



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 64 OF 2015

ALEXANDER KIPNGETICH SITIENY.....PLAINTIFF

-VERSUS-

JAPHETH KIPLANGAT MUTAI.....DEFENDANT

AND

ANDREW CHERUIYOT ROTICH.....1ST THIRD PARTY

EQUITY BANK LTD.....2ND THIRD PARTY

ALFRED KIPSANG MARITIM.....3RD THIRD PARTY

REBMAN KIPKURUI.....4TH THIRD PARTY

RULING

1. By a Notice of Motion dated 24th December, 2019 filed here on 10th January, 2020 and expressed to be brought under Order 1 Rules 9 and 15 (1) of Civil Procedure Rules, 2010, Sections 1A, 1B, and 3A of the Civil Procedure Act, and all other enabling law, the 2nd third party – **EQUITY BANK (K) LIMITED** – desires that its inclusion as a party in these proceedings by the defendant be deemed unnecessary and that the court also makes provision for costs of this application. In a more precise way, the following prayers are made:

(1) That this honourable court be pleased to make an order that the 2nd third party be struck out of the proceedings for reason that it is not a necessary party.

(2) That costs for this application be provided for.

2. Before I say more on this application, some background is necessary. This suit as initially filed on 2nd December, 2015 was between the plaintiff – **ALEXANDER KIPNGETICH SITIENY** – and the defendant – **JAPHET KIPLANGAT MUTAI**. At the time, the plaintiff pleaded that the defendant had trespassed in to his land said to be Land Reference number 631/2354. The plaintiff wanted the defendant evicted.

3. The defendant however filed a defence on 23rd December, 2015 and denied the plaintiff's claim. He stated that he was on Land parcel **NO KERICHO MUNICIPALITY BLOCK 1/356** legally, having purchased it from its previous owners. The defendant also expressed intention to join more parties in the suit, with 2nd third party expressly mentioned as one of them. The defendant made good his intention by filing an application dated 22nd August, 2017 seeking to enjoin four (4) other parties, the 2nd third party included. The court records show that that application was allowed twice by the court, first, on 6th November, 2017, and, second, which was possibly an oversight, on 1st March, 2018.

4. At that time, the defendant justified joinder by pointing out that the third parties were all necessary parties; that they would be affected by the outcome of the suit; that joinder would enable the court to effectively and completely adjudicate on the matter; and that such joinder would not prejudice the plaintiff.

5. When joinder was allowed, the defendant filed an amended defence on 7th October, 2019 which in effect tried to show how the land had changed hands over time until it became his own. All the third parties were seen to be part of that process. The plaintiff later amended the plaint and introduced allegations of fraud against the defendant concerning the manner he had acquired title to the disputed land. In the amended plaint, the plaintiff's complaint against the defendant had broadened. This time round, the defendant was not only a trespasser who

needed to be evicted, but was also an illegal owner of land that he had fraudulently acquired and whose title therefore required cancellation.

6. I now come back to the application at hand. The 2nd third party's beef with the defendant is that he has not stated any cause of action against it despite being given ample time to do so. The 2nd third party averred that its presence in the proceedings is not necessary for adjudication of the matter. The supporting affidavit that came with the application serves to reiterate and/or emphasize this same position.

7. The defendant responded vide a replying affidavit filed on 4th February, 2020. According to the defendant, the cause of action against the 2nd third party is disclosed at paragraphs 9A and 9B of his amended defence. The inclusion of the 2nd third party was seen as critical in shedding light on how the property had changed hands. The 2nd third party is said to have played a major role in the process. According to the defendant, the court should be given a chance to interrogate the movement of the property from the original owner to the defendant.

8. The application was canvassed by way of written submissions. The 2nd third party's submissions were filed on 27th February, 2020. The issues for determination were said to require the court to establish whether the proceedings herein are an abuse of the court process; whether the 2nd third party is a necessary party in these proceedings; and whether the affidavit sworn by the counsel for the defendant in response to the application is sustainable in law.

9. It was submitted that the proceedings are an abuse of the court process. The defendant is said to have been urged to state clearly his cause of action against the 2nd third party but has failed to do so. His proceedings are therefore said to be in bad faith and are meant "*merely to vex and oppress the 2nd third party*". The 2nd third party was also said to be an unnecessary party in these proceedings. The defendant is said to have failed to respond to a point of deposition by one **Kariuki Kingori** in an affidavit sworn on 24th December, 2019, which was to the effect that the 2nd third party is not a necessary and proper party in the proceedings. That deposition is contained in the supporting affidavit that came with the application now under consideration. According to the 2nd third party, this position would be supported by the observation of Ibrahim J (as he then was) in the case of **Coftea Machinery Services Ltd Vs Akiba Bank & 2 Others (2004) eKLR**, which went thus: "*If a party does not controvert affidavit evidence then he is presumed to have admitted the same.*"

10. The affidavit sworn by the defendant's counsel was also faulted. It is not sustainable in law as counsel has deposed to contentious matters, which is something expressly prohibited by law. The court was told that the affidavit should be expunged from record.

11. The defendant's submissions were filed on 12th March, 2020. According to the defendant, the necessary nexus between the 2nd third party and the suit is clear in the amended defence. Thus stated the defendant: "*There is a direct connection between the 1st third party, the 2nd third party, and the 3rd third party who (3rd party) sold the suit property to the defendant*". The position of the defendant is that it is 2nd third party who sold the land to 3rd third party from whom he bought the land. If, per chance, it ultimately turns out that the 3rd third party did not have a good title, then the legality of the sale of the land by the 2nd third party to the 3rd third party will also come into question. If the application is allowed, the 2nd third party will have succeeded in running away from this possible scenario. The court was therefore asked to dismiss the application.

12. I have considered the application, the response made, rival submissions, and the pleadings already on record generally. My understanding of the pleadings is that the genesis of the various dealings in the disputed land can be traced to a financial arrangement between the 1st third party and the 2nd third party. And the financial arrangement consisted in the advancement of a loan by 2nd third party to the 1st third party with the disputed land being offered as security. A term of that arrangement seems to have been that the disputed land then owned by 1st third party would be sold if there was default in repayment. And there was default. And the land was sold. And the 3rd third party was the buyer. The 3rd third party then sold half of the portion to the 4th third party and these two later sold their respective portions to the defendant.

13. By his pleadings, the defendant is saying that the disputed land is his and he acquired it lawfully. But if it ultimately turns out that the plaintiff's claim against him is well founded, any illegalities found to attend to his ownership were not authored by him. Such illegalities, according to defendant, can be traced to the third parties he has brought on board because they are the ones who had past dealings in the land. The 2nd third party is one such party. In other words, what the defendant seems to be saying is this: What is alleged against me is not true, but if it is, I am not responsible and the third parties should be asked about it.

14. It is important to appreciate that all the parties enjoined in the suit are third parties. It is important to appreciate this because what the defendant has instituted are third party proceedings. I think at this stage, it is critical that the nature and significance of third party proceedings be understood.

15. In procedural law, third party proceedings is a useful device in civil action resorted to by a defendant to bring into the suit a third party to the action who may ultimately be liable for the claim of the plaintiff against such defendant. It is a legal tool contrived for the benefit of a defendant who, if defeated in the suit, is entitled to reimbursement by way of indemnity or compensation from third parties. The rationale for it is that the defendant need not be driven into a fresh suit to put his claim of indemnity or compensation into operation. Usually, and crucially too, it is only matters from the same cause of action, or which can be tried together, that are supposed to be handled by way of third party proceedings.

16. Third party proceedings aim at preventing multiplicity of actions and to enable the court to settle disputes between all parties in one proceeding. They also save costs and help to ensure that the same issue is not heard twice in separate but similar causes of action, possibly with different results. It is a time saving process, or device if you will, meant to ensure that the defendant's claim against a third party is simultaneously and/or contemporaneously decided together with the plaintiff's claim against the defendant.

17. It is with all this in mind that I choose to approach the matter at hand. The 2nd third party has chosen to address the issue in a decidedly technical manner. The first concern raised is that no cause of action is disclosed. I have tried elsewhere in this ruling to give my

understanding for the joinder of 2nd third party.

18. If the 2nd third party expects its liability to come out clearly, then it should wait until all evidence is in. At this stage, it is clear that the 2nd third party is enjoined because the first sale transaction is traced to it. And the 1st third party who was presumably the first owner in the third party line-up dealt with it. For the whole picture to emerge concerning the fraud or illegality alleged by the plaintiff, it appears to me clear that one would have to start with the first presumed owner, the 1st third party, and it is not possible to go to the other subsequent owners without considering the role played by the 2nd third party. To me, it is clear why the 2nd third party was enjoined. I therefore don't agree with the 2nd third party. There is no abuse of court process and in my view, the 2nd third party is a necessary party in the proceedings. And this is so because if the application is allowed and the 2nd third party is removed, a disconnection is created regarding how ownership of the land changed hands all the way from 1st third party all through to the defendant himself.

19. It is also useful to appreciate that if joinder of the 2nd third party or any other third party herein is disallowed, there is a real possibility that there would be a multiplicity of suits if the defendant is found liable in the suit and he decides to seek indemnity from the 3rd and 4th third parties. The 3rd party may decide to sue the 2nd third party who sold the land to him through public auction. And finally, the 2nd third party may decide to institute action against 1st third party who charged the land to it. All these suits would take a lot of time and exert a heavy financial burden on the parties. Handling the matter as it is at one go is more prudent, efficient, and preferable. It will save judicial time and reduce expenses for the parties. More importantly, the court will have been enabled to put the whole matter into perspective.

20. The 2nd third party also felt that that the defendant did not controvert its averment concerning liability as raised in the affidavit of the deponent in the supporting affidavit that came with the application. That is simply not true. The defendant's replying affidavit is essentially a denial of all the material issues raised in the application. More particularly, the defendant seems to be responding to that issue at paragraphs 5 and 6 of the replying affidavit. It would be wrong in my view to try and force an admission on the defendant.

21. Ultimately then, it is clear to me that the application herein has not had its merits sufficiently demonstrated. I therefore find the application unmeritorious and hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 20th day of May, 2020.

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A. K. KANIARU

JUDGE