



Impact Properties Limited v Owiti & 2 others (Environment and Land Case Civil Suit 24 of 2013) [2024] KEELC 4329 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 24 OF 2013**

EK MAKORI, J

MAY 28, 2024

BETWEEN

IMPACT PROPERTIES LIMITED PLAINTIFF

AND

LUCAS OWITI 1ST DEFENDANT

CLEOPHAS NYAMETA 2ND DEFENDANT

LEO GOGO MTEPE 3RD DEFENDANT

RULING

1. This matter, pending in our Court system since 2013, is over 21 years old. This is not just a delay; it's an unacceptable delay that urgently needs to be addressed. This case must be concluded in one way or another. On 2nd November 2022, this Court, as I can see from the record, delivered a ruling which sought to have 3rd parties joined in these proceedings; this is what the Court said:

“The joinder of the two parties is at the behest of the Applicant, who requests that they be joined as Defendants/Interested Parties and that the parties amend their pleading to accommodate the joinder. In other words, the Applicant seeks to introduce new Defendants to the Plaintiff. That is not what Plaintiff desires. If the Applicant wanted to include those parties, he could have filed 3rd party proceedings. He is the only one who knows about their involvement in the sale transaction. Nothing has been presented to this court to show how those parties were involved. It's just assertions in the supporting affidavits with no evidence. In this case, just like in the Good News Church of Africa (supra), I agree with Justice Odeny that the new intended parties to be joined in this suit will, if admitted, further complicate it. They will be leaning as witnesses for the Applicant/ 3rd Defendant. I don't think they are fit for joinder. They will further cloud this protracted trial. We will go to the drawing board and reopen pleadings for a fresh start. Too much time seems to have been consumed



in addressing interlocutory applications since 2013, and the main suit remains docked – the sails have never been unfurled. It defeats expeditious disposal and active case management strategies and erodes the course of justice.

The upshot and my holding are that the application dated 21st of February is hereby dismissed with costs to the Respondent in any event.”

2. A new war front has been opened once again with an application dated 19th December 2023, seeking 3rd proceedings to be commenced by way of issuance of 3rd party notice under Order 1 Rule 24(2) of the Civil Procedure Rules. The parties whom the 3rd party proceedings are intended to be taken out are the 1st and 2nd Defendants, who the 3rd Defendant claims will be necessary to indemnify him as they acted through a firm called Vros Ltd during the sale transaction. Some monies were paid before the sale transaction in which the 3rd Defendant participated as a lawyer for the parties.
3. The 3rd Defendant alleges that the Plaintiff, who sued the 1st and 2nd Defendants alongside himself, has not requested judgment against them and that if the matter proceeds for trial as it is, the indemnity issue may not be well-ventilated.
4. The Plaintiff, in the grounds of opposition dated 12th February 2024, vehemently opposes the application as being devoid of merit, fatally defective as filed, seriously misconceived, frivolous, bad in law, and nothing other than utter abuse of the Court process. The Plaintiff argues that no reasons or grounds have been set out to warrant the exercise of the Court’s discretion in favour of the Applicant. And that the entire application should be dismissed.
5. The issues I frame for this Court’s determination are whether it will be germane to allow third-party notice taken out by the third defendant against the co-defendants—the second and third defendants—and who should bear the costs of the application.
6. In the filed submissions by the applicant, it is argued that the object of 3rd party proceedings is to avoid multiple suits and the same matter being litigated twice. See *Standard Securities Limited v Hubbard* [1967] Ch. 1056. 1059, under Order 1 Rule 24; the Court is urged to adopt the same procedure where a defendant is allowed to take out 3rd party notice against co-defendant(s). It is as if the same was issued against an ordinary 3rd party who was not already a defendant. The application seeks to achieve the goal that the 1st and 2nd defendants will be held to indemnify the 3rd defendant in this matter. The 3rd defendant further fortifies this position by stating that the 1st and 2nd defendants have never entered an appearance or filed a defence in this matter.
7. Conversely, the plaintiff submits that the application is unintelligible; it only poses questions that cannot be answered instead of seeking specific prayers as provided under Order 1 Rule 24 of the Civil Procedure Rules. The plaintiff argues that under Order 1 Rule 15- 21, a co-defendant cannot raise 3rd party notice as envisaged by the 3rd defendant. The plaintiff avers that it would be prejudicial if the Court allowed the application. The plaintiff cites the case of *Meka Sisal Development Ltd v The AG & 2 others* [2011] eKLR.
8. Order 1 Rule 15 (1) of the Civil Procedure Rules lays the rationale for a 3rd party notice and provides as follows:
 - (1) Where a defendant claims as 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 as some 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, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...”

9. Where a Defendant is claiming against a co-defendant, Order 1, Rule 24 of the [Civil Procedure Rules](#) provides:

- (1) Where a defendant desires to claim against another person who is already a party to the suit—
 - (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 action which is substantially the same as some 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 as some 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 the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.
- (2) No appearance to such notice shall be necessary, but there shall be adopted for the determination of such claim, question, or issue the same procedure as if such other person were a third party under this Order.
- (3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.”

10. In this matter, the 3rd Defendant wishes to take out 3rd party notice against the 1st and 2nd Defendants. He says that acting as a lawyer in the sale transaction, which led to the current suit, the 1st and 2nd Defendants had acted through a firm called Vros Ltd, and some money had been paid out before the sale agreement was executed and the entry of the 3rd Defendant acting as a lawyer for the parties’ subject of this suit. That money must be discounted by having the 1st and 2nd Defendant answer for it as proposed in the 3rd party notice.

11. Under Order 1 Rule 24 of the [Civil Procedure Rules](#)(supra), the procedure to adopt is that the 3rd Defendant may, without leave of the Court, issue and serve on such other person (1st and 2nd Defendants in this case) a notice making such claim or specifying such question or issue, that may be common for the trial hereof. The rule provides that no appearance to such notice shall be necessary. Still, the same procedure shall be adopted for the determination of such claim, question, or issue as if such other person were a 3rd party.



12. To that extent, this Court's leave to issue 3rd party notice against the 1st and 2nd Defendants will be unnecessary. They are already parties. The rule envisages that the issues the 3rd Defendant could have against the 1st and 2nd Defendant need to be framed and tried together with those involving the 3rd Defendant and the Plaintiff; in my view, indemnity will be one of them. Application dated 19th December 2023 is hereby dismissed with costs. The 3rd Defendant, as I have said, is to adopt the procedure envisaged under Order 1 Rule 24 of the *Civil Procedure Rules*.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY 2024. PURSUANT TO EARLIER DIRECTIONS BY THE COURT, THE PARTIES BE SUPPLIED WITH A SOFT COPY OF THE RULING VIA THEIR RESPECTIVE EMAILS.

E. K. MAKORI

JUDGE

