



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC 214 OF 2017**

**KYALO MAITHYA.....PLAINTIFF**

**VERSUS**

**WAMBUA MUNYAO.....1<sup>ST</sup> DEFENDANT**

**FRED NDUNGU SENG.....2<sup>ND</sup> DEFENDANT**

**FRANCISCA M. KISOL.....3<sup>RD</sup> DEFENDANT**

**AND**

**LAND REGISTRAR, MAKUENI.....INTENDED 1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF LAND ADJUDICATION &**

**SETTLEMENT.....INTENDED 2<sup>ND</sup> INTERESTED PARTY**

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, KIBWEZI**

**SUB-COUNTY.....INTENDED 3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. By her chamber summons application dated 31<sup>st</sup> January, 2017 and filed in court on 1<sup>st</sup> February, 2017, the third Defendant/ Applicant prays for orders that: -

- 1. That this honourable court be pleased to enlarge time to allow to Applicant to institute 3<sup>rd</sup> Party proceedings out of time.**
- 2. That the 3<sup>rd</sup> Defendant/Applicant be granted leave to issue third party notice to Elizabeth Baika Musau.**
- 3. That cost of this application be provided for.**

2. The application is predicated on the grounds on its face and is supported by affidavit of the Applicant sworn at Nairobi on the 31<sup>st</sup> January, 2017.

3. It is expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act Order 1 Rule 15 and Order 50 Rules 5 of the Civil Procedure Rules and all enabling provisions of the law.

4. The applicant's counsel on record filed written submissions in support of the application. The submissions can be summarized as follows:  
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- That the Applicant has proved extensively in her affidavit in support of the application that she is entitled to indemnity from the intended third party over the suit property.

5. Regarding the issue of leave to issue third party notice outside the statutory time limits, the counsel submitted that it is well established

principle that the court has discretionary powers to grant such leave. The counsel relies on the case of MORANO LTD VS SINOHYDRO CORPORATION LTD [2014] eKLR where Onguto, J held thus;

**“Extension of time for the performance of an act or process under the Civil Procedure Rules is purely a discretionary matter. In exercise of such discretionary jurisdiction, the court must act judiciously. The court must closely scrutinize all relevant factors and ignore irrelevant ones. Thus a party must plainly explain the reasons for its failure to comply with the rules. The court will consider too the length of the delay and if any prejudice will be occasioned to the opposite party.”**

6. The Applicant’s counsel pointed out that the Applicant is a layman, who is not well versed with the intricacies of the Civil Procedure. The counsel added that upon being served with the summons to this suit, she acted in haste to get her finances in order, to enable her to get representation in this matter and that once the counsel got on record for the Applicant, this application was brought to court with haste. The counsel submitted that the Plaintiff will not suffer prejudice should the prayers sought by the Applicant are granted. The counsel further submitted that it is in the interest of justice that this application be granted as prayed and the aforementioned third party be enjoined in the suit, to enable the court to access all the relevant information that is crucial in aiding the court reach a just and fair determination of the matter.

7. Lastly, the counsel submitted that the Applicant has a right to fair trial under Article 50(1) of the Constitution. He also pointed out that the court is guided by the principle in Article 159(2) (a) of the Constitution which requires that justice shall be done to all and that the court must act with the aim of attaining a just determination of the proceedings as provided for in section 18 of the Civil Procedure Act.

8. Order 1 Rule 15 of the Civil Procedure Rules provides that an application for leave to commence third party proceedings be brought within fourteen (14) days after the close of pleadings.

9. Order 2 Rule 3 of the Civil Procedure Rules provides as follows;

**“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.”**

10. The last pleading in this case is the 3<sup>rd</sup> Defendant defence dated 13<sup>th</sup> July, 2016 and filed in court on even date. There is no indication as to when service was effected. In the circumstances, I will take the date of filing the defence to be the date of service and as such, pleadings in this case closed on the 27<sup>th</sup> July, 2016.

