



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.191 OF 2017

THE PRESBITERIAN FOUNDATION....PLAINTIFF/RESPONDENT

VERSUS

STANLEY CHEGE.....1ST DEFENDANT/APPLICANT

JOHN NYAGA.....2ND DEFENDANT/APPLICANT

AND

WILLY MUTIE.....1ST THIRD PARTY/RESPONDENT

CHRIS MUASYA NGALA.....2ND THIRD PARTY/RESPONDENT

RULING

The Defendants herein were on **16th July 2014**, allowed to issue **Third Party Notice** in terms of their **Notice of Motion** dated **24th February 2014**, wherein the Defendants/Applicants had sought to issue the said **Third Party Notice** upon **Mutie Willy** and **Chris Muasya Ngala T/A One2One Development Co. Ltd.**

The Defendants had alleged that though they have been sued by the Plaintiff herein, the said Third Parties are the ones who sold the suit property to them in the **year 1999** and **2000**. Therefore the issue relating to the instant suit should properly be determined not only as between the Plaintiff and the Defendants but also between the Plaintiff, the Defendants and the said Third Parties.

Though the Defendants were granted the said **Leave** on **16th July 2014**, they only sought to serve the said Third Parties by means of **Substituted Service** on **14th December 2016**, which application they did not prosecute until **2nd October 2017**, when **M/S Kimetto** for the Defendants attempted to prosecute the said application before the commencement of the Plaintiff's case. That was indeed unexplained delay and the Court disallowed the said application.

However, after the Plaintiff commenced its case, the Defendants again filed the instant **Chamber Summons** dated **23rd November 2017**, brought under **Order 1 Rule 22** of the **Civil Procedure Rules** and sought for the following orders:-

- 1. The Honourable Court be pleased to give directions for the determination of the issues raised between the Defendants and the Third Parties as encapsulated in the Defendants' Affidavit in Support of the Chamber Summons application dated 23rd November 2017, and summarized by particulars in the Third Party Notice dated 24th February 2014, and filed on the 16th July 2014.**
- 2. The Defendants' claim against the Third Parties set out in the said Defendants' Affidavit in Support of the Chamber Summons application and particularized in the said Third Party Notice be tried at the trial of this suit or at such other time as the court may direct.**
- 3. Alternatively, to (2) above, Judgment be entered for the Defendants as against the Third Party for indemnity against the Plaintiff's claim and the costs of this action, all consequential orders and the Plaintiff's suit against the Defendants be dismissed.**

The said application is supported by the following grounds:-

1) *The Defendants have filed and served a Third Party Notice*

against the Third Parties seeking full indemnity against any orders that may be made against them in this suit.

2) *It is necessary that the question of the Defendants' claim against the Third Parties for indemnity be heard and determined in and within the trial of this suit for convenient prosecution of this matter.*

3) *No proper question in the instant case falls to be adequately responded to without reference to the Third Party.*

4) *The grant of the orders prayed for herein will save time and costs.*

The said application is also supported by the *Affidavit of John Nyaga*, the 2nd Defendant herein who averred that the Plaintiff's claim is for vacant possession of *LR.No.13858/97*, together with *eviction Order* against the Defendants who are both *bonafide* purchasers for value having been in such possession from the year *2000*. He also averred that they purchased the said suit property from the Third Parties herein who were proprietors of *Mwendwa Farm* and sons of the late *Ngala Mwendwa*. He also alleged that the suit property was sold to them by an entity known as *One2One Investment Company* which was manned by *Mutie Willy* and *Chris Muasya Ngala* who are sons of the late *Eliud Ngala Mwendwa (Deceased)* the alleged vendor who sold the suit property to the Plaintiff. That the Defendants have completed payment of the purchase price but the said *Mutie Willy* and *Chris Muasya* have failed to effect transfer of the suit property to the Defendants.

Further, that they took over possession in *2000* and the Plaintiff has always been aware of the said possession and that Plaintiff has never been in possession. That the claim by the Plaintiff is unfounded and fraudulent but given the failure by the Defendant to transfer and issue title documents to them, then the Third Parties are liable for all the claim brought by the Plaintiff against the Defendants over the suit property *LR.No.13858/97/3*. Further that there is a proper question to be tried as to the liability of the Third parties and which the court needs to give directions.

This *Chamber Summons* is opposed and *Gilbert Nganga* on behalf of the Plaintiff swore a *Replying Affidavit* and averred that the application lacks merit, is an abuse of the court process and is only meant to delay the finalization of this matter. That the alleged Third parties have never entered appearance or filed a Defence hence the application is an exercise in futility only meant to delay the suit herein. Further that the Plaintiff and the Defendants have already given their evidence and closed their respective cases and it is therefore prejudicial to the Plaintiff to allow this application brought too late in the day without any justifiable reason for the delay. Indeed, the Defendants have an opportunity to file a separate suit against the Third Parties to avoid unnecessary delays in this suit.

The Third Parties through *Willy Mutie* filed a *Replying Affidavit* on *31st May 2018* and averred that the Defendants have brought a Third Party claim against the wrong parties. That the claim against the Third

Parties in their individual capacities is wrong since the suit property was sold to the Defendants by *One2One Development Co. Ltd* which is a distinct legal entity. That the said Company indeed sold *LR.No.13858/97/2 & 3* to the Defendants herein. That the said parcels of land were vacant and the Defendants took immediate possession and the same were never sold to the Plaintiff herein. They urged the Court not to allow the instant *Notice of Motion*.

The said application was canvassed by way of written submissions which this Court has carefully considered. The Court too has considered the whole pleadings, the court record, the relevant provisions of law and makes the following findings;-

The application is anchored under *Order 1 Rule 22* which provides;-

“If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

Under the above provision of law, the Court has discretion to issue directions on how the question of liability between the Third Party and the Defendants is to be tried. However, such discretion is issued upon the court being satisfied that there is a proper question to be tried as to liability of the Third Party.

It is evident that Third party proceedings are taken to prevent multiplicity of actions and to avoid the same facts being tried with different results. See the case of *Kenya Commercial Bank...Vs...Suntra*

Investment Bank Ltd(2015) eKLR, where it was 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 Rules 15-22 of the Civil Procedure Rules and liability between the Defendant and 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. The way I understand the law on Third Parties, such issues of Third Parties are issues and triable only between Third Party and the Defendant and cannot be bonafide issues triable between the Defendant and

the Plaintiff. On the basis of those legal reason, even if the Third Party had been joined which he has not, it is not triable issue as all for purposes of liability between the Plaintiff and the Defendant...”

The Court has considered the pleadings herein and has noted that in the ***Plaint***, the Plaintiff is seeking for various Orders against the Defendants among them vacant possession of ***LR.No.13858/97***. The Plaintiff alleged it purchased the suit property in the ***year 2000*** from one ***Eliud Ngala Mwendwa***. However, in their defence, the Defendants have contended that they have been in lawful and actual possession of the suit land ***since 1999***.

The Defendants further claimed to have acquired the suit property by virtue of adverse possession, having taken possession of the suit land in ***1999 and 2000*** respectively and the suit herein was filed in the ***year 2013***.

The question for determination at the end of the trial is whether the Plaintiff is the rightful owner of the suit property or whether the Defendants are entitled to registration of the same by virtue of being adverse possessors.

Further, the Defendants have alleged that they purchased the suit property from ***One2One Development Co. Ltd***. The ***Sale Agreement*** produced by the Defendants are between ***One2One Investment Co. Ltd*** and the Defendants. The Defendants have sought Third Party proceedings against the ***Directors*** of the Company, ***Mutie Willy*** and ***Chris Muasya Mwendwa***, whereas a ***Limited Liability Company*** is a legal entity which is capable of suing and being sued on its right. The Court is therefore not satisfied that there is a proper question to be tried as to the liability of the Third Parties herein as the Defendants have brought wrong Third Parties to the proceedings. In the event that any liability is entered against the Defendants herein, then they have a recourse in a separate suit against the Company that allegedly sold to them the suit property. In any event, the said Third Parties have not filed any Defence to the claim against them.

Having now carefully considered the instant ***Chamber Summons*** dated ***23rd November 2017***, the ***Court finds it not merited and the said application is dismissed entirely with no orders as to costs***.

The parties have closed their respective cases. Let the Defendants file their written submissions as earlier directed by the Court.

It is so ordered.

Dated, Signed and Delivered at Thika this 20th day of December 2018.

L. GACHERU

JUDGE

20/12/2018

In the presence of

Mrs Kangethe for Plaintiff/Respondent

No appearance for Defendants/Applicants

No appearance Third Parties/Respondents

Lucy - Court Assistant

L. GACHERU

JUDGE

20/12/2018