



**Mombasa Water Products Limited v NIC Bank Limited; I&M Bank Limited & another
(Third party) (Civil Suit 1 of 2021) [2024] KEHC 14301 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 1 OF 2021
JK NG'ARNG'AR, J
NOVEMBER 14, 2024**

BETWEEN

MOMBASA WATER PRODUCTS LIMITED PLAINTIFF

AND

NIC BANK LIMITED DEFENDANT

AND

I&M BANK LIMITED THIRD PARTY

MAWINGO CONSTRUCTION LIMITED THIRD PARTY

RULING

1. The 2nd Third Party filed a Notice of Motion application dated 25th June 2024 under Certificate of Urgency pursuant to Order 51 Rule 1 of the Civil Procedure Rules, Section 1A & 3A of the [Civil Procedure Act](#) and all the enabling provisions of the law. The Applicant seeks that this court be pleased to issue an order striking out the 2nd Third Party from the proceedings herein and that costs be awarded to the 2nd Third Party.
2. The application is premised on grounds on its face and the Supporting Affidavit of Clive Erkinie sworn on 25th June 2024 that the 2nd Third Party engaged Commercial Bank of Africa for a loan and the bank requested for the original valuation of title as security. That the 2nd Third Party deposited the original title document of land reference number 5046 with the advocate for Commercial Bank of Africa, Ms. Sally Mahihu. That however, the advocates for Commercial Bank Limited illegally and without the 2nd Third Party's consent or authorization release the title deed to a third party. That NIC Bank Limited informed the 2nd Third Party that they were in possession of the said title deed, however, the 2nd Third Party was at a loss on how the Defendant herein was in possession of the title since it had been deposited with Commercial Bank of Africa. That the 2nd Third Party reported the issue and filed a complaint to Regional CID leading to officers being dispatched to NIC Bank Limited and the regional branch



- managers were interviewed. That the officers during interrogation suggested that if the title document of land reference number 5046 was in the name of the 2nd Third Party and was not charged to anyone, the same should be returned to the 2nd Third Party within 24 hours lest criminal proceedings ensue.
3. The 2nd Third Party/Applicant further stated that the Defendant herein, having no reason to withhold the title hastily released it and the same was delivered to I&M Bank Changamwe under instruction of the 2nd Third Party's director with a copy of an undertaking and/or commitment letter directing the 2nd Third Party to pay Kshs. 11,000,000 to the Plaintiff herein. That the 2nd Third Party acknowledged receipt of the title deed and instructed I&M Bank not to sign the undertaking attached. That the 2nd Third party does not owe the Plaintiff any money and in fact avers it overpaid the Plaintiff who have to date failed to complete their obligation of transferring properties that the 2nd Third Party had purchased. That the 2nd Third Party filed a suit, Mombasa Civil Suit No. 288 of 2014 which is yet to be determined. That the 2nd Third Party is therefore a stranger to the averments in the Plaint and Third Party Notice and should be struck of the suit with costs.
 4. The 1st Third Party filed Grounds of Opposition dated 24th July 2024 in opposition to the 2nd Third Party's Notice of Motion application dated 25th June 2024 that considering this court deemed it fit and just to grant leave to enjoin the 2nd Third Party, it will be acting in cross-purposes to now ask this court to depart from such finding and strike out the 2nd Third Party before hearing of the case on merit. That the application will defeat the aim of the courts to dispense substantive justice expeditiously and with finality. That the application seeks drastic orders at an interlocutory stage denying parties a chance to fully ventilate their cases. That it is in the interest of the expeditious administration of justice that the instant application be dismissed with costs.
 5. The 1st Third Party also filed a Replying Affidavit sworn by James Maingi Ng'ang'a on 6th August 2024 in opposition to the 2nd Third Party's application that the Defendant's claim against the 1st Third Party is that the Certificate of title in respect of the property known as L.R. No. 5046 (Original Number 5046/1/MN) which the Plaintiff seeks release of was released to the 1st Third Party for purposes of registering a legal charge for a facility granted to the 2nd Third Party and that it is still in possession of the 1st Third Party. That the 1st Third Party advanced to its then client, the 2nd Third Party, a term security loan of Kshs. 40,000,000 which loan was secured by a charge over the property known as L.R. No. 5046 (Original number 5046/1/MN). That the charge dated 30th November 2015 was duly registered against the title of the suit property. That the bank therefore validly held the certificate of title to the suit property as chargor.
 6. The 1st Third Party further averred that the 2nd Third Party facilitated the unconditional release of the subject title from the Defendant to the 1st Third Party and has not been in possession of it since 16th September 2019 upon the facility being paid off in full. That the matters aforesaid have been admitted by the 2nd Third Party in its affidavit in support of the application which demonstrates how necessary a party they are in these proceedings to enable this court determine the matter with finality. That the presence of the 2nd Third Party is necessary to accord the 1st Third Party its right to claim for indemnity of contribution from the 2nd Third Party for the entire claim and costs that may be awarded to the Plaintiff against the Defendant and in turn any claim for indemnity and contribution that may be awarded to the Defendant against the 1st Third Party in this suit. That considering the existence of a contract between the Plaintiff and the 2nd Third Party, which contract the 1st Third Party was not privy to and yet forms the genesis of these proceedings, it is in the interest of justice that all parties in this suit ventilate such issues through a substantive hearing of the case on merit.



7. The application was canvassed by way of written submissions. The 2nd Third Party/Applicant in their submissions dated 23rd July 2024 argued that it is neither a necessary nor proper party in the instant proceedings. They relied on the test in *Zephir Holdings Limited v Minosa Plantations Ltd & 2 Others* (2014) eKLR, *Pizza Harvest Limited v Felix Midigo* (2013) eKLR, *Werrot & Co. Ltd & 3 Others v Andrew Douglas Gregory & 2 Others* (1998) eKLR, and *Kizito M. Lubano v KEMRI Board of Management & 8 Others* (2015) eKLR. The 2nd Third Party submits that there is no financial or contractual relationship with the Defendant herein and placed reliance on the holding in the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR. The 2nd Third Party also maintains that they do not owe the Plaintiff any money and avers that it overpaid the Plaintiff who owes them and has to date failed to complete its obligations of transferring all the subject properties that the 2nd Third Party had purchased. That therefore, the joinder in these proceedings as a third party is not warranted.
8. The 1st Third Party in their submissions dated 8th November 2024 argued that the 1st Third Party filed its defence and supporting documents indicating that it validly obtained through the 2nd Third Party and held the title to the suit property as security for a loan facility advanced to its then client, the 2nd Third Party. That the 1st Third Party was acting on instructions of the 2nd Third Party, as its agent, and the 1st Third Party was neither party nor privy to any agreement between the Defendant and the 2nd Third Party or the apparent sale and purchase agreements between the Plaintiff and the 2nd Third Party. That on 16th September 2019, the loan facility to the 2nd Third Party was paid off and the title released to the 2nd Third Party. That the 2nd Third Party not only holds the title to the suit property but is the primary party to the third party proceedings enjoying a contractual relationship harboring legal interests and responsibilities with both the Defendant, the Plaintiff and the 1st Third Party. The 1st Third Party relied on the decisions in *Zephir Holdings Ltd v Mimosa Plantations Ltd & 2 Others* (2014) eKLR and *Joseph Njau Kingori v Robert Maina Chege & 3 Others* (2002) 2 KLR 243.
9. The 1st Third Party further submitted that by an order issued herein by this court on 10th November 2023, the 1st Third Party was granted leave to join the 2nd Third Party as the court found that there was a question of liability to be determined between the 1st and 2nd Third Party pursuant to Order 1 Rule 22 of the Civil Procedure Rules. That the court considered and rendered itself in respect to the joinder of the 2nd Third Party and that asking this court to reconsider this decision will be causing the court to act in cross-purpose and therefore an abuse of the court process.
10. I have considered the Notice of Motion application dated 25th June 2024, the Grounds of Opposition dated 24th July 2024, the Replying Affidavit sworn by on 6th August 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
11. It is not in dispute that the property known as L.R. No. 5046 (Original Number 5046/1/MN) is in the name of the 2nd Third Party. That the original title document of the land was released by Commercial Bank of Africa to the Defendant without consent of the 2nd Third Party and to the 1st Third Party with consent of the 2nd Third Party. That release of the original title document to the 1st Third Party had a copy of an undertaking and/or commitment letter directing the 2nd Third Party to pay Kshs. 11,000,000 to the Plaintiff. That the 2nd Third Party acknowledged receipt of the document but instructed the 1st Third Party not to sign the undertaking attached. It is also not in dispute that the 1st Third Party validly held the certificate of title to the suit property as chargor having advanced to the 2nd Third Party a loan of Kshs. 40,000,000. That the 1st Third Party was in possession of the certificate of title from 30th November 2015 and the same was released on 16th September 2019 upon the facility being paid in full.



12. The court in *Josphat Njuguna Kariuki v Simon Karichu Irungu* (2004) eKLR cited with authority the case of *Yafesi Walusumbi v The Attorney General of Uganda* (1959) E.A. 223 the court held that in order that a third party be lawfully joined, the subject matter between the third party and defendant must be the same as the subject matter between plaintiff and defendant and the original cause of action must be the same.
13. On the one hand, the 2nd Third Party maintains that they do not owe the Plaintiff any money. That in fact it overpaid for properties which the Plaintiff have to date failed to complete effecting transfer, necessitating filing of Mombasa Civil Suit No. 288 of 2014 which is pending determination. On the other hand, the 1st Third Party argues that they were neither a party nor privy to the agreement between the Defendant and the 2nd Third Party or the apparent sale and purchase agreements between the Plaintiff and the 2nd Third Party.
14. The Defendant's claim for indemnity and/or contribution against the 1st Third Party and the 1st Third Party's claim against the 2nd Third Party has not been determined. It is incumbent upon the 2nd Third Party to show that they do not have financial or contractual relationship with the Defendant and they do not owe the Plaintiff any money. This makes the 2nd Third Party a necessary party to the suit herein and they will not suffer any prejudice by participating in the suit. It is the view of this court that the 2nd Third Party are required in the proceedings to properly and effectively ventilate the issues on merit, expeditiously and with finality.
15. In the circumstances, the Notice of Motion application dated 25th June 2024 lacks merit and is dismissed. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF NOVEMBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:

No appearance Advocate for the Plaintiff

No appearance Advocate for the Defendant

Barasa Advocate for the 1st Third Party

No appearance Advocate for the 2nd Third Party

Court Assistant – Mr. Samuel Shitemi

