



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1889 of 1999**

**JOSEPH OMWAMBO OWITI ..... PLAINTIFF**

**VERSUS**

**MAGADI SODA CO. LTD & ANOTHER .....DEFENDANT**

**RULING**

The Plaintiff moved to this Court vide a plaint dated 24<sup>th</sup> September, 1999 and filed on 28<sup>th</sup> September, 1999. Summons to enter appearance were issued on 1<sup>st</sup> October, 1999. The defence entered appearance dated 23<sup>rd</sup> day of November 1999 and filed on 24<sup>th</sup> November 1999. The defence is dated 6<sup>th</sup> December 1999 and filed on 16<sup>th</sup> December 1999. Statement of issues is dated 11<sup>th</sup> January 2000 and filed on 14<sup>th</sup> January 2000 by Counsel for the Plaintiff. Plaintiffs list of documents is dated 1<sup>st</sup> January 2000 and filed on 14<sup>th</sup> January 2000. Reply to defence is dated 11<sup>th</sup> January, 2000 and filed on 14<sup>th</sup> January 2000. Summons for directions as was then the practice, was dated 24<sup>th</sup> January, 2000 and filed on 30<sup>th</sup> March 2000.

A further perusal of the record reveals that the defendant moved to this court vide a chamber summons under order 1 rule 14 Civil Procedure Rules dated 15.1.2002 seeking leave of court to take out and serve a 3<sup>rd</sup> party notice on the Heritage All insurance company Ltd. The same was filed on 16.1.202. The orders in respect of the same were granted ex parte on 17.1.2002 by Rimita J. (as he then was) although 3<sup>rd</sup> party notices on the file do not have the court stamp they appear to have been served.

From a reading of a ruling by D.M. Rimita J. (as he then was) dated 7<sup>th</sup> March 2003, there is mention of there having been filed an application dated 12 February 2002, filed seeking to strike out an order which had been issued ex parte to join an insurance company as a 3<sup>rd</sup> party. It is noted in the body of the said ruling that the application had come before the learned judge as he then was on 17<sup>th</sup> July 2002 and since Counsel for the respondent was absent the 3<sup>rd</sup> party notice was ordered to be struck out.

Another application was filed on 19<sup>th</sup> August 2002 to set aside the order of 17.7.2002. The application of 19.8.2002 was allowed because in the learned judge's opinion (as he then was) "*there were interesting arguments on the issue whether an insurance company is a proper third party simply because a defendant is entitled to an indemnity under the terms of an insurance policy issued by the insurance company*".

The reinstatement of the 3<sup>rd</sup> party notice also reinstated the application which had been presented to strike out those *ex parte* orders. This gave rise to arguments *inter parties* leading to Rimita J's ruling (as he then was) of 30<sup>th</sup> May 2003. A reading of the same reveals that the learned judge (as he then was) declined to grant the application for setting aside because wrong procedure had been followed in that the party aggrieved with an application for leave to issue a 3<sup>rd</sup> party notice against him, has leave to attack those orders during 3<sup>rd</sup> party directions. The application was found premature and struck out.

Following the ruling of 30<sup>th</sup> May 2003 by Rimita J. (as he then was) disallowing the application to set aside the *ex parte* order for 3<sup>rd</sup> party notice, paved the way for the hearing of the application for directions which had been presented to court by the defendant dated 25<sup>th</sup> March 2002 and filed on 26<sup>th</sup> March 2002. it sought the following orders.

- (1) *That this Honourable Court be pleased to give direction on third party notice issued herein.*
- (2) *That the 3<sup>rd</sup> party notice dated 7<sup>th</sup> January 2002 be taken as the defendants statement of claim against the 3<sup>rd</sup> party.*
- (3) *That the question of indemnity between the 3<sup>rd</sup> parties and the defendant be tried and determined at the same time as the trial of this action.*
- (4) *That this honourable court be pleased to give directions as to the filing of defence and any other relevant pleadings by the 3<sup>rd</sup> parties as it deems fit.*
- (5) *That costs of this application be costs in the cause.*

That application is indicated on record to have been argued on merit on 19.7.2002 before Mugo J. In attendance were Counsels for the Plaintiffs, defendants, 1<sup>st</sup> and 2<sup>nd</sup>, 3<sup>rd</sup> party. That argument gave rise to a ruling delivered by Mugo (J) on 10<sup>th</sup> day of December 2004. Arguments by Counsel, runs from page 1 to page 3 line 11 from the bottom. The relevant provisions of the law set out by the learned judge run from page 3 line 7 from the bottom to page 4 line 3 from the bottom. The reasoning of the judge is found at page 4 line 2 from the bottom to page 7 line 3 from the top. The final orders run from page 7-8.

In this courts own opinion the salient features of the learned judges ruling is as follows:-

- (1) *The wording of order 1 rule 14(a) (b) and (d) being in the alternative means that the contention that the defendant is entitled to indemnity by the 3<sup>rd</sup> party is sufficient to avail the defendant a right to take out third party proceedings independently of the requirements of (b) and (c).*
- (2) *That by reason of matters set out in number 1 above, it is not necessary therefore to consider whether or not the issues in dispute as between the plaintiff and the defendant are substantially the same as between the defendant and the 3<sup>rd</sup> party. It matters not therefore that the question or issue between the defendant and the plaintiff are in tort/negligence and or that the relationship between the defendant and the 3<sup>rd</sup> party may be in contract.*
- (3) *From the reading of order 1 rule 18 Civil Procedure Rules, there is no possibility for the Plaintiff to join in opposition to the application for 3<sup>rd</sup> party directions as in the learned judges opinion, This is a matter between the defendant and the 3<sup>rd</sup> parties.*
- (4) *That a contract of insurance being one of indemnity, the court found that since the existence of the policies was not in dispute, there existed a proper question to be tried as relates to the 3<sup>rd</sup> parties liability to indemnify the defendant for any judgment that may be awarded against it in favour of the plaintiff.*
- (5) *The learned judge disagreed with Counsel for the Plaintiffs arguments that indemnity can only arise*

after judgment, as order 1 rule 18 was clear that such a question may be “tried at or after the trial of the suit.

