



Gacheru v Ready Consultancy Company Limited & 2 others; Badbess & 3 others (Intended Third Parties) (Environment & Land Case 218 of 2021) [2025] KEELC 56 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEELC 56 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 218 OF 2021
LL NAIKUNI, J
JANUARY 17, 2025**

BETWEEN

JAMES MWANGI GACHERU PLAINTIFF

AND

READY CONSULTANCY COMPANY LIMITED 1ST DEFENDANT

BROWNBARK ENGINEERING SYSTEM LIMITED 2ND DEFENDANT

CHRISTOPHER NGURU WARUTERE 3RD DEFENDANT

AND

ABDALLA HAYTHAM AHMED BADBESS INTENDED THIRD PARTY

WALID OMAR INTENDED THIRD PARTY

SHABAN MWALIMU INTENDED THIRD PARTY

SULEIMAN MWALIMU T/A KHASH VENTURES . INTENDED THIRD PARTY

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination on two (2) the Chamber summons applications, one dated October 30, 2024 by Brownbark Engineerings System Limited, the 2nd Defendant/Applicant herein and the other one dated 31st October, 2024 by Christopher Nguru Warutere, the 3rd Defendant/Applicant herein respectively.



2. Upon service of the Chamber Summon applications, the Respondent responded through filing of the Replying Affidavit sworn on 13th November, 2024 thereof. The Honourable Court shall be dealing with all these pleadings on their merit in this Ruling.

II. The 2nd Defendant's case

3. The 2nd Defendant brought the Chamber Summons application dated 30th October, 2024 under the provision of Order 1 Rule 15 of the Civil Procedure Rules, 2010. The 2nd Defendant sought for the following orders:-
 - a. That the 2nd Defendant/Applicant herein be given leave to issue Third Party Notices to Abdalla Haytham Ahmed Badbess (Intended 1st Third Party) and Walid Omar (Intended 2nd Third Party) as the Defendants are entitled to relief and/or remedy against-them.
 - b. That costs of this application be provided for.
4. The application was based on the grounds, testimonial facts and the averments founded on the 10 Paragraphed Supporting Affidavit of Samwel Mwaura, the Managing Director of the 2nd Defendant/Applicant herein, sworn and dated the same day as the application. He deponed that:-
 - a. The 1st Intended Third Party hired an excavator bearing registration numbers KHMA 879P from his company in the period subject to this suit.
 - b. The 2nd Intended Third Party acted as an agent of the 1st Intended Third Party above and even paid for the services to his company for the use of the said excavator.
 - c. The said Intended Third Parties were the ones who pointed out the parcels of land the excavations were to be carried out.
 - d. It was the fact that the Machines were said to have been working at the Plaintiffs alleged parcel of land that the suits herein have been filed against the Defendants.
 - e. Thus they would wished that the three parties could be joined into the suit as both were entitled to reliefs and/or remedies as against-them-in-relation-to -the original subject-matter of the suits herein.
 - f. Therefore, they prayed that the relevant Third-Party notices be issued for the joinder of the three parties as Third parties herein.
 - g. Their joinder would assist in making a just and final determination in the matter.

III. The 3rd Defendant's case

5. The 3rd Defendant brought the Chamber Summon application dated 31st October, 2025 under the provision of Order 1 Rule 15 of the Civil Procedure Rules, 2010. The 3rd Defendant sought for the following orders:-
 - a. That the 3rd Defendant/Applicant herein be given leave to issue Third Party Notices to Shaban Mwalimu (Intended 3rd Third Party) and Suleiman-Mwalimu T/A-Khash Ventures-(Intended 4th Third Party) as the Defendants are entitled to relief and/or remedy against them.
 - b. That costs of this application be provided for.



