



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 118 OF 2005**

**WILFRED KAMAU GITHUA T/A**

**GITHUA & ASSOCIATES ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**CITY COUNCIL OF NAIROBI ..... DEFENDANT/APPLICANT**

**R U L I N G**

1. For the determination of the Court is an application dated 12<sup>th</sup> April, 2012 by the Defendant brought under the ambit of **Order 50 Rule 1** and **Order 1 Rule 16**. The applicant seeks for orders to file the application out of time and upon the grant of this prayer, grant leave to issue a Third Party Notice against **Nairobi Water and Sewerage Co. Ltd**. The application is predicated upon the grounds as set out on the face of it. It maintains that the circumstances of the case warrant grant of the relief sought and that the issues arising from this suit will properly be determined as between the Plaintiff, Defendant and intended Third Party.
2. In the Affidavit in support of the application sworn on even date, the deponent, Aduma J. Owuor, the acting Director of Legal Affairs for the Applicant, avers that the intended Third Party was initially sued as 2<sup>nd</sup> Defendant in a suit by the Plaintiff dated 7<sup>th</sup> March, 2005 but was later struck off the suit on 28<sup>th</sup> July, 2008. He depones that on 5<sup>th</sup> April, 2004, the Applicant and the intended Third Party entered into an agency agreement in which the latter was mandated to carry out water and sewerage services from the Applicant's Water and Sewerage Department. Further, he claims that the intended Third Party, as a subsidiary of the Applicant, was obligated to indemnify and/or settle with the Applicant in respect of any claims and/or suit brought against it, as was the case in the instant suit. The Applicant on 10<sup>th</sup> March, 1998 entered into a consultancy agreement with the Plaintiff as regards the Third Nairobi Water Supply Project Phase (II) and (III), in which the latter was to provide consultancy services. It is the Applicant's contention that the intended Third Party is intricately involved in the dispute and, as such, no prejudice will be occasioned if the instant application is allowed.
3. In opposition to the application, the intended Third Party in an affidavit in reply sworn on its behalf by its Company Secretary, Ivy Nyarango on 23<sup>rd</sup> October, 2012 and in response to the Applicant's allegations, depones as follows: (a) that on 22<sup>nd</sup> March 2006, the Respondent filed an application upon which a Ruling was delivered by Khaminwa, J on 28<sup>th</sup> July, 2008 striking out the

intended third party's name from the suit as the 2<sup>nd</sup> Defendant. (b) that no appeal has been filed by either of the parties to date and (c) that the resolution allegedly passed on 7<sup>th</sup> November, 2008 was irregular and in any event, not binding upon the Respondent.

4. In as far as it is important to consider and determine the instant application on its merits, it cannot however, be considered in isolation. It is important to consider in a general view, the context in which the application is brought and the circumstances leading to its institution. In submitting as to its application, the Applicant contends that there was an agency relationship that subsists as between the Applicant and intended Third Party, by virtue of its incorporation and mandate to take over its water and sewerage services. At Clause 10.3 of an agreement entered into by the parties on 5<sup>th</sup> April, 2004, the intended Third Party was mandated as follows:

**“The Company shall keep the company fully indemnified against all actions, suits, expenses, proceedings, demands claims, costs which may be brought or made (directly or indirectly) by reason of its non-observance or non-compliance with provisions of such statutes or other requirement, (emphasis added) PROVIDED that if such requirements are not complied with by the Company, its servants or its agents, the Council shall be at liberty to carry out the works needed to comply with any such requirement and the costs of its so doing shall immediately be refunded to the Council by the Company”.**

5. In considering the above-mentioned clause, together with the application by the Applicant and the submissions thereto, it would seem that the intended Respondent was obligated to take over all pending suits, and indemnify the Applicant, when and at such time such indemnity was due. It was submitted by the Applicant that indeed they had entered into an agreement with the Plaintiff/Respondent, to which by having them enjoined in the suit, the issues raised by the Plaintiff/Respondent in the suit would be properly and effectually determined as between the Plaintiff/Respondent, the Applicant and the intended Third Party. The Applicant bases its claim on a further provision under Clause 10.3 of the 5<sup>th</sup> April, 2004 Agreement which reads:

**“Further, the Company shall take over the conduct of all the suits pending before Court on account of Water and Sewerage Department and all outstanding judgment debts and shall keep the Council fully indemnified at all times in this respect”.**

6. It is the intended Third Party's submissions that indeed there was a suit that was instituted by the Plaintiff on 7<sup>th</sup> March, 2005, in which it made claims against the Applicant on an agreement that they had entered into on 10<sup>th</sup> March, 1998. In an application dated 22<sup>nd</sup> March, 2006, the intended Third Party, a 2<sup>nd</sup> Defendant then in the suit, was granted orders by Khaminwa, J, striking out its name as a Defendant in the suit. It is the intended Third Party's contention therefore, that the issues raised by the Applicant are *res judicata*, having effectively been heard and determined pursuant to the application, which issues are substantially and directly in issue in the present application. The intended Third Party relied on the authorities of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996** and **Greenfield Investments Ltd v Baber Alibhai Mawji Civil Appeal No. 160 of 1997** to support its case for *res judicata*. Further, it was submitted that in any event, the application has been filed late in the day, it having taken the Applicant over seven (7) years since the close of pleadings to file the instant application. This, according to the intended Third Party, is beyond inordinate delay which the Applicant had not validly explained.

