

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA  
ELCC NO. 166 OF 2009

KENYA ANTI-CORRUPTION COMMISSION .....  
PLAINTIFF

VERSUS

AERIAL DEVELOPERS LIMITED ..... 1<sup>ST</sup>  
DEFENDANT

ENOCH TUITOEK ..... 2<sup>ND</sup>  
DEFENDANT

SILAS KOMEN MWAITA ..... 3<sup>RD</sup>  
DEFENDANT

**RULING**

*[NOTICE OF MOTION DATED 26<sup>TH</sup> JUNE 2025]*

1. The 1<sup>st</sup> & 2<sup>nd</sup> defendants filed the chamber summons dated 26<sup>th</sup> June 2025, seeking for the following orders:

*i. "Spent.*

*ii. THAT the 1st and 2nd defendants herein be granted leave to issue third party notice against the honourable Attorney General out of time and that the said notice be served upon the said intended third party within a period of 7 days.*

*iii. THAT the third-party notice herein filed and attached hereto be deemed as duly filed and properly on record.*

- iv. *THAT the honourable court be pleased to issue directions pursuant to Order 1 rule 22 of the Civil Procedure Rules.*
- v. *THAT the honourable court be pleased to issue an order recalling the Plaintiff's witnesses, PW1 (DEDAN OKWAMA), PW2 (PIUS NYANGE MAITHYA, PW3 (JAMES NGUGI KIMANI) and PW4 (GEORGE OMBASO MOGAKA) for purposes of cross-examination by the third party and the Defendants.*
- vi. *THAT the costs of this application be provided for."*

The application is supported by the affidavit of the 2<sup>nd</sup> defendant, sworn on the 26<sup>th</sup> June 2025, deposing inter alia that the 1<sup>st</sup> defendant was legally allocated the suit property by the Government of Kenya in 1998 pursuant to the Government Land Act and subsequently issued with certificate of title in 2002; that the suit property was previously being utilized by the East African Directorate of Civil Aviation (EADCA); that during cross-examination of the plaintiff's witnesses on 20<sup>th</sup> February 2025, it was stated that the 3<sup>rd</sup> defendant had authority to allocate the plots, and that the requisite payments were made and hence due process was followed; that the plaintiffs filed a

gazette notice No. 15370 of 26th November 2010, and the Registrar of Titles confirmed that the suit property belonged to the 1<sup>st</sup> defendant; that it is only later that the Government of Kenya realized vide the letter dated 16<sup>th</sup> December 1974 that the suit property was land reserved for staff housing of the East African Community; that it is evident that the 1<sup>st</sup> defendant legally acquired the suit property after the same became available after reverting back to the Government of Kenya, following the collapse of the EAC; that the prayer for leave for third party notice is for the event that judgment is entered against them, as it is solely through the acts and representations of the Government that availed the suit property to 1<sup>st</sup> Defendant without encumbrances; that continued exclusion of the Government from these proceedings would occasion a substantial injustice to the defendants as they would be held liable for the actions of the state.

2. The plaintiff and the Office of the Attorney General filed grounds of opposition dated 18th July 2025 and 3rd October 2025 respectively, in opposition to the application. In the plaintiff grounds of opposition, it was stated inter alia that the application is time barred, having been

brought six years after the close of pleadings. Further that the Third-Party notice is vague and does not directly intricate the Office of the Attorney General. That the application is an abuse of court process, and would serve no purpose as the AG would not bring any new evidence other than what is already in court. That the application demonstrates the 1<sup>st</sup> and 2<sup>nd</sup> defendants pattern of delaying court proceedings, and that the allocation of the suit property was a collaboration between the three defendants. The Attorney General ground's grounds of opposition are inter alia that the application was filed with inordinate delay and was drafted in ambiguity and obscures which Government department is being faulted, hence occasioning hardship to the AG on how to defend the suit.

3. The Attorney General also filed a response to the Third Party Notice, reiterating the above grounds as well as alleging that the 1<sup>st</sup> and 2<sup>nd</sup> defendants wilfully refused to conduct due diligence and participated in fraud.

4. The learned counsel for the plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and the Attorney General filed their submissions dated 2<sup>nd</sup> September 2025, 16<sup>th</sup> September

2025 and 3<sup>rd</sup> October 2025 respectively, which the court has considered.

5. The 1<sup>st</sup> & 2<sup>nd</sup> defendants' notice of motion raises the following issues for the court's determinations:

- i. Whether the 1<sup>st</sup> & 2<sup>nd</sup> defendants have made a reasonable case for the third party notice to issue under Order 1 Rule 15 of Civil Procedure Rules.
- ii. Who bears the costs?

