



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CIVIL CASE NO. 693 OF 2016**

**ANTHONY ODHIAMBO ODUNDO.....PLAINTIFF**

**=VERSUS=**

**KUKAM LIMITED.....1ST DEFENDANT**

**METRA INVESTMENTS LIMITED.....2ND DEFENDANT**

**RULING**

1. On 18/9/2017, the defendants brought a chamber summons application dated 11/9/2017 seeking the following orders:

***1. That the honourable court do grant the defendants leave to serve Kenya National Highways authority, third party notice to appear in this suit***

***2. That the honourable court be pleased to strike out the 2nd defendant from this suit with costs***

***3. That the costs of this application be provided for***

2. The application is supported by an affidavit sworn by Rahab Karei Mukiyama on 11/9/2017. The case of the defendants is that at all material times, it held title to a parcel of land described as Nairobi/Block 72/3081 situated in Langata Area Nairobi (the **suit property**). It decided to develop a housing project on the suit property and commenced construction of a house described as Maisonette Number 26 thereon. It subsequently entered into a sale agreement with the plaintiff pursuant to which it offered to sell to the plaintiff the said maisonette number 26. Before completion of the sale and while construction works on the said unit were in the final stages, the Kenya National Highway Authority, without notice or court order, demolished the maisonette. Consequently, the 1st defendant filed **Nairobi ELC Civil case Number 950 of 2014; Kukam Limited v Kenya National Highways Authority and 2 others** seeking compensation for the loss occasioned by the demolition. The said suit is pending.

3. It is the case of the defendants that in the circumstances, a third party notice should issue against Kenya National Highway Authority. Secondly, it is the case of the 2nd defendant that the plaintiff's suit does not disclose any reasonable cause of action against the 2nd defendant and should be struck.

4. The plaintiff opposes the application through a replying affidavit sworn on 2/2/2018. His case is that the suit against the defendants is a claim for breach of contract and a refund of the sums paid to the defendants in pursuance of the contract and KENHA did not have any role in the said contract. The plaintiff further contends that the plea for third party notice is unmerited because: (i) the defendants have not put forth a proper and sufficient basis for an order of indemnity and/or contribution; (ii) the defendants have not demonstrated that they are entitled to any relief or remedy relating to the original subject matter of the suit which relief is substantially the same as the relief claimed by the plaintiff; (iii) the defendants have not demonstrated that any question or issue relating to or connected with the subject matter is substantively 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 but also as between the plaintiff, the defendant and the intended third party; and (iv) the plea for third party notice is brought in bad faith to convolute the issue and delay the expeditious determination of the suit.

5. On joinder of the 2nd defendant as a party to this suit, the plaintiff contends that the joinder is proper because he has a right of relief against the 2nd defendant as the party who received the contractual money, which money he seeks to be refunded to him. He adds that the 2nd defendant is a necessary party for the purpose of enabling the court to effectually and completely adjudicate on all the issues involved in the suit.

6. I have considered the tenor and import of the application together with the materials and submissions put forth by the parties. I have also considered the relevant legal framework and jurisprudence. Two questions fall for determination in this application. The first issue is

whether the applicant has laid a proper basis for grant of leave to issue and serve a third party notice against KENHA. The second question is whether the 2nd defendant is a necessary party in this suit.

7. This courts' jurisdiction to grant leave to a defendant to issue a third party notice is exercisable under Order 1 rule 15(1) of the Civil Procedure Rules which provides as follows:

***(1) Where a defendant claims as against any other person not already a party to this 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 connect 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 third party or between any or either of them;***

***he shall apply to the court within fourteen days after the close of pleadings for leave of 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 ex parte supported by affidavit.***

8. In the present suit, the defendants filed their joint statement of defence on 8/9/2016. The plaintiff filed a reply to defence on 21/9/2016. It is therefore clear from the record that pleadings closed in 2016. The application for leave to issue and serve a third party notice was brought one year later. The above legal framework required the applicant to bring the application within 14 days after the close of pleadings. The applicant has neither applied for extension of time nor tendered an explanation to justify the exercise of that jurisdiction at this point in time.

9. Even if the court were to invoke Article 159 of the Constitution and overlook the applicant's non-compliance with the requirements of Order 1 rule 15(1) of the Civil Procedure Rules, there is the question as to whether a third party notice can properly issue against a background where the applicant has a subsisting suit against KENHA (Nairobi ELC Case Number 950/2014) seeking compensation for the loss and damages suffered by the applicant as a result of the material demolition. If the leave to be were granted and the applicant succeeds as against KENHA, both in ELC 950/2014 and in the present suit, the applicant will end up with two decrees against KENHA in respect of the same cause of action. In my view, in light of the subsistence of a substantive suit by the 1st defendant against KENHA in respect of the same cause of action, the plea for third party notice is not tenable. If the 1st defendant so wishes, it is at liberty to apply to have the two suits heard together. The totality of the foregoing is that the plea for leave to issue a third party notice is unmerited and the same is rejected.

10. The second issue is whether the 2nd defendant is a necessary party to this suit. The prevailing jurisprudential criteria which guides this court when determining questions of joinder is whether the presence of a particular party before the court is necessary in enabling the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

11. The suit before court is a claim for refund of Kshs 4,080,000 paid by the plaintiff in pursuance of an agreement between the plaintiff and the 1st defendant. The plaintiff contends that at the behest of the 1st defendant, part of the money was paid to and received by the 2nd defendant on behalf of the 1st defendant. Both defendants have in their joint statement of defence denied liability to refund the money to the plaintiff. In my view, in light of the fact that the claim is for refund of money part of which was paid to the 2nd defendant and both defendants have denied liability, the 2nd defendant is a necessary party whose presence will be key in enabling the court to effectually and completely adjudicate upon and settle all questions involved in the suit, more so, questions relating to payment of the money whose refund the plaintiff seeks. The plea for an order removing the 2nd defendant from this suit is therefore declined.

12. The net result is that the defendants' chamber summons application dated 11/9/2017 is wholly rejected for lack of merit. The plaintiff shall have costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Waiganjo holding brief for Mr. Njeru advocate for the plaintiff

June Nafula - Court Clerk