



REPUBLIC OF KENYA



Mayuki v Siku & another; Wanjema (Intended Third Party) (Environment & Land Case 965 of 2016) [2023] KEELC 18084 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 965 OF 2016
OA ANGOTE, J
JUNE 8, 2023**

BETWEEN

ALI HANGAYA MAYUKI PLAINTIFF

AND

EMMANUEL MAHISU SIKU 1ST DEFENDANT

WASHINGTON RURIGI KINGORI 2ND DEFENDANT

AND

MARTIN MUTONGA WANJEMA INTENDED THIRD PARTY

RULING

Background

1. Vide a chamber summons application dated April 26, 2022, brought pursuant to the provisions of section 3A of the *Civil Procedure Act* and order 1 rule 15 of the *Civil Procedure Rules*, the plaintiff/applicant seeks the following reliefs;
 - i. That the honourable court do grant leave to the plaintiff/applicant to enjoin Martin Mutonga Wanjema.
 - ii. That a third party notice be and is hereby issued to the intended third party Martin Mutonga Wanjema herein to be enjoined in the suit.
 - iii. That upon determination the third party notice be served and he Martin Mutoma Wanjema be deemed admitted as a third party and be allowed to file his responses.



2. The application is based on the grounds on the face of the motion and is supported by the affidavit of Ali Hangaya Mayuki, the plaintiff herein of an even date. The plaintiff deposed that he is and was at all material times the duly registered owner of plot number 2304 measuring 0.0160Ha, Nasra Estate Nairobi(hereinafter the suit property) described in the letter of allotment reference number 81391/1300 in the name of John Ngumba(deceased) which was issued on the November 27, 2007 by the commissioner of lands after he bought it from the estate.
3. It is the plaintiff's deposition that he purchased the suit property through his now deceased agent, Jane Adhiambo and that sometime in 2016, he carried out a search and was shocked to discover that the 1st defendant had sold the plot to the 2nd defendant using a forged power of attorney in his name allegedly permitting the 1st defendant to deal with the plot.
4. The plaintiff deposed that he realized that after the death of his agent Jane Adhiambo, the 1st defendant accessed his documents and forged a power of attorney registered as IP/A 64388/1 giving him power to deal with the suit property without his knowledge and that using the forged power of attorney, the 1st defendant entered into a deed of agreement with the 2nd defendant for the sale of the suit property.
5. It was deposed by the plaintiff that despite the pending court orders, the 2nd defendant sold the suit property to Martin Mutonga Wanjema, the intended third party, who has illegally constructed a structure on the suit property in contempt of court and that the interests of justice dictate that the orders sought are granted.
6. The 2nd defendant responded *vide* a replying affidavit in which he deposed that the plaintiff is not the registered owner of the suit plot as the letter of allotment is in the names of John Ngumba; that he purchased the aforesaid plot after which he was issued with a letter of allotment dated the August 12, 2011 and that he eventually became the registered owner of the suit property and was issued with a certificate of lease for parcel of land number Nairobi/Block/157/2304 after making the requisite payments to the lands office.
7. It was deposed by the 2nd defendant that no evidence has been adduced in support of the allegation that one Jane Adhiambo acted on behalf of the plaintiff in purchasing the suit property in any manner, including evidence of purchase and remittance of funds; that the plaintiff has not substantiated his allegations that the power of attorney that gave rise to the transactions was fraudulent and that he entered into a valid deed of agreement with the 1st defendant after he was satisfied that the power of attorney was valid.
8. It is the 2nd defendant's case that allegations of fraud have a criminal element and as no charges were preferred against him or the 1st defendant before his demise, the same remain mere allegations; that the plaintiff had filed a civil suit in the Magistrates Court being civil suit No 761 of 2016, which suit the plaintiff withdrew on October 3, 2016; that he disposed off the suit property to a third party on October 17, 2016 after failing to settle a loan facility and that there was no court order barring him from doing so.

Submissions

9. The plaintiff's counsel submitted that order 1 rule 10 of the *Civil Procedure Rules* grants the court the power to enjoin any party who may be necessary to enable the court effectually and completely adjudicate and settle questions in a suit.
10. It was submitted that the court in *Winfred Kamua Githua t/a Githua Associates v City Council of Nairobi*[2013] eKLR gave an in depth exposition on the definition of a third party; that a third party



was defined in that case as someone who is not a party to a lawsuit, agreement or other transaction but who is usually somehow implicated and that the general purpose of third party proceedings is to avoid two actions which should be tried together and save time and cost of reduplication of evidence to obtain consistent results from identical evidence.

11. Counsel submitted that the intended third party is clearly implicated in the suit and must be enjoined to aid in determination of the matter.
12. The 2nd defendant's counsel submitted that the reference number for the letter of allotment is 81391/1327 and not 81391/1300 as claimed; that the plot number in issue is 2186 and not 2304 as claimed while the acreage is 0.0156 Ha and not 0.0160Ha; that the plaintiff is giving evidence of a different property of which the 2nd defendant is a stranger to and that the plaintiff is relying on a letter of allotment bearing the names John Ngumba who is not a party to the suit.

Analysis and Determination

13. The applicant seeks to have the court issue a notice to the intended third party to be enjoined into these proceedings. the legal foundation of a third party notice is found under order 1 rule 15 of the [Civil Procedure Rules, 2010](#) which provides thus;

“Where a defendant claims 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 relief or remedy is 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 should be properly be determined as between the plaintiff and the defendant but as between the plaintiff and defendant and the 3rd party or between any or either of them, he shall apply to court within fourteen days after close of pleading for leave to issue a notice (hereinafter called a third party notice) and such leave shall be applied by summons in chambers ex parte supported by affidavit.”

14. In considering the question of joinder of third parties, the Court of Appeal for East Africa in *Yafesi Walusimbi v Attorney General of Uganda* [1959] EA 223, stated thus;

“In order to join a third party, the subject matter between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same.”

15. Whereas the Court in *EK Kagwa v Costa* [1963] EA 213 & *Sango Bay Ltd v Dresdner Bank Ltd* [1971] EA 307, held that;

“Before the court can exercise its discretion to issue third party notice, it has to evaluate the allegations of the plaintiff in terms of his legal claim to the relief he is seeking. The court also has to evaluate the defendant's allegations against the third party and has to be satisfied that the substance of each claim is the same and that there is a linkage between all the claims before issuing the notice.”



16. The court in *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] Eklr, while discussing the rationale for third party joinder, stated as follows:

“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, 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. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue as all for purposes of liability between the plaintiff and the defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out.”

17. Having regard to the sections and case law aforesaid, it is apparent that the present application is manifestly wanting. Order 1 rule 15 of the *Civil Procedure Rules* is clear that it is only a defendant who can seek for the issuance of a third party notice to enjoin the third party. A third party notice is brought at the instance of the defendant who has a claim against him for indemnity, contribution or other remedy or relief connected with the plaintiff's claim against the defendant.
18. Looking at the application, the plaintiff is claiming the suit property from the intended third party who seems to have purchased the same from the 2nd defendant. The plaintiff asserts that the transfer of the suit property from the 1st defendant to the 2nd defendant who ultimately sold it to the intended third party is fraudulent. That being the case, the plaintiff has a claim against the intended third party. The best course of action would have been the joinder of the intended third party in the suit as a defendant, and not as a third party.
19. It is clear that the orders being sought by the plaintiff are untenable and unavailable. The application is fatally defective and the same is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 8th day of June, 2023

O. A. Angote

Judge

In the presence of;

Mr. Kanuthu for Plaintiff/Applicant

Mrs Macharu for 2nd Defendant

Court Assistant - Tracy

