



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 Exparte chamber summons dated **24th August, 2014** by the third party. It seeks leave to issue and serve a third party notice upon Mr Joshua Macharia Kihara, trading as Kihara & Associates .
2. The application is premised on the grounds that the 3rd party was instructed by the 1st defendant to act for the 3rd defendant in the sale of the subject matter of the suit herein, LR No. Nyandarua/Gilgil West/18 measuring 90.2 acres vide two letters dated 27th June 2012 and marked NWG-1; that the intended third party was authorised by the 3rd defendant to sell the land at Kshs 220,000 per acre and any amount over and above the agreed sum of Kshs 220,000 per acre, would be paid to the intended third party as his comission for the sale.
3. The purchase price of Kshs. 31, 570,000/= was paid by the plaintiff to the 3rd party. The third party paid Kshs 19,800,000 to the 3rd defendant and on his instructions and those of the 1st defendant, paid Kshs.11, 700,000/= to the intended third party.
4. Explaining that it will seek indemnity/ contribution from the intended 3rd party for any money that may be found due from it, the third party argues that enjoining the intended 3rd party to the suit will facilitate the final and effectual determination of the issues arising in the suit.
5. Even though by dint of the provisions of **Order 1 Rule 15** of the Civil Procedure Rules (CPR), the application ought to have been made *ex parte*, it is opposed through the grounds of objection of the 1st

and 3rd defendants, that the application is bad in Law, an abuse of the court process, malicious and an afterthought meant to confuse the court. The 1st defendant, Johnstone Muchai Muthanga, also filed a replying affidavit in which he denies knowing the intended third party or having been directed to him by the 3rd defendant. He also denies any knowledge of the letters referred to by the third party and terms them as forgeries and further denies giving instructions to the third party to pay the intended third party Kshs.11, 700,000/=.

6. The application was argued before me this morning. In his oral submissions, **Mr Kiboi**, counsel for the applicant, urged the court to enjoin the intended third party to the suit as he was a necessary party as evidenced by the correspondence marked **NWG2, NWG4 and NWG5** between the intended third party and other parties in this suit.

7. In opposition, Mr Kahuthu submitted that the intended third party was not privy to the contract between the 3rd defendant and the third party. He further submitted that 1st defendant is a stranger to the documents produced by the third party and did not even know the intended third party.

Analysis and determination

8. 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 and should be properly determined not only 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 for summons in chambers ex parte supported by affidavit.

(2)

(3)

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply *mutatis mutandis* as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply *mutatis mutandis*, and the expressions “third party notice” and “third party” shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply *mutatis mutadis* with the provisions of this rule.”

9. Under the above Order, 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 allegation that the third party paid Kshs.11,700,000/= to the intended third party on instruction of the 1st and 2nd defendants. In this regard see the case of **Oceanfriight (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).

10. In the circumstances of this case, it is not in dispute that the third party received Kshs. 31, 570,000/= from the plaintiff as purchase price for the subject matter of this suit.

11. Whilst the third party contends that it disbursed the money in accordance with instructions of the 1st and 3rd defendants, the 1st defendant denies having issued those instructions.

12. The third party having been found to be a necessary party in this suit, and having been enjoined in these proceedings to facilitate the final and effective determination of the issues arising in this suit because of its role in facilitating the sale transaction, I also find and hold that the third party has made up a case for issuance of a third party notice against the intended third party. I say this because a legitimate issue of law or fact has arisen on whether the third party is the one holding 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 or whether the intended third party is the one who received Kshs.11,700,000/= on instructions of the 1st and 3rd defendants as his commission.

13. In view of the foregoing, I allow the application as prayed.

Dated, signed and delivered in open court at Nyeri this 2nd day of November, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kiboi h/b for Mr. Kipngeno for the 3rd party

N/A for the 1st and 3rd defendants

Court assistant - Esther