



**Basil & another v Safari Leisure Motels Limited & 5 others (Environment & Land Case 1 of 2024) [2024] KEELC 3710 (KLR) (Environment and Land) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3710 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 1 OF 2024**

**EK WABWOTO, J**

**MAY 9, 2024**

**[FORMERLY MOMBASA ELC NO. 229 OF 2020]**

**BETWEEN**

**SURJEET SINGH BASIL ..... 1<sup>ST</sup> PLAINTIFF**

**DR. SEEMA BASIL ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SAFARI LEISURE MOTELS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ELIUD MATU WAMAE ..... 2<sup>ND</sup> DEFENDANT**

**PATRICK WAMAE ..... 3<sup>RD</sup> DEFENDANT**

**KAMAU NJENDU ..... 4<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, MOMBASA ..... 5<sup>TH</sup> DEFENDANT**

**THE PUBLIC TRUSTEE (ADMINISTRATOR OF THE ESTATE OF ELIUD  
TIMOTHY MWAMUNGA) ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The 4<sup>th</sup> Defendant/Applicant seeks the following reliefs vide his application dated 20<sup>th</sup> July 2023:-
  1. That this Honourable Court be pleased to enlarge time to enable the Applicant seek leave to issue third party notice.
  2. That upon grant of prayer one above, the Honourable Court be pleased to grant leave to the Applicant to issue a Third Party Notice to M/s Safari Leisure Motels Limited and the Land Registrar, Mombasa.



3. That costs of this application be provided for.
2. The application is premised on the grounds made in support of the application and the supporting affidavit sworn on 7<sup>th</sup> August 2023 by Kamau Njendu. The 4<sup>th</sup> Defendant also filled written submissions dated 30<sup>th</sup> January 2024 in support of his application. It was averred that Safari Leisure Motels Limited is the registered proprietor of all that parcel of land known as LR No. 13909/12 (Original No. 13909/10/2) registered as LR No. 25140. It was averred that on or about March 1994, the 4<sup>th</sup> Defendant engaged in a contract with M/s Safari Motels Limited to inter alia design and supervise the proposed motel construction.
3. It was also averred that the settlement of the fee payable by the said Safari Leisure Motels Limited to the Applicant is the subject of ongoing arbitral proceedings pitting the Applicant and the proposed Third Party, Safari Motels Limited. It was contended that on 8<sup>th</sup> April 1999 and during the pendency of the said Arbitral proceedings the Applicant moved the Land Registrar, Mombasa for registration of a caveat against the suit parcel to secure his lien. It was averred that on 23<sup>rd</sup> September 2016 and during the pendency of the said caveat, the Plaintiff entered into a sale agreement with Safari Leisure Motels Limited and hence therefore the Applicant is seeking for indemnity from the said proposed Third Parties arising from the registration of the said caveat.
4. The application was opposed by the Plaintiffs. The Plaintiffs filed a Replying Affidavit sworn by Surjeet Singh Basil on 11<sup>th</sup> September 2023 and written submissions dated 13<sup>th</sup> March 2024. It was contended that the application for extension of time sought herein by the Applicant cannot be entertained under the *Civil Procedure Rules*. It was also contended that the withdrawal of the suit as against the 1<sup>st</sup> and 5<sup>th</sup> Defendants did not create a cause of action in favour of the 4<sup>th</sup> Defendant nor did it extinguish any cause of action the 4<sup>th</sup> Defendant may have had against them.
5. In respect to the prayer for leave to issue a Third Party Notice, it was contended that Order 1 rule 15 of the *Civil Procedure Rules* stipulates that the application ought to have been made within 14 days after the close of the pleadings and the 4<sup>th</sup> Defendant has not given any reasons for the delay.
6. It was also contended that there was no application for a caveat and that the same was registered fraudulently and illegally and further that if the 4<sup>th</sup> Defendant wishes to cross-examine the Land Registrar, he may call him as a witness without necessarily having to make him a Third Party.
7. Parties were also granted an opportunity to highlight their respective written submissions that had been filed. Learned Counsel Mr. Achoka appeared for the 4<sup>th</sup> Defendant/Applicant while Learned Counsel Mr. Kinyua made oral submissions on behalf of the Plaintiffs.
8. Learned Counsel Mr. Achoka submitted that the Applicant seeks leave to bring a Third Party Notice and it is only a Third Party who can object to such proceedings. He relied on the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR. Counsel also submitted that the pendency of arbitral proceedings does not bar them from bringing a Third Party to the suit. He urged the court to allow the application and grant the prayers sought.
9. Learned Counsel Kinyua submitted that the 4<sup>th</sup> Defendant/Applicant has not explained the delay and had not stated where he had been for over 30 years. He also reiterated that the application ought to have been made under the *Limitation of Actions Act*. He submitted that the Applicant and proposed Third Party Safari Leisure Motels Limited are engaged in arbitration proceedings and they cannot have simultaneous proceedings. It was also submitted that witness summons can be issued to the Land Registrar since there was no application made for registration of the caveat. He urged the court to dismiss the application.



