



**Kalu (As the Legal Representative of the Estate of Jumwa Tinga Kalu alias Jumwa Thinga Kalu) v Auma & 4 others; Omwenga & another (Third party) (Environment & Land Case 256 of 2018) [2023] KEELC 22003 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22003 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 256 OF 2018**  
**SM KIBUNJA, J**  
**DECEMBER 6, 2023**

**BETWEEN**

**FRANSCISCA THINGA KALU (AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JUMWA TINGA KALU ALIAS JUMWA THINGA KALU) ..... PLAINTIFF**

**AND**

**MORIN LEAH AKETCH AUMA ..... 1<sup>ST</sup> DEFENDANT**  
**MICHAEL ARINA KNIGHT ..... 2<sup>ND</sup> DEFENDANT**  
**N. J MAGIYA ADVOCATE ..... 3<sup>RD</sup> DEFENDANT**  
**REGISTRAR OF LANDS, MOMBASA ..... 4<sup>TH</sup> DEFENDANT**  
**THE HONOURABLE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**PETER OMWENGA ADVOCATE ..... THIRD PARTY**  
**FRANCIS KADIMA ..... THIRD PARTY**

*(1st Defendant’s Chamber Summons dated the 21st July 2023 for Third Party Directions and 3rd Defendant’s Notice of Motion dated the 18th December 2018)*

**RULING**

1. The 1<sup>st</sup> defendant moved the court through the chamber summons dated 21<sup>st</sup> July 2023 seeking the following prayers:



- a. That the Third-Party Notice dated 7<sup>th</sup> March 2023 served by the First Defendant on the Third Parties be taken as the Defendant's statement of claim against the Third Parties.
- b. That the Third Party's defence be filed and treated as the Third-party defence to the Defendant's claim.
- c. That the Third Party be at liberty to appear at the trial of this action and take such part as this Honourable Court shall direct and be bound by the result of the trial.
- d. That the question of liability of the Third Party to indemnify the defendant be determined at the trial of this action.
- e. That the costs of this application be cost in the cause and in third party proceedings.

The application is supported by the affidavit of Morin Leah Aketch Auma, the 1<sup>st</sup> defendant, sworn on the 21<sup>st</sup> July 2023 in which she inter alia deposed that the subject matter in this suit was land parcel L. R. No. 5136/Section 111/MN, suit property; that the conveyance documents for the suit property including the agreements for sale and transfer were drawn by Peter M. Omwenga, 1<sup>st</sup> Third Party, who was also her advocate; that Francis Kadima, 2<sup>nd</sup> Third party, was the advocate for the plaintiff; that the 1<sup>st</sup> third party remitted the purchase price to the 2<sup>nd</sup> third party; that the transfer of the suit property, including the registration of the property in the name of the 2<sup>nd</sup> defendant was exclusively handled by 1<sup>st</sup> third party; that it is important for the said third parties to be joined in the suit to enable the issues raised to be fully determined.

2. In his response, the 1<sup>st</sup> third party opposed the application through the grounds of opposition dated 4<sup>th</sup> August 2023, inter alia that the claim between the 1<sup>st</sup> defendant and himself is purely of professional negligence while that between the plaintiff and 1<sup>st</sup> defendant is about fraud and illegality over the suit property transactions; that the application is time barred as the event leading to the suit was concluded over seven years prior to the filing of this suit; that the 1<sup>st</sup> defendant's claim against him is not one of those set out under Order 1 Rule 15 of the Civil Procedure Rules.
3. The court gave directions on the 20<sup>th</sup> September 2023 for the parties to file their submissions. The learned counsel for the 1<sup>st</sup> defendant and 1<sup>st</sup> third party filed their submissions dated the 27<sup>th</sup> October 2023 and 30<sup>th</sup> October 2023 respectively, which the court has considered. Briefly, the Counsel for the 1<sup>st</sup> defendant submitted the 1<sup>st</sup> and 2<sup>nd</sup> third party conducted the whole conveyancing transaction and all proceeds of sale were remitted through the 1<sup>st</sup> third party, who acted as advocate for the 1<sup>st</sup> defendant, to the 2<sup>nd</sup> third party, who acted as advocate for the plaintiff. That the 1<sup>st</sup> defendant's claim against the third parties is not for professional negligence but rather for their role in the conveyancing transactions over the suit property, which is the subject matter in the main suit as they are in a better position to help this court determine the issues of fraud. Inversely, the learned counsel for the 1<sup>st</sup> third party inter alia submitted that the claim between the 1<sup>st</sup> defendant and the third party is for professional negligence as could be read from paragraph (a) to (c) of the Third-party notice. The counsel relied on the decision in the case of Yafesi Walusumbi versus The Attorney General of Uganda (1959) EA 223 where Lyon J. held:

