



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 108 OF 2013**

**IRIA-INI TEA FACTORY LIMITED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JOHNSTONE MUCHAI MUTHANGA.....1ST DEFENDANT/APPLICANT**

**LEAH WANJIRU MURUGI ..... 2ND DEFENDANT/APPLICANT**

**MUCHASTONE LIMITED ..... 3RD DEFENDANT**

**FREDRICK MUNYUA WAIYAKI ..... 4TH DEFENDANT**

**DAVID KAMAU MWANGI &**

**NAOMI WANJUGU GITHUI T/A**

**KAMAU GITHUI & COMPANY ADVOCATES..... INTENDED 3RD PARTY**

**RULING**

1. This ruling is in respect of the applications dated **28th April, 2016** and **20th June, 2016**.
2. The application dated 28th April, 2016 is by the 4th defendant. It seeks leave to amend the 4th defendant's statement of defence by *inter alia* introducing a counter-claim.
3. The application is grounded on the affidavit of the 4th defendant's advocate Collin Sami Satuma, and the grounds on its face.
4. According to the 4th defendant's advocate, the amendment sought will help the court to conclusively determine this matter and will not occasion any prejudice to the plaintiff/respondent.
5. The application is opposed on the grounds that there has been inordinate delay in seeking leave to amend and introduces new issues/causes of action.
6. It is further contended that the affidavit sworn in support of the application violates **Order 4 Rule 4** of the Civil Procedure Rules (CPR); it has been brought in bad faith and has a likelihood of clogging and clouding the issues in question thus elongating or lengthening hearing and adjudication of the matter.

7. I have read and considered the rival arguments concerning the application, the law and principles concerning amendment of pleadings.
8. Whilst there has been some delay in seeking the amendment, as the matter is yet to be set down for hearing, I am not persuaded that allowing the application may occasion the respondents prejudice otherwise uncompensable by costs.
9. Having seen the amendments sought, I hold the view that they are necessary as they will help the court to conclusively determine this matter.
10. For that reason, I allow the application in terms of prayer 1 and 2 thereof. Costs of the application shall abide the outcome of the suit.
11. The second application, dated **20th June, 2016** is by the 3rd defendant. It seeks leave to issue and serve a third party notice upon Kamau Githui & Company Advocates and their partners David Kamau Mwangi & Naomi Wanjugu Githui.
12. The application is premised on the grounds that the 3rd party instructed the intended 3rd party to act for it in the conveyance of the subject matter of the suit herein, LR No. Nyandarua/Gilgil West/18; that the purchase price of Kshs. 31, 570,000/= was paid through the intended 3rd parties who withheld Kshs. 11, 700,000/= which amount remains unpaid to date despite demand by the applicant.
13. Explaining that it will seek indemnity/contribution from the intended 3rd party for any money that may be found due from it, the 3rd defendant argues that enjoining the 3rd party to the suit will facilitate the final and effectual determination of the issues arising in the suit.
14. Even though by dint of the provisions of **Order 1 Rule 15** of the CPR the application ought to have been made *ex parte*, it is opposed through the affidavit of Naomi Wanjugu Githui (replying affidavit) in which it is contended that the 3rd defendant/applicant authorised Joshua Kihara (hereinafter referred to as the third defendant's agent) to sell the suit property at Kshs. 220,000/= per acre.
15. According to Mrs. Githui, the third defendant's agent was to receive any amount over and above the purchase price.
16. Subsequently, the third defendant's agent approached the plaintiff who agreed to buy the suit property at Kshs. 350,000/= per acre.
17. It is admitted that the plaintiff paid the total cost of the suit property amounting to Kshs. 31,157,000/= to the intended third party but explained that the amount over and above the price of Kshs. 220,000/- per acre was paid to the 3rd defendant's agent, being his commission.
18. It is contended that the law firm or any of its partners was not involved in the acquisition of the suit property or its transfer to the plaintiff and that there was no conflict of interest in the law firm's involvement in the transaction as it only rendered professional services to the defendants for which it is owed legal fees.
19. It is further contended that there is no resemblance or similarities between the issues arising between the plaintiff and the defendants and the alleged issues between the law firm and the 3rd defendant.
20. According to Mrs. Githui, the dispute between the plaintiff and the defendants concerns land while the dispute between the 3rd defendant and the intended third party arises out of an advocate-client relationship for which this suit is not the appropriate forum to resolve.
21. In view of the foregoing, it is contended that the application is frivolous, vexatious, incompetent and an abuse of the process of the court.

## **Submissions**

22. On behalf of the applicant it is submitted that:

- (i) The reason for seeking third party proceedings against the intended third party is that it is the one which received the sale proceedings for purpose of transmitting the same to the 3rd defendant;
- (ii) Issues arise as to whether the 3rd defendant is entitled to contribution from the intended third parties who allegedly fraudulently retained part of the proceeds of sale;
- (iii) Issues have been raised as to whether the consideration was paid in full, and if it was, whether it was transmitted to the 3rd defendant in full;
- (iv) There are matters to be resolved between the proposed third party and the 1st and the 3rd defendant;
- (v) The proposed 3rd party is an integral party in resolving the dispute;
- (vi) The proposed third party needs to be put to task to help in settling the dispute;
- (vii) The proposed third party needs to be brought on board to give an account as to why or how it transmitted Kshs. 17, 815, 600/=;
- (viii) Granting the orders sought will avoid multiplicity of suits with similar or substantially similar issues and evidence. It will also avoid the possibility of inconsistent findings over the same subject matter;
- (ix) The person who was allegedly paid is a stranger to 1st and 3rd defendants;
- (x) Allowing the application will give the intended third party an opportunity to explain their dealings with the said agent;
- (xi) Allowing the application will help the court attain expeditious, proportionate and affordable justice.
- (xii) This is not a complain against the proposed third party as regards legal fees or legal services that would oust the jurisdiction of the court and vest it in the Advocates Complaints Commission.

23. The intended third party filed submissions reiterating the averments contained in the affidavit sworn in opposition to the application and maintaining that the dispute between the 3rd defendant and the proposed 3rd party arises out of an advocate-client relationship, for which this court lacks jurisdiction to hear and determine the dispute preferred before it.

24. Contrary to the averments contained in the affidavit sworn in reply to the application, the intended third parties contends that the dispute between it and 3rd defendant concerns fees retained by it from the sale transaction.

25. It is the intended 3rd party's case, that the dispute between it and the 3rd defendant/applicant should be referred to the Advocates Complaints Commission or the Advocates Disciplinary Tribunal. In this regard, reference is made to the case of **Albert Lukoru Loduma v. JSC & 2 Others (2013) e KLR** and the case of **Republic v. Disciplinary Committee ex parte Wambugu Kariuki (2015) e KLR** where it was held:

**“...the Advocates Act prescribes the manner in which the discipline of advocates is enforced, either through the Advocates Disciplinary Tribunal or the Advocates Complaints Commission... (Albert Lukoru Loduma case)”**

**“the Disciplinary Committee...is mandated to receive, hear and dispose of complaints brought against an advocate in the manner prescribed under the Act. It is also true that under section 60 of the Act, the said Committee has the power to receive complaints of professional misconduct against an advocate from any person. I agree that since the applicant herein is such an advocate, the Committee has jurisdiction to entertain any complaints made against him in his professional capacity pursuant to section 55 of the Act... (The Republic v. Disciplinary Committee case).”**

26. According to the intended 3rd party, enjoining them to the proceedings will render them mere spectators in the dispute.

27. In his submissions, the 4th defendant refers to the provisions of **Order 1 Rule 1** of the CPR (on factors the court considers in an application for joinder) and submits that the applicants lack capacity to join the 3rd party to the current suit. It is further contended that the applicant is introducing a new cause of action, not in the controversy between the plaintiff and the third defendant.

28. Like the intended 3rd party, the 4th defendant argues that the issues raised in the application touch on advocate-client relationship and not proprietary interests being contested in the suit. Based on the test enunciated in the case of **Kingori vs. Chege & 3 others (2002) e KLR**, it is submitted that the applicant has not met the threshold for joinder.

29. According to the 4th defendant, failure by the intended 3rd parties to remit part of the purchase price raises issues of professional misconduct, a matter which the Advocates Disciplinary Tribunal is legally mandated to entertain by virtue of **Section 60(1)** of the Advocates Act.

30. Based on the decision in the case of speaker of **National Assembly v. Njenga Karume (2008) 1 KLR 425**, to the effect that where a statute provides a mechanism for resolving a dispute, that mechanism must be pursued first before resorting to other means of resolving the dispute, it is submitted that the 3rd party should pursue the complaint against the intended 3rd party through the mechanism provided for under the Advocates Act.

31. It is further submitted that issuance of the orders sought would be prejudicial to the 4th defendant as he will be reduced to a mere spectator in the suit.

32. According to the 4th defendant, the applicant has not demonstrated that the intended 3rd party has any proprietary interest in the suit property to warrant its being enjoined to the suit.

33. Terming the application a delaying tactic, the plaintiff complains that the applicant has waited for 3 years to apply for leave to issue a third party notice, which delay is prejudicial to it.

### **Analysis and determination**

34. As pointed out in the submissions by the plaintiff, this being an application for leave to issue a third party notice, the law requires that it be made ex parte. In this regard see **Order 1 Rule 15** of the CPR which provides as follows:

**“Where a defendant claims 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 relief or remedy is 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 should be properly determined as between the plaintiff and the defendant but as between the plaintiff and defendant and the 3rd party or between any or either of them, he shall apply to court within fourteen days after close of pleading for leave to issue a notice (hereinafter called a third party notice) and such leave shall be applied by summons in chambers ex parte supported by affidavit.**

35. It is clear from the above provisions of the law when leave may be sought to issue a third party notice; who may apply for the leave; the circumstances upon which the leave may be sought and the procedure of applying for the leave.

36. Concerning time for seeking leave, the law limits it to fourteen days after close pleadings.

37. In the circumstances of this case, pleadings closed on or about 1st September, 2013.

38. By dint of the provisions of **Order 1 Rule 15** the CPR, the application for leave ought to have been made on or about 15th September, 2013. It therefore follows, that the application herein was made out of time.

39. No application for extension of time was made as contemplated under **Order 50 Rule 6** of the CPR thus making the application defective. In this regard see the said Rule which provides as follows:

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”**

40. In addition to failure to apply for extension of time within which it ought to have applied for leave to issue a third party notice, the applicant has not offered any explanation for the delay of over three years before bringing the application. Be that as it may, under **Section 1A** of the CPR as read with **Article 159** of the Constitution of Kenya 2010, this court is enjoined to dispense justice without undue regard to procedural technicalities.

41. **Section 3A** of the Civil Procedure Act, on the other hand, gives this court power to make such orders as may be necessary for ends of justice, the defect in the application notwithstanding.

42. Turning to the merits of the application, under **Order 1 Rule 15(a)** of the CPR, the applicant would be entitled to issuance of the leave sought for purposes of determining whether or not it is entitled to contribution or indemnity on account of the alleged withholding of part of the purchase price by the intended third party. In this regard see the case of **Oceanfriegt (EA) Ltd vs Technomatic Ltd & Another**, 2010 eKLR where it was held:

**“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 linked to contract as such; such joinder may be sought in connection with different causes of action, provided only that there exists 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.”** (emphasis supplied).

43. In the circumstances of this case, it is not indispute that the intended third party received Kshs. 31, 570,000/= from the plaintiff in connection of the subject matter of this suit.

44. Whereas the intended third party contends that it disbursed the money in accordance with the instructions of the 3rd defendant, the 3rd defendant denies having issued those instructions.

45. As the intended third party does not claim that the money withheld was its legal fees, there arises a legitimate issue of law or fact on whether the intended third party holds part of the purchase price for which the 3rd defendant may be entitled to indemnity or contribution in case he loses the case against it, bearing in mind that part of the plaintiff's claim is for recovery of the purchase price.

46. In view of the foregoing, notwithstanding the defect in the application, I find and hold that the 3rd defendant has made up a case for issuance of a third party notice against the intended third party. Consequently, I allow the application as prayed.

**Dated, signed and delivered in open court at Nyeri this 29th day of March, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Gathega Mwangi h/b for Ms. Mwai for the plaintiff

Mr. Kassam for the 4th defendant

N/A for the 1st and 3rd defendants

N/A for the 2nd defendant