

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(Land Division)

MISCELLANEOUS APPLICATION NO. 1236 OF 2014

(Arising from Civil Suit No. 543 of 2014)

LASTO BOSCO MAYANJA
APPLICANT

VERSUS

LUGYA RONALD
RESPONDENT

BEFORE: Hon. Lady Justice Monica K. Mugenyi

RULING

The applicant, Mr. Lasto Mayanja, seeks the issuance of a third party notice to the respondent in respect of **Civil Suit No. 543 of 2014**. The plaintiff in that case lays claim to a *kibanja* that was purportedly sold to the Applicant by the Respondent. The applicant now seeks indemnification from the respondent for representing himself as the owner of the *kibanja* in dispute, which claim is in issue in the substantive suit in reference above. The application is premised on Order 1 rule 14(1) and (2) of the Civil Procedure Rules (CPR), and supported by an affidavit deposed by the applicant dated 10th October 2014.

For ease of reference, Order 1 rule 14(1) and (2) of the CPR is reproduced below:

- (1) Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the suit, he or she may, by leave of the court, issue a notice (hereafter called a “third party notice”) to that effect.**
- (2) The leave shall be applied for by summons in chambers ex parte supported by affidavit.**

Mr. Edwin Busuulwa, who represented the applicant at the hearing of this application, did also cite the case of **NBS Television Ltd. Vs. Uganda Broadcasting Corporation Misc. Application No. 421 of 2012** in support of his argument that a third party may be lawfully joined to a suit where the subject matter between the plaintiff and the defendant, on the one hand, and that between the plaintiff and the defendant is one and the same.

I have carefully considered the applicant's averments in this matter, as well as pleadings in respect of **Civil Suit No. 543 of 2014**, from which this Application arises. Paragraph 3(b) of the plaint in issue reads:

“The Plaintiffs’ claim against the Defendant is for i) a declaration that a plot of land 46 ft by 97 ft at Kiruddu adjacent to the plot of deceased George William Mukasa Bossa is the property of the Estate of the said deceased; ii) an order of eviction against the Defendant; iii) damages for trespass; iv) interest and v) costs, and arose as follows:

b) 3 years after the deceased Bossa’s death ie in 2000 his customary heir, (Ronald Luggya) then 19 years old, entered into a sale agreement with the defendant unknown to any other member of the Bossa family, not even to his widow, the said Nakku Reste, although her signature was forged and put on the purported sale agreement dated 30.03.2000 (a copy of the said agreement is annexed marked B).”

Paragraphs 4 and 6 of the applicant's affidavit in support of the application read:

“4. THAT throughout the transaction, the said Luggya Ronald represented to me that he is the owner of the kibanja with power to sell the same which fact was confirmed by his sister (the second Plaintiff) and their mother who witnessed the sale agreement. A copy of the sale agreement is attached as annexure “A”.

*5. THAT I have been served with Summons and a Plaint by the Plaintiffs in **Civil Suit No. 543 of 2014: Lumu Mike & Nakiguli Nevis Mukasa vs. Lasto Bosco Mayanja** contending that the Respondent had no*

authority to sell the suit kibanja and that the sale was illegal. A copy of the Plaintiff is attached as annexure “C”.”

Quite clearly, Order 1 rule 14(1) and (2) of the CPR is confined to cases where a defendant claims indemnity or contribution from a third party that would otherwise be a stranger to the suit. It is trite law that for a third party to be legally joined to a suit, the subject matter as between the defendant and the third party must be the same as that between the defendant and the plaintiff, and similarly the cause of action between the defendant and third party must be the same as the original cause of action. See **NBS Television Ltd. Vs. Uganda Broadcasting Corporation** (supra) and **Yafesi Walusimbi vs. Attorney General of Uganda (1959) 1 EA 223 at 225**. In **Yafesi Walusimbi vs. Attorney General of Uganda** (supra), where the plaintiff’s cause of action was found to have been premised in negligence while the defendant’s cause of action against the third party was rooted in fraud, the third party notices were cancelled.

In the instant case, the plaintiffs’ case is rooted in trespass by the defendant onto the suit land pursuant to an allegedly unauthorised and illegal sale transaction he executed with a beneficiary of an Estate that includes the disputed land. On the other hand, the defendant’s claim for indemnification by the third party appears to be premised on misrepresentation in the sale transaction in respect of the suit land. Although they pertain to the same subject matter, I find these to be two distinct causes of actions.

Furthermore, it seems to me that an applicant for third party notice would be required to establish his/ her right to indemnity or contribution. In the instant case, the applicant’s application is premised on a claim in indemnity and not contribution. Nonetheless, for completion, I shall briefly address the concept of contribution in third party proceedings. When two or more people are jointly liable for the same tort and a plaintiff claiming thereunder seeks to make good his injury from one of them as defendant, the said defendant may seek contribution from other tortfeasor(s). See **Oxford Dictionary of Law, Oxford University Press, Seventh Edition, p.132**. I find a claim for contribution inapplicable to the present circumstances as the defendant and third party are not jointly liable in trespass herein.

On the other hand, the right to indemnity is well articulated in the following authorities. In Eastern Shipping Co. Vs. Quah Beng Kee (1924) AC 177 at 182 it was held:

“A right to indemnity generally arises from contract express or implied, but is not confined to cases of contract. A right to indemnity exists where the relationship between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. ... These considerations were all dealt with by the Lords Justices in Birmingham and District Land Co. Vs. London and North Western Ry Co.”

In Birmingham and District Land Co. Vs. London and North Western Railway Co. (1887) 34 Ch. D 261 at 271, Cotton LJ had clarified:

“Of course if A requests B to do a thing for him, and B in consequence of doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A to indemnify B from the consequence of his doing it. In that case there is not an express but an implied contract to indemnify the party for doing what he does at the request of the other.”

In the same case (Birmingham supra), Bowen LJ drew a distinction between the right to indemnity as against the right to damages in the following terms:

“A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties.”

The foregoing decisions were applied in Edward Kironde Kaggwa vs. L. Costaperaria & Another (1963) 1 EA 213. In that case, the plaintiff sued the defendant for damages arising from the latter’s trespass on his land, in the course of which he removed some soil therefrom. The defendant sought indemnification from a third party who had allegedly given him a license to enter onto the land and remove the soil. It was held that the defendant could establish a claim against the third party for damages for breach of contract or misrepresentation but not indemnity.

Similarly, in the instant case I find nothing in the sale agreement between the two parties that would denote an express or implied obligation to indemnify the Applicant. In my considered view, there is no legal or equitable basis for a finding that the misrepresentation by the Respondent created upon him an obligation to indemnify the Applicant for any liability that could arise therefrom. On the contrary, the need for due diligence and inquiry prior to any dealings in land has been duly recognised as an integral process in land transactions. See **Kampala Land Board & Another vs. Venansio Babweyaka & Others Civil Appeal No. 2 of 2007 (SC)**. In my judgment, therefore, misrepresentation *per se* would not entitle the applicant to a right to indemnity as against the Respondent, but rather establishes a claim for damages against the proposed third party.

In the result, I would dismiss this application with no order as to costs.

I so order.

Monica K. Mugenyi
JUDGE

10th March, 2015