



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 8 OF 2019

CHERUIYOT EDWIN MUTAI.....PLAINTIFF

VERSUS

CYRUS NGARUIYA.....DEFENDANT

RULING

1. The application for determination before me is a motion on notice dated 20th November, 2019 and filed on 21st November, 2019 by the Plaintiff – **CHERUIYOT EDWIN MUTAI**. It is against the third party – **MICHAEL ARINGO ONYURA** – whose entry into the suit herein was caused by the defendant – **CYRUS NGURAYA**. The application is expressed to be brought under Order 1 Rule 15, Order 2 rule 15, Order 51 of Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act (cap 21) and all other provisions of law.

2. The application came with two prayers, which are as follows:

Prayer 1: That the third party's counter-claim dated 5/7/2019 be struck out with costs on the basis that:

- a. It discloses no reasonable cause of action against the plaintiff
- b. It is scandalous, frivolous or vexatious
- c. It may prejudice, embarrass the fair trial of the action
- d. It is otherwise an abuse of the process of the court

Prayer 2: That the costs of the application be borne by the third party in any event.

3. The motion is anchored on the grounds that the plaintiff has no claim against the third party; that the third party cannot sustain a claim against the plaintiff; that the counterclaim as presented has introduced a new course of action between the plaintiff and the third party which is strange in law; and that it is in the interests of justice that the counter-claim be struck out.

4. The supporting affidavit that came with the application restates and amplifies the substance of the application.

5. The third party responded to the application by way of grounds of opposition filed on 22nd January, 2020. According to the third party, the plaintiff has misapprehended the provisions of Order 1 rule 15 (a) (b) and (c) and Order 2 rule 15 of Civil Procedure Rules, 2010. The application was said to be fundamentally defective, brought in bad faith, and an abuse of the court process.

6. Both sides canvassed the application by way of written submissions. The plaintiff's submissions were filed on 4th March, 2020. According to the plaintiff, the third party's counterclaim is not only frivolous, vexatious, scandalous, and an abuse of the court process but is also in complete contravention of the provisions of Order 1 Rules 15-22 of the Civil Procedure Rules, which govern third party proceedings.

7. The counterclaim was said to be without foundation as the issue for consideration in third party proceedings should solely be between the defendant and the third party. It was reiterated that the plaintiff has not lodged any claim against the third party. The third party's counter claim was therefore said to be misplaced.

8. Several cases were cited, including, **COMMISSIONER FOR TRANSPORT VS. F.O. BOERO (1954) LRK 9, ZANFRA VS DUNCAN & ANOTHER (1969) THCD, 135, NAIROBI CITY COUNCIL VS THE CO-OPERATIVE BANK OF KENYA LIMITED: CA NO.**

226 OF 2000, JESSIE MWANGI GACHAGO VS ATTORNEY GENERAL & OTHERS: CA NO. 24 OF 1980 AND KENINDIA ASSURANCE COMPANY LTD VS SAMUEL NJUGUNA GITAKA & ANOTHER: CA NO.130 OF 1992, to emphasise that third party proceedings are essentially between the defendant and the third party, with the plaintiff not being part of the proceedings.

9. The court was asked to allow the application.

10. The third party's submissions were filed on 11th March, 2020. The third party submitted that the plaintiff claims to be the owner of land parcel in dispute. The defendant is said to have trespassed. But the defendant pleads that he is the bonafide owner, having purchased the land from the third party. That third party was said to have been allocated the property way back in 1984. Both the third party and the defendant aver that the plaintiff became the registered owner through fraud.

11. It was submitted further that given the prevailing scenario, the ownership of the parcel of land is an issue between the third party and the plaintiff. It was submitted that it is indeed the third party who is properly entitled to seek cancellation of the plaintiff's title. The law, according to third party, not only envisages that issues may arise between the plaintiff and the defendant, but also between the plaintiff, defendant, and third party or between any or either of them. And such issues are all intended to be handled within the ambit of third party proceedings. The case of **INTERACTIVE ADVERTISING LIMITED & ANOTHER VS EQUITY BANK LIMITED & 2 OTHERS (2016)eKLR** was cited to drive the point home. Further reinforcement was sought in the case of **THACHMAANZ LTD VS PRIDE INN LTD (2016)eKLR**.

