



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 212. OF 2017**

**JOSHUA KYALO MUETI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOSEPH MUTUA ZAKAYO.....DEFENDANT/APPLICANT**

**AND**

**ISAAC KIMANTHI KAULA.....INTENDED THIRD PARTY**

**RULING**

1. This ruling relates to an ex-parte Chamber Summons dated 23<sup>rd</sup> February, 2021, brought under **Order 1 Rule 15** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**.

2. The application seeks the following prayers: -

- 1. That the defendant/applicant be granted leave to issue a third party notice upon Kimanthi Kaula.**
- 2. That the annexed third party notice be deemed duly filed.**
- 3. That costs of this application be paid by the third party.**

3. The application is premised on the grounds on the face of it and supported by the affidavit of the defendant/applicant, Joseph Mutua Zakayo, sworn on the 23<sup>rd</sup> February, 2021. He deposed that on 6<sup>th</sup> November, 2008, the intended third party sold to him the suit land known as plot number 229 Kinyoo adjudication section Emali for a sum of Kshs. 47,500/= and at the time of sale, the proposed third party owed the defendant the said sum of Kshs. 47,500/= for goods sold to him and that they mutually agreed that the said sum be treated as consideration in which the third party proceeded to sign a voucher to that effect.

4. He further deposed that he took actual possession of the suit land and has been cultivating crops to date. Thereafter, the proposed third party purported to sell the suit land to the plaintiff/respondent which sale is illegal, null and void ab initio. It was after the purported sale that the defendant/ applicant went to the adjudication officer to register the interest upon which he was advised to present confirmation of the sale of the suit land. The adjudication officer duly entered his name in the register as the proprietor of the suit land. That it is only fair that the proposed third party is joined in these proceedings to enable the court make a just and fair determination of all the issues herein.

5. The plaintiff/respondent filed grounds of opposition dated 19<sup>th</sup> April, 2021 in which he opposes the application on the following three grounds namely: -

- 1. That the application does not meet the legal threshold for issuance of a third party notice as envisaged under Order 1 Rule 15 of the Civil Procedure Rules.**
- 2. That the defendant/applicant has not demonstrated the existence of any triable issues between him and the intended third party and the intended third party has no interest in the plaintiff's case.**
- 3. That the application herein is frivolous, vexatious, fatally defective and an abuse of process of this honourable court and the same should be struck out or dismissed with costs.**

6. The defendant/applicant filed written submissions dated 13<sup>th</sup> July, 2021. It is his submission that the intended third party is a necessary party to these proceedings for the reasons that he has demonstrated triable issues between him and the intended third party. He relies on the case of **Interactive Advertising Limited versus Equity Bank Limited & 2 Others [2016] eKLR** in which the court noted that although the application had been brought after a long delay, the same was meritorious and necessary so that the serious issues raised by the defendant as against the third party could be determined. It is also his submission that a look at the provisions of **Order 1 Rule 15** clearly shows that this application meets the criteria for issuance of a third party notice.

7. The plaintiff/respondent filed written submissions dated 19<sup>th</sup> July, 2021. It is the plaintiff's/respondent's submission that the application does not meet the legal threshold as provided under **Order 1 Rule 15 of the Civil Procedure Rules**. He relies on the case of **Anthony Odhiambo Odundo versus Kukam Limited & Another [2019] eKLR** which the court in arriving at its decisions stated that **'the above legal framework required the applicant to bring the application within 14 days after the close of pleadings'**. It is the defendant's/respondent's submission that the plaintiff/applicant did not apply for enlargement of time as required and as such the application is legally incompetent and has to fail.

8. The plaintiff/respondent further submits that the intended third party is not a necessary third party for the just determination of this case as the defendant/applicant has misconstrued the nature of the plaintiff's/respondent's case as being a property in dispute which is not the case. The plaintiff/respondent relies on the case of **ASC Metal, Belgium versus Blue Nile (East Africa) Limited & 2 Others [2018] eKLR**. He submits that the defendant/applicant does not seem to have served the intended third party with the application and if at all that is the case, then the omission is fatal and ought to be denied a chance to hear the third party.

9. The plaintiff/respondent also submits that the application is frivolous and vexatious as it is without substance and is only intended to further delay the trial of this case by taking the plaintiff/respondent in a circus of frivolous process. In conclusion, the plaintiff/respondent submits that the intended third party sold the suit land to both the plaintiff/respondent and the defendant/applicant hence he should be joined in order for the issues of liability to be determined. However, since the plaintiff/respondent case is based on trespass and not ownership the question of liability cannot be determined between the parties.

10. I have considered the application, the affidavit in support, reply thereto and the submissions filed by the parties, and find that the only issue to consider is:-

*whether the applicant has laid the basis for grant of the orders sought.*

11. It is the defendant's/applicant's position that he bought the suit land from the intended third party sometime in 2008 in which he took possession and even cultivated on the land. That it occurred that the intended third party owed him money to the tune of Ksh. 47,500/= which they mutually agreed to be treated as a mode of exchange such that the intended third party sells the suit land to the defendant/applicant for a sum of Kshs. 47,500/=. A look at the defendant/applicant's annexures show copies of sale agreement and voucher executed by the defendant/applicant and the intended third party.

12. In the case of **Cheruiyot Edwin Mutai v Cyrus Ngaruiya [2020] eKLR** paragraph 15, the Court observed as follows: - **'It is plain from the foregoing that third party proceedings are not solely about contribution or indemnity by the third party to the defendant. That is only one aspect of it. Subrules (b) and (c) of Order 1 rule 15 (1) of Civil Procedure Rules, 2010, envisage other scenarios. Subrule (c) thereof is particularly instructive. It foresees issues that may arise not only between the third party and the defendant but between all the three parties in the suit viz: the plaintiff, defendant and third party. Strange as it may seem, Subrule (c) envisages a situation where an issue may arise between the third party and the plaintiff, with the defendant not necessarily being centrally involved (emphasis mine). This becomes clearly manifest when one considers the language used in Subrule (c), which, in the relevant part, is as follows:**

**"...determined not only as between the plaintiff and the defendant and the third party or between any or either of them."**

13. The defendant/applicant filed this application on 23<sup>rd</sup> February, 2021. Prior to this, he had filed his statement of defence in protest on 5<sup>th</sup> August, 2020. That despite failure by the defendant/applicant filing this application out of time, I do not see any prejudice to be suffered by the plaintiff/respondent and, therefore, the application is not frivolous, vexatious and an abuse of the court process. I am also of the view that the claim by the defendant/applicant against the intended third party raises triable issues which require just determination by this honourable court.

14. I hereby allow the chamber summons application dated 23<sup>rd</sup> February, 2021 in terms of prayers 1 and 2. I direct the defendant shall serve the third party with his pleadings within 14 days and the third party shall enter appearance and file a defence within 14 days of such service. After the third party complies with the directions given, the suit may be set down for hearing. Costs shall abide the outcome of the main suit. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8TH DAY OF FEBRUARY, 2022**

**MBOGO C.G**

**JUDGE**

**8/2/2022**

In the presence of: -