(6) The learned judge was of the opinion that since the defendants claim that, risk insured is in all circumstances connected with the cause of action herein, it is best for the questions of indemnity to be tried at the same time as the issue of liability in order that the proceeding herein can be brought to an earlier end as such an approach would be beneficial to the plaintiff since the question of who compensates him would have been determined without need for further application.

Following the above reasoning the learned judge made the following orders:-

- (1) 3<sup>rd</sup> party notices dated 17.1.2002 were deemed to constitute the defendants claim against the 3<sup>rd</sup> parties named.
- (2) Question of indemnity between the defendant and 3<sup>rd</sup> parties were ordered to be determined at the same trial as the action.
- (3) 3<sup>rd</sup> parties were to proceed to file and serve their defences on all the parties to action within 14 days from the date of the ruling.
- (4) The plaintiff was permitted to file any necessary pleadings as may have been necessitated by the 3<sup>rd</sup> party proceedings.
- (5) Costs were ordered to be in the cause.

The first 3<sup>rd</sup> party has come back to this court vide an application dated 23<sup>rd</sup> November 2005 and filed on 24<sup>th</sup> November, 2005 seeking review of the above orders. The grounds in support are set out in the body of the application, supporting affidavit and written skeleton arguments. The major ones are as follows:-

- (1) Under Cap.405 a defendant seeks indemnity only after a claim against it has been proved. The joinder effected is therefore premature.
- (2) Failure to join the “3<sup>rd</sup> parties to this proceeding will not rob the plaintiff of his right to proceed against the 3<sup>rd</sup> party as the plaintiff has a right to file a declaratory suit against the 3<sup>rd</sup> party seeking orders that the now 1<sup>st</sup> 3<sup>rd</sup> party is obligated to indemnify him as concerns the claim in question. By which time he will be armed with a judgment against he defendant.
- (3) Since the plaintiffs claim against the defendant arise from tort to which action the 3<sup>rd</sup> parties have not contributed to the 3<sup>rd</sup> parties role in the trial will be nil.
- (4) The issue of which of the two 3<sup>rd</sup> parties should compensate the plaintiff through indemnity, to the defendant, does not arise from the pleading which pleadings do not assign any wrong doing to the 3<sup>rd</sup> parties in so far as the action complained of is concerned.
- (5) Likewise the 3<sup>rd</sup> parties have no defence to the plaintiffs claim.
- (6) Continuance of the joinder of the 3<sup>rd</sup> parties to these proceedings will rob the 3<sup>rd</sup> parties of their right to invoke the arbitration clause in the contract document to which the plaintiff is not a party and which he cannot access.
- (7) Still maintain that if the purpose of joinder is for indemnity after judgment, then the move is premature as there is no judgment in place. For the reasons given above the court was surged to correct the error committed by the judge in the ruling sought to be set aside

The defendant has opposed the application on the basis of grounds of opposition filed, dated 2<sup>nd</sup>, February, 2006 and filed the same date. Seven grounds were put forward namely:-

- (1) The application does not lie abinitio.
- (2) The application is incompetent bad in law and an abuse of the court process.
- (3) There has been inordinate delay on the part of the 1<sup>st</sup>, 3<sup>rd</sup> party in bringing the application.
- (4) There is no new and important evidence which was not within the knowledge of the 1<sup>st</sup> third party or which the 1<sup>st</sup> third party would not produce at the time the order of 10 December, 2004 was made. The alleged evidence does not therefore form a ground for review or current review under the cited provisions of law or at all.
- (5) There is no apparent error on the record as alleged or at all or any other sufficient reason to warrant the grant of the orders sought.
- (6) The 3<sup>rd</sup> party's remedy if any lies on appeal.
- (7) The application lacks bona fides and is merely intended to delay the hearing and determination of the main suit.

In their written skeleton arguments, counsel reiterated the grounds of opposition and then stressed the following points.

- (1) That in view of the appeal preferred by the 2<sup>nd</sup> 3<sup>rd</sup> party the first 3<sup>rd</sup> party shares common ground on review with the 2<sup>nd</sup> 3<sup>rd</sup> party on appeal. As such no review can lie.
- (2) The application herein has been presented after an undue delay of 11 months which has not been explained and as such the applicant is disentitled to the relief sought.
- (3) The motor vehicle policy insurance No. MP9700 M001 which is the basis of the applicants application has been in existence and applicants knowledge since 1997 and so it cannot be said to be new and important matter because:-
  - (i) 3<sup>rd</sup> party notice was served on or about 17.1.2002 to which the applicant entered appearance on 23.1.2002 where as the 2<sup>nd</sup>, 3<sup>rd</sup> party entered their appearance on 24.1.2002.
  - (ii) The applicant applied to strike out the 3<sup>rd</sup> party notice served on it on 12.2.2002
  - (iii) Directions on the 3<sup>rd</sup> party notices was applied for on 25.3.2002. The reasons given was that the question of liability of the defendant to the plaintiff was intrinsically inter moven with the indemnity arising on defendants contracts of the insurance and that the third parties had refused and/or neglected to handle the claim by the plaintiff despite being given notice by the defendant.
  - (iv) The applicants opposition to the application for direction was based on the same grounds as those presented herein.
  - (v) Similar grounds had been presented in the application to strike out the orders granting leave to issue 3<sup>rd</sup> party notice.
  - (vi) Upon giving of the ruling sought to be reviewed delivered on 10.12.2004 both 3<sup>rd</sup> parties filed their defences with the 2<sup>nd</sup>, 3<sup>rd</sup> party filing theirs on 21<sup>st</sup> December, 2004.

(vii) At paragraph 4 of its defence the applicant confirm its knowledge of the existence of the policy.

(viii) The amended statement of issues filed on 18<sup>th</sup> July 2005 contains 4 issues namely number 4 rule 5 which deal with questions as to whether the plaintiffs claim against the defendant is covered under either policy issued by the applicant or that issued by the 2<sup>nd</sup> 3<sup>rd</sup> party or both and whether the defendant is entitled to be indemnified by the applicant for the 2<sup>nd</sup>, 3<sup>rd</sup> party or both.