12. The third party argued that denying him a chance to plead a case against the plaintiff would force him to file a separate case and that would seem to encourage multiplicity of proceedings, which third party proceedings aims to prevent. It was pointed out further that the plaintiff was ordered on 21st September, 2019 to file a defence against the third party's counter-claim and that order has not been varied or set aside. The plaintiff was also faulted for failing to demonstrate that the third party's counter-claim is scandalous or vexatious. This court was asked to dismiss the plaintiff's application.

13. I have had a peek into the suit as filed. I have considered the plaintiff's application, the response by the third party, and the rival submissions. I understand the plaintiff to be saying that third party proceedings are concerned only with issues between the third party and the defendant and that such issues should involve only the question of determining the contribution or indemnity by the third party to the defendant.

14. The plaintiff is wrong. And here is why:

Order 15 Rule 1 (a) (b) and (c) states as follows:

15 (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 or 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 as some relief or remedy claimed by the plaintiff; or

c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant and the third party or between any or either of them

Shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *exparte* supported by affidavit.

15. 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. 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.”

16. But that said, I must say that I have difficulty agreeing with the third party when he tries to base his justification for the counter-claim against the plaintiff on Order 1 rule 15 Subrules 1(a), (b) and (c). It is clear from a full reading of that provision that the substance contained therein is not about what the third party should do. It is about what the defendant is entitled to do. In fact the provision empowers the defendant, not the third party or even the plaintiff.

17. A more relevant and crucial basis for the third party's counterclaim and defence can in my view be found in Order 1 Rule 17, which provides as follows:

“If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the “third party”) desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be

deemed to admit the validity of the decree obtained by consent or otherwise, and his own liability to contribute or indemnity, as the case may be, to the extent claimed in the third party notice: provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit”

It is crucial here that the rules foresees a situation where the third party may wish to dispute the plaintiff’s claim against the defendant (please note the underlined words in the provision).

18. A question then arises in light of the above provision: How can the third party go about the task of disputing the plaintiff’s claim? The answer is simple in my view. All suits instituted by way of a plaint are responded to either by way of filing a defence or by filing a defence and a counter-claim. It appears to me that the third party chose the latter and therefore filed a defence and a counter-claim. The law then is clear: Order 1 rule 15 (a) (b) and (c) is relevant in delineating the range of issues that third party proceedings can cover. The provision however does not prescribe the kind of action that the third party can take; it is only about what the defendant can do. Order I rule 17 on the other hand is all about what the third party can do and it is clear that he can enter appearance and, among other things, dispute the plaintiff’s claim. The court is saying that the third party can dispute such claim either by way of filing a defence or by filing a defence and counter-claim.

19. A look at the submissions filed by the plaintiff reveals that the plaintiff chose to highlight the law selectively. He limits the issues that third party proceedings can be involved with and the cases he has cited seem not to appreciate or even mention the provisions of Order I rule 17 of the Civil Procedure Rules, 2010. In my view, the plaintiff has not appreciated the applicable law well. The court was infact right to direct that he responds to the third party’s claim. The claim is sound in law.

20. But there is also another weakness in the plaintiff’s approach. His prayers in the application are about striking out the third parties counter-claim. The third party not only filed a counterclaim, he also filed a defence. If the counter-claim is struck out, the defence will still be left standing. The plaintiff’s argument is that he has no claim against the third party to warrant filing of a counter-claim against him. But defences also require that a claim exists against a party. Why is the plaintiff then not seeking to strike out the third party’s defence also? Shouldn’t lack of claim against the third party apply to defence as well?

21. But even a holistic appreciation of the matter makes it pragmatic and desirable that this matter be handled as one. To begin with, it is true that though the person sued is the defendant, it is plain that there is noticeable interconnectedness between the competing claims of ownership or entitlement to the disputed land by all the parties. The plaintiff is saying that he owns the land. The defendant is saying that he is actually the rightful owner, having bought the land from the third party who owned it. The third party is in turn concurring with the defendant that he owned the land. He is further saying that the plaintiff is a fraudster. If the third parties counter-claim is struck out, it is foreseeable that the third party may file a separate suit. Yet it might be a separate suit that will be making reference to this very suit. Why should the court encourage multiplicity of suits with the attendant likely increase in costs? Why not appreciate the considerable difficulty that may arise in handling separate but related suits? Why not handle the matter as one suit?

22. When all this is considered, it is clear that the plaintiff’s application is for dismissal and I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 6th day of July, 2020.

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A. K. KANIARU

JUDGE