



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 4 OF 2016

(Consolidated with: (i) Misc. Application No 4 of 2016 (OS); (ii) Miscellaneous Application Number 5 of 2016 (OS) (iii)

Misc. Application No 10 of 2016 (OS); (iv) Misc Application Number 13 of 2016 (OS) (v) Miscellaneous Application Number 85 of 2018 (OS); and (vi) ELC Case No 333 of 2019 (OS).

EMILY MWENDA WAITAAPPLICANT

=VERSUS=

VENTURE HOLDINGS LIMITED.....RESPONDENT

GRACE WANJIRU KONI.....THIRD PARTY

RULING

1. There are six consolidated causes being dealt with under the cover of Nairobi ELC Miscellaneous Application Number 4 of 2016 (the Lead File). The six consolidated causes are: (i) Misc. Application No 4 of 2016 (OS); (ii) Miscellaneous Application Number 5 of 2016; (iii) Miscellaneous Application Number 10 of 2016 (OS); (iv) Miscellaneous Application Number 13 of 2016 (OS); (v) Application Number 85 of 2018 (OS); and (vi) Misc. ELC Case No Number 333 of 2019 (OS).
2. The applicants in the six causes took out originating summonses on diverse dates through the firm of Okulo & Co Advocates seeking the court’s determination on a similar set of five questions, namely: (i) Is the respondent prevented from transferring the property to the applicant by circumstances beyond its control? (ii) Is the respondent in breach of the terms of the letter of offer to complete the sale and transfer by 31st December 2010? (iii) Is the applicant entitled to payment of special and general damages as itemized in the supporting affidavit? (iv) Should the applicant after receiving the payment thereafter surrender the apartment to the respondent? and (v) Who is to bear the costs of this suit?
3. A brief summary of the common facts relating to the six consolidated causes is that, at all material times, Grace Wanjiru Koni (the third party) was the registered proprietor of Land Reference Number 330/356 (Original No 330/113/1) measuring approximately one (1) acre, situated along Gitanga Road, Nairobi (the parcel of land). By an agreement dated 2/7/2009, the third party agreed to sell to M/s Venture Holdings Limited a ½ acre portion of the said parcel of land at Kshs 36,000,000. Upon paying part of the purchase price, the defendant took possession of the ½ acre portion of the land and proceeded to develop thereon twenty-four (24) apartments. The defendant proceeded to sell the apartments to members of the public, among them, the plaintiffs/applicants in the six consolidated causes. The Plaintiffs in the six consolidated causes have possession of the apartments but do not have title documents to the apartments. The third party alleges that the development and sale of the apartments were done illegally, fraudulently, and without her authority.
4. Subsequent to the execution of the agreement for sale, the defendant initiated Nairobi High Court (Commercial Courts) Civil Case No 361 of 2011 in which they sought orders of specific performance and damages [for breach of contract] against the third party, contending that the third party had reneged to carry out sub-division of the parcel of land to parcel out the ½ acre portion in tandem with the agreement for sale. The said suit was subsequently transferred to Nairobi ELC and registered as **ELC Civil Case Civil Suit No 88 of 2019**.
5. While the originating summonses were pending, the defendant and the plaintiffs recorded a consent on 9/3/2018 authorizing the defendant to take out third party notices against the third party. Upon being served, with the third party notices, the third party participated in the proceedings for some time but subsequently brought a chamber summons application dated 4/3/2020 seeking to be removed from the proceedings. The said application dated 4/3/2020 is the subject of this ruling.
6. The application was supported by the third party’s affidavit sworn on 4/4/2020 in which she deposed, *inter alia*, that there existed Nairobi ELC No 88 of 2019 between the defendant and herself concerning the sale of ½ acre portion of the parcel of land by the third party to the defendant. She added that she was not privy to the contract between the plaintiff and the defendant, and therefore the defendant could not seek indemnification against her on the basis of the said contracts.

7. The defendant opposed the application through a replying affidavit sworn on 18/2/2021 by Kwame Kariuki. He deposed that their case in **Nairobi ELC No 88 of 2019 [formerly Nairobi High Court (Commercial) Civil Case No 361 of 2011]** was premised on the fact that they were entitled to the remedy of specific performance against the third party whose failure to transfer ownership of ½ acre portion of the parcel of land had rendered them unable to fulfil their contractual obligations to the plaintiffs and that it was the third party's continued breach of contract that had given rise to the suits herein, hence the third party was properly joined to these proceedings.

8. The application was canvassed through written submissions dated 2/3/2021, filed by Ms Nyamweya Mableo Advocates. Counsel for the third party argued that the third party was improperly joined in these proceedings because she was not privy to the contracts between the plaintiffs and the defendant in the consolidated causes. He contended that none of the remedies sought by the applicants could be enforced by the defendant against the third party. Counsel further submitted that the implementation of the agreement dated 2/7/2009 between the third party and the defendant in the consolidated causes was the subject of adjudication in **Nairobi ELC Case No 88 of 2019** and the said suit was pending determination. Counsel urged the court to remove the third party from these proceedings.

