



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 578 OF 2009
CHARLES ONYANGO

CERPHAS OBONYOPLAINTIFFS

VERSUS

EQUITY BANKDEFENDANT

DIRECTIONS

This suit was commenced by a plaint dated 6th August, 2009 and filed in Court on 10th August, 2009. The statement of defence was filed on 17th November, 2009. By an application by Chamber Summons dated 18th January, 2010, the Defendant sought the Court's leave to issue a Third Party Notice to one Elisha Ochieng Ombere trading as "**Jupiju Electrical Services Contractor**". The application was based on the grounds that the Defendant had been sued by the Plaintiff herein in a matter against which the Defendant sought indemnity from the Third Party, and that it was in the interest of justice and fairness that the Third Party be issued with a notice.

The application came for hearing on 12th February, 2010. The Defendant/applicant was represented by Mr. Nyikuli but, on account of the application being made *ex parte* under the provisions of **Order I Rule 14** of the **Civil Procedure Rules**, the Plaintiff/Respondent did not attend and was not expected to attend Court. Mr. Nyikuli told the Court that the Defendant would be seeking indemnity from the Third party in respect of the suit. He explained that the Plaintiff had sued the Defendant for certain sums of money held in the Defendant's bank in respect of which the Defendant had received a demand letter from the Third party against releasing the same. It was for this reason that the Defendant sought to join the Third party in order to facilitate a full determination of the matter. On that basis, the Defendant was accordingly granted leave on the same day to issue a Third party notice to Elisha Ochieng Ombere trading as "**Jupiju Electrical Services Contractor**" as prayed.

On 22nd March, 2010 the Plaintiff filed an application by Chamber Summons dated the same date praying for an order that the Defendant's statement of defence dated 16th November, 2009 be struck out pursuant to **Order VI Rule 13 (1) (b) (c) and (d)** and **Order XIII Rule 1 (2)** of the Civil Procedure Rules on the grounds that it discloses no reasonable defence and that the same was scandalous, frivolous and vexatious and was otherwise intended to prejudice, embarrass or delay the fair trial of this suit besides being an abuse of the process of the Court. The application came for hearing before this Court on 26th April, 2010, and Mr. Arua appeared for the Plaintiff/Applicant while Ms. Mwau appeared for the Defendant/Respondent. Ms. Mwau applied for leave to file a replying affidavit within 7 days and also stated that the application which was coming for hearing had been overtaken by events since the Court

had allowed Third Party proceedings.

Mr. Arua opposed the application for adjournment taking the position that the application coming for hearing was not opposed. He argued that no replying affidavit or grounds of opposition had been filed even though the application had been served on the Respondent more than a month before the hearing date, and that no reason had been given to show why no replying affidavit had been filed. He further stated that the Plaintiffs had no information about the filing of the Third Party proceedings or their being allowed by the Court. He submitted that the allegation that the application was overtaken by events was without merit as it was not related to the application coming up for hearing. He urged the Court to allow the Plaintiffs to proceed with their application as it was unopposed. In a short reply, Ms. Mwau said that she had not been able to file the replying affidavit as she didn't get instructions on time.

In the context of above facts, it is noteworthy that the Plaintiff's application to strike out the defence was filed long after the Court had allowed the Defendant to issue a Third Party Notice. If that application is not related to the Third Party Notice as Mr. Arua for the Plaintiff contended, then it should be viewed independently of the said Third Party Notice. Counsel for the Defendant pleaded for 7 days within which to file a replying affidavit to that application as she had not obtained appropriate instructions to that effect any earlier. In fairness to all the parties and all the circumstances of this case, this Court takes the view that it is fair and proper that the Defendant be granted the chance to file a replying affidavit as prayed. I accordingly direct that –

- 1. The Defendant be and is hereby granted 7 days from today within which to file and serve a replying affidavit to the application by the Chamber Summons dated 22nd March, 2010.***
- 2. A fresh hearing date be given by the Registry.***
- 3. The Defendant will pay the Plaintiff's costs for the attendance on 26th April, 2010 as well as the court adjournment fees for the same date before the next hearing date.***

DATED and DELIVERED at NAIROBI this 28th April, 2010.

L. NJAGI

JUDGE