6. The 3rd Defendant/Applicant's application was based on the grounds, testimony and the averments founded on the 9 Paragraphed Supporting Affidavit of Christopher Nguru Warutere, the 3rd Defendant/Applicant herein; sworn and dated the same day as the application. He deponed that:-
- a. The intended 3rd and 4th third Parties hired an excavator from the 3rd Defendant.
 - b. The said Intended Third Parties were the ones who pointed out the parcels of land and facilitated the excavator to the parcels of land the excavations were to be carried out.
 - c. It was the fact that the Machines were said to had been working at the Plaintiff's alleged parcel of land that the suit herein have been filed against the 3rd Defendant.
 - d. The 2nd and 3rd Defendant would therefore wished that that three parties could be joined into the suit as both Defendants – were -entitled to reliefs and/or remedies as against them in relation to the original subject matter of the suit herein.
 - e. The deponent wished that the two parties could be joined into the suit as both were entitled to - reliefs and/or remedies as against them in relation to the original subject matter of the suits herein.
 - f. Therefore, they prayed that the relevant Third-Party Notices be issued for the joinder of the two parties as Third Parties herein.
 - g. Their joinder would assist in making a just and final determination in the matter.
 - h. The affidavit was in support of the application therein.

IV. The responses by the Plaintiff/Respondent

7. The Plaintiff, Martin Mwangi Gacheru, responded to the Chamber Summon Application by the 2nd Defendant dated 30th October, 2024 and the Chamber Summon application by the 3rd Defendant dated 31st October, 2024 through a 14 paragraphed replying affidavit sworn on 13th November, 2024. He deponed that:-
- i. The Defendants/Applicants filed the Application outside the prescribed time for applying for leave to issue a third-party notice because:-
 - a. Order 1 Rule 15 (1) of the Civil Procedure required a Defendant who claimed against a third party to apply for leave to issue a third-party notice within fourteen (14) days after the close of pleadings.
 - b. Order 2 Rule 13 provides that pleadings shall close 14 days after service of the reply or Defence to Counter - Claim, or, if neither was served, 14 days after service of the defence.
 - c. Pleadings in this matter closed on 24th July, 2023, being 14 days after service of the last defence on 10th July, 2023 by the 1st Defendant. Annexed and marked as "J-1" and "J-2" were copies of the 1st Defendant's Statement of Defence dated 7th July, 2023 and the 1st Defendant's Advocates email dated 10th July, 2023 serving the said Defence.
 - d. The fourteen (14) days after the foresaid 24th July, 2023 when pleadings closed and within which the Defendants were required to apply for leave to issue a third-party notice expired on 4th August, 2023.



- e. The Defendants lodged the instant Applications for leave on 31st October, 2024, which was more than one (1) year after the foresaid 4th August, 2023 when the prescribed 14 days for applying for leave to issue the third-party notices expired.
- ii. The Defendant had not given any or any plausible explanation for filing the applications outside the prescribed time by more than one (1) year.
- iii. The Defendants sought to introduce the intended third parties after an inordinate delay of about 3 years since:-
 - a. He instituted this fairly old suit on 6th December, 2021 vide the Plaint dated 6th December, 2021. Annexed and marked as “J-3” was a copy of the Plaint.
 - b. The Defendants filed the instant Application seeking to introduce the intended third parties on 31st October, 2024, almost 3 years since 2021 when he instituted this suit.
- iv. He was apprehensive that introducing the intended third parties almost 3 years from the date the suit was instituted will further unjustly delay the trial of this fairly old matter.
- v. The Defendants had not established a sufficient basis for claiming against the intended third parties because:-
 - a. Under Paragraphs 4 and 5 of the grounds of the respective Applications, the Defendants contend that “..... the three parties can be joined into this suit as both defendants are entitled to reliefs and/ or remedies as against them in relation to the original subject matter of the suit.”
 - b. Contrary to the provision of Order 1 Rule 15(b), the Defendants had not pleaded and/ or demonstrated that the reliefs and/ or remedies that the Defendants were allegedly entitled to are substantially the same as some relief or remedy claimed by the Plaintiff in this suit.
- vi. There was no basis for liability of the intended third parties to the Defendants because:-
 - a. The Defendants had not pleaded or demonstrated any proper question to be tried as to liability of the intended third parties to the Defendants.
 - b. The Defendants had not produced any evidence in the Application to prove that,
 - a. The intended third parties hired an excavator from the Defendants, as alleged at Paragraph 2 of the respective Supporting Affidavits.
 - b. The intended third parties were the ones who pointed out the parcels of land on which respective Supporting Affidavit.
- vii. The Application was an afterthought because:-
 - a. In the 2nd Defendant’s Statement of Defence dated 18th January, 2022, the 2nd Defendant never pleaded any of the allegations now made in this Application. Annexed and marked as “J-4” a copy of the 2nd Defendant’s Defence.
 - b. In the 3rd Defendant’s Statement of Defence dated 19th July, 2022, the 3rd Defendant never pleaded any of the allegations now made in this Application. Annexed and marked as “J-5” a copy of the 3rd Defendant’s Defence.



- viii. In particular, in the foresaid Statements of Defence, the Defendants never pleaded the allegations that:-
 - a. The intended third parties hired an excavator from the Defendants, which allegation was now alleged at Paragraph 2 of the respective Supporting Affidavits to this Application
 - b. The intended third parties were the ones who pointed out the parcels of land on which the excavation were to be carried out, which allegation was now alleged at Paragraphs 3 and 4 of the respective Supporting Affidavits to this Application
- ix. The Defendants would not suffer any prejudice if the Court denied the Defendants leave to issue the third-party notice because:-
 - a. The Defendants could properly bring the purported claim they had against the intended third parties, in a separate suit.
 - b. The Defendants had not pleaded or demonstrated any prejudice they would suffer if they bring their purported claim against the intended third parties in a separate suit.
- x. The appropriate recourse available to the Defendants was to institute a separate suit against the intended third parties to pursue the purported claim against them, as opposed to introducing the claim in this suit by way of third-party notice.
- xi. Based on the foregoing, he prayed that the Court declined the Defendants leave to issue third party notice and dismisses the two Chamber Summons Applications dated 30th October, 2024 and 31st October, 2024 with costs.

V. Submissions

- 8. On 4th December, 2024 while all the parties were present in Court, they were directed to have the Chamber summons applications dated 30th October, 2021 and 31st October, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that a ruling date was reserved on 17th January, 2025 by Court accordingly.

A. The Written Submissions by the 2nd and 3rd Defendants

- 9. The 2nd and 3rd Defendants through the Law firm of Messrs. Jessee Kariuki & Co. Advocates filed their written submissions dated 29th November, 2024. The Learned Counsel submitted that the 2nd and 3rd Defendants herein filed applications dated 30th and 31st October, 2024 respectively for leave to issue Third Part Notices to the Intended Third Parties as listed above. When the suit came for hearing on 4th November, 2024 before the court, the Learned Counsel Mwai for the Plaintiff indicated to court that he had been instructed to oppose the said two applications. Therefore, the Court gave directions that the parties do file Replying affidavit and Submissions. The matter was to be mentioned on 4th December, 2024 for further directions. At the time of doing these Submissions, they had not received any Replying Affidavit from the Plaintiff.
- 10. On the leave to issue third party notices, the Learned Counsel submitted that Order 1 Rule 15(1) of the Civil Procedure Rules provides;

“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 and the defendant but as between the plaintiff and defendant and the third parties after the close of pleadings for leave of the Court to issue a notice (hereinafter summons in chambers ex parte supported by affidavit.

11. According to the Learned Counsel, of most critical in this case was that the “leave shall be applied for by Summons in Chambers ex parte supported by Affidavit”. The application for leave is therefore supposed to be made the filing of a response in opposition to the application seeking the leave. The leave to issue Third Party Notices need to be issued as a matter of cause.
12. In conclusion, the Learned Counsel submitted that the Honourable Court grants the prayers as sought from the said applications.

VI. Analysis & Determination.

13. I have carefully read and considered the pleadings herein, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
14. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether this Honourable Court should issue third party notices to the 1st, 2nd, 3rd and 4th third party?
 - b. Who will bear the Costs of Chamber summons applications dated 30th and 31st October, 2024.

Issue No. a). Whether this Honourable Court should issue third party notices to the 1st, 2nd, 3rd and 4th third party

15. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter herein being whether the 2nd and 3rd Defendants have made out a case for the leave to issue Third Party Notices to Abdalla Haytham Ahmed Badbess (Intended 1st Third Party), Walid Omar (Intended 2nd Third Party), Shaban Mwalimu (Intended 3rd Third Party) and Suleiman-Mwalimu T/A-Khash Ventures- (Intended 4th Third Party).
16. Accordingly, the Third party proceedings are made under the provision of Order 1 Rule 15 of the Civil Procedure Rules, 2010. It provides as follows: -

“ Order 1, rule 15 Notice to third and subsequent parties



- (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 sub rule (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 sub rule (4) makes such a claim as is mentioned in sub rule (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.

17. The above rule provides for a time frame within which a party may seek leave to issue third party notice. In their applications, the Applicants have averred that the 1st, 3rd and 4th intended Third parties hired an excavator from the 2nd and 3rd Defendants. The 2nd Intended Third Party acted as an agent of the 1st Intended Third Party above and even paid for the services to his company for the use of the said excavator. The said Intended Third Parties are the ones who pointed out the parcels of land and facilitated the excavator to the parcels of land the excavations were to be carried out. It was the fact that the Machines were said to have been working at the Plaintiff's alleged parcel of land that the suit herein have been filed against the 3rd Defendant. The Court considered the Pleadings and finds there is a triable issue between the Defendants and the third party.



18. There is an establishment of the nexus between the Plaintiff, the Defendants and the Third parties. The manner in which the dispute between the Defendants and the 3rd Parties is to be tried that necessitates the court to hear from all 3 parties in full and final determination of the dispute.

19. In the case of: “Oceanfreight (EA) Limited – Versus - Technomatic Limited & Another (2010) eKLR”, the Court held that;-

“It is, in my opinion professionally expedient that the defendant should seek to enjoin the applicant herein, as a third party. This is because of the perceived connection between the applicant’s role in the said contract and the cause of action.”

Court further stated “from the several authorities canvassed by counsel on both sides, it emerges, contrary to the applicant’s contentions, that joinder of third parties as may be prayed by defendants, is not conceptually linked to contract as such; such joinder may be sought in connection with different causes of action was that, provided only that there exists a basis of liability of the third party to the defendant; and such a basis of liability can arise by operation of the law, in the light of the applicable facts and circumstances.”

20. The Court of Appeal decision in the case of:- “Gachago – Versus – Attorney - General [1981] KLR 232”, demonstrated that third-party proceedings are not dependent on there being a contract binding the intended third party, nor on there not being a different case pending before the Court or before a Court of equal jurisdiction. (emphasis supplied) The principle emerging from the “Gachago case” is that the judicial approach to third-party proceedings is a liberal one, that accords the parties an opportunity to prove their claim, and is less preoccupied with striking out; and that privity of contract is not the sole consideration in determining whether third-party proceedings may be filed and sustained.

21. Further in the case of “Kenya Commercial Bank – Versus - Suntra Investment Bank Limited (2015) eKLR”, was cited where the Court held that:-

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

22. In the instant case, I find legal basis for allowing the Application. First, the Defendant’s Application is not an afterthought. Therefore, from this evidence, I am persuaded that indeed there is a triable issue between the 2nd and 3rd Defendants/Applicants and the intended 1st, 2nd, 3rd and 4th Third Parties.

23. Thus, it is conclusive that the third party notices should issue against the intended 1st, 2nd, 3rd and 4th third parties to enable the Court to determine the issues in question conclusively and effectively as such the intended 3rd Parties is crucial to the hearing and determination of the Plaintiff’s claim against the Defendants.

Issue No. b). Who will bear the Costs of Chamber summons applications dated 30th and 31st October, 2024.

24. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of



Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

25. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
26. In this case, this Honourable Court has reserved its discretion not to award the costs.

VII. Conclusion & Disposition

27. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-
 - a. That the Chamber summons application by the 2nd Defendant dated 30th October, 2024 be and is hereby found to have merit and is hereby allowed.
 - b. That the Chamber summons application by the 3rd Defendant dated 31st October, 2024 be and is hereby found to have merit and is hereby allowed.
 - c. That the 2nd Defendant/Applicant herein be and is hereby given leave to issue Third Party Notices to Abdalla Haytham Ahmed Badbess (Intended 1st Third Party) and Walid Omar (Intended 2nd Third Party as the Defendants are entitled to relief and/or remedy against-them.
 - d. That the 3rd Defendant/Applicant herein be and is hereby given leave to issue Third Party Notices to Shaban Mwalimu (Intended 3rd Third Party) and Suleiman-Mwalimu T/A-Khash Ventures-(Intended 4th Third Party) as the Defendants are entitled to relief and/or remedy against them
 - e. That there be mention on 25th February, 2025 for compliance of the orders and further direction
 - f. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF JANUARY, 2025.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Mwai Advocate for the Plaintiff.
- c. Mr. Macharia Advocate holding brief for Mr. Kariuki Advocate for the 2nd & 3rd Defendants.

