



REPUBLIC OF KENYA



KENYA LAW
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**Nderitu v Leonard Shimaka t/a Marende Necheza & Company Advocates;
Odhiambo & another (Intended Third Parties) (Environment & Land
Case E047 of 2023) [2024] KEELC 5291 (KLR) (17 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E047 OF 2023**

**SM KIBUNJA, J
JULY 17, 2024**

BETWEEN

JOSHUA MAINA NDERITU PLAINTIFF

AND

**LEONARD SHIMAKA T/A MARENDE NECHEZA & COMPANY
ADVOCATES DEFENDANT**

AND

**DOUGLAS ODHIAMBO INTENDED THIRD PARTY
MUTHOGA GATURU & COMPANY ADVOCATES INTENDED THIRD
PARTY**

RULING

Defendant's Notice of Motion and Preliminary Objection Dated 12th July 2023

1. Before this court is a notice of motion dated 12th July 2023 by the defendant seeking for the following orders:
 1. "That this Honourable Court be pleased to grant leave to the Defendant herein to issue and serve a Third Party Notice upon Douglas Odhiambo and Muthoga Gaturu & Co. Advocates.
 2. That the Honourable Court be pleased to issue any other order it may deem fit in the circumstance.
 3. That costs of this application be provided for."

The said application is supported by the seven [7] grounds on its face and supported by the affidavit of Leonard N. Shimaka, the defendant, sworn on 12th July 2023, *inter alia* deposing that he seeks



- indemnity against the intended third parties as he was only acting as an advocate on behalf of the 1st intended third party, (vendor), while the agreement for sale was drawn and executed jointly and severally by the third parties.
2. The defendant also filed a notice of preliminary objection dated 12th July 2023 raising four grounds as follows:
 1. ‘That the plaintiff’s suit is misconceived, a nullity and an abuse of the court process.
 2. That granting the orders sought by the Plaintiff will totally prejudice the defendant whose function were that of an advocate acting on behalf of the vendor as is requirement of Law under section 34 of the Advocate Act Cap 16 Laws of Kenya.
 3. That the orders sought should not be granted as they are in breach of the Constitutional rights of the Defendant.
 4. That the plaintiff’s action are malicious, scandalous and is a total breach and abuse of the court process as the property in question is registered in their names.’”
 3. On the 25th October 2023, the plaintiff filed the statement of grounds of opposition dated 26th October 2022, [sic] raising three grounds summarized as follows:
 - a. That the application to join the 2nd intended third party is misconceived and an abuse of court process it was not at any material date a party to the sale transaction of the subject matter;
 - b. That the plaintiffs suit is a claim based on breach of the professional obligation as counsel acting for the 1st intended third party by releasing purchase amount without the knowledge and approval or consent of the plaintiff, and hence under no circumstance can he seek indemnity against the 2nd intended third party who only represented the plaintiff.
 - c. That the application is bad in law, ill-conceived and ought to be dismissed with costs.
 4. The plaintiff also filed a replying affidavit sworn by the himself dated 23rd January 2024 where he inter alia deposed that the instant application is a waste of judicial time as the firm of Muthoga Gaturu & Co. Advocates were not parties to the suit, but were only acting as his advocates as a purchaser; that the cause of action arose as a result of the defendant releasing the purchase price without his approval, or even notifying the plaintiff’s advocates; that the sale agreement had clear clauses stating that the funds are to be held until successful registration of the property in the plaintiff’s name; that his advocates issued a notice of rescission, and a recall of Kshs. 9,600,000 as deposit paid, and that the instant application is aimed at frustrating the progress of the suit.
 5. On the 27th July 2023, the court directed the defendant’s application and preliminary objection to be canvassed together through submissions to be filed and exchanged with the timelines given. Extension of timelines was granted upon application by counsel on the 26th October 2023 and the 19th February 2024.
 6. The learned counsel for the defendant filed their submissions dated 8th August 2023 and 22nd February 2024, while that for the plaintiff filed theirs dated the 17th February 2024 and 26th April 2024, which the court has considered.
 7. The issues for the court’s determinations are as follows:
 - a. Whether the notice of preliminary objection dated 12th July 2023 has merit?
 - b. Whether the notice of motion dated 12th July 2023 has merit?



- c. Who pays the costs in the suit?
8. The court has after considering the grounds on the notice of motion grounds of opposition, notice of preliminary objection, affidavit evidence by the parties, submissions by learned counsel, superior courts decisions cited thereon come to the following determinations:
- a. It is important for the court to deal with the notice of preliminary objection first. What constitutes a preliminary objection was defined in the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 as follows:

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised, if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

The point of law that the defendant has raised is that the plaintiff's suit is misconceived, prejudicial and an abuse of the court process because he has been sued, for acting in the interest of his client as he is obligated to do under section 34 of the [Advocates Act](#) chapter 16 of Laws of Kenya.

- b. Section 34 of the [Advocates Act](#) states as follows:

- “(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—
- (a) relating to the conveyancing of property; or
 - (b) for, or in relation to, the formation of any limited liability company, whether private or public; or
 - (c) for, or in relation to, an agreement of partnership or the dissolution thereof; or
 - (d) for the purpose of filing or opposing a grant of probate or letters of administration; or
 - (e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or
 - (f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or



for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to—

- (i) any public officer drawing or preparing documents or instruments in the course of his duty; or
 - (ii) any person employed by an advocate and acting within the scope of that employment; or
 - (iii) any person employed merely to engross any document or instrument.
- (2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.
- (3) Any person who contravenes subsection (1) shall be guilty of an offence.
- (4) This section shall not apply to—
- (a) a will or other testamentary instrument; or
 - (b) a transfer of stock or shares containing no trust or limitation thereof.”

There is nothing in the plaintiff’s pleadings to suggest that the defendant was unqualified when he acted or transacted in the matter giving rise to this suit. The counsel for the defendant has submitted that the defendant’s participation was limited to attestation of the sale agreement and transfer. That does not address the concerns raised by the plaintiff in his pleadings about the Kshs. 9,600,000 deposit, and its release. The above provision of the statute therefore, bears no relevance in this suit, and the preliminary objection premised on it fails.

- c. Going to the defendant’s joinder application dated the 12th July 2023 as amended on the 12th February 2024, it relates to third-party notice that is regulated under Order



1 rule 15 of the *Civil Procedure Rules* which states 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.”

In the case of *Oceanfreight (EA) Ltd vs Technomatic Ltd & Another* [2010] eKLR, the Court held that;

“It is, in my opinion professionally expedient that the defendant should seek to enjoin the applicant herein, as a third party. This is because of the perceived connection between the applicant’s role in the said contract



and the
cause of
action.”

And, in the case of
*Kenya Commercial
Bank vs Suntra
Investment Bank
Ltd* (2015) eKLR,
the Court held
that;

“In law,
a third
party is
enjoined
in a suit
at the
instance
of the
Defendant
and
through
the set
procedure
under
Order 1
rule 15
– 22
of the
Civil
Procedure
Rules.
And,
liability
between
the
Defendant
and the
third
party is
determined
between
the
Defendant
and the
third
party,
but of



course,
after the
court is
satisfied
that
there is
a proper
question
to be
tried as
to
liability
of the
third
party
and the
Defendant,
and has
given
directions
under
Order 1
rule 22
of the
Civil
Procedure
Rules.”

- (d) The nexus between the defendant and the intended 1st intended third party is that he represented him during the conveyance process, which is in a way in issue herein. I find it is only logical that the 1st intended third party should be joined in the suit.
- (e) In regards to the 2nd intended third party, the defendant has



claimed *inter alia* that he only attested the agreement for sale, while it is the 2nd intended third party who drew and executed the agreement [deed of variation], and the transfer. The copies of the said documents are annexed to the supporting affidavit and appear as deposed by the defendant. The court is of the opinion that the 2nd intended third party's participation in this suit is necessary in enabling a just, fair, effectual and expeditious determination of the suit, as between all parties.

- (f) According to Section 27 of the [Civil Procedure Act](#) Chapter 21 of Laws of Kenya, the costs always follow the event unless where there is a good reason to depart from the general rule. In the circumstances of this suit, I am of the considered view that justice will better be served, by an order



that the costs in the application abide the outcome of the suit.

9. Flowing from the foregoing, the court finds and orders as follows:

- a. That the defendant's notice of preliminary objection dated 12th July 2023 is without merit and hereby dismissed.
- b. That the defendant's notice of motion dated 12th July 2023, has merit and consequently allowed in terms of prayer (1) only, and the 1st and 2nd intended third parties are hereby joined as the 1st and 2nd third parties respectively.
- c. The costs in the preliminary objection and application to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JULY 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In the presence of:

Plaintiff: M/s Ondimu for Mugambi

Defendant : M/s Kyalo

Third Parties : No appearance

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