10. This court having considered the application, rival affidavits and written submissions filed together with oral submissions made by Counsel for the parties has outlined the following issues for determination:-
  - i. Whether this court should enlarge time to enable 4<sup>th</sup> Defendant/Applicant seek leave to issue a Third Party Notice.
  - ii. Whether this court should issue a Third Party Notice to the intended Third Parties.
11. On the first issue, the Applicant seeks enlargement of time to enable him seek leave to issue Third Party Notice. The reasons offered for the same is that the proposed Third Parties ceased being parties to these proceedings upon the adoption of the consent on 6<sup>th</sup> June 2023. The Plaintiffs were opposed to the said enlargement of time for the reasons that no reasons have been offered for the delay and further that the application ought to have been brought under the provisions of the *Limitation of Actions Act*.
12. The 4<sup>th</sup> Defendant/Applicant seeks for enlargement of time to enable him seek leave to issue Third Party notice. His application is filed under the provisions of Sections 1A, 1B, 3A, 63(e) and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*. Section 95 of the *Civil Procedure Act* grants the court power to enlarge time for doing any act set under the *Civil Procedure Act* while Order 50 Rule 6 grants the court powers to enlarge time for doing any action set under the *Civil Procedure Rules*.
13. Order 50 Rule 6 on the court's power to enlarge time stipulates 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.”
14. The application before court was filed under the provisions of Order 1 Rules 15 and 16 which relates to Third Party proceedings. Considering the said provisions, it is evident that Order 50 Rule 6 of the *Civil Procedure Rules* grants the court powers to enlarge time for any act or proceedings provided for under the Rules as justice of the case may require.
15. As to whether or not the same ought to have been filed under the provisions of the *Limitation of Actions Act* Cap.22 as was submitted by the Plaintiffs, it is worth noting that in this matter there was already a suit that had been filed which suit is still pending. The suit herein was filed by the Plaintiffs and what the 4<sup>th</sup> Defendant seeks is a procedural application for leave to issue a Third Party notice to the proposed Third Parties within the same suit. In view of the foregoing, this court is of the view that, the said procedure is properly provided for under the provisions of Order 1, Rule 15 and 16 upon a party can invoke the provisions of Order 50 rule 6 while seeking for enlargement of time.
16. Having addressed myself to the above mentioned provisions, this court now ought to consider whether it can enlarge time to enable the 4<sup>th</sup> Defendant seek leave to issue Third Party Notice.



17. The applicable law for enlargement of time in respect to court proceedings is Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure rules*.

Section 95 provides that: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion, from time enlarge such period even though the period originally fixed or granted may have expired.”

18. Extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court and whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis. Further where there is a reasonable basis for the delay, the delay should be explained to the satisfaction of the court.
19. The 4<sup>th</sup> Defendant in support of his application has argued that the proposed Third Parties were initially parties to the suit but they ceased being so on 6<sup>th</sup> June 2023 pursuant to a consent that was adopted by this court which consent was between the Plaintiffs and the proposed Third Parties. The court has indeed perused the said consent filed on 6<sup>th</sup> June 2023 and it is evident that the 4<sup>th</sup> defendant was not a party to the same. In the circumstances this court is satisfied with the reasons advanced by the 4<sup>th</sup> Defendant and shall proceed to enlarge time to enable the Applicant seek leave to issue a Third Party Notice.
20. On the second issue as to whether this court should grant leave to the Applicant to issue a Third party Notice to the proposed Third Parties. Order 1 Rule 15 (1) of the *Civil Procedure Rules* stipulates that:

- “(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...”

21. The above provision implies that for a Defendant to apply for leave to issue a Third Party notice, it is important to show 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, thus should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff, the Defendant and the Third Party or between any or either of them.



22. In the instant case, the Plaintiffs seeks for general, punitive and aggravated damages against the 4<sup>th</sup> defendant for maintaining his caveat against the suit premises and refusing to remove it. On the other hand, the 4<sup>th</sup> Defendant/Applicant has maintained that the Plaintiffs entered into a sale agreement on 23<sup>rd</sup> September 2016 during the pendency of the said caveat with Safari Leisure Motels Limited and further that the Land Registrar Mombasa is in possession of all such information which informed him to exercise his discretion and register the said caveat. The Plaintiffs has also argued that there is no application that was made prior to the registration of the said caveat and that the same was fraudulently and illegally registered. Based on the foregoing, this court is persuaded that there is a triable issue between the 4<sup>th</sup> Defendant and the intended Third Parties on the aspect of the registration and existence of the said caveat.
23. It is therefore conclusive that the Third Party Notices should issue against the intended Third Parties, Safari Leisure Motels Limited and The Land Registrar, Mombasa to enable the court determine on whether the Third Parties should indemnify the 4<sup>th</sup> Defendant in respect to the Plaintiffs claim.
24. In the end, the 4<sup>th</sup> Defendants application dated 20<sup>th</sup> July 2023 is merited and the same is allowed in the following terms:-
- i. Time be and is hereby extended to enable 4<sup>th</sup> Defendant seek leave to issue Third Party Notice.
  - ii. Leave is hereby granted to the 4<sup>th</sup> Defendant to issue a Third Party Notice to Safari Leisure Motels Limited and Land Registrar, Mombasa.
  - iii. The Third Parties shall be served with all the pleadings for them to file and serve their responses within the next 21 days.
  - iv. Each party to bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

N/A for the Plaintiffs.

Mr. Achoka for 4<sup>th</sup> Defendant/Applicant.

Court Assistant; Mary Ngoira.

