



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**LAND CASE NO. 30 OF 2013**

**KENNETH GITUNDA KAMAU.....PLAINTIFF**

**VERSUS**

**LUCAS OWITI.....1<sup>ST</sup> DEFENDANT**

**LEWIS THORLELIUS GOGO MTEPE.....2<sup>ND</sup> DEFENDANT**

**CLEOPHAS BICHANGA NYAMETA.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

**Introduction:**

1. What is before me is the 3<sup>rd</sup> Defendant's Application dated 3<sup>rd</sup> February, 2014. The Application has been filed pursuant to the provisions of Order 1 Rule 10, Order 2 Rule 15(1) (a) (b) and (d) of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act.

2. The Application was argued together with another Application of the same date and filed in Malindi HCCC No. 24 of 2013. The two Applications and the Plaints are similar in all respects. The Defendants are the common denominators in the two suits. The Applications are seeking for the following orders.

**a. The third defendant's name is struck out of the suit as a defendant, as no reasonable cause of action is disclosed against him and as an advocate of the High Court, he all along acted as an agent of a known principal – Vros Produce Limited – which has not been joined in these proceedings, an omission which renders the suit scandalous, frivolous, and vexatious; or otherwise an abuse of the court process; alternatively the plaintiff is ordered to amend its plaint so as to join Vros Produce Limited in these proceedings, in place of the third defendant.**

**b. Upon allowing prayer (b) above, costs of this application and of the suit, on appropriate scale, are provided for.**

2. According to the Applicant's Supporting Affidavit, he is an advocate of the High Court. The 3<sup>rd</sup> Defendant has deponed that his name should be struck out of the suit as a Defendant or have it substituted with that of Vros Produce Limited, his instructing client.

3. According to the Applicant, the agreement for sale in this suit and in HCCC No. 24 of 2013 were made between two parties, the Plaintiffs and Vros Produce Limited; that as at the time the impugned

agreements were made, he was licensed and permitted to practice law as an advocate and that he was instructed to act for Vros Produce Limited, the vendor. According to the Applicant, at no time did he become privy to the agreements for sale of land as he had no land to sell and thus cannot be joined in those proceedings as a Defendant.

4. It was the deposition of the 3<sup>rd</sup> Defendant that the Plaintiff has opted to sue him as an agent of a known principal and leave out the party who contracted with it; that he cannot be held personally liable as for the impugned contracts or even for deceit or negligence because he was duly appointed to act for the vendor.

5. The 3<sup>rd</sup> Defendant finally stated that the Plaintiff as drawn does not disclose any cause of action against him and that in any event, the client he was acting for all along in the impugned sales has been left out; that there is no plea by the Plaintiff as to why he has opted to sue an agent of a known principle and that Vros Produce Limited is not a phantom.

#### **Plaintiff/Respondent's case:**

6. The Plaintiff in this matter filed a Replying Affidavit on 20<sup>th</sup> March 2014. The Plaintiff deponed that there are two persons disclosed in the agreement for sale as directors of the vendors, that is the 1<sup>st</sup> and 3<sup>rd</sup> Defendants; that the 3<sup>rd</sup> Defendant executed the Agreement for sale as a director of the alleged vendor and that his presence is necessary in these proceedings.

7. The Plaintiff/Respondent further deponed that the 3<sup>rd</sup> Defendant had a duty both to him as the purchaser and to the vendor to ascertain the identity of the directors of the vendor and ascertain that those persons were truly directors of the company he purported to act for. He did neither and consequently, he must answer for this negligence or fraud.

8. According to the Plaintiff, Vros Produce Limited appears to exist twice under the district certificates of incorporation; that in Mombasa HCCC. No. 131 of 2010, Mr. Stephen Macharia Kimani acted for Vros Produce Ltd and that it is not clear if Mr. Kimani, counsel for the 3<sup>rd</sup> Defendant, would be competent to act for the 3<sup>rd</sup> Defendant when he is already acting for Vros Produce Limited.

9. It is the Plaintiff's position that Mr. Kimani, the 3<sup>rd</sup> Defendant's counsel may be called as a witness to state who the real directors of Vros Produce are, which if the two Vros Produce Limited is genuine and whether the 3<sup>rd</sup> Defendant in this suit may have facilitated the fraudulent set of directors to defraud the real Vros Produce Ltd.

10. The Plaintiff finally deponed that it is his right to have this suit heard as against the 3<sup>rd</sup> Defendant; that the Plaintiff may amend his Plaintiff once he finds the pleadings in the other existing suits and that the advocates who have acted for any of the two Vros Produce Limited may be necessary parties.

11. The Plaintiff in HCCC No. 24 of 2013 filed its Grounds of Opposition and averred that the Application by the 3<sup>rd</sup> Defendant is misconceived, frivolous, bad in law and an utter abuse of the process of the court.

12. The parties' advocates appeared before me on 10<sup>th</sup> April 2014 and made oral submissions. Mr. Kimani, counsel for the 3<sup>rd</sup> Defendant/Applicant submitted that his client was invoking the provisions of O.1 Rule 10 of the Civil Procedure Rules to be removed from the suit or in the alternative his name to be substituted by that of Vros Produce Limited.

13. Counsel took the court through the provisions of Section 3(3) of the Law of Contract Act and section 44 of the Land Registration Act, 2012. Counsel submitted that if section 3(3) of the Law of Contract Act was not complied with, as admitted by the Plaintiff, then no suit can be filed in respect to the contract. According to counsel, the current suit is a non-starter in view of the averments in the Plaintiff as read together with Section 3(3) of the Law of Contract Act.

14. Counsel finally submitted that the plea that the 3<sup>rd</sup> Defendant represented himself as an advocate cannot find a cause action because the procedure to raise such a complaint is different. Counsel submitted that the role of an advocate is to attest signatures and that the 3<sup>rd</sup> Defendant was acting for a known principal. According to counsel, an action cannot be taken as against an agent if the principal is available.

15. Counsel finally submitted that this court has a duty to enforce the law, and in this case, the provisions of section 3(3) of the Law Contract Act. The Plaintiff's counsel relied on the case of **Phillips Vs Copping (1952) 1 K.B. 15** to buttress his arguments.

16. Mr. Ole Kina, counsel for the Plaintiff in this matter submitted that under order 2 Rule 15 (1) (a) of the Civil Procedure Rules, evidence is not receivable. The court is only obliged to look at the Plaintiff in arriving at its decision.

17. The Plaintiff's counsel submitted that an allegation of fraud has been pleaded as against the 3<sup>rd</sup> Defendant for having represented an entity that did not exist and received money. Consequently, it was submitted the 3<sup>rd</sup> Defendant cannot hide behind the provisions of section 3(3) of the Law of Contract Act where fraud has been pleaded.

18. Counsel submitted that the pleadings in the matter have not closed and that the Plaintiff may file an amended Plaintiff once a Defence is filed. It is only after a Defence has been filed that the Plaintiff may decide to strike out the 3<sup>rd</sup> Defendant's name.

#### **Analysis and findings:**

19. The two Applications before me are seeking to have the name of the 3<sup>rd</sup> Defendant struck out of the suit as a defendant having acted as an agent of a known principal, Vros Produce Ltd. In the alternative, the 3<sup>rd</sup> Defendant is seeking the Plaintiff to be ordered to amend its Plaintiff so as to join Vros Produce Limited in place of the 3<sup>rd</sup> Defendant.

20. The 3<sup>rd</sup> Defendant has annexed on his Supporting Affidavit the practicing certificates for the years 2011, 2012 and 2013 showing that he was licensed to practice as an advocate during those years. The 3<sup>rd</sup> Defendant has also annexed a copy of the resolutions by the Directors of Vros Produce Limited instructing his law firm to act for the company. The letter states as follows:

**“This is to appoint your firm to draw and witness Sales Agreements on behalf of VROS PRODUCE LTD. On the proposed development plan (PDP sub-divisions) of that parcel of land known as plot 150 of section IV Main Land North situate as Mtwapa and any sub-divisions created there from.”**

21. The letter is signed by the directors. It is on the basis of these instructions that the 3<sup>rd</sup> Defendant claims to have prepared a sale agreement between the Plaintiff and his client, Vros Produce Limited.

22. In the Plaintiff, the Plaintiff has averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants represented themselves to be directors of Vros Produce Limited and that they were in a position to dispose and transfer L.R. No. 150 Mainland North to the Plaintiff. The Plaintiff has further averred in the Plaintiff that the 3<sup>rd</sup> Defendant represented himself to be an advocate with authority and instructions to act on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the alleged sale of the suit property.

23. At paragraph 6 of the Plaintiff, the Plaintiff has stated that in accordance with the sale agreement dated 27<sup>th</sup> September 2012, the Plaintiff issued three bankers cheques to the 3<sup>rd</sup> Defendant in the sum of kshs. 2,050,000 being the deposit of the purchase price. According to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to perform their part of the agreement.

24. One of the particulars of fraud as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is that they at different times and separately gave to the Plaintiff two certificates of incorporation in respect to Vros Produce Limited which showed conflicting dates of incorporation.

25. The Plaintiff has annexed on his Replying Affidavit the two Certificates of Incorporation. The first Certificate of Incorporation of Vros Produce Limited shows that the company was registered as C.27992 on 16<sup>th</sup> August, 1984 while the second one shows the registration number as C. 64998 and dated 2<sup>nd</sup> May, 1996.

26. The Plaintiff has also annexed two different resolutions by the “two” Vros Produce Limited giving instructions to their respective advocates to defend the company in Mombasa HCCC No. 131 of 2010. The first resolution by Vros Produce Limited was dated 7<sup>th</sup> October 2010 instructing B.M. Musyoki and Company Advocates to represent it in the said suit. The 2<sup>nd</sup> resolution is dated 10<sup>th</sup> July 2012 instructing the firm of Stephen Macharia Kimani advocates to represent Vros Produce Limited in the same suit.

27. The two resolutions were signed by a set of two different directors. It would appear, from the Notice of Appointment of advocate annexed on the Plaintiff's Replying Affidavit that Mr. Stephen Macharia Kimani appeared for the Defendant, Vros Produce Limited in Mombasa HCCC No. 131 of 2010.

28. In the Notice of appointment of advocate and the certificate of urgency filed by Mr. Kimani in Mombasa HCCC No. 131 of 2010, Mr. Kimani indicates that he was as appearing for Vros Produce Limited (C 64998).

29. In the Originating Notice of Motion that was filed Mr. Kimani in Mombasa HCCC No. 131 of 2010, counsel sought for the following orders:

a. The court is pleased to order an investigation by Registrar of Companies of the affairs of Vros Produce Limited (C No. 27992) and Vros Produce Limited (C No. 64998) under the companies Act.

b. A comprehensive report to be filed by the Registrar of Companies under section 166 (b) (ii) of the Companies Act within seven days from the date of service of this order.

30. It is not clear what happened to that suit and whether indeed the court ordered for an investigation by the Registrar of Companies into the affairs of the two companies with similar names.

31. The Plaintiff has accused the 3<sup>rd</sup> Defendant, who has admitted in his affidavit that he was acting for Vros Produce Limited, of having colluded with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to defraud him. Some of the particulars of fraud as against the 3<sup>rd</sup> Defendant are that he did not disclose the identity or whereabouts of the Defendants; that he purported to witness blank signatures of the Defendants; that he received payments from the Plaintiff when he knew that his alleged clients were not in a position to effect the sale and transfer of the suit property in favour of the Plaintiff; that he failed to respond to correspondences from the Plaintiff's lawyers; that he had notice that the suit property did not belong to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that the 3<sup>rd</sup> Defendant knew or ought to have known that either one of the two Certificates of Incorporation in respect of Vros Produce Limited was a forgery.

32. Those, in my view, are serious allegations of fraud against an advocate of this court. These allegations should be responded to satisfactorily in view of the evidence on record showing that there are two companies purportedly in existence known as Vros Produce Limited, both of which are claiming to own the suit property.

33. The 3<sup>rd</sup> Defendant has to disclose to this court, and to the Plaintiff, who his client was. It is not true, at this stage, to say that the 3<sup>rd</sup> Defendant was an agent of a known principal or that the Vros Produce Limited that the 3<sup>rd</sup> Defendant represented is not a phantom. Those are issues which can only be

determined after the full hearing of the case.

34. The Plaintiff in the suit is not asking this court to enforce the impugned sale agreement. What the Plaintiff is seeking is a refund of the deposit of kshs. 2,050,000 which he alleges was paid to the 3<sup>rd</sup> Defendant as a deposit. It is for the 3<sup>rd</sup> Defendant to explain in his Defence to whom the said deposit was paid to and why the transaction fell through, if at all. Consequently, the provisions of section 3(3) of the Law of Contract Act which require that all agreements for the sale of land must be signed by all the parties and the signatures of each party signing attested by a witness before a suit can be filed for specific performance does not arise, at least at this stage.

35. It is only after a Defence been filed by the 3<sup>rd</sup> Defendant, in view of the allegations in the Plaint, that this court would be in a position to ascertain if the Plaintiff has a cause of action as against Applicant or not. Indeed, the Plaintiff can elect to either add or substitute parties to the suit after being served with Defences as provided for under Order 1 Rule 10 of the Civil Procedure Rules.

36. For the reasons I have given above I find and hold that the 3<sup>rd</sup> Defendant's Applications dated 3<sup>rd</sup> February, 2014 and 1<sup>st</sup> January 2014 in this matter and in Malindi HCCC. No. 24 of 2013 respectively are unmeritorious. I dismiss the two Applications with costs to the Plaintiffs in this matter and in Malindi HCCC No. 24 of 2013.

DATED AND DELIVERED AT MALINDI THIS 6<sup>th</sup> DAY OF **June**, 2014.

**O. A. Angote**

**Judge**