6. The court has carefully considered grounds on the application and opposition, affidavit evidence, submissions by the learned counsel and come to the following conclusions:

- i. To determine any delay in filing, whether inordinate or not the court has to look at the procedure for filing the said notices which can be found under Order 1 rule 15 Civil Procedure Rules. Rule 15[1] states that the third party notice has to be taken out within 14 days after the close of pleadings. This matter was filed in 2009 and it is now 16 years old as at the time of this ruling. In *Thachmaanz Ltd v Pride Inn Ltd [2016] eKLR* the court while dealing with an application for leave to institute third-party notice which was filed late held as follows:

*“As correctly pointed out by the plaintiff the delay is not explained by the defendant and had it been inordinate then the court would have outrightly declined to entertain the application out of time. However, because the application was filed about 60 days late and before the date set for case management conference this court is of the view that the delay is not inordinate. An explanation of delay is of vital importance when the delay is extensive. The delay here not being extensive, is excused for the sake of considering the application on merit. Justice may be better served in that way.”*

The 1<sup>st</sup> and 2<sup>nd</sup> defendants are aware that they are out of time and that is why they ask for leave to file for the third party notice out of time. *Section 95* Civil Procedure Act chapter 21 of Laws of Kenya empowers the court to, in appropriate cases, extend the time for doing something. It therefore gives the court the discretion to do substantive justice, like in this case where delay is explained sufficiently.

ii. *Order 2 rule 15* of the Civil Procedure Rules provides as follows:

“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,.....”

Further in Rule 16 thereof provides as follows:

“Notwithstanding anything in rule 15, leave to issue a third party notice for service on the

Government shall not be granted unless the Court is satisfied that the Government is in possession of all such information as it reasonably requires as to the circumstances in which it is alleged that the liability of the Government has arisen and as to the departments and officers of the Government concerned.”

Though the learned counsel for the Attorney General has contended that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have not specified the relevant Government agency in respect of whom the third party notice is sought to be issued to, that does not expressly nullify or invalidate the third-party notice. Article 156 (4) (b) of the Constitution, states that the office of the Attorney General “*shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;*” which means that it is not necessary that any specific government office must be specified before the application can be considered. From the disclosures so far made by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their claim is most probably directed towards the abolished office of

the Commissioner of Lands, whose functions were taken over by the National Land Commission, which is not a party to the suit.

- iii. In the case of Cheruiyot Edwin Mutai v Cyrus Ngaruiya [2020] eKLR the court observed as follows:

*“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 (emphasis mine). 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.”*

The Commissioner of Lands who allocated the suit property, or its successor in title, the National Land Commission, not being a party should be joined in the suit alongside the Attorney General, as the 1<sup>st</sup> and 2<sup>nd</sup> defendants intention is to have any adverse judgment against it, be indemnified from the office which allocated the suit property.

- iv. Having found that the NLC and the Attorney General ought to be issued with the Third Party Notices, it is only fair and just that the plaintiff's witnesses be recalled for cross-examination by the third parties during the subsequent hearings.
- v. Under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where ordered differently on good reasons. Though the 1<sup>st</sup> and 2<sup>nd</sup> defendants have succeeded in their application, I find it fair and just that the costs of the application to abide the outcome of the suit.

7. From the foregoing determinations, the court finds and orders as follows:

- i. THAT the 1<sup>st</sup> and 2<sup>nd</sup> defendants are granted leave to issue Third Party Notice against the Honourable Attorney General and the National Land Commission. That the said notices be issued and served upon the said intended third parties within a period of 21 days from today.*
- ii. THAT the Plaintiff's witnesses, PW1 (DEDAN OKWAMA), PW2 (PIUS NYANGE MAITHYA, PW3 (JAMES NGUGI KIMANI) and PW4 (GEORGE OMBASO MOGAKA) be recalled during the next hearing for cross-examination by the Third Parties.*
- iii. That the costs of the application to abide the outcome of the suit.*

It is so ordered.

DATED, SIGNED AND VIRTUALL DELIVERED ON THIS 12TH DAY OF NOVEMBER 2025.

S. M. Kibunja, J.  
ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF: Mrs Abdulrahim

DEFENDANTS : Mr Arunga for Osman for 1<sup>st</sup> and 2<sup>nd</sup>  
Defendants and Mr Rutto for 3<sup>rd</sup> Defendant

THIRD PARTIES : Mr. Penda

NECHESAH-COURT ASSISTANT.

S. M. Kibunja, J.  
ELC MOMBASA.

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