11. Order 1 Rule 15 of the Civil Procedure Rules that the 3<sup>rd</sup> Defendant relies on provides as follows;

**“(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 on 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 claimed by the plaintiff; or**

**c. That any question or issue relating to or connected with the subject matter is substantially the same question or issue arising between the Plaintiff and the Defendant and should properly be determined not only between the Plaintiff and the 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 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 an affidavit.”***

12. Having found that pleadings herein closed on the 27<sup>th</sup> July, 2016, it follows therefore that the last day for the application for leave was 11<sup>th</sup> August, 2016. The instant application was filed on the 31<sup>st</sup> January, 2017, five months after the close of pleadings.

13. The Applicant has deponed as to why the proposed 3<sup>rd</sup> party is a necessary party in these proceedings but she does not explain why she took so long to file the application.

14. The plaintiff herein wants the Defendants evicted from the suit land on the grounds that they are trespassers. In her defence, the Applicant has stated the following in paragraph 3;

**“The 3<sup>rd</sup> Defendant avers that she purchased the suit property for value from its lawful owner on or about 2011 and took possession thereof”**

15. The above averment shows that the applicant was aware of the existence of the 3<sup>rd</sup> party even at the time of preparing her defence. The Applicant is duty bound to give reasons for the delay in filing the application for leave out of time so that the court can weigh the validity of the reasons against the period of delay. I am persuaded by the findings of Onguto, J in MORANO LTD VS SINOHYDRO CORPORATION LTD [2014] eKLR and having noted that the Applicant has not explained the reasons for the delay in filing the application for leave, the

application stands on shaky ground. However, the circumstances of this case calls upon this court to stretch its discretion and this brings to mind the case of **WILFRED KAMAU GITHUA & ASSOCIATES VS CITY COUNCIL OF NAIROBI [2013] eKLR** where Havelock, J cited two foreign decisions which set out the purpose and benefits to be achieved by allowing third party proceedings as follows;

**“In the Canadian Court of appeal in Alberta, Justice Keran in Dilcon Construction Ltd Vs ANC Developers 1994 ABCA 245, the learned Judge referred to the decision of the Second Circuit Court of Appeal in case of Dery Vs Wyr [1959]Ca2 N.Y, 265 F2d 804 in which it was held inter alia on the general purpose of third party proceedings.”**

**“... to avoid two actions which should be tried together to save time and cost of reduplication (Sic) of evidence, to obtain consistent results from identical evidence, and to do away with a handicap to a defendant of a time difference between a judgment against him and a judgement in his favour against a third party defendant”**

16. This opinion was also adopted in the case of **KAPTIAN VS HARDY 1999 CA LII 19088 (ABQB)** where Moore CJ held;

**“the benefits to be achieved by following third party procedure are summarized in Williston and Rolls, The Law of Civil Procedure , Vol 1 , PP426 and 427 as quoted by Purvis J in the Alberta Queens Bench decision of Edmonton and Rural Auxilary Hospital and Nursing Home District No. 24 Vs Bill of – Holland – Christianson Architects Ltd, Ellis –don and Travelers Idemnity Insurance Co. of Canada (1981), 3A R. 60 (QB), at page 62. Briefly they are**

- 1. To avoid a multiplicity of actions,**
- 2. To avoid the possibility that there might otherwise be contrary or inconsistent findings in two different actions on the same facts;**
- 3. To allow the third party to defend the plaintiff’s claim against the Defendant;**
- 4. To save costs, and**
- 5. To enable the Defendant to have the issue against the Third Party decided as such as possible, in order that the Plaintiff cannot enforce a judgement against him before the third party issue is determined.”**

17. In the pleadings before me, I do note that the proposed 3<sup>rd</sup> party has been mentioned by the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants in their defence. The two contend that she is the registered proprietor of the suit land herein. Further it is alleged that she is the one who sold a portion of the suit land to the 3<sup>rd</sup> Defendant. Given those circumstances, the interest of justice demands that the third party be brought on board. I will therefore, allow the application in terms of prayers 1 and 2. The Applicant is undeserving of costs.

**Signed, dated and delivered at Makueni this 2<sup>nd</sup> day of May 2018**

**MBOGO C.G**

**JUDGE**

**In the presence of :**

1. No appearance for the Applicant
2. No appearance for the Respondent

Mr. Kwemboi Court Assistant

**MBOGO C.G, JUDGE**

**2/5/2018**