(ix) Discovery has been done and the applicant has participated in this procedural step by filing its list of documents inclusive of the policy in question.

(x) On 7<sup>th</sup> November, 2005 when the suit came up for hearing the applicant raised a preliminary objection along the same lines but objection application was struck out with costs.

(xi) The applicant has all along been aware since the notice was served on them that the defendant was placing reliance on the comprehensive motor vehicle policy number MP 9700M001 in seeking indemnity against the applicant in respect of any sum that the plaintiff may be awarded against the Applicant in respect of any sum that the plaintiff may be awarded against the defendant in this suit.

(xii) They contend that there is no error which is apparent on the face of the record as required by law. It matters not that had this court been seized of the application, it itself would have arrived at a different decision.

(xiii) They also contend that revising the decision of Mugo J. would amount to this court sitting on appeal of a decision of a court of concurrent jurisdiction.

4. They also maintain that if the applicant is truly aggrieved they would have moved to the court of appeal as all the reasons advanced for review had been canvassed by them on merit and ruled against.

5. The application is incompetent as it has been supported by an affidavit sworn by Counsel which affidavits deal with contentious issues and as such it is unsupportable.

6. It is their stand that the application is meant to delay the quick disposal of the application.

On case law the applicant relied on the decision in the case of **KAYANJA VERSUS NEW INDIA ASSURANCE COMPANY LTD [1968] E.A. 295** where it was held inter alia that a stranger cannot sue upon a contract unless given a statutory right to do so.

The case of **GALAXY PAINTS COMPANY LTD VERSUS FALLAN GUARDS LTD CA. 219 OF 1998** decided on 14<sup>th</sup> day of April 2000 whose central theme is found at page 5 of the judgment and runs from line 4 from the top to line 8 from the bottom. A summary of them is to the effect that:

*(i) It is trite law as confirmed by the provisions of Order XIV of the Civil Procedure Rules that issues for determination in a suit generally flow from the pleadings.*

*(ii) Unless the pleadings are amended, the trial court as per requirement of Order XX rule 4 Civil Procedure Rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the courts' determination.*

*(iii) Unless pleadings are amended parties, must be confined to their pleadings and to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record.*

The case of **KARIUKI VERSUS IRUNGU [2004] E.A. 108** where it was held inter alia that “*the subject matter between the 3<sup>rd</sup> party and the respondent was based on contract and was therefore different from the subject matter between the plaintiff and the respondent which was based on tort. The*

3<sup>rd</sup> party was therefore not lawfully joined.”

The case of **KENIDIA ASSURANCE COMPANY LTD VERSUS JAMES OTIENDE [1989] 2 KAR** a Court of Appeal decision where it was held inter alia that “the requirement in Section 10 (1) of the insurance motor vehicle third party risks Act that judgment is obtained against the insured before the insurer became liable under the Act is an essential pre-condition of liability under the Act, without it the court has no jurisdiction to order the insurer to pay damages for insurances to the respondents so that the appellant company was not estopped from raising the issue as a preliminary point on appeal.”

The Respondent on the other hand relied on the code of Civil Procedure 16<sup>th</sup> Edition Volume 4. Review is indicated to be falling under Order 47 thereof. The principles relied upon by the applicant are found on pages 4105, to 4122. The salient features of the same are:-

(i) That the power to review is the creation of a statute. It must be conferred by law either specifically or by necessary implication. Review is not an appeal in disguise. Herein the applicant has anchored his application on a subsidiary statutory provision namely order XLIV rule 1 Civil Procedure Rules.

(ii) The mere fact that different views on the same subject are possible is no ground to review the earlier judgment passed by a bench of the same strength. The power of review can be exercised for the correction of a mistake not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. Herein the applicant relied on there being an error apparent on the face of the record. It can be pointed out from the record without lengthy arguments.

(iii) The error that can pass the test must be one that needs not be searched and fished out. It must be of inadvertence, one that is apparent on the face of the record, which error must not require any long drawn process of reasoning on points where they may be conceivably two options. Herein the applicant contended that the error is apparent on the face of the record where as the respondent contended that it is not. The Court has been invited to rule in favour of each which exercise has been reverted to in due course.

(iv) The error referred to above is not one that relates to an erroneous claim but one which is apparent on the face of the record. The first can be corrected by the higher forum where as the latter can be corrected by the exercise of review jurisdiction. Herein the respondent has contended that what the applicant is complaining about is an alleged erroneous decision and not an error apparent on the face of the record.

(v) A review petition has a limited purpose and cannot be disguised as an appeal. It is not maintainable if the only ground of review is that the points not deal in correct perspective. It cannot be exercised merely on merits because it has come to a different conclusion on further argument and further consideration.

(vi) The ground of discovery of new evidence can only stand if the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. Herein the stand of the respondent is that there is no new evidence as the applicant has all a long been aware of the existence of the policy in question. Further that issues touching on indemnity based on the insurance policy have been raised in this same forum and ruled upon.

(vii) An application based on new evidence must be treated with great caution and the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the alleged facts.

(viii) Before acting on the request on the basis of new evidence, it must be established that the applicant had acted without due diligence and that the existence of the evidence was not within this knowledge. The evidence must be new and important which was not within the knowledge of the party when the

decree was made.

The case of **KEN FREIGHT (E.A) LIMITED VERSUS STAR EAST AFRICA CO. LTD** where Onyango Otieno J. (as he then was declined a request for review because.