“In order that a third party be lawfully joined, the subject matter between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same. As the plaintiff was suing the defendant for negligence, the third-party notices alleging fraud should be set aside”.



Counsel for the 1<sup>st</sup> third party also quoted section 4 (1) of the Limitations of Actions Act chapter 22 of Laws of Kenya which provides that actions on contract may not be brought after the end of six years from the date on which the cause of action accrued. They calculated the latest date for instituting a third-party notice was not later than 17<sup>th</sup> June 2021.

4. The following are the issues for the determinations by the court:
  - a. Whether the application is time barred.
  - b. Whether the 1<sup>st</sup> defendant's claim against the 1<sup>st</sup> third party meet the requirements of Order 1 Rule 22 of the Civil Procedure Rules.
  - c. Who pays the costs of the application?
5. The court has carefully considered the application, affidavit evidence, grounds of opposition, submissions by the two learned counsel, the pleadings in this suit and come to the following findings:
  - a. This application emanates from the main suit revolving transactions over land parcel L.R. No. 5136 Section III Mainland North measuring 0.9809 ha or 2.43 acres thereabout and situated in Mtwapa, Kilifi County (hereafter known as the suit property). In the amended plaint dated 7<sup>th</sup> February 2022 the current plaintiff has sued as the legal representative of the previous plaintiff; Jumwa Tinga Kalu (deceased) who according to the titles submitted was the original registered owner of the suit property.
  - b. The 1<sup>st</sup> third party has objected to the joinder application primarily on two grounds. Firstly, that the cause of action between the plaintiff and defendants in the suit is not related to the claim the 1<sup>st</sup> defendant is raising against the third parties, and secondly that the 1<sup>st</sup> defendant claim against him is time barred. From what is apparent from the 1<sup>st</sup> defendant's application and her learned counsel's submissions, the reasons of seeking to join the third parties is because of the role they prayed in drawing and processing the conveyancing documents over the suit property, and the payment of the purchase price on behalf of their respective clients. The claim is not plainly professional negligence as the 1<sup>st</sup> third party has stated. In the case of *Champion Motor Spares v Phadke* (1969) EA 42, at page 47, Duffus Ag V-P (as he then was) had this to say on professional negligence:

“The extent of an advocate's liability to his client for negligence has been considered at various times by this Court. I would refer to the case of *Stephens & Co. v. Allen* (1918), 7 E.A.L.R. 197. This case went to the Privy Council (1921), 8 E.A.L.R. 211. The following extract from the judgment of the Privy Council is of some assistance:

‘The question of negligence with regard to the performance of a solicitor's duty must to some extent be affected by the local conditions and the local circumstances, as to which their Lordships might not be perfectly informed. In the present case the negligence is alleged to be due to the ignorance of the provisions of an Act of Parliament. It may well be that in Nairobi this Act of Parliament has practically never been heard of in judicial proceedings; it is impossible for their Lordships to know; but the question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute that is involved is one which is of constant and common occurrence in practice or whether it is one unfamiliar and remote. With those circumstances their Lordships are unable to deal’.



Russell, J., in his judgment on appeal considered this question very fully and with respect has, in my view, correctly set out the degree of care required by an advocate practicing in Uganda. He quoted from the following passage from the judgment of Lord Denning, in the recent English decision of *Rondel v. Worsley*, [1967] 3 All E.R. 993.

‘Finally, it must be remembered that counsel is not liable in negligence merely because he expresses an opinion which ultimately turns out to be wrong nor merely because he overlooks one of a number of relevant authorities. Further, in spite of the expression of Lyneskey, J., in *Pentecost v. London District Auditor*, [1951] 2 All E.R. 330 that so far as civil proceedings are concerned gross negligence is not known to the English Common Law, I remain of the opinion that counsel will only be guilty of *crassa negligentia* or gross negligence by some really elementary blunder, see *Purves v. Landell* (1845), 12 Cl. & Fin. 91’.

I agree with Russell, J., that the liability of an advocate to his client for negligence in performing his professional duties must generally arise from some really elementary mistake and not be an error of judgment on some complicated point or one of doubtful construction. Each case must depend on its own particular facts, and as Scrutton, L.J., said in *Fletcher & Son v. Jubb Booth & Helliwell*, [1920] 1 K.B. 275 at p. 280:

‘And moreover, I accept the opinion of Tindal, C.J., in *Godefroy v. Dalton*, 6 Bing. 460, that it would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed’.

- c. Paragraphs 11 to the 17 of the amended plaint contains the plaintiff’s averments on the extents of the 1<sup>st</sup> and 2<sup>nd</sup> defendants dealings with the initial plaintiff, hereinafter referred to as the deceased, with the suit property. Paragraph 18 of the same plaint details how the plaintiff discovered the suit property had been sold to the 1<sup>st</sup> defendant, the consequent arrest and criminal prosecution of the 1<sup>st</sup> defendant in a case that is said to be still pending. The averments in paragraphs 19 to 30 of the plaint shows that the plaintiff is disowning the documentations and processes used to transact over the ownership of the suit property. That as it has not been disputed that the third parties are the ones who acted for the parties involved in the said transactions, then their joinder in this proceeding is necessary. The 1<sup>st</sup> defendant’s application to join the 1<sup>st</sup> third party, who was the advocate who acted for her in the process of transferring the suit property from the deceased to the 1<sup>st</sup> defendant, and from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant, has merit. So far only the 1<sup>st</sup> third party has entered appearance through counsel.
- d. The suit by the plaintiff against the defendants commenced through the plaint dated the 29<sup>th</sup> October 2018 as amended on the 7<sup>th</sup> February 2022 and is grounded on fraud and illegality as particularized at paragraphs 22 and 28 thereof. Order 15 Rule 1 of the Civil Procedure Rules provides as follows:

“ 15.



- (1) where a defendant claims as against any other person not already a party to the suit (hereinafter called third party)-
  - I. that he is entitled to contribution or indemnity; or
  - II. 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 claimed by the plaintiff; or
  - III. 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.”

That having found that the plaintiff's claim against the defendants is based on fraud and illegality that includes the impugned documentations used in the transactions over the suit property from the deceased to 1<sup>st</sup> defendant and then 2<sup>nd</sup> defendant, which documents or some of the documents were drawn and processed by the third parties herein, then the court finds that 1<sup>st</sup> defendant claim against the third parties is substantially connected to the issues raised for determinations between the plaintiff and defendants.

- e. The second ground raised by the 1<sup>st</sup> third party is that the 1<sup>st</sup> defendant's claim of professional negligence is statute time barred under section 4 of the Limitation Act chapter 22 of Laws of Kenya. That actions based on contracts are supposed to be raised within six years and the 1<sup>st</sup> defendant's claim should have been instituted by 17<sup>th</sup> June 2021. I notice the 2<sup>nd</sup> third party has not objected to the notice. The court has also made a finding that the 1<sup>st</sup> defendant's claim against the third parties is not just professional negligence but goes to the same issues raised in the main suit. It is also important to note that the 1<sup>st</sup> defendant had earlier filed the notice of motion application dated the 7<sup>th</sup> March 2023 seeking for leave to issue third party notices to the 1<sup>st</sup> and 2<sup>nd</sup> third party out of time. That application was allowed on the 14<sup>th</sup> March 2023. Accordingly, the 1<sup>st</sup> third party objection on limitation based on the six years cupping for claims based on contracts fails.

- f. That Order 1 Rule 22 of the Civil Procedure Rules provides that:

“If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case



may require to be entered in favour of the defendant giving the notice against the third party.”

The decision in the case of *Courtney- Evans and Another v. Stuart Passey & Associates* [1986] 1 ALL E.R. 932, makes it clear at page 933 that while the defendant’s obligation is to merely make a prima facie case for third party notice, “it will be for the plaintiff or the third party to show some special circumstances why the directions should not be given”.

And in the case of *Bhundia Properties Ltd v East African Airways Corporation* [1976] eKLR it was held as follows:

“I am clear that an application for third-party directions may be made and the court may give third-party directions even after judgment has been entered against the defendant in the suit. If the Court is satisfied that there is a proper question to be tried as to the liability of the third party to make the contribution or indemnity claimed, it cannot refuse the defendant an order for third-party directions on the ground that judgment has already been entered against the defendant, as counsel for the third-party seemed to suggest should be done in this case; that would be manifestly unjust. However, in deciding what form the directions should take the Court must carefully take into account the interests of both the defendant and the third-party and any other party and avoid injustice or prejudice being suffered by any of them. In giving or refusing directions, care should be taken that the plaintiff is not unduly embarrassed or put to additional expense or difficulty, for he has nothing to do with the questions which have arisen between the defendant and the third-party (see 1 Supreme Court Practice 1967, page 206). The powers of the court are admirably stated in 30 Halsbury’s Laws of England (3rd Edn) page 447, paragraph 847, as follows:

If there is a question or issue proper to be tried as between the plaintiff and the defendant and the third party, or between any or either of them, as to the liability of the defendant to the plaintiff, or as to the liability of the third party to make any contribution or indemnity claimed, in whole or in part, or as to any other relief or remedy claimed in the notice by the defendant, or that a question or issue stated in the notice should be determined not only as between the plaintiff and the defendant but as between the plaintiff, the defendant and the third-party or any or either of them order such question or issue to be tried in such manner as the Court or judge may direct.

On the other hand, if the Court is satisfied that there is no proper question to be tried as to the liability of the third-party to make the contribution or indemnity claimed, in my opinion the Court instead of giving any other directions may order such judgment as the nature of the case requires to be entered in favour of the defendant giving the notice against the third party. It is not requisite that the third-party directions must come before the Court can enter judgment; the Court may deal with the situation in either of the two ways visualised in order 1, Rule 18, without such directions having been given. In this sense, the provisions of order 1, Rule 18, are akin in effect to the provisions of order XXXV, Rule I, which empowers the Court to enter summary judgment against a defendant on being satisfied that there are no triable issues between the plaintiff and defendant. Order I, rule 18, is the counterpart of the provisions contained in order XXXV, Rule I; in both cases the Court is empowered to decide whether there are any triable issues between the parties; if not, to enter judgment as the nature of the case



may require. Once a third-party notice is issued the defendant assumes the role of a plaintiff against the third-party who is turned into a defendant, and all normal consequences follow.

If a third-party is unable to satisfy the Court that there is a proper question to be tried as to the liability of the third-party to make the contribution or the indemnity claimed, in whole or in part, I think that the Court must order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third-party. This procedure is not to be taken lightly because it is intended to bring about a quick finish to litigation which is in the interest of the society generally.

Some litigants and their counsels do not seem to realise that it is the inescapable duty of the court to enter judgment for the plaintiff if a triable issue is not produced when contesting an application for summary judgment under order XXXV, Rule I, or if no proper question is shown to exist, at least prima facie, to be tried as to the liability of the third-party to make the contribution or indemnity claimed, when contesting an application for directions under order I, Rule 18.”

I am in full agreement with the position restated in the above two superior courts decisions. I find that the two third parties and the 3<sup>rd</sup> defendant are necessary parties in bringing out the real issues in the main suit, as between the plaintiff and defendants and 1<sup>st</sup> defendant and the third parties and or any one of them. The 1<sup>st</sup> defendant’s application therefore has merit.

- g. I have seen a notice of motion application by the 3<sup>rd</sup> defendant dated the 18<sup>th</sup> December 2018 seeking for inter alia that the 3<sup>rd</sup> defendant be struck out from the proceedings. That application is opposed by the plaintiff through the grounds of opposition dated the 14<sup>th</sup> February 2019. The 3<sup>rd</sup> defendant filed their submissions dated the 24<sup>th</sup> October 2019. I have noted from the record that Mr. Gitonga for the 3<sup>rd</sup> defendant addressed the court on that application on the 18<sup>th</sup> December 2018 after which the notice of motion was fixed for hearing on the 26<sup>th</sup> February 2019. On that date the court was told of out of court settlement initiatives that were ongoing and the matter was fixed for mention on the 19<sup>th</sup> March 2019. On the 19<sup>th</sup> March 2019 the court was informed that no settlement had been reached and directions on the applications dated the 18<sup>th</sup> December 2018 and 13<sup>th</sup> February 2019 being canvassed together through written submissions were among others, given. Then on the 24<sup>th</sup> October 2019 the application dated the 13<sup>th</sup> February 2019 was set down for ruling on the 28<sup>th</sup> January 2020. There is no evidence of the 3<sup>rd</sup> defendant taking any other steps to prosecute his application, and to avoid any further delay in this suit, I have found it necessary to deal with it in this ruling. Having considered the pleadings, the application, affidavit evidence, grounds of opposition and submissions filed, and without making conclusive determinations on the role the 3<sup>rd</sup> defendant may or may not have prayed in the impugned transactions forming part of the plaintiff’s claim, and in view of the particulars of fraud pleaded at paragraphs 22 and 28 directed at the 3<sup>rd</sup> defendant and others, I find the 3<sup>rd</sup> defendant is a necessary party in the proceeding before the court. Accordingly, I find the notice of motion dated the 18<sup>th</sup> December 2018 to be without merit and is hereby dismissed with costs in the cause.
- h. Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs shall follow the events unless for good cause the court directs otherwise. Though the 1<sup>st</sup> defendant has emerged successful in her application, I am of their view that justice of the case with be served better by direction that costs abide the outcome of the suit.

6. In view of the foregoing determinations, the court finds and orders as follows:



- a. The application dated 18<sup>th</sup> December 2018 be and is hereby dismissed with costs in the cause.
- b. The 1<sup>st</sup> defendant's application dated the 21<sup>st</sup> July 2023 is hereby allowed in the following terms:
  - I. The 1<sup>st</sup> and 2<sup>nd</sup> third parties to file and serve their defence in response to the 1<sup>st</sup> defendant's third-party notice dated 7<sup>th</sup> March 2023 within fourteen (14) days from the date of this ruling.
  - II. That the question of liability of the third parties to indemnify the 1<sup>st</sup> defendant be tried and determined together with the main claim/suit.
  - III. The costs be in the cause.
- c. That to avoid further delay in this suit, the 3<sup>rd</sup> defendant is hereby granted last opportunity to file and serve his defence in the main suit in fourteen (14) days from the date of this ruling.
- d. That a mention date to be fixed to confirm compliance and to set the suit for hearing.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

IN THE PRESENCE OF:

PLAINTIFF : Mr. Mkomba.

DEFENDANTS : Mr. Waweru for 1<sup>st</sup> Defendant,

Ms. Kiti for 4<sup>th</sup> and 5<sup>th</sup> Defendants

THIRD PARTIES: M/s Obwangi for Third Party.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