9. The defendant opposed the application through written submissions dated 20/4/2021 filed by M/S A N Ndambiri & Co Advocates. Counsel for the defendant argued that the application dated 4/3/2020 was not only an abuse of the court process but also an attempt to reverse the orders made by the court on 9/3/2018 granting the defendant leave to issue third party notices. Counsel contended that the said orders were made after the court heard the defendant's application and after the court was satisfied that the third party was a contributor and was closely connected to the claim made in the originating summonses.

10. The plaintiffs did not oppose the third party's application.

11. I have considered the application, the response thereto, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in the application is whether the third party is improperly joined in the consolidated causes. I will make brief pronouncements on the question.

12. The third party was joined to these proceedings pursuant to a consent recorded by Mr Kibe [Counsel for the defendant in the consolidated causes] and Mr Okulo [Counsel for the plaintiffs in the consolidated causes] on 9/3/2018 in the following terms;

“By Consent

1) The application dated 2/11/2017 seeking consolidation of ELC 4/2016, Misc 5/2016, Misc 10/2016 and Misc. 13/2016 is hereby withdrawn with no orders as to costs.

2) The respondents' application dated 25/1/2018 seeking to enjoin Grace Wanjiru Koni as a third party be allowed as prayed.

3) Mention on 31/7/2018 for pre-trial directions”

13. It is further noted from the court record that subsequent to the above consent, parties to the consolidated causes recorded a further consent on 31/7/2018 through which they procured a consolidation order relating to five out of the six consolidated causes. On 13/5/2020, **ELC Case No 333/2019 (OS)** was similarly consolidated with the five causes, bringing the tally of consolidated causes to six.

14. The originating summonses in the six consolidated causes were taken out by the respective plaintiffs in the consolidated causes under **Order 37 rule 3 of the Civil Procedure Rules** which provides as follows:

“3. A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”

15. It is clear from the above contextual background that the joinder of the third party was not procured through a considered determination by the court. It was procured through a consent entered into between the defendant and the plaintiffs in the consolidated causes. In the circumstances, the third party cannot be faulted for seeking her removal from proceedings.

16. Secondly, it is apparent from the third party notices that the defendant has through the third party notices invited the court to determine the question as to whether the third party is liable to pay him damages arising from the alleged breach of the contract dated 2/7/2009. It is also apparent from the evidence presented by the third party that the same question is one of the key issues pending determination in **Nairobi ELC Civil Case No 888 of 2019; Venture Holdings Ltd v Grace Wanjiru Koni**.

17. Given the above circumstances, it is the view of this court that the third party was improperly joined in these proceedings. This view is informed by two key reasons. First, the question of liability of the third party to pay the defendant damages on the ground of alleged breach of the contract dated 2/7/2009 is one of the key issues under adjudication in **Nairobi ELC Case No 88 of 2019**. The said suit was initiated in the High Court way back in 2011. While aware that the issue was under adjudication before this court, the defendant took out third party notices inviting the court to entertain and determine the same issue on the platform of a third party notice in the consolidated causes. This was done against the express provisions of **Section 6 of the Civil Procedure Act**.

18. The second reason is that, by issuing third party notices on the platform of originating summonses taken out under **Order 37 rule 3 of the Civil Procedure Rules**, the defendant is, in essence, taking out a parallel originating summonses and inviting the court to make additional determinations relating to the validity of the contract dated 2/7/2009 executed between them and the third party. Regrettably **Order 37 rule 3** of the Civil Procedure Rules expressly prohibits the adjudication of questions relating to the existence or validity of a

contract on the platform of an originating summons. The platform of an originating summons under **Order 37 rule 3** of the **Civil Procedure Rules** is available for determination of questions relating to a land sale contract whose validity is not contested. Where the validity of the contract is contested, the platform available for adjudication of the dispute is that of a plaint.

19. The net result is that the court is in agreement with the third party that the third party is improperly joined to these proceedings. I accordingly allow the chamber summons dated 4/3/2020 and hereby remove the applicant, Grace Wanjiru Koni, from the six consolidated originating summonses herein. Because the third party did not bring this motion promptly, and because she initially participated in the proceedings before bringing the present application, there will be no order as to costs.

20. Lastly, to avoid the making of conflicting orders by different Judges the six consolidated causes shall be disposed by the court seized of Nairobi ELC Case No 88 of 2019. Consequently, the six consolidated causes shall be mentioned before Komingoi J on 9/6/2021 for directions.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr A Ndambiri for the Defendant

Mr Nyamweya for the 3rd Party

Ms Murugi holding brief for Mr Okulo for the Plaintiffs

Court Assistant: June Nafula