(i) *There had been an un explained delay of 3 months before presenting the in application.*

(ii) *The order sought to be reviewed had not been extracted.*

(iii) *Insertion of the word “at Mombasa” in the verifying affidavit could not qualify to be new and important matter which could not have been discovered after due diligence.*

The case of **TOURING CARS (K) LTD VERSUS MUKANJI [2000] 1 E.A. 261**, a Court of appeal decision where it was held inter alia that:-

(i) *Lack of Candow revealed in the affidavit in support of the review application alone renders the application undeserving.*

(ii) *Where a judge finds that new and important evidence has been produced, he is under a duty to consider whether this evidence could not have been discovered after the exercise of due diligence by the party seeking to produce it.*

The case of **NATIONAL BANK OF KENYA LTD VERSUS NJERU (1995-1998) 2 EA 249**, a Court of Appeal decision where it was held inter alia that “*a review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and relied on erroneous conclusion of law thus construing a statute or other previsions of law cannot be a ground for review.*”

The case of **EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANK VERSUS AFRICAN GREEN FIELDS LTD AND OTHERS [2002] 2 EA 397**, on review Ringera J. as he then was held inter alia that:-

*“An order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Further it could not be reviewed on the ground that another other judge of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the issue.*

*The proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose”*

The case of **KISYA INVESTMENTS LTD AND ANOTHER VERSUS KENYA FINANCE CORPORATION LTD AND OTHERS NAIROBI HCCC NO. 3504 OF 1993** decided by Ringera J (as he then was) on 15<sup>th</sup> July 1996. It is a ruling on a preliminary objection to an application. One of the ground was on the affidavit being sworn by the Counsel. At page 3 line 1 from the top the learned judge as he then was observed thus “*It is not competent for a party’s advocate to depone to evidence on facts at any stage of the suit. By deponing to such matters the advocate courts an adversarial invitation to step from his privilege position at the bar into the witness box. He is liable to be cross-examined on his deposition. It is impossible and unseemly, for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same cause”.*

The court has given due consideration to the fore set out rival arguments and considered the same in the light of case law cited by either side in support of their case and in this courts opinion the following matters do not seem to be in dispute namely:-

- (1) That the Plaintiff's claim against the defendant is founded in tort. Liability as pertains to that tortuous action has not yet been settled. The action arises from events arising from a road traffic accident.
- (2) The defendants claim against the 1<sup>st</sup> and 2<sup>nd</sup> 3<sup>rd</sup> party arise from contracts of insurance between them in so far as the accident vehicle is concerned. It is what is known in law as a claim to indemnity.
- (3) It is not disputed as ruled by Mugo J. in the ruling sought to be reviewed that the provisions of order 1 rule 18 Civil Procedure Rules gives a discretion to a Court seized of the matter either to decide or determine issues of liability between the defendant and the 3<sup>rd</sup> party at the same trial in which the determination of a liability between the plaintiff and the defendant is being done. In the arguments before the ruling both the plaintiff and the 3<sup>rd</sup> parties argued that the issue of indemnity is premature and still argues so. That the plaintiff should obtain judgment first and then the Plaintiff can thereafter move to file a declaratory suit to enforce the judgment or the defendant to file suit for indemnity.

After due consideration of the said rival arguments, the learned judge ruled that it was "more convenient to have both liabilities determined at the same trial. The 1<sup>st</sup> 3<sup>rd</sup> party has come back to this Court and wishes this Court to revisit that issue for the reasons given. To them it was an error on the part of the learned judge to rule in the manner she did, and have given reasons for that stand whereas the defendant has stated that same is sound and proper and should not be disturbed also for the reasons given. This is the situation that this court has been invited to resolve.

The starting point for this Court in its attempt to resolve the issue is the provisions under which the application has been presented and or anchored. Order XLIV rule 1 reads:-

*"1 (i) Any person considering himself aggrieved –*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.*

*(2) A person who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and or when being respondent he can present to the appellate court the case on which he applies for the review. . .".*

From a reading of the above provisions it is apparent that in order to succeed a litigant wishing to avail himself/herself of this relief has to demonstrate presence and or existence of certain ingredients contained therein which I hereby proceed to set out.

- (1) The party must consider himself to be aggrieved. The applicant has stated that he is aggrieved by the ruling sought to be reviewed and there is no dispute about that.
- (2) The ground must be as a result of a decree or order from which no appeal is hereby allowed.

Herein the applicant complaint falls under rule 1(a) as it has been argued and not disputed that the order

sought to be reviewed is appealable and in fact the second 3<sup>rd</sup> party filed an appeal whose state of affairs is not known. It is however clear that the applicant did not prefer an appeal. The application is therefore proper subject to passing the test under sub rule 2.

In view of the allegation that the second 3<sup>rd</sup> party preferred an appeal against that ruling.

(3) The applicant must have discovered new and important matter or evidence which after due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made. The stand of the respondent is that the applicant cannot rely on this ingredient because the source of their complaint is an insurance policy which has been within their knowledge even before the proceedings were set in motion. This court has revisited the grounds put forward by the applicant as supporting their plea for review both in the supporting affidavit, as well as the skeleton arguments, and found that reliance has not been placed on this ingredient. There is mention by the respondent that there is further supporting affidavit annexing the order complained of which has not been traced on the court record. There is no mention by the respondent that the said missing further supporting affidavit contained deponement in support of the ingredient of discovery of new and important evidence or matter which was not within the knowledge of the applicant and which could not be discovered after due diligence as at the time the decree or order was passed.

(4) Or an account of some mistake or error apparent on the face of the record. This is what is contained both in the supporting affidavit as well as the written skeleton arguments. The principles set out from Mulla on the code of Civil Procedure set out herein as well as case law referred to above have already produced the yardstick to be used for satisfying this ingredient. In that in order to succeed the error must be obvious on the face of the record. It must not be one that can be fished out or one that can be established by lengthy arguments.

This Court has applied the yardstick to the facts herein and it has found that the issue of insurance contract is not a hidden issue. It is obvious save that it is not mentioned in the plaint and the defence even the reply to defence. But it has featured prominently in the 3<sup>rd</sup> party notice. As submitted by the respondents Counsel, it features prominently in the inter parties argument during the hearing on 3<sup>rd</sup> party directions heard on 19.7.04.

