



**Lebasha v Mucheru (Civil Suit E004 of 2025) [2025] KEMC 161 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEMC 161 (KLR)

**REPUBLIC OF KENYA  
IN THE MARALAL LAW COURTS  
CIVIL SUIT E004 OF 2025  
AT SITATI, SPM  
JUNE 19, 2025**

**BETWEEN**

**PETER LEBASHA ..... PLAINTIFF**

**AND**

**MARGARET WAMBUI MUCHERU ..... DEFENDANT**

**RULING**

1. By an Notice of motion application dated 18th March, 2025 the defendant/applicant applied for leave to issue Third Party Notice to one Peter Gakuu in the following terms:
  1. That leave be granted to the defendant to take out a Third Party Notice to the proposed Third Party Peter Gakuu Mbogo alias Peter Gakuo.
  2. That a third Party Notice be issued to Peter Gakuu Mbogo alias Peter Gakuo to be joined in this suit.
  3. That a third party notice be served upon Peter Gakuu Mbogo alias Peter Gakuo and he be deemed admitted as the Third Party and he be allowed to file his defence.
  4. That the costs of this application be costs in the cause.
2. The main ground pleaded was that the Defendant seeks to have a 3rd party notice issued to the person who sold the plot to her and have him joined in the proceedings so that if the Court is to find in the Plaintiff's favour that indeed the plot did not belong to the proposed 3rd party, it would automatically follow that the defendant shall equally be entitled to a refund of the purchase price paid by herself to the proposed 3rd party as per the sale agreement dated 31/5/16.
3. The application was opposed by a Replying Affidavit dated 21ST March, 2025. In summary, it was deposed that: The defendant/respondent lacked a contract of sale between herself and the said Peter Gakuu. The application was only a scheme designed to convolute this case and delay the expeditions determination of the case. The transaction between the plaintiff and the defendant were separate and



distinct from the one allegedly between the defendant and the proposed third party for which the defendant could separately sue to recover her purchase monies if any had bene paid. The alleged Peter Gakuu was a wanted suspect in Rumuruti Criminal Caase No. 6043 of 2025 Republic –vs- Margaret Wambui Mucheru.

4. As directed by the court, the application was canvassed by written submissions.

### **Applicant's Submissions**

5. The applicant lodged submissions dated 23rd April, 2025 citing the following authorities: *Has Petroleum (K) Limited Viota Engineering and Construction Limited & Ano*, HCCC No: 226 Of 2019 At Nairobi *Oceanfreight (EA) Ltd vs Technomatic Ltd & Another Gachago v. Attorney-General* [1981] KLR 232, *Kenya Commercial Bank vs Suntra Investment Bank Ltd* (2015) eKLR,
6. In summary, it was contended that joinder of third parties on the authorities was not limited to contractual transactions but could be extended to any scenario that establishes nexus between the parties the and issues on trial. It was argued that as long as triable issues were raised, the third party could be enjoined provided the procedure under Order 1 rule 15 CPR was complied with.
7. The plaintiff/respondent lodged written submissions dated 6th May, 2025. He contended that the application lacked merit for the following main reasons: The defendant/respondent lacked a contract of sale between herself and the said Peter Gakuu. The application was only a scheme designed to convolute this case and delay the expeditions determination of the case. The transaction between the plaintiff and the defendant were separate and distinct from the one allegedly between the defendant and the proposed third party for which the defendant could separately sue to recover her purchase monies if any had bene paid. The alleged Peter Gakuu was a wanted suspect in Rumuruti Criminal Caase No. 6043 of 2025 Republic –vs- Margaret Wambui Mucheru. The alleged purchase price of Kshs 920, 000 owed by the alleged Peter Gakuu had bene overtaken by the limitation of time and was unrecoverable. Reliance was placed on *Divecon –V- Samani* (1995-1998) 1 EA 48 at page 54 and *Benjamin Wachiri Ndiithi –V- Public Service Commission* citing with approval the Court of Appeal decision in *Thuranira KaraurI –V- Agnes Nchebe* (1997)eKLR which held that time limitation goes to jurisdiction and that 6 years was the limitation period for contractual claims. This was a civils suit for the recovery of contract sums paid under the sale agreement dated 23.03.2020 as he is no longer interested in plot no. UNS Commercial Rumuruti Township measuring 0.05Ha.
8. The applicant was represented by Martin Waichungo Advocate while the respondent represented himself.
9. The only issue for determination is whether the application to take out the Third Party Notice is merited or not.

### **Determination**

10. The guiding rule is Order 1 rule 15 of the *Civil Procedure Rules* (CPR) stating:  
Order 1, rule 15.  
Notice to third and subsequent parties  
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 but as between the plaintiff and defendant 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 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 ex parte supported by affidavit.
- (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
  - (3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.
  - (4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.
  - (5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.
11. From the material placed before the court, it is clear that the applicant has not complied with rule 1 rule 15(2) of the [CPR](#) providing that a copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons. If such service had been effected (hence the notice), and this has not been so done, an affidavit of service ought to have been filed under Order 5 rule 15 of the [CPR](#) providing thus:

Order 5, rule 15.

Affidavit of service.

- 15. (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require



12. As is contained in Order 1 Rule 15(2), the service of the third party notice application is required at the time of applying for leave but not after the leave has been granted. The applicant had not served the notice on the purported third party Peter Gakuu at the time of lodging the application. This deprived the said party of a right to be heard on the merit of the application itself before leave could be granted.
13. The effect of such a failure has been held to be fatal to the application as discussed in *Mary Njeri v Aga Khan Health Services & 2 others* [2005] KEHC 1776 (KLR) (J.B.Ojwang' j. (as he then was) held that:

I would also restate the legal principle that a third party notice, insofar as it obliges the recipient of the notice to defend, is in every respect a pleading; the joinder process which brings into the suit the third party must be openly ventilated; and the third party must be properly served and put on notice that he or she will plead and defend, in exactly the same way as the defendant must do vis-à-vis the claims of the plaintiff.”
14. In arriving at this position in law, the learned Judge adopted the previous position held in the authority of the *Official Receiver Continental Bank of Kenya Ltd vs. Mukunya* [2003] 1 EA 213 (p.214) where it was held that:

An order obtained without serving a party affected by it as per the requirements of Order L, rule 2 of the Civil Procedure Rules, is a nullity and must therefore be set aside ex debito justitiae. *Graig v Kanseen* [1943] 1 ALL E.R. 108 adopted; *Khami v. Kirobe and others* [1956] 23 EACA 195 applied.”
15. The applicant did not explain why they did not serve the application and notice as required of them by the aforesaid rule. As a possible explanation, the respondent indicated that the said Peter Gakuu is a wanted man for many years as an accomplice in criminal transactions and he cannot be traced thereby rendering this application a diversionary tactic and convolution of this litigation.
16. In the court’s view, the failure to effect service deprived the application of any merit since the rule on service was mandatory and not optional. A Third Party Notice must be served concurrently at the time of seeking leave. In the result the court dismisses the application with costs. The main suit shall be set down and proceed for hearing. It is so ordered.

**DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 19<sup>TH</sup> DAY OF JUNE, 2025**

**HON. T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**MARALAL LAW COURTS**

Present

Lepikas Court Assistant

The plaintiff/Respondent

Mr. Gakenia ADV Holding brief for Waichungo for the Defendant/Applicant