7. According to the Black's Law Dictionary 9<sup>th</sup> Edition at pg. 1617, a third party is defined as:

**“A person who is not a party to a lawsuit, agreement or other transaction but who is usually somehow implicated (emphasis added) in it; someone other than the principal parties”.**

By the definition itself, the Applicant implicates the intended Third Party as an integral party in resolving the dispute between the three parties. It would therefore follow, that for the Applicant to

bring the intended Third Party into the suit, a Third Party Notice needed to be issued against it. **Order 1 Rule 15** of the *Civil Procedure Rules* reads:

**“Where a defendant claims as against another person *not already a party* (emphasis added) to the suit (hereinafter called the third party) – (a) that he is entitled to contribution or indemnity; or (b) that he is entitled to relief or remedy related 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 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 defendant but as between the plaintiff and defendant and third party or between any or either of them, *he shall apply to the Court within fourteen days* (emphasis added) after the close of pleadings for leave of 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”.**

The applicant therefore, has to establish that the intended Third Party’s inclusion in the matter would suffice in order to properly determine the matter between the parties.

8. In the Canadian Court of Appeal in Alberta, Justice Keran in **Dilcon Constructors Ltd v ANC Developments 1994 ABCA 245**, the learned judge referred to the decision of the Second Circuit Court of Appeal case of **Dery v Wyer (1959) Ca2 N.Y., 265 F2d 804**, in which it was held *inter alia* on the general purpose of third party proceedings:

**“...to avoid two actions which should be tried together to save the time and cost of reduplication [sic] of evidence, to obtain consistent results from identical evidence, and to do away with a handicap to a defendant of a time difference between a judgment against him and a judgment in his favour against the third party defendant.”**

This opinion was also adopted in the case of **Kaptian v Hardy 1999 CanLII 19088 (AB QB)**, Moore, CJ held:

**“The benefits to be achieved by following the third party procedure are summarized in Williston and Rolls, *The Law of Civil Procedure*, vol. 1, pp. 426 and 427 as quoted by Purvis, J., in the Alberta Queen's Bench decision of Edmonton and Rural Auxiliary Hospital and Nursing Home District No. 24 v. Bittof-Holland-Christianson Architects Ltd., Ellis-Don and Travelers Indemnity Insurance Co. of Canada (1981), 33 A.R. 60 (Q.B.), at page 62. Briefly they are:**

1. **To avoid a multiplicity of actions;**
  2. **To avoid the possibility that there might otherwise be contrary or inconsistent findings in two different actions on the same facts;**
  3. **To allow the third party to defend the plaintiff's claim against the defendant;**
  4. **To save costs; and**
  5. **To enable the defendant to have the issue against the third party decided as soon as possible, in order that the plaintiff cannot enforce a judgment against him before the third party issue is determined.”**
9. From the foregoing, it would be in the interest of the Court and the parties to the suit, therefore, to achieve the overriding objective as set out in **Section 1B** of the *Civil Procedure Act* and Article

159 (2) (d) of the Constitution to achieve justice in an expeditious, proportionate and affordable resolution of disputes. Read together with **Order 1 Rule 15** of the *Civil Procedure Rules*, the Court has the discretion to make such orders as may be necessary for the enforcement of the overriding objective, pursuant to the provisions of **Section 1B** and Article 159 (2) (d) aforesaid. However, the power of the Court to grant such orders should not be used whimsically or capriciously or to the detriment of either or all parties to a suit. The applicant in its application, either willfully or negligently, or otherwise, did not bring up the issue of the Ruling delivered by Khaminwa, J on 28<sup>th</sup> July, 2008. In that Ruling, the learned Judge in rendering her decision reiterated that:

**“It is not disputed that a corporation is an independent legal body separate from its shareholders or members. It cannot therefore be compelled to undertake projects made before its incorporation...[T]herefore, my orders in respect to the application dated 22/3/2006, I allow the application and strike out the name of the second defendant from the suit.”**

The learned judge in her Ruling, from which no appeal has been proffered, determined that the issues between the Plaintiff and Defendant had no nexus on the intended Third Party and it was therefore, struck out from the suit as 2<sup>nd</sup> Defendant. The issues raised by the Applicant as between itself and as between itself and the Plaintiff, are not, according to **Order 1 Rule 15 (c)**, substantially the same issue which would then be properly dispensed with if the intended Third Party is enjoined in the suit. Furthermore, this application has been made over seven (7) years after the close of pleadings, whilst **Order 1 Rule 15** provides for a period of fourteen (14) days only. This inordinate delay has not been explained. At paragraph 15 of the Affidavit in support of the Application, the deponent admits that the delay was caused by an oversight to instruct counsel. That does not however, in my view, give sufficient reason and explanation as to the extensive delay. In **Kaptian v Hardy** (supra) the learned judge referred to the decision in **Lister et al. v. Calgary (City) et al. (1997), 193 A.R. 218; 47 Alta. L.R.(3d) 14 (C.A.)**, where the court denied a four and a half year extension to add a third party because the defendant presented no evidence justifying the delay. The court held inter alia:

**“Where a party seeks a significant time extension, it is expected to give evidence to explain the delay, i.e., why prompt compliance did not occur. Maybe it would be different if the extension sought was slight, but here the delay was over four and a half years. Evidence must be proper admissible evidence, not mere allegations by counsel.”**

10. The upshot of the foregoing is that the Applicant has not established and satisfied the Court that its application has merit. In any event the delay in filing the same is manifestly inordinate and no satisfactory explanation whatsoever has been proffered. Further, I find that the application is res judicata as per Khaminwa J's Ruling of 28<sup>th</sup> July, 2008. The application is therefore dismissed with costs to the intended Third Party.

**DATED and delivered at Nairobi this 15<sup>th</sup> day of July, 2013.**

**J. B. HAVELOCK**

**JUDGE**