The argument on behalf of Waweru is found at page 70-71 of the record. This Court has perused the same and finds that there are salient features of the same set out here under as:-

- (a) The subject matter is what guides the Court in giving out directions on trial.
- (b) That the defence does not mention the issue of indemnity and on that account prayed for the 3<sup>rd</sup> party directions to be dismissed.
- (c) That in order for the 3<sup>rd</sup> party to be lawfully joined, the subject matter between the 3<sup>rd</sup> party and defendant must be the same as the subject matter between the plaintiff and the defendant which is not the case herein.
- (d) That there are provisions of arbitration in contracts of insurance and there is a likelihood of delay if the 3<sup>rd</sup> parties are brought on board at that stage.
- (e) To them indemnity must be established first before the 3<sup>rd</sup> party is sought which is not the case herein.
- (f) That Cap.405 requires that the liability of a 3<sup>rd</sup> party be established first before liability of a 3<sup>rd</sup> party can arise.
- (g) Counsel relied on **HCCC NO.1170 of 1987 ANNE W. MURARA VERSUS BENSON WANJIRU AND CC 109 OF 1958. YAFESI WALUSIMBI VERSUS ATTORNEY GENRAL UGANDA.**

This court has revisited the ruling sought to be reviewed and finds that the learned judge had noted at page 2 of the ruling line 1 from the bottom that, the plaintiffs Counsel had opposed the application for directions by arguing that the defence does not raise indemnity. At page 3 line 4 from the top the Court notes that the same Counsel had argued that indemnity should not come up before judgment and the suit ought to be heard first independently or whether there is a question of indemnity or not and that the 3rd party is intended to delay the suit which had previously been ordered to be heard on priority. At line 9 from the top on page 3, it is observed that counsel for the 1<sup>st</sup>, 3<sup>rd</sup> party had agreed with that argument.

The learned judges response to that argument is found at page 4 of the said ruling line 2 from the bottom and it reads thus:-

*“The wording of order 1 rule 14 (a) (b) and (c) being in the alternative means that the very contention that the defendant is entitled to indemnity by the 3<sup>rd</sup> parties is sufficient to avail the defendant right to take out third party proceedings independently of the requirements of (b) and (4). It is therefore not necessary therefore to consider whether or not the issues in dispute as between the plaintiff and the defendant are substantially the same as between the defendant and the 3<sup>rd</sup> party. It matters not therefore that the question or issue between the defendant and the plaintiff are in tort (negligence) order that the relationship between the defendant and the 3<sup>rd</sup> party may be contract.”*

The court went on to conclude at page 6 line 6 from the top thus:-

*“A contract of insurance being one of the indemnity is found that since the existence of the policies is not in dispute, there exists a proper question to be tried as related to the third parties liability to indemnify the defendant for any judgment that may be awarded against it in favour of the plaintiff. I do not agree with the counsel for the plaintiff that the question of indemnity can only be raised after a judgment is entered since order 1 rule 18 Civil Procedure Rules is very clear that the court may decide whether such question be tried either at or after the trial of the suit.”*

There is no doubt that this conclusion is what the applicant wishes this Court to revisit. According to him the learned trial judge made a mistake. She should have applied the provisions of Cap.405 Laws of Kenya Section 10(1) and ruled that liability should be established first, as between the plaintiff and the defendant and only after such liability is established is when either the plaintiff or the defendant can file a declaratory suit for indemnity against the 3<sup>rd</sup> parties. According to the applicant this is an error apparent on the face of the record for the court to have ruled otherwise which error should be rectified.

Whereas the stand of the respondent is that this court has no jurisdiction to revisit that issue as in doing so it will be sitting on an appeal through the back door and secondly it will be being invited to rule upon an allegedly wrong decision by a court of coordinate jurisdiction.

Due consideration has been given to that rival arguments by this court and considered the same in line with the learned judges' conclusion on the matter and find that, the learned judge was alive to the issue of there being no pleading on indemnity in the pleadings exchanged between the plaintiff and the Respondent. It is also noted that the learned judge was aware that the liability as regard indemnity was an issue as between the defendants and the 3<sup>rd</sup> parties only. The learned judge went on to invoke the discretion embedded in Order 1 Rule 18 of the Civil Procedure Rules where by the issues between the defendant and the 3<sup>rd</sup> party would be determined within the same trial or after the trial and in her ladyship's opinion she opted for a joint trial as that was thought to be beneficial to the plaintiff.

The question to be determined by this court is whether the learned judge's arrival at that decision is to be taken as an error as claimed by the applicant, or a construction or interpretation of law as stated by the respondent. Secondly whether this court has power, authority and jurisdiction to interfere with that order?

In support of his stand as noted earlier on the applicant has placed reliance on case law already cited namely:- **KAYANJA VERSUS NEW INDIA ASSURANCE COMPANY LIMITED (1968) EA 295** whose central theme is that *“a stranger cannot sue upon a contract unless he has been given a statutory*

*right to do so”, the case of **GALAXY PAINTS COMPANY LIMITED VERSUS FALCON GOODS LIMITED NAIROBI CA2197 1998** whose central theme is that “issues for determination in a suit generally flow from the pleading”, the case of **KARIUKI VERSUS IRUNGU (2004) 2 EA 108** decided by Ochieng Judge, a decision of a court of coordinate jurisdiction, whose central theme is that “the 3<sup>rd</sup> party had been wrongly joined to the proceedings because the subject matter between the 3<sup>rd</sup> party and respondent was based on contract and was therefore different from the subject matter between the plaintiff and the respondent which was based on tort”, and lastly the case of **KENINDIA ASSURANCE COMPANY LIMITED VERSUS JAMES OTIENDE (1989) 2 KAR 162** whose central theme is that “the requirement of Section 10 (1) of the Insurance Motor Vehicle Third Party Risks Act is that judgement is obtained against the insured before the insurer becomes liable under the Act, is an essential pre-condition of liability under the Act . Without it the court has no jurisdiction to order the insurer to pay money for insurers to the respondent”.*

Whereas on the other hand the authorities relied upon by the respondent to oust the claim of existence of an error are the case of **NATIONAL BANK OF KENYA LIMITED VERSUS NJAU (1995-98) 2 EA 249**, a court of appeal decision whose central theme as stated earlier is that “a review may be granted where the court considers that it is necessary to correct an apparent error or omission on the face of the record, the error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review, that another Judge, could have taken a different view of the matter. Nor can it be a good ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law can not be a ground for review”. The case of **EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANK VERSUS AFRICAN GREEN FIELDS LIMITED AND OTHERS (2002) 2 EA 377** decided by Ringera Judge, whose central theme as stated earlier is that “an order can not be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Further it could not be reviewed on the ground that other judges’ with co-ordinate jurisdiction and or even the Judge whose order is sought to be reviewed have substantively arrived at a different decision on the issue. The proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law of his alleged wrongly exercise of discretion is to appeal the decision unless the error be apparent on the face on the record and therefore requires no elaborate argument to expose”.

Due consideration has been given to the above rival arguments as pointed out earlier, of the existence or non existence of an error apparent on the face of the record, sufficient enough to warrant the review sought. Of paramount consideration that this court, has to take note of is that the error must be obvious and evident on the record, it should not be one which has to be disclosed after a lengthy scrutiny of the facts or one that requires lengthy arguments to have it established.

The error is stated to be based on:-

- (i). Contract
- (ii). Pleadings
- (iii). Other courts have made similar decisions. (Judicial precedent)

On contract, the applicant has alleged that the error arises from the facts that the insurance contract is between the insurer and the insured and so the plaintiff who is a third party to the said contract, cannot directly sue upon it. Indeed the **KENINDIA CASE (Supra)** which is a court of appeal decision is to the effect that a party who is not party to a contract cannot sue upon it unless if there is a statutory right conferred on him. In the circumstances of this case, indeed the plaintiff is not party to the contract of insurance but he is the ultimate beneficiary, should a judgment be made in his favour. The stand of the applicant is that the learned judge made an error when she ruled that the 3<sup>rd</sup> party liability with the defendants can be determined at the same time as the liability between the plaintiff and the defendant.

The learned judge whose orders are sought to be reviewed stated that it is proper to hold such a joint trial. In his ruling of 7.3.2003 Rimita J. (as he then was) when he opened the application for directions to be reinstated for arguments on merit observed thus:- *“I think there will be interesting arguments on the issue of whether an insurance company is a proper third party simply because the defendant is entitled to an indemnity under the terms of an insurance policy issued by the insurance company”*. The learned Judge considered the provisions of law under Order 1, Rule 18 Civil Procedure Rule and ruled that it was proper.

The learned Judge had in mind the possibility of determining liability between the plaintiff and defendants, first and after issuance of judgement in favour of the plaintiff is when the plaintiff can avail himself of the Section 10 (1) of cap 405 3<sup>rd</sup> Party Insurance Risks Act procedures, move against the insurer and enforce cover benefits. But ruled that this can be decided in one trial.

In this courts opinion construction of the Order 1 Rule 18 Civil Procedure Rule discretion to order the section 10 (1) of cap 405 procedures and rule that these can be determined in one trial is a matter of interpretation of legal provisions by a judge of coordinate jurisdiction. As noted Rimita J. (as he then was) ruled that *“it would be interesting if it were to be ruled so”*. Mugo J. ruled that it was possible. This ruling in this courts’ opinion can not be stated to be an error but an interpretation of provisions of law. In this courts’ opinion determination as to whether the learned Judge was right or not is a matter for a higher court to determine and not a court of co-ordinate jurisdiction, especially, when it is on record that the same argument was urged before the learned judge.

It is further the finding of this court that apart from saying that the practice has always been, that judgement is obtained first, and then enforcement orders sought against the insurer, no argument has been advanced as to why the applicant thinks that new jurisprudential trends should not be started to lean towards a joint trial to save on costs, and time and shorten the enforcement journey for the plaintiff so that, if successful he will be given judgement in his favour and at the same time be given an order as to who of the two defendants or 3<sup>rd</sup> party is the party to satisfy its judgement. In this courts’ own opinion, there is no error in the learned Judges’ order that a joint trial on liability was feasible.

As regards pleadings, the applicants’ arguments is that the very fact that both pleadings filed by the plaintiff and the defendant in their favour and as against each other, does not mention the contract of insurance between the defendant and the 3<sup>rd</sup> party, should have been sufficient reasons for the court to rule that a joint trial is not possible. That it was therefore an error that the court ruled that a joint trial was feasible.

Indeed this court agrees that the plaint and defence does not mention the contract of insurance, giving rise to a claim of indemnity. The fact that an order of court was made deeming 3<sup>rd</sup> party notice to be a pleading of the defendant, against the 3<sup>rd</sup> party, the 3<sup>rd</sup> party notice was thereby elevated to the status of a pleading and thus provides a link between the liability as between the 3<sup>rd</sup> party and the defendant on the one hand and the defendants and plaintiff on the other hand, which link would require the court to establish both liabilities in the trial and then provide a means for the plaintiffs’ execution of the judgement in the same trial, either as against the defendant or the 3<sup>rd</sup> party after pronouncement of the judgment.

As noted earlier, the learned Judge whose orders are sought to be up set, ruled that, it is possible to make both orders as regards the two liabilities in a joint trial. In this courts’ opinion failure to rule otherwise, cannot be termed an error. But at its best it can be termed either a wrong construction or interpretation of the law or a misapprehension of the same. Which fact can not be corrected by a court of coordinate jurisdiction but by the court of appeal which is superior in Jurisdiction over the superior court.

As regards Judicial precedent, there is the case of **KARIUKI VERSUS IRUNGU (2004) 2 EA 108**, where a judge of coordinate jurisdiction ruled that *“since the subject matter between the 3<sup>rd</sup> party and respondent was based on contract and was therefore different from the subject matter between the plaintiff and the respondent which was based on tort, the 3<sup>rd</sup> party was therefore not lawfully joined”*.

This is a decision of a court of coordinate jurisdiction, and therefore not binding on this court, nor the court that made the orders sought to be reviewed. The court whose orders are sought to be reviewed as well as this court, has jurisdiction to revisit the relevant provisions of law on the subject matter and then arrive at its own decision as it did.

As for the case of **KENINDIA INSURANCE COMPANY LTD. VESUS OTIENDE (SUPRA)** which is a court of appeal decision, it was held inter alia that the victim has to obtain judgement against the insured, before the insured can call upon the insurer to indemnify it as against that judgement. The court of appeal however did not say that the establishment of liability between the plaintiff and the insured cannot be done in the same trial and where the establishment of liability based on indemnity can be established. The learned trial Judge whose orders are sought to be reviewed ruled that this was feasible. It was therefore the court of appeal which can revisit this decision with its decision in the **KENINDIA CASE (SUPRA)**, and specify as Ochieng J. did in the **KARIUKI VERSUS IRUNGU CASE (SUPRA)** that the establishment of the two liabilities should be distinct and separate from one another. More so when the party bringing the 3<sup>rd</sup> party into the joint trial is not the plaintiff but the defendant, who may have a lawful claim against the 3<sup>rd</sup> party subject to proof of course.

The other ingredient that a party seeking review can avail himself/herself/itself of is one, where any other sufficient reason is being cited as a reason for review. The applicant did not rely on this. That notwithstanding the court is not precluded from considering on its own, if his is a reason for review.

This court has done so, and has come to the conclusion that the sole reason for seeking review is mistake based on an alleged wrong assumption that liability based on tort can be fellow in one trial with a liability on indemnity arising from a contract. Construction of relevant provision can only be dealt with either under construction or interpretation of these provisions and not any other manner and so the ingredient of any other sufficient reason has not found its way herein.

The last ingredient to be considered is one which requires that the application for review be presented without undue delay. The orders complained of were made on 10th December 2004. Whereas the application for review is dated 23<sup>rd</sup> November 2005, almost one year later. As submitted by the respondent, the applicant offered no explanation as to why it took this length of time to seek review. However, it was brought to the courts' attention that the same applicant raised a preliminary objection dated 5<sup>th</sup> November 2005. It reads:-

*“Take notice that at the hearing of this suit, the first 3<sup>rd</sup> party will raise a preliminary objection for determination contending that this Honourable court has no jurisdiction to determine whether the insurer of the motor vehicle under a 3<sup>rd</sup> party claim within the meaning of the Insurance Act Cap 405 is to pay damage to an insured 3<sup>rd</sup> party other than in a declaratory suit which this suit is not”*

It is on record that the matter went before Ang'awa J., on 7.11.2004 and after due consideration, struck out the preliminary objection because what the P.O was asking her to do was to revise the order of Rimita J. which had allowed leave to join the 3<sup>rd</sup> party which orders had not yet been upset and are still on record. And secondly the orders made by Mugo Judge to the effect that the trial be joint. The learned Judge went on to state that the only way those orders could be upset is either by way of appeal against them or by way of review. This court has no doubt that this is how the applicant settled for the application for review subject of this ruling. On undue delay it is to be noted that order 44 rule 1 (1) does not provide a yard stick for measuring what amounts to and what does not amount to an undue delay. The yard stick that the courts have come to apply and or use in the discharge of their jurisdiction has been developed by judicial decisions, especially the court of appeal. The overriding paramount consideration is that each case depends on its own circumstances.

In the case of **FREIGHT (EA) LIMITED (SUPRA)** Onyango Otieno J. (as he then was) now J.A held inter alia that a delay of three months was inordinate This court in its own ruling dated 18<sup>th</sup> day of July 2008 in the case of **CRESTED SEA AGENCIES LIMITED VERSUS MURANG'A COUNTY COUNCIL, NAIROBI HCCC 2714 OF 1997**, was called upon to review a matter in which the

application for review was being presented 4 years after the making of the order sought to be reviewed and set aside. At page 16 of the said ruling, the court set out the ingredients that a litigant is required to demonstrate in order to earn oneself the relief of review.

At page 23 line 5 from the bottom, this court, made the following observations:-

*“The last ingredient is proof that the application has been presented to court without undue delay. It is common ground that the application subject of this ruling has been presented to court 4 years after the consent was entered into. Indeed it is agreed on both sides that there has been inordinate delay in presenting the application. The respondent has urged the court to disallow the application on account of laches on the part of the applicant. The applicant countered this by saying that indeed they took 4 years to seek review. There is a delay but the court should look at the:-*

- (i). Reasons for the delay.*
- (ii). The reason for seeking review.*
- (iii). Public policy that frauds and collusions should not be allowed to stand.*
- (iv). The court should also tap on its inherent powers to excuse the delay.*
- (v). The court has a discretion in circumstances displayed herein to excuse the same.*

At page 24 line 5 from the bottom the court went on to observe further. *“This court has judicial notice of the fact that, case law, that it has judicial notice, of emanating from both the court of appeal and the superior courts have construed this provision Order 44 Rule 1 Civil Procedure Rules and determined ‘without undue delay’ to mean almost immediately. It would appear that 4 years is definitely outside that ambit. If the applicant wishes to avail itself of the courts’ discretion and the inherent powers of the court”.*

At page 25 of the said ruling this court went on to cite the case of **ELITE EARTH MOVERS LIMITED VERSUS KRISH NA BEHAL & SONS (2005) IKLR 379** decided by Emukule J. on March 11, 2005, a court of coordinate jurisdiction and the case of **SHAH VERSUS MBOGO (1967) EA116** also a high court decision. The principle echoed by these two decisions is that *“the discretion to set aside an exparte judgement (order) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake, or the error but not to assist a person who has deliberately sought whether by evasion, or otherwise to obstruct or delay the course of justice”.*

At page 26 of the said ruling there is cited a court of appeal decision on the manner of exercise of the courts’ discretion. This is the case of **CMC HOLDING LIMITED VERSUS NZIOKI (2004) KLR 173** in which the court of appeal laid down the following guide lines on the exercise of the courts’ discretion:-

- (i). Discretion must be exercised upon reason and judiciously.*
- (ii). It should not be exercised wrongly, in principle neither should the court act perversely on the facts.*
- (iii). It should be exercised to ensure that a litigant does not suffer injustice or hardship as a result of among other things, an excusable mistake or error.*
- (iv). It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such excusable mistake, inadvertence, accident or errors. Such an exercise of discretion would be wrong in principle.*
- (v). The court must consider not only the reason why the defence was not filed or why the appellant did not turn up for hearing but also whether the applicant has reasonable defence which is usually referred to whether the defence if filed already or a draft defence is annexed raise triable issues.”*

This court has applied the afore set out principles on the exercise of discretion in so far as it should be invoked to excuse the delay of 11 months, in presenting the application under review. This court has revisited the applicants supporting affidavit to the application, under review and has failed to trace any deponement regarding the reason as to why review was not sought promptly. The court has also skimmed through the written skeleton arguments and has not traced any mention of reasons given as to why review was not sought promptly.

As explained in own decision cited above, it is the would be beneficiary of the courts discretion who is supposed to offer an explanation as to why the delay occurred and secondly why the same should be excused. Here in no explanation has been given by the applicant as to why review was not sought promptly and so this court cannot on its own embark on finding out from the record, the reason as to why there was delay. For this reason it is sufficient to say that the Respondents' arguments that the application was presented after undue delay has not been ousted.

There was also argument advanced by the respondent that the applicant has become disentitled to the relief sought because they were not candid enough to disclose to the court that they had also raised a preliminary objection which had also been disallowed. Indeed this court, has traced notice of the fact that there is a wealth of authorities that this court has judicial notice of emanating from both the superior courts and the court of appeal that non disclosure of material information disentitles a party and where one would have been granted in his favour on the basis of non disclosure the same are liable to be discharged.

Applying that to the facts herein, the court finds that indeed the issue of a disallowed preliminary objection was not disclosed by the applicant. However, since the preliminary objection was disallowed on the courts own motion, and on a point of technicality and not on merits, the applicant should not be penalized for not disclosing this to court more, so when it was after he was advised to file, and seek review, that he presented the application for review.

In conclusion and for the reasons stated above the court makes the following findings herein:-

**(1)** The court is satisfied that indeed there is on record an order namely the order made by Mugo Judge on 10/12/2004 which is sought to be reviewed. It is the finding of this court that the applicant had an option to appeal against the order or seek review. He opted for review and is entitled to receive a decision on the same on its merits.

**(2)** The ingredient of discovery of new and important matter, or evidence which, after the exercise of due diligence, was not within the applicants knowledge, or could not be produced by him, at the time when the decree was passed, or made was not relied upon by the applicant. Even if it had been relied upon by them, the same would not have held as what has been put forward in support of their plea for review are nothing but the insurance contracts which have all along been within the knowledge and is the custody of the applicants which formed the core of the applicants' arguments against a joint trial during the hearing of 3<sup>rd</sup> party directions which gave rise to the orders sought to be reviewed.

**(3)** The applicant has relied on the ingredient of some mistake or error apparent on the face of the record. The particulars of this error and or mistake have been deponed to in paragraph 2 - 6 of the supporting affidavit as well as written skeleton arguments. As explained in the body of the ruling, the error is alleged to have arisen thus:-

**(i)** The contract of insurance was not exhibited for the perusal of the court. Indeed since it was an application for 3<sup>rd</sup> party directions, the contract of insurance was not exhibited. But that notwithstanding the arguments on record reveal that the terms and content of the insurance policy were submitted on/or before, the learned judge as a ground for opposing a joint trial and the learned judge overruled that agreement.

**(ii)** On argument that liability between the plaintiff and the respondent have to be determined first, and there after if ruled in favour of the plaintiff, he can then avail himself of the Cap 405 procedures, through

a declaratory suit, it is also on record that this arguments was advanced by both the plaintiff and the 3<sup>rd</sup> party, but the learned judge overruled the same saying that firstly the issue of 3<sup>rd</sup> party proceedings is a matter between the defendant and the 3<sup>rd</sup> party, and it has nothing to do with the plaintiff and on that account disallowed the plaintiffs arguments on the matter. As regards the issue of indemnity between the defendant and the 3<sup>rd</sup> parties, the learned Judge was alive to the fact that the claim between the plaintiff and the defendants is based on tort; where as the claim between defendants and the 3<sup>rd</sup> party is based on an insurance policy contract. Further that the defendant was not sure as to which of the two 3<sup>rd</sup> parties was to indemnify him in the event that the plaintiffs claim against them succeeding and, as such a joint trial was the most appropriate mode of procedure to be adopted to dispose off the matter herein. The learned judge went further to rule that in her considered opinion, the discretion conferred on the court by Order 1 Rule 18 of Civil Procedure Rules was wide enough to entitle her to rule in the manner she ruled.

**(iii)** As regards the error of conferring a wrong jurisdiction on the court by ordering a joint trial of two claims one arising from tort, and another on contract, the same argument was over ruled. In this courts' opinion, ruling in the manner the learned judge ruled cannot be termed an error. But at the most it can be said to be a wrong interpretation, construction or misapprehension of the law as governs indemnity claims in contracts arising from insurance policy, hence any attempt by this court, to upset that construction/interpretation and or misapprehension of Order 1 Rule 18 of Civil Procedure Rule as being wide enough to bring into the trial claims of indemnity arising from insurance contracts, will be tantamount to an act of sitting on appeal of a decision of a court of coordinate jurisdiction, and not review, a right reserved for the court of appeal.

**(4)** As regards reliance on judicial precedent, as noted earlier on in the ruling, indeed there is the case of **KARIUKI VERSUS IRUNGU (SUPRA)** where Ochieng Judge, ruled otherwise but as stated that decision is not binding on this court or the court whose orders are sought to be reviewed. As for the **KENINDIA ASSURANCE COMPANY LIMITED CASE (SUPRA)**, indeed the court, of appeal ruled that liability between the insurer and the insured has to be established first before the insurer can be called upon to answer a claim of indemnity from the insured. However, as noted earlier on by this court, nothing is contained in that decision to the effect that both liabilities can not be pronounced upon in one trial. The learned Judge ruled this as feasible. In this courts' opinion, nothing prevents a court of law holding such a joint trