



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 25 OF 2017 (O.S)

IN THE MATTER OF THE ADVOCATES AT, CAP 16 LAWS OF KENYA

BETWEEN

GEORGE ADADA NYAGOWA.....PLAINTIFF

VERSUS

MS SHETH AND WATHIGO ADVOCATES.....DEFENDANT

RULING

1. Sheth & Wathigo Advocates, the Defendant seeks, vide the Chamber Summons dated 14th November 2017, for leave to issue and serve a Third Party Notice upon Crater Automobiles (NBI) Ltd and costs. The summons is based on the four (4) grounds set out on its face and supported by the affidavit sworn by Daniel Ndeke Gatimu, a partner with the Defendant's firm on the 13th November 2017.

3. The application is opposed by George Adada Nyagowa, the Plaintiff, through his replying affidavit sworn on the 5th March 2017.

4. The application came up for hearing on the 6th March 2018 when Mr. Maganga and Onyango, the learned counsel for the Defendant and Plaintiff respectively, made their oral submissions.

5. The following are the issues the Court's determination;

a) Whether the proposed Third Party is privy to the professional undertaking subject matter of the proceedings, or alternatively;

b) Whether the proposed Third Party is a necessary party in this proceedings.

c) Who pays the costs of the chamber summons.

6. The Court has carefully considered the grounds on the summons, the supporting and replying affidavits, oral submissions by counsel and come to the following determinations;

a) That from the agreement for sale dated 12th January 2015 and Deed of variation of agreement for sale dated the 16th June 2015, it is clear the Plaintiff sold the land described therein to Crater Automobiles (NBI) Limited, who are the proposed Third Party. That this suit is not between the Plaintiff as the vendor, and Crater Automobiles (NBI) Limited as the purchaser. That indeed there is no evidence presented before this Court on the existence of any suit between the Plaintiff and the proposed Third Party over their transaction under the said Sale agreement.

b) That pursuant to clauses 2 (b) of the sale agreement, the Defendant gave their "irrevocable professional undertaking in the following terms,

1. That we will hold the completion document referred to at Clause 7.1 (i)- (xiii) of the sale agreement to your order, returnable on demand pending our payment to you on behalf of the vendor the sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000.00) being the purchase price of the property herein less any advance payment that shall have been released to the vendor as per Clause 2 (i) of the sale agreement, which sum shall accrue interest as per Clause 3 of the sale agreement, net of all bank charges and deductions or withholdings whatsoever be forwarded to your client A/C via RTGS as follows:-

OUMA NJOGA & COMPANY ADVOCATES

A/C NO. 0091325845

BARCLAYS BANK OF KENYA-KISUMU BRANCH

BARCKENX

Within 14 DAYS of registration of the transfer in favour of our client CRATER AUTOMOBILES (NBI) LIMITED.

2. That if the sum advised in Clause (i) hereof together with any interest for late payment thereon are not forwarded to you on behalf of your client with 14 days from the date of successful transfer, of title into the purchaser's name then we shall forthwith and immediately upon demand return to you the completion documents in the same condition in which they were on leaving your offices without prejudice to your client's other remedies available in law.

3. That by accepting, retaining or utilizing the completion documents that shall be sent by you to us, we shall be deemed not only to have accepted and confirmed the foregoing undertaking terms and conditions as set forth hereinabove but also to have acknowledged and confirmed that we are solely liable and responsible for the full compliance with the said undertakings terms and conditions."

c) That this proceedings commenced through the Originating Summons dated 19th September 2017 is about enforcing the professional undertaking set out in (b) above by the Plaintiff whose position that he complied with all that he was supposed to do as the vendor has not been challenged by the purchaser todate. That as the professional undertaking given by the Defendant was irrevocable and was not subject or on condition to any indemnity by their client, the proposed Third Party, the Court finds no merit in the Chamber Summons dated 14th November 2017. That any legal recourse the Defendant may seek against their client, the proposed Third Party, has no connection with their obligation under the professional under to the Plaintiff.

7. That for the reasons set out above, the Chamber Summons dated 14th November 2017 is found to be without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30TH DAY OF MAY 2018

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel Mr. Abwa for Maganga for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE