



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 290 of 2007**

**TITUS OKUMU ALAI (ALSO KNOWN AS TITO ALAI).....1<sup>ST</sup> PLAINTIFF**

**LUCY ACHIENG OJANY ALAI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JUDAH KAIRIMA MAGAMBO.....1<sup>ST</sup> DEFENDANT**

**SUSAN NKATHA KAIRIMA.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The application here is brought under the provisions of order 1 Rule 18 of the Civil Procedure Rules and all other Enabling Provisions of the Law. It seeks that the question of liability between the 3<sup>rd</sup> Party and the Defendants be tried together during the hearing of the case. It also prays for costs to be provided for. It is based on the grounds that the 3<sup>rd</sup> party acted for the Defendants and in the interest of justice the application should be allowed. It is supported by the Affidavit of the 1st Defendant in the suit.

The 3<sup>rd</sup> Party has filed grounds of opposition and a Replying Affidavit in which he opposes the application on the grounds inter alia that hearing the dispute between the Plaintiffs, the Defendants and the Third Party at the same time would only cloud the issues in dispute. He avers that the Plaintiffs and the Defendants should first sort out the dispute between themselves and only then can the dispute between the Defendants and himself be heard and even then, separately.

Mr. Macharia for the Defendants/Applicants submitted that the Third Party herein acted for the Defendants in a matter of sale of property. The Defendants paid the balance of the purchase price to the Third Party who did not remit the same to the Plaintiffs and/or their Advocates. He therefore submitted that this is a proper case to be heard together as between the Plaintiffs the Defendants and the Third Party. He said that the Third Party should not be allowed to hide behind a professional undertaking and objections which were brought under provisions of Law which do not exist. He urged that the Third Party must be at the hearing so that he can answer to the issues that relate to the monies he received from the Defendants.

Mr. Waiganjo for the Respondent on his part submitted that in order for Third Party to be joined the subject matter between the Plaintiff and the Defendant and between the Defendant and the Third Party must be the same. He submitted that as the Third Party was only acting for the Defendants, the Defendants should file a case against the Third Party for professional negligence. He quoted the case of **YAFESI WALUSIMBI –VS- THE ATTORNEY GENERAL OF UGANDA CIVIL CASE NO. 109 OF 1958** He said that the applicants had not demonstrated why the Third Party should be joined at the hearing. He therefore asked that the application be dismissed with costs.

In a quick and precise reply Mr. Macharia stated that Order 1 Rule 14 supports his case fully.

**Order I Rule 14 reads:-**

Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third part)-

- (a) that he is entitled to contribution or indemnity or**
- (b) 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 or remedy claimed by the plaintiff; or**
- (c) 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 the Defendant and the Third Party or between any or either of them;.....”**

And that was why he sought to bring in the Third party in the proceedings in the first place. The subject matter in the case is the amount paid to the Third party by the Defendants and which was not remitted to the Plaintiffs, submitted Mr. Macharia. The Defendants’ defence is to have the Third Party answer as for that money. He submitted that indeed the Authority of YAFESI (supra) quoted by the Respondent squarely supported the Applicants’ case as to the subject matter between the three parties being the same.

I have considered the Application and submissions by counsel on their rival positions. This is the view I take after considering everything in its totality. Third Party Notice having been issued and the Third Party having entered Appearance it now rests with the court to order, as is prayed for under Order I Rule 18, as to how the suit shall proceed. I agree with the Applicants’ counsel that the subject matter between the Third Party and the Defendant is the same as the subject matter between the plaintiff and the defendant and indeed the original cause of action is the same. The Third party’s Counsel in my view is not aided by the case of YAFESI (SUPRA) as in that case the Plaintiff was suing the Defendant for negligence while the claim against the Third party was on allegations of fraud. Those were not same subject matters. That is not the case in the case now under consideration. In my view the Third Party’s presence before the court at the hearing is necessary for the Court to effectually and completely adjudicate upon and settle the issue in this suit as between the Plaintiff and the Defendant and the Defendant and the Third party. I was not able to find Order 54 of the Civil Procedure Rules in Cap 21 of the Laws of Kenya which was quoted by the Third Party to aid him.

These are the orders of the court:

1. The question of liability between the Third Party and the Defendants be tried together during the hearing of the suit between the Plaintiff and the Defendant.
2. The costs of the Application be in the cause.

DATED and DELIVERED in open court this 7<sup>th</sup> day of March 2008 in the presence of Mr. Wainaina holding brief for Macharia for the Defendants/Respondents and Mr. Waiganjo holding brief for Mr. Githinji for the Third Party.

P. M. MWILU

JUDGE

Mr. Wainaina prays for leave to file a Third Party defence.

P. M. MWILU

JUDGE

Court:

Leave is granted to the Third party to file and serve his defence within fifteen (15) days of the date hereof.

**P. M. MWILU**

**JUDGE**