

aside on 26.09.2005 paving the way for the filing of the current application under consideration.

(12) 25.10.2005 the defendants' application dated 18.10.2005 was filed seeking third party Directions which is the subject of this ruling.

The said application dated 18.10.2005 is brought under Order 1 rule 18 Civil Procedure rules seeking 6 reliefs, that:-

- (1)** This Honourable Court be pleased to give its directions on the 3rd party notice issued herein.
- (2)** The defendant serve a statement of its claim on the third party no. 1 within 30 days from the date of the order.
- (3)** The third party no.1 plead there to within thirty (30) days after service of the said statement upon it, inclusive of the date of service.
- (4)** The third party no.1 may take such part at the trial of this suit as the court shall direct and be bound by the result of the trial.
- (5)** The question of liability of the third party No.1 for indemnity and/or contribution of the defendant be tried at the same time as the trial of this action or suit.
- (6)** The costs of this application be costs in the cause and in the third party proceedings.

The grounds in support are set out in the supplementary affidavit and oral submissions in court, the major ones are:-

- (1)** It is not disputed that the defendant was granted orders on 19.12.03 to join the 3rd party which orders have not been set aside. It is not also disputed that pursuant to the granting of those orders, a 3rd party notice was served on the 1st 3rd party which 1st 3rd party respondent by entering appearance which action prompted the filing of the application for directions.
- (2)** The sole reason for joining the 1st 3rd, party to the proceedings is because the deceased was his private patient.
- (3)** The 1st 3rd party ought to have filed a defence within 14 days from the date of entry of an appearance but instead of doing so, they filed objection.
- (4)** It is their stand that 3rd party proceedings can be filed at any stage of the proceedings and their application is properly before court and it should be allowed.

Counsel for the Plaintiff save for saying that he agrees with the deponents of the 1st 3rd party's replying affidavit vide paragraph 5 and 6 thereof, had nothing else to add as the contest is between the defendant and first 3rd party. The said deponements simply relate to the information on the date of injury which was on 28.9.1998, the date the suit was filed on 21.5.01, the date the defence was filed on 18.6.01, the date the application for 3rd party notice was filed on 28.11.03, the date the orders were issued on 19.12.03, the date the first 3rd party was served on 29.7.04 which was 6 years after the date of the injury and more than three years after the institution of the proceedings.

The first 3rd party on the other hand in response to the application relies on the replying affidavit, written skeleton arguments filed in court, as well as case law. After setting out chronology of events, set out earlier on in this ruling, went ahead to stress the following points:-

- (1)** They maintain that the 3rd party proceedings should be dismissed and if the defendant so wishes,

they should file a distinct suit between them and the first 3rd party.

- (2) They contend that they came to court to object at the appropriate stage as they have no locus standi to object to proceedings at the leave stage. They can only do so at the directions stage.
- (3) It is their stand that the 3rd party notice and directions are abinitio a nullity as the 3rd party proceedings are time barred.
- (4) Also the serious delays which have occurred have prejudiced the first 3rd party.
- (5) They contend the notice served does not state in what way the defendant has a claim against them.
- (6) The notice should have been served within the same time allowed for service of the defence and no explanation has been given as to why it was served more than two years later which fact was not brought to the attention of the court.
- (7) They contend the claim against them is time barred because since it arises from tort, its life span is three years which cause of action arises from the date it becomes a defendant by the institution of the proceedings.
- (8) They have been prejudiced as the defendant has not even served the 2nd 3rd party, thus denying them the right to claim indemnity from this other doctor.
- (9) They maintain that Act of limitation apply to 3rd party proceedings as these constitute a separate cause of action between the defendant and the 3rd party and time for this does not begin to run after judgment has been entered for the plaintiff against the defendant or after admission by the defendant.
- (10) They maintain that the provisions of Order 1 rule 14, 18 are specific and there is no discretion to extend the time for the filing and service of the 3rd party notice.

The defence countered the first 3rd party's submission on the following points:-

- (i) That the relationship between the defendant and first 3rd party is contractual and as such the period of limitation does not apply to 3rd party proceedings.
- (ii) They contend that the application for 3rd party directions is not a nullity because the orders granted in pursuance to an application for leave to issue a 3rd party notice are still in force and parties to the suit are bound by them.
- (iii) The first 3rd party cannot be heard to complain because when served he entered appearance and by entering appearance, submitted himself to the jurisdiction of the court.
- (iv) Their construction of the provisions of order 1 rule 14 (4) reveals that since a 3rd party notice can be issued at any stage of the proceedings, it means that the same can even be issued after judgment.
- (v) The delay complained of herein is excusable as it has been demonstrated that there was lack of instructions from the client over the period of delay.
- (vi) There is a triable issue between the defendant and the first 3rd party because, the first 3rd party was a consultant surgeon at the said hospital and if locked out of these proceedings the defendants' defence will be prejudiced.
- (vii) That the issue of indemnity between the 3rd party and the person they are entitled to claim from

will only arise after judgment has been given against them.

(viii) Order 1 rule 18 is not rigid, it gives flexibility to make such orders as are appropriate for ends of justice to be made to both the defendant and the court is urged not to allow the first 3rd party escape his obligation herein on the basis of technicalities. And on that account the proceedings subject of this ruling are not vexatious and frivolous as there existed a contract between the parties herein.

On case law and legal principles the first 3rd party referred the court to the supreme court practice 1997 volume (part 1) London, Sweet & Maxwell, 1996, page 259 paragraph 16/1/1 where it is stated inter lia that:-

“(a) 3rd party proceedings including contribution from co defendants have a life of their own quite independent of the main action, so that if the main action is settled, 3rd party proceedings already began can still proceed and so can the issue between co-defendants.

(b) A defendant and a 3rd party stands in the relations to one another as if the defendant had brought a separate action against the third party and therefore the costs of the successful third party should normally be ordered to be paid by the defendant.

(c) Vide 16/1/3 – a claim to contribution is a claim to indemnity. Contribution is bottomed and fixed on general principles of justice and does not spring from contract though contract may qualify it.

(d) Vide 16/2/2 – after service of the defence, leave must be obtained. The fact that the application is made after service of the defence is no ground for refusing leave, but if such application is made later in the proceedings, the master may direct a summon for leave to issue so that the plaintiff can be heard as to any prejudices being occasioned by such delay.

(e) Vide 16/2/3 – the court has a general discretion in all cases whether or not to allow a third party notice to issue. But will not be allowed where the result will be to embarrass or delay the plaintiff.

(f) Vide 16/2/4 the Plaintiff or the 3rd party may apply to discharge the order after notice of intention to defend. The application is made by summons/motion, but it is convenient to apply on the hearing of the applications for directions.

(g) Vide 16/3/3 (pg.267) the 3rd party notice must be served personally on the 3rd party or alternatively may be served by post.

(h) Vide 16/3/5 – (pg.268) a new claim by way of 3rd party proceedings is deemed to have been commenced on the date when those proceedings were commenced. They are not commenced by lodging an ex parte affidavit for leave to issue a third party notice or by issuing a summons for such leave or by an order granting such leave. Third party proceedings are instituted when the 3rd party notice is issued.

(i) Vide 16/4/2. Summons for 3rd party must be issued. It is on this application that the validity of the notice and the objections of the Plaintiff or the third party will be gone into.

(j) Vide 16/4/7 – dismissal for summons for directions arises where the facts disclosed are not within the rule, if the disclosed case is too difficulty or too complicated to be tried with the original action, or if the plaintiff will be embarrassed, or if the matters cannot be decided in one trial. It is granted if a prima facie case under rule 1 is made out. It is the party objecting to show some special circumstances why the direction should not be given.

In volume 2 pg.2053 paragraph 2, a cause of action for the 3rd party proceedings will be grounded on a right to recover contribution for damage for which the defendant is liable to the plaintiff. The defendant is to be deemed as plaintiff for purposes of his claim against the 3rd party. ”

In the case of **PONTIFEX VERSUS FOORD [1884] 53 QB 321**, 3rd party directions were declined because there was no claim of contribution by the defendant from the 3rd party.

In the case of **SANGO BAY ESTATES LTD AND OTHERS VERSUS DRESDNER BANK, [1971] EALR 17**. The superior court dismissed an application for 3rd party directions because the claim was for damages and not contribution or indemnity. On appeal it was reiterated that the court may dismiss an application for directions where a claim for contribution or indemnity had not been shown.

In the case of **PREMIER SAVINGS AND FINANCE LTD VERSUS H AMENDRA MANSUKHLAL SHAH MSA. HCCC NO. 2005/1996** Waki J. as he then was (now JA) made observations at page 3 of the ruling line 10 from the top that:-

“it is the duty of the Court to determine at the stage of third party directions whether there is a proper question to be tried as to liability of the third party and the defendant giving notice”. At page 4 line 5 from the bottom the learned judge observed that *“although indemnity is claimed against the third party, there is no contract of indemnity pleaded nor does one arise by operation of law”*. At page 6 line 4 from the top that, *“It would be undesirable in matters of contract to import indemnity where there is no express provisions for it and none can be implied”*.

On the basis of the foregoing reasoning the learned Judge declined, third party directions because indemnity had not been shown to exist either in fact or in law and the alleged damages for misrepresentation does not give rise to contribution.

In the case of **SLADE & KEMPTON (JEWELLERY) LTD VERSUS N. KAYMAN LTD LEROY 3RD PARTY [1969] 3AER 786**.

3rd party notice was issued in October 1963. In December, 1967 summons for 3rd party directions were taken out. In January, 1968 the 3rd party took out a summons to dismiss the third party proceedings inter alia for want of prosecution. The 3rd party proceedings were ordered dismissed for want of prosecution because there had been inordinate delay in the prosecution of the main cause of action and the third party had not been an ally of the defendant in allowing the proceedings to go to sleep.

In the case of **COURTENAY – EVANS AND ANOTHER VERSUS STUART PASSEY & ASSOCIATES (A FIRM) AND ANOTHER (GREAT LONDON COUNCIL, THIRD PARTY) [1986] 1 AER 932**, it was held that, where a party who is the subject of a 3rd party notice, is able to show that, special circumstances exist, why third party directions ought not to be given, i.e. because of delay in bringing the third party proceedings, the court may, refuse to give such directions. The effect of a refusal to give such directions is to make the third party notice a nullity and put an end to third party proceedings.

In the case of **OBONDO VERSUS AKADI KISUMU HCCC NO. 306/95** decided on 25 September, 2000 by BIRECH COMMISSIONER OF ASSIZE as he then was, the 3rd party raised objection that the claim against it was statutorily barred in the first instance, and in the second instance, that the notice was incurably defective and ought be struck out. The brief facts were that on 13.12.92 an accident occurred involving the defendant’s motor vehicle and the third party’s motor vehicle. The Plaintiffs were injured and eventually they filed a suit against the defendant blaming him for the accident. The defendant sought and obtained leave to file third party proceedings claiming indemnity and contribution from the third party. The basis of the objection was that by the time the third party proceedings were filed, in court, time had lapsed as the cause of action in tort lapses after three years. Reliance was placed on the provisions of section 2 of the limitation of Action Act, Chapter 22 Laws, of Kenya, which provides that an action grounded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

In response to the above argument the defence argued that the right to indemnity only arises when the defendant has been sued. The second objection was that since the leave to file 3rd party notice was granted on 11th January, 2000, the notice ought to have been filed within 15 days from that date in

accordance with the provisions of order 1 rule 14(3), to which the defence made no response. The learned commissioner at page 2 of the ruling line 5 from the bottom ruled that since the notice was not filed by 26th January, 2000 but by February, 2000, it was filed out of time and this contravened the provisions of order 1 rule 14(3) Civil Procedure Rules. But on the issue of the proceedings being time barred the learned judge after reviewing the provisions to section 3(c) of the Law Reform Act and Section 5(1) of the Limitation of Actions Act Cap.22 Laws of Kenya ruled that the period of Limitation does not apply because indemnity arises after judgement and procedural measures introduced in the Civil Procedure Rules to bring in the 3rd party, to participate in the main action proceedings, so that liability, is decided at the same time, was for purposes of convenience and quicken the proceedings.

On this courts' assessment of the facts herein, it is clear that the principles of law cited above both from the texts as well as case law both of percussive and binding force are in agreement that a 3rd party wishing to object to his /her being joined to the main action has two options (1). He may take out summons to challenge leave granted to have him joined to the proceedings, or he has to wait till summons for directions are taken out and then raise his objection. It follows therefore that the first 3rd party objection at the directions stage are properly laid and will be ruled upon on merit.

The objections raised touch both on the merit and the technicalities. The court has deliberately chosen to tackle the merit objection first because it is the basis upon which the leave to join the first 3rd party and the current application for directions are anchored. This is based on the 1st 3rd party's stand that there is no reasonable cause of action disclosed against the first third party. The issue of what amount and what does not amount to a reasonable cause of action has been explored and settled by the Court of Appeal in numerous cases. A leading one is the case of DT DOBIE & COMPANY (KENYA) LTD VERSUS MUCHINA [1982] 1. The holding herein is to the effect that:-

“(1) A reasonable cause of action means action with some chance of success when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.

(2) The words cause of action means an action on the part of the defendant which gives the plaintiff his cause of complaint as against the defendant and justification to come to court.”

Applying the foregoing test to the facts herein, it is clear that the first stop that the court has to make when determining whether there is a reasonable cause of action or not should be in the statement of claim laid. The first statement of claim in these proceedings is the one touching on the main claim between the Plaintiff and the defendant which does not touch or mention the first third party. It is the amended defence which introduces the claim of the defendant against the 1st 3rd party. This is set out in paragraph 3 and 14 A - D thereof. For purposes of the record they state:

“3. The defendant states that the deceased was admitted to the Aga Khan Hospital Nairobi (herein after referred to as “the said hospital”) on the 27th September 1998 for a surgical operation, as a private patient of Prof. Muthure Macharia and Dr. A.W. Wahome, the consultant ENT, surgeon and consultant Anesthesia logistic respectively.

§ 14 A further and or in the alternative and without prejudice to matters pleaded herein above the defendant states as herein after appearing.

§ 14 B the defendant states that if the matters complained of in the plaint were true (which is denied) the same were caused and or substantially contributed to by the acts and or omission on the part of the said Prof. Muthure Macharia and Dr. A.W. Wahome who were both at all material times acting as private consultants employed or engaged by the deceased and/or the plaintiff and/or the deceased's family for the material operation and treatment including pre and post operative care given to the deceased at the said hospital.

§ 14 C the defendant states further that at all material times the defendant's staff acted on the

instructions, directives and advise of Prof. Muthure Macharia and Dr. A.W. Wahome who were both fully in charge of the material operation and pre and post operative treatment to the deceased.

§ 14 D *the defendant will seek leave of this Honourable Court to issue a 3rd party notice against the said Prof. Muthure Macharia and Dr. A.W. Wahome in order to seek indemnity and/or contribution from them in the event the defendant is held liable for the matters complained of in the plaint”.*

In addition to the above averments in the defence, the defendant has put forward a statement of claim dated 19th October, 2004 and filed on 26th October 2004. Items 2,3,4,5 and 6 are relevant here. They state.

“(2) The defendant owns and operates a hospital known as the Aga Khan Hospital situate in Nairobi (herein after referred to as “the said Hospital”).

(3) The third party No.1 is a consultant ENT surgeon. Service upon the third party No.1 will be effected through the offices of the Defendants Advocates.

(4) The Plaintiffs claim against the defendant is for the alleged loss and damage suffered her and by the estate and dependants of the late Kenneth Wangendo Gatimu (herein after referred to as “the deceased”) arising from the death of the deceased while undergoing treatment at the said Hospital.

(5) The defendant has denied liability as fully set out in the attached copy of the Amended Defence.

(6) The Defendants claim against the third party No.1 is for indemnity and/or contribution in the event the defendant is held liable to the plaintiff”.

In consequence of the above, the reliefs sought against the first 3rd party no.1 are 5. These are:-

- (a) A declaration that the defendant is entitled to the indemnity and or contribution as aforesaid.
- (b) Judgment against the third party No.1 of the amount that may be entered against the defendant in terms of the plaint.
- (c) Order that the third party No.1 do indemnify the Defendant for such sums or sums of money or preparation thereof as this honourable court may seem just.
- (d) Judgment against the third party No.1 for the amount of any costs which may be adjudged to be paid to the plaintiff and for the amount of the defendants costs for the defendant in this suit and for the amount of costs of these third party proceedings.
- (e) Any other or further relief that this Honourable Court may deem fit to grant”.

The first 3rd party complaint as regards both the averments in the amended defence and the statement of claim is that the relationship between the defendant and the first 3rd party has not been disclosed.

In response to that submission, the defendants submitted that the same is based on contract. In response to that submission that the relationship is based on contract Counsel for the first 3rd party replied that contract has to be pleaded and in the absence of such pleading, no reasonable cause of action has been disclosed and in the absence of such disclosure no reasonable cause of action has been disclosed against them and this court should order so accordingly.

This court has considered the said argument and related it to the averments in the amended defence and the content of the statement of claim by the defendant against the first 3rd party and finds that it is not clearly borne out how the 1st 3rd party came to treat his private patient at the defendant’s hospital. There is no averment of existence of a contractual relationship between the two. Neither does it say whether the

said first 3rd party was an employee or not. This court cannot take a statement from the bar as providing a link. This should be in built on the defence to provide a link.

The question is whether in the absence of pleading of such a link or nexus is fatal to the defendants' claim against the first 3rd party. The answer for this is found in the principles guiding the court on rejection of pleadings popularly known in judicial language as striking out of pleadings. These principles have already been established both by the superior court and the Court of Appeal. In the same case of DT DOBIE & COMPANY LTD (SUPRA) it was also held inter alia that *“as the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.”*

(b). by way of obiter Mandan JA (as he then was) held that *“the power to strike out should be exercised only after the court has considered the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.*

(c) *As the court should aim at sustaining rather than terminating a suit, a suit, should only be struck out, if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit, can be injected with life by amendment it should not be struck out.”*

Also in the case of COASTAL PROJECTS LTD VERSUS MR. SHAH CONSTRUCTION (K) LTD [2004] 2 KLR the Court of Appeal held inter alia that *“striking out a pleading is a procedure that is to be resorted to in very clear, plain and obvious cases.*

(ii) *In an application to strike out a pleading, the court ought not to deal with any merits of the case for this is a function solely reserved or the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery and without oral evidence, tested by cross-examination in the ordinary way.*

(iii) *Summary procedure is a radical remedy and a court of our should be slow in resorting to this procedure.”*

The Court has applied these principles to the first 3rd party's complaint regarding *“lack of a cause of action”* against them by the defendant and secondly lack of pleading of a contractual relationship. The Court makes a finding that the defence complaint that the expertise was provided by the first 3rd party and his team and that the defendants employees who handled the case were under the direction of the 1st 3rd party raises triable issues and hence there is a triable issue and where there is a triable issue there is a cause of action. Complaint on failure to plead existence of a contractual relationship between the defendant and 3rd party can be cured through an amendment.

Turning to the technical objections, the first one to be dealt with is the one relating to assertion by the first 3rd party that the defendants claim against them is statutorily barred by virtue of the relevant provisions of law applicable.

Paragraph 4 of the plaint states that the deceased died on 28th September, 1998. In this court's opinion that is when the cause of action arose against the defendant. Three years elapsed on or about 28th September, 2001 by which time the plaintiffs plaint dated 17th May 2001 had been filed in court on 21st May 2001.

From the principles of law set out earlier on in this ruling, the cause of action between the defendant and a 3rd party arises when the defendant assumes the position of a plaintiff and the 3rd party assumes the position of a defendant. It was noted that the scenario arises when the plaintiff's claim is lodged against the defendant. This would be from the date the Plaint is served on them. There is no Return of Service

showing when the plaint was served, but it is on record that the appearance was entered on 12th June 2001 which can be taken to be the date the defendant assumed responsibility for the plaintiffs claim. Being a tortuous claim, it will ordinarily have a life span of three years subject to any other provisions of the law to the contrary. Three years from 12th June 2001 would lapse on or about 12th of June 2004 by which time the defendant was expected to have put in an application for leave to issue a 3rd party notice.

From the chronology of events set out above, the application for leave was filed on 10.7.2003 slightly over 2 years and about 28 days. 10.7.2003 is within the three year limitation period which generally governs tortuous claims generally as provided for in the limitation of Actions Act.

This is provided for in Section 5 of the limitation of Action Act Cap.22 Laws of Kenya. It reads: “5(1) where under section 3 of the Law Reform Act a tort feisor, (in this section referred to as the first tort feisor), becomes entitled after the commencement of this Act to a right to recover contribution in respect of any damage from another tort feisor, an action to recover contribution by virtue of that rights shall subject to subsection (3) of this section not be brought after the end of two years from the date on which that right accrued to the first tort feisor.

(2) For the purposes of this Section the date on which a right to recover contribution in respect of any damage accrues to a tort feisor (in this subsection referred to as the relevant date shall be ascertained as follows:

(a) If the tort feisor is held liable in respect of that damage by a judgment given in civil proceedings or by an award, the relevant date is the date on which the judgment is given or the date of the award as the case may be.

(b) If in a case not falling within paragraph (a), the tort feisor admits liability in favour of one or more persons in respect of that damage, the relevant date is the earliest date on which the amount to be paid by him in discharge of that liability is agreed by or on behalf of the tort feisor and that person, or each of those persons as the case may be and for the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the tort feisor.

Section 3 of the Law Reform Act Cap. 26 laws of Kenya to which Section 5 of the Cap.22 is subject reads as follows:

3 (1) where damage is suffered by any person as a result of a tort (whether a crime or not).

(a) judgment recovered against any tort feisor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued have been liable as a joint tort feisor in respect of the same damage.

(b) If more than one action is brought in respect of that damage by or on behalf of the persons by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person against tort feisors liable in respect of the damage (whether as joint tort feisor or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions other than that in which judgment was first given the plaintiffs shall not be entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action.

(c) Any tort feisor liable in respect of that damage may recover contribution from any other tort feisor who is or would if sued have been, liable in respect of the same damage whether as a joint tort feisor or otherwise, but no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable

from any person shall be such as may be found by the court to be just and equitable having referred to the extent of that persons responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity”.

This courts construction of these two provisions agrees with the reasoning of commissioner Birech as he then was in the cited case of OBONDO VERSUS AKEDI (supra) that the three year period of Limitation that binds the plaintiff and the defendant does not automatically move to bind the would be contributor on account of indemnity. Both provisions of law are in agreement that contribution arises after judgment against the party seeking contribution in indemnity. Such a person has two years from the date of judgment against him to do so otherwise he loses that right at the end of two years. Here in as judgment, has not yet been given in favour of the Plaintiff, as against the defendant, the cause of action on contribution on indemnity is yet to arise. The move to bring in the first 3rd party is for purposes of expediting trial of issues.

The second technical objection raised by the 1st 3rd party is that one relating to service of the 3rd party notice after leave to serve the same had been obtained by the defendant. It is their argument that 3rd party notice was not accompanied with the plaint neither was the said 3rd party notice served within the required period as it was served about 7 months later. The relevant provision is Order 1 rule 14 Civil Procedure Rules. The relevant portions of it reads: “14(1) where a defendant claims as against any other person not already a party to the suit (herein after called the third party):-

(a) *that he is entitled to contribution or indemnity ... he may by leave of the court 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.*

(2) *A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of the summons*

(3) *The notice shall state the nature and grounds of the claim and shall unless otherwise ordered by the Court be filed within the time limited for filing the defence*”

There are two requirements that the beneficiary of such notice is required to be complied with namely:-

(i) The notice is to be served in the same manner as summons to enter appearance are served.

(ii) It shall unless otherwise ordered by the Court be filed within the time limited for filing the defence. Order V rule 7 Civil Procedure Rules provides that “service of the summons shall be made by delivering or tendering a duplicate thereof signed by the Judge, or such officer as he appoints in this behalf, and sealed with the seal of the Court”. There is no complaint that the notice was not served in accordance with Order V rule 7 of the Civil Procedure Rules Order VIII rule (1) (2) Reads:-

“1(1) *The defendant may and if so required by the court at the time of issue of the summons, or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his defence.*

(2) *Where a defendant has been served with a summons to appear he shall unless some other or further order be made by the Court file his defence within fifteen days after he has entered an appearance in the suit and serve it on the plaintiff within seven days from the date of filing of the defence”.*

From the above it is clear that indeed the notice was not served within 15 days as required by law. The first 3rd party has urged the Court to disallow the notice because the rule does not leave the court with any discretionary power to extend, the time *suo moto*. In the cited case of OBONDO VERSUS AKEDI (supra) COMMISSIONER OF ASSIZE BIRECH, upheld the rule and nullified the notice.

The applicants stand on the other hand in to the effect that, the notice cannot be nullified because the orders which granted it are still on record and as long as they stand the notice is proper. Secondly the first 3rd party having entered appearance has submitted himself to the jurisdiction of the court and so he cannot be heard or be deemed to attack the very process which has brought him into these proceedings. It is on record that the first 3rd party has entered appearance but filed no defence. Failure to do so was because he had an intention to challenge the process used to bring him into these proceedings. The stand of the defendant applicant is that the orders granting leave to join him to the proceedings are sufficient if not upset which is not the case. Where as the stand of the first 3rd party is that it is the service of the notice which determines the locus standi and where the notice is invalid by reason of it not having been served within the prescribed period laid down by the rules, their participation in these proceedings are limited to participation for purposes of objecting to the notice and not beyond.

As noted earlier on the 1st 3rd party had an option to apply to set aside leave granted to serve the notice or object at the directions stage and so the objection is properly lodged in the manner presented. The rules set out earlier, namely order 1, rule 14 (3) specify expressly that this should be served within the period allowed for service of a defence which is 15 days. The notice subject of the proceedings leading to this ruling was served about 7 months from the date leave was granted. The question is whether, failure to comply with order 1 rule 14(3) is fatal to the 3rd party notice issued as well as the directions sought.

This court takes judicial notice of the fact that there is now a wealth of authorities both by the superior court and the Court of Appeal on the consequences of non compliance with the procedural rules. This court had occasion to consider some of them in its ruling delivered on the 13th day of December, 2007 set out at page 21-23 of the said ruling.

In the case of SARAH HERSI VERSUS KENYA COMMERCIAL BANK CIVIL APEPAL NO. NAI 165 OF 1999 AKIWUMI JA as he then was ruled that “*Rules are hand maidens of the Court which court is called upon to ensure, that the hand maidens do not become bad masters*”. The case of NDEGWA WACHIRA VERSUS RICARDA WANJIRU NDANJERU (1982) 1 KAR where it was held inter alia that where the breach of the rules is not fundamental the proceedings will not be set aside. The case of CONSOLATA NDINDA JULIUS AND 4 OTHERS VERSUS BANUEL BOVIS OMAMBIA NAIROBI HCCC NO. 2050 OF 1993 where Kubo J. ruled inter alia that a court must at least be prepared to do substantial justice to the parties undeterred by technical procedural rules “..... *Substantive justice demands priority over technicalities of procedure*”. The case of MACHAKOS RANCHING COMPANY LTD VERSUS JOSEPH KYALO MUTISO CIVIL APPEAL NO. NAI 12 OF 1997 consolidated with MACHAKOS RANCHING COMPANY LTD VERSUS WAEMA ITUMO MUOKA CIVIL APPEAL NAI 123 OF 1997 in which A.B. Shah J.A. as he then was now (rtd) held inter alia that “*it is the duty of the Court to strive to do justice between the parties undeterred by technical procedural rules.*”

This Courts construction and application of the foregoing principles to the facts of this application leads to the finding of this court that jurisdiction exists for the court to fail to uphold the rules of procedure in favour of substantial justice to both parties.

Order 1 rule 14(3) Civil Procedure Rules does not give any discretion to the court to go round it in the event of breach. The phrase “*Unless the court orders otherwise*” is limited to the period leave orders are being granted. Those granted herein had no condition attached to them, meaning the resultant notice was mandatorily required to be served within 15 days from the date of granting of leave.

The net result of failure to uphold the notice will mean that the defendant will be left remediless in the event that at the end of the trial some blame is laid or placed on the 1st 3rd party. The Plaintiffs claim too rendered remediless should the trial ultimately find that blame worthy lies (stands) with the intended 3rd party and not the defendant. In this courts opinion, the scenario demonstrated above is therefore likely to cause injustice.

In instances where no avenue exists to redress an injustice, the court has no alternative but to turn to

section 3A of the Civil Procedure Act. This is a section which shrouds the courts inherent powers. It reads *“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”*.

Section 3 A Civil Procedure Act being a substantive provision overrides the subsidiary rules of order 1 rule 14 (3) Civil Procedure Rules, in that although the Court has no room under this rule to grant a reprieve to the defaulting applicant out right, it can nonetheless invoke the inherent powers under Section 3A of the Civil Procedure Act to do all that is necessary for ends of justice to be met. The circumstances under which this provision is to be invoked are now clear and settled. In the case of WANJAU VERSUS MURAYA KNELLER AG. JA, As he then was, held inter alia that *“Section 3A of the Civil Procedure Act Cap.21), although saving the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of the Court, should not be cited where there is an appropriate section or order and rule to cover the relief sought.*

This is therefore a proper case where Section 3 A can be applied as there is no avenue in order 1 rule 14 (3) through which the Court can remedy a faulty service of a 3rd party notice in circumstances where failure to remedy, such a default, is likely to occasion not only injustice but also a miscarriage of justice to an innocent party as demonstrated herein. In such circumstances the court has jurisdiction to fault the service but allow reprieve to the defaulting party and grant leave and time frame within which to serve a fresh notice such circumstances are both demonstrated and displayed herein and so the court will be inclined to fault the 3rd party notice served outside the stipulated period, but for reasons of ends of justice to be met to both parties, leave will be granted to the defendant to issue a proper one. Failure to do so would allow the first 3rd party wiggle out of his responsibility on the basis of technicalities should the court ultimately find him liable to contribution. In this courts opinion a rule which permits such a situation to subsist is a bad master in serious need of a disciplinary action along the lines suggested herein.

The last complaint related to likelihood of suffering prejudice based on the fact that the defendant has not even served a 3rd party notice on the second intended 3rd party (the 2nd intended, 3rd party is so referred to because he is not yet joined to the proceedings). From the averments in paragraph 3 and 14 A –D of the amended defence, the first intended 3rd party and the intended 2nd 3rd party are the Doctors who attended the deceased, and further that if any of its (the defendants) employees rendered services to the deceased, then they did so on the instructions and directions of the said 1st 3rd party and the intended second 3rd party. No explanation has been given as to why the intended 2nd, 3rd party has not been served.

The foregoing notwithstanding, the court, has to determine whether, on the facts demonstrated herein, as well as the legal provisions of law, applicable to the situation herein, the first 3rd party has been prejudiced or stands to suffer prejudice as a result of the defendants default to bring in the intended 2nd 3rd party. Order 1 rule 14 (4) offers assistance. It reads *“where a third party makes as against any person not already a party to the action such a claim as is mentioned in sub rule 1, the provisions of this order relating to the rights and procedure as between the defendant and the third party shall apply “Mutatis Mutandis” as between the third party and such person and the court may give leave to such third party to issue a 3rd party notice and the preceding rules of this order shall apply “Mutatis Mutandis”, and the expression third party shall respectfully apply to and include every notice so issued and every person served with such notice”*.

Further to this Section 5 (1) as read with Section 5 (2) of the limitation of Actions Act stipulates clearly that the right to indemnity arises after judgment has been given. Also Section 3 (1) (a) of the limitation of Actions Act talks of the right to contribution arising from issuance of judgment.

The net effect of the foregoing assessment on prejudice is that this courts’ construction of those provisions of the law and applying them to the facts herein, leads to the conclusion that there is still room for the 1st 3rd party to move by way of exparte summons, to move the court to grant him leave to issue a

3rd party notice on to the intended second 3rd party if he so wishes. Or alternatively, wait till after judgment has been issued against them, and then move to seek contribution and indemnity from the intended second 3rd party.

In conclusion the final orders of this court as regards 3rd party directions issued herein are as follows:-

(1) The assessment of legal provisions case law and principles of law on the subject have revealed that a 3rd party who feels aggrieved by 3rd party proceedings brought against him has an option to file an application by way of chamber summons to apply to have the ex parte orders for leave to issue 3rd party notice self aside. Or alternative be is at liberty to raise objections at the taking of directions stage. I therefore follows that the 3rd party failure to apply to upset the orders granting leave to apply for 3rd party proceedings herein notwithstanding the first 3rd party has properly raised the objections raised and will be ruled upon on merit.

(2) As regards lack of cause of action against the 1st 3rd party by the defendant, the court, makes a finding that an allegation that the deceased was a patent of the 1st 3rd party and the intended 2nd 3rd party and any action taken by employees of the defendant, in so far as the deceased, is concerned was under the direction, instruction and supervision of the first 3rd party and 2nd intended 3rd party, raises a triable issue as to where blame worthiness is to be placed, which issue can only be resolved by adduction of evidence. It is now trite law that where a triable issue arises, there is a reasonable cause of action irrespective of whether it will succeed or not. The test is whether it is likely to succeed.

(3) On the allegation that the relationship between the defendant and the 1st 3rd party in so far as the subject matter of the proceedings has not been spelt out, the court, finds that this assertion is correct from the reading of the pleadings. But makes a finding that such an omission is not fatal in all circumstances. It is now trite law that where a pleading can be saved through an amendment, it should not be rejected. In this courts opinion, this is a proper candidate for saving of the said defence as what is complained of lacking in the defence can be cured by an amendment.

(4) As regards the cause of action between the defendant and the intended 3rd party being time barred, the court, makes findings that case law as well as construction of section 5 of the limitation of actions Act Cap. 22, Laws of Kenya, and Section 3 of the Law Reforms Act Cap. 26, Laws of Kenya, makes it clear that a cause of action on contribution and indemnity starts running from the date of judgment for a period of two years. There is no judgment in place herein yet and so the cause of action has not yet arisen as between the defendant and first 3rd party.

The defendant's action of bringing in the 1st 3rd party at the trial stage is for purposes of having liability between them and that between the defendant and the plaintiff decided at the same trial for convenience purposes and also for saving on costs and time.

(5) As regards the alleged prejudice being suffered by the 1st 3rd party by reasons of the defendant not serving a 3rd party notice on to the intended 2nd 3rd party, the court makes a finding that no such prejudice is likely to be suffered as alleged because the said 1st 3rd party, has the same powers as the defendant to issue a 3rd party proceeding against the said intended 2nd 3rd party and have the issue of liability between them decided at the same time. Or alternatively they can wait and when judgement is passed against them move to seek contribution from the said intended second 3rd party.

(6) It is correctly submitted by the 1st 3rd party that it is a requirement of law that 3rd party notice be served within 15 days from the date the leave granting issuance of the same is granted. The 3rd party notice subject of this ruling was served more than 7 months later, and so it is in valid, null and void.

However such a finding is not fatal to the leave granted as the provisions of order 1 rule 14 (3) does not override the provisions of the substantive Section 3A of the Civil Procedure Act, which empowers the

Court to do all that is necessary for ends of justice to be met and to prevent abuse of the court process.

It is the finding of this court that upholding order 1 rule 14(3) without qualification is likely to result in injustice to both the defendant and the plaintiff. The injustice against the plaintiff will arise in that if the trial court finds at the end of the trial that the defendant is blameless and that blame worthiness is attributed to the first 3rd party, and the intended 2nd 3rd party, then the plaintiff will be left remediless. Likewise if the trial finally finds that the 1st 3rd party and the intended 2nd 3rd party share blame with the defendant then the defendant will be forced to shoulder that burden alone. The 3rd parties would have been allowed to wriggle out of their responsibilities on the basis of technicality should the trial court ultimately find them blame worthy. In this court's opinion, a rule which can be viewed as an instrument of injustice and hardship to litigants as opposed to it being a vehicle of justice should be upheld only in exceptional circumstances. The court has noted on the record that the rule was upheld in the case of OBONDO VERSUS AKEDI, a decision by a court of concurrent jurisdiction. That is not binding on this court. This court is entitled to revisit that provision and arrive at its own construction as it has done and rightly invoked Section 3 A Civil Procedure Act to apply substantial justice as opposed to applying technical into the parties for the reason given.

(7) In the circumstances of this case and for the reasons given above the court is of the opinion that although order 1 rule 14(3) does not give an express leeway to the court to cure a faulty 3rd party notice by virtue of it having been served outside the statutory period, operation of this rule does not oust the operation of the substantive provision in section 3A of the Civil Procedure Act which empowers the Court to do that is necessary for ends of justice to be met. The invocation of Section 3 A of the Civil Procedure Act could be formal, informal or suo moto by the court. The court is satisfied that this is a proper case where Section 3 A of the Civil Procedure Act can be invoked suo moto by the court and it is so invoked to the extent that directions sought on the 3rd party, notice herein are declined, for the reason that the notice was served outside the 15 days period only. Otherwise the other legal issues raised regarding them, have been found by this court not to be contributing to the faulting of the said notice as shown hereunder;-

(i). It is correct that 3rd party proceedings can be filed at any stage of the proceedings save that where liability is sought to be determined at the same trial, it is preferable that they be processed before commencement of the trial.

(ii). Where they are initiated after judgment, they have to be commenced within 2 years of the date of judgment.

(iii). Serious delays which were occurred have not prejudiced the 1st 3rd party as some of it is attributable to normal routine delays by the court to which the defence had no control.

(iv). In the over all consideration of the circumstances herein 3rd party proceedings have rightly applied for as well as leave as the facts displayed do not reveal a situation of embarrassment or prejudice or a likelihood of unnecessary delay to the plaintiff. In fact for reasons given, it is for the benefit of the plaintiff that the 3rd party proceedings be processed and form part of the proceedings at the trial.

(v). There is no justification in declining the 3rd party proceeding as it has not been shown that the notice is not within the rule. The only hitch that the notice has suffered is because it was served outside the stipulated 15 days period which this court has ruled that, that default does not operate to oust the inherent powers of the court enshrined in Section 3 A of the Civil Procedure Act which empowers the court to do all that is necessary for ends of justice to be met to the parties.

(vi). In this courts opinion the purpose for which the defendant seeks to introduce the 3rd party proceedings herein are part and parcel of those that the plaintiff seeks to introduce the defendant to these proceedings. There is no difficulty or complexity displayed that can be said that they are likely to arise to make it impossible for the 3rd party proceedings to be tried within the main cause. More so when the

plaintiff herself has not complained that, she will be embarrassed. Neither has it been argued by the 1st 3rd party that it is impossible to have the liability as against the plaintiff and the defendant and that of the defendant and 1st 3rd party to be decided at the same trial.

(vii). It has been demonstrated in the assessment, that a prima facie case, or a reasonable cause of action has been displayed by the amended defence as against the 1st 3rd party subject to the introduction of an amendment to provide a link.

(viii). The burden placed on the 1st 3rd party to prove that the 3rd party notice should not have been issued was not discharged as their allegation of there being no reasonable cause of action against them, and cause of action that may be found to be against them being time barred were ousted by the courts finding that a reasonable cause of action exists, and secondly that the issue of the cause of action being time barred does not hold as contribution and indemnity arises after judgment by operation of law, which judgment has not yet been entered herein.

(ix). It is correct that indemnity cannot be implied, but where the missing link is minor, like in this case, as explained, that alone cannot be used to fault proceedings, as that link can be cured through an amendment. There is still, room for amendment as the trial has not yet been concluded.

(8) For the reasons already given the application for directions is accordingly dismissed. But with leave to the defendant to reissue the said 3rd party notice and have the same served on the first 3rd party within 15 days from the date of the reading of this ruling.

(9) The 1st 3rd party who participated in the proceedings will have costs of the said application for directions.

(10) There after parties to proceed according to law.

DATED, READ AND DELIVERED AT NAIROBI THIS 7th DAY OF MARCH 2008.

R.N. NAMBUYE

JUDGE