



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 68 OF 2010

ELIAKIM MILTON MASALE.....PLAINTIFF

-VERSUS-

ILALE MOHAMED.....1ST DEFENDANT

ASHA ABDALLAH.....2ND DEFENDANT

ZAINA MWACHOFI.....3RD DEFENDANT

DULU MWAMBURI.....4TH DEFENDANT

ALI ZAI.....5TH DEFENDANT

RULING

1. The application dated 30th September 2016 and brought under the provisions of Order 1 rule 15 of the Civil Procedure Rules and section 1A, 1B & 3A of the Civil Procedure Act. The defendant/applicant seeks the following orders:

1. That the matter be certified as urgent.

2. That leave be granted to the defendant to issue a third party notice to the National Land Commission, Chief Lands Registrar, Chief Registrar, Lands adjudication officer Kaloleni adjudication settlement scheme.

3. That upon leave being granted and service effected, the applicant herein to enter appearance and file defence and/or counter claim within 14 days from the date of service.

4. That the costs of this application be provided for.

2. The applicant contend the 3rd parties are necessary parties to this suit and no prejudice will be occasioned to the plaintiff. That it will be in the interest of justice and for the just determination of the issues that the application be allowed.

3. The application is opposed by the plaintiff vide his grounds of opposition filed on 25th October 2016. The grounds are :

1. That no grounds, sufficient or at all have been made out for grant of the orders sought herein. At all events the manner in which the alleged right to indemnity upon which the proposed third party proceedings arise is neither sufficiently disclosed nor sustainable in the context of the law applicable.

2. That under the rule invoked the application to take out third party proceedings is belated and ought to be made within 14 days of close of pleadings.

3. To the extent that a Third Party notice is in the nature of an indemnity and given that the plaintiff's action is one for vacant possession the defendants would suffer no real prejudice if this matter proceeded in the absence of the proposed third parties. Indeed, the defendants would be at liberty to pursue any independent action against them.

4. In the circumstances, the application is an abuse of the Court process.

4. In submissions, the defendant/applicant relied on the pleadings as filed. The plaintiff on his part submit that the time to file the present application is long past the stipulated time. Secondly that the application is an abuse of the Court process intended to obfuscate the issues and will not serve any useful purpose. In particular, the plaintiff submitted that given the background of this title, there is no legal issue that would arise to be resolved by way of 3rd party proceedings.

5. Order 1 rule 15 requires this nature of application to be made within 14 days of the close of the pleadings. The plaintiff submits the pleadings in this suit closed six years ago therefore the defendant ought to have applied for extension of time before filing the present application. I have perused the record and noted that this suit has been listed for hearing three times but the hearing has not taken off. The 1st time due to lack of instructions on the part of the defendants' previous advocates and on another time that parties were negotiating.

6. The plaintiff filed their list of documents dated 17.12.2014 on 20th May 2015 and further list on 8th September 2016 while the defendant filed his list on 21.6.2016. The record therefore shows that although pleadings ought to have closed on 16th April 2010, it was re-opened by both parties when they filed their documents in 2015 and 2016. Secondly Mr Mwakisha advocate for the plaintiff informed the Court on 22nd March 2016 that the ground had changed as some of the defendants were no longer on the land. It is not clear from the record which defendants have moved out of the except that this application is brought by the 1st defendant.

7. The reason I have set out this background is for purposes of confirming whether or not the pleadings in this file closed six (6) years ago and my answer is in the negative. After the fixing of the hearing dates new things cropped up which led to the pleadings being re-opened.

8. The second issue is whether the issue in dispute can be resolved through issuance of 3rd party notices. Order 1 rule 15 (1) give 3 scenarios on issuance of 3rd party notices as follows :

(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 is substantially the same as 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.

9. I have perused the draft 3rd party notice filed on 25.10.2016. In paragraph 6 thereof, the defendant

states that their claim against the 3rd party “is for indemnity and or compensation for any loss suffered if adverse orders are issued against them due to acts and/or omissions on the part of the 1st & 2nd third parties. In rule 15 (1) (b) provides “for any relief or remedy to or connected with the original subject – matter of the suit”

10. The plaintiff submitted that they wished to draw a distinction between indemnity and compensation and that a compensatory claim may be of more utility to the defendants if at all. This means the plaintiff is appreciating the fact that the defendant’s claim as regards compensation may lie. How they word it whether indemnity and or compensation is a question to be resolved during the trial.

11. Lastly the plaintiff also raised the issue that the defendant’s claim for compensation as against the government officers to be joined is time barred in view of the Public Authorities Act. Again it is my opinion that this is a matter that can be determined only after the claim has been presented to the Court. The proper persons to raise that issue if at all is the said 3rd parties. It would be premature for me to determine the issue before the leave to join the 3rd parties is granted and the actual claim is made available in the Court file/records.

12. For the reasons given in the body of this ruling, I find merit in the motion and consequently do grant the orders sought with costs in the cause. The applicant is given 14 days to file and serve the 3rd party notice.

Dated and delivered in Mombasa this 23rd day of February 2017.

A. OMOLLO

JUDGE