to say:-
> >
> > > 'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ...[Emphasis added].

74. Having taken cognizance of the foregoing observations, it is now apposite to return to the subject matter and discern whether the Applicants have demonstrated sufficient cause and triable issue to underpin the issuance of leave.

75. To start with, the Applicants herein are seeking leave to issue third-party notice on the basis of a sale agreement that is stated to have been entered into on the 24th January 2005. Furthermore, it is imperative to underscore that the same Applicants have also conceded that there was an attempt by the proposed third-party to evict same from the suit property in the year 2012.

76. Based on the contention that there was an attempt by the proposed third-party to evict the Applicants from the suit property, the Applicants have posited that same [Applicants] were obliged to and indeed filed civil suit vide ELC No. 291 of 2012.

77. In my humble view, the suit vide ELC No 291 of 2012 could not have been filed if there was no breach of the sale agreement. In this respect, there is no gainsaying that the filing of the said suit was informed

by what the Applicants' deemed to constitute breach of the sale agreement and thus a cause of action for breach of contract.

78. To the extent that there was a suit which was filed in the year 2012 and whose import was to enforce the terms of the sale agreement, it is my finding and holding that a cause of action accrued in the year 2012 and not otherwise. In this regard, the Applicants herein cannot now turn back and contend that the sale agreement was open ended and not time bound.

79. Simply put, the cause of action which underpins the intended issuance of the third-party notice beforehand is time barred. In this respect, a court of law cannot be called upon to grant leave to issue a third-party notice in pursuance of a cause of action/claim which is time barred. [See Section 4[1] of the *Limitation of Actions Act*].

80. At any rate, it suffices to highlight that where a cause of action/claim is barred by limitation of actions, such a cause of action/claims, cannot be agitated before a court of law. In short, where a cause of action is barred by statute, the claim is rendered otiose and redundant and by extension, the court is divested of jurisdiction to entertain same.

81. In the case of Gathoni v Kenya Co-operative Creameries Ltd[1982] eKLR, the court of Appeal dealt with the implications attendant to the Statute of Limitations.

82. Same stated and observed as hereunder;

> The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

83. Secondly, it is also worthy to recall that the Applicants herein admittedly filed ELC No. 291 of 2012. Furthermore, it is conceded that the said suit was dismissed for want of prosecution. For good measure, the Plaintiff/Respondent has exhibited a copy of the decree issued on the 11th November 2021 and wherein it is highlighted that the suit was dismissed pursuant to the provisions of Order 12 Rule 3 of the Civil Procedure Rules, 2010.

84. Whereas learned counsel for the Applicants contend that the dismissal of the suit for want of prosecution was on the basis of a procedural technicality, it is worthy to point out that the dismissal of a suit for want of prosecution has legal consequences. Instructively, where a suit is dismissed for want of prosecution, the Plaintiff or claimant in the suit is barred and/or prohibited from filing a fresh suit on the same cause.

85. To this end, it is appropriate to cite and reference the provisions of Order 12 Rule 6 of the Civil Procedure Rules, 2010.

86. Same provides as hereunder;

6. (1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit.

(2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.

87. My reading of the provision of Order 12 Rule 6 [2] of the Civil Procedure Rules [whose details have been cited in the preceding paragraph] drives to me the conclusion that the Applicants herein are barred and/or prohibited from filing a fresh suit on the basis of the same cause of action/claims as the one which underpinned the dismissed suit.

88. Additionally, it is imperative to point out that the granting of leave and the issuance of third-party notice, which would constitute third party proceedings, amounts to and constitute a suit. [See Section 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya].

89. In my humble view, the leave to take-out third-party proceedings, if granted, shall be tantamount to affording the Applicants an opportunity to file a fresh suit/proceeding on the same cause of action/claim. For good measure, it is not lost on this court that the foundation of the intended third-party proceedings is the sale agreement dated the 24th January 2005, which underpinned the previous suit.

90. Thirdly, it is worthy to recall that upon the dismissal of the previous suit, namely, ELC No. 291 of 2012, the Applicants herein proceeded to and filed an appeal before the Court of Appeal. Furthermore, it is conceded by the Applicants that the appeal before the court of appeal is still pending.

91. To my mind, the appeal before the court of appeal, constitute further proceedings wherein the Applicants are propagating their claim to the suit property. In any event, if the appeal were to succeed, the Applicants herein would be having an opportunity to address the same cause of action. In this regard, what becomes crystal clear is that the Applicants are desirous to pursue the same cause of action/claim before two[2] separate courts, albeit at the same time.

92. Without belabouring the point, the conduct of the Applicants herein of seeking leave to take out third party proceedings against the proposed third-party, whilst at the same time pursuing an appeal before the court of appeal on a similar, if not, same cause of action/claim constitutes an abuse of the due process of the court.

93. The concept of abuse of the due process of the court has been variously elaborated upon. In this regard, it suffices to reiterate the holding of the Supreme Court [the apex Court] in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016)* [2018] KESC 27 (KLR) (19 September 2018) (Ruling),

> 27. In Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:
>
> > " The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice.
> >
> > The bottom line in a case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption..."....Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process."

94. Consequently and in the premises, my answer to issue number three is threefold. Firstly, the Applicants herein have neither demonstrated nor established the existence of a sufficient cause to underpin the

grant of leave to issue and serve third-party notice. For good measure, the issuance of such leave does not lie as of right, but same constitutes an exercise of judicial discretion.

95. Secondly, the cause of action/claim which underpins the intended/proposed third-party notice is clearly time barred. Suffice it to highlight and underscore that the cause of action/claim is one for breach of contract.

96. Thirdly, the cause of action/claim which colours the intended third-party proceedings, is similar to the claim which was propagated at the foot of ELC No. 291 of 2012. For good measure, the said suit was dismissed for want of prosecution.

97. As a result of the foregoing, no fresh proceedings can be mounted in line with the provisions of Order 12 Rule 6[2] of the Civil Procedure Rules 2010.

Issue Number 4 - Whether the intended third-party proceedings are Res-judicata.

98. Other than the position which has been discussed in the preceding paragraphs, there is yet another perspective that merits discussion. For good measure, the perspective herein relates to and/or concerns whether the issues to be canvassed vide the intended third-party proceedings are res-judicata or otherwise.

99. To start with, it is not in dispute that ELC No. 291 of 2012 was dismissed for want of prosecution. Having been dismissed for want of prosecution, the dismissal of the said suit constitutes a judgment in favour of the proposed third-party, who was the Defendant in the dismissed suit. [See the decision in the case of Njue Ngai -v- Ephantus Njiru Ngai & another [2016] eKLR].

100. Insofar as the dismissal order in ELC No. 291 of 2012 constitutes a judgment in favour of the adverse party, it then means that no further proceedings can be filed and/or instituted against the adverse party who has a judgment in her favour. In this respect, this court posits that for as long as the judgment attendant to the dismissed suit has not been set aside, the Applicants herein cannot seek to implead the proposed third-party on the basis of the same claim/cause of action.

101. In my humble view, the dismissal of the suit for want of prosecution, which I have held to be a judgment, constitute[s] a decision on merits. For good measure, such a decision is not a technical decision in the manner argued and/or canvassed by learned counsel for the Applicants.

102. Furthermore, for as long as that judgment based on the dismissal remains in situ, the issues that were underpinned by that suit, cannot be re-agitated/ re-litigated in a separate and distinct suit. Furthermore, if a new suit or proceedings are commenced on the same set of facts, cause of actions/ claim, such a subsequent suit becomes res-judicata.

103. To this end, I beg to highlight and reiterate the holding of the Court of Appeal in the case of Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR, where the court stated and held as hereunder;

> (17) As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand.

> The 1st respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1st respondent could do was to invoke the appellate process and not filling a fresh suit.

104. To surmise, the intended third-party proceedings for which the Applicants herein are seeking leave to institute, would no doubt, be barred by the doctrine of Res-judicata. For good measure, the Applicants herein cannot be allowed to re-invent and re-agitate the same claim that had hitherto been canvassed at the foot of ELC No. 291 of 2012; and which was dismissed for want of prosecution.

105. Simply put, the intended third-party proceedings are prohibited by the doctrine of Res-Judicata and by extension, the provisions of Section 7 of the *Civil Procedure Act*, chapter 21, Laws of Kenya.

Final Disposition:

106. Flowing from the discussion [details highlighted in the body of the ruling] what becomes crystal clear is that the application by the Applicants has not only been mounted with unreasonable and inordinate delay, but same [application] is also devoid of merits.

107. In the premises, the final Orders of the Court are as hereunder:

    i. The Chamber Summons Application dated the 11th June 2024, be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Plaintiff/Respondent.

108. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Ms Buluma h/b for Mr. Peter Kibet for the Defendants/Applicants.

Mr. Ojiambo for the Plaintiff/Respondent.

N/A for the Proposed Third-Party