



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC NO 194 OF 2015**

**SULEIMAN M. MWINYIHAJI..... PLAINTIFF**

**VERSUS**

**OMAR SALIM MWABEL.....1<sup>ST</sup> DEFENDANT**

**VICTOR KARHAYU ..... 2<sup>ND</sup> DEFENDANT**

**PENTUM W. MUSEMBI ..... 3<sup>RD</sup> PARTY/RESPONDENT**

**RULING**

1. This is the Amended Notice of Motion dated 3<sup>rd</sup> July 2017. It is brought under Section 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act (Cap 21 Laws of Kenya) Order 10 Rule 12 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders that;

a. Spent.

b. Fentum W. Musembi be joined in these proceedings as a third Defendant and/or third party.

c. The third party/Defendant be restrained by himself, his servants, employees or their agents or any other person whosever and whatsoever from constructing, alienation or in any other way whatsoever dealing with or wasting the property known as Plot No. 826/Bububu B Squatter Settlement Scheme pending hearing and determination of the application inter parties/determination of the suit.

d. The 3<sup>rd</sup> party/Defendant be ordered to demolish any structure constructed on the parcel of land Known as Plot No. 826/Bububu B Squatter Settlement Scheme and remove all debris arising therefrom at his costs.

e. The court give directions for expeditious disposal of the suit.

f. The third party pays costs emanating from the proceedings in any event.

3. The grounds are on the face of the application listed as paragraph (i – v).

4. It is supported by the affidavit of Suleiman N. Mwinyihaji, the Plaintiff/Applicant.

5. The application was fixed for hearing on 9/11/2017. The Plaintiff/Applicant's advocate never appeared in court to argue the application.

6. Mr. Asige for the Defendants made oral submissions in apposition of the application.

7. I have considered the Amended Notice of Motion dated 3/7/2017 and the submissions by the defence counsel.

8. I find that the said application is brought under Order 10 Rule 12 of the Civil Procedure Rules. Rule 12 does not exist.

9. Order 1 Rule 15 of the Civil Procedure Rules states;

**i. “Where a Defendant claims as against any other person not already a party to the suit (hereinafter called the third party) .....**”

10. I agree with Mr. Asigi for the Defendants that it is only a Defendant who can join a third party.

The Plaintiff cannot join a third party. He ought to have sought leave to amend the plaint to include other Defendant(s).

11. This application as it stands is incompetent and misconceived. The same is dismissed with costs to the Defendants.

**It is so ordered.**

**Ruling Dated, Signed and Delivered at Mombasa on the 16<sup>th</sup> day of November 2017** in presence of Mr. Asige for the Defendant and the Court Assistant Koitamet.

**L. KOMINGOI**

**JUDGE**

**16/11/2017**