

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO.38 OF 2014

GEORGE ARUNGA SINO.....PLAINTIFF

VERSUS

VIPUL BUCH GIRO COMMERCIAL BANK LIMITED.....RESPONDENT

R U L I N G

By his Chamber Summons dated 2/12/14 the applicant/defendant prays that leave be granted to issue 3rd party notice to Jone Brooks Consultants Limited. The substantive reason is that indemnity and or contribution shall be sought against the said intended 3rd party pursuant to a judgment obtained in Kisumu CMCC No.463/2012 between **Giro Commercial Bank vrs Jone Brooks Consultants Limited**. The supporting affidavit of **Vipul Buch** avers that the defendant intends to lift the corporate veil so as to disclose the nexus between the plaintiff and the intended 3rd party. It appears that the above mentioned suit at the magistrate's courts had to do with a dispute at Auctioneers Board between the 1st defendant and the intended 3rd party.

The plaintiff has responded by filing the grounds of opposition dated 9th February 2015. Substantially he states that the said orders cannot be granted since the issue in dispute between the intended 3rd party and the defendant was well or could well be articulated in the civil case No.463/2012 and if allowed the same would amount to res- judicata.

I have perused the application together with the plaintiff/respondent's grounds of opposition as well as his written submissions

Order 1 rule 5(1) of the Civil Procedure Act stipulates the circumstances which qualifies a party to apply for the 3rd party proceedings. Ordinarily the same is applied ex-parte supported by an affidavit and **"5(2)..... the notice shall state the nature and grounds of the claim, and shall unless otherwise ordered by the court, be filed within fourteen days."**

It must be based on the same cause of action as the instant suit and consequently the court shall be able to determine simultaneously with the current suit.

The issues raised in the third party's notice attached to the application herein seemed to arise from the case at the lower court between the 1st defendant and the intended third party. If this is the case therefore why doesn't the applicant sought out the issues at the said suit. What would be the effect of bringing the 3rd party herein yet there is a suit pending or having been concluded?

Without delving into the suit herein I find and agree with the plaintiff/respondent that by introducing the 3rd party herein on the strength of another valid suit whether determined or not, this court shall be treading on a dangerous zone of res-judicata. I think and find that the proper forum for the defendants is to agitate the claim in the lower court suit or at least rely on the evidence if any from the said suit in this suit.

In **YAFES WALUSIMBI VRS THE ATTORNEY-GENERAL UGANDA (1959) E.A.** at 223 the court held that:

"in order that a 3rd 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 defendant and

the original cause of action must be the same.”

The attached plaint, defence and its reply in the affidavit by the 1st defendant does not convince me that the cause of action are similar. I find that the lower courts suit could be the best forum to deal with the issues raised at the Auctioneers Board and this suit on defamation to proceed independently.

In the premises I shall disallow the application with costs to the plaintiff/respondent.

Dated, signed and delivered this 30th day of July 2015

H. K. CHEMITEI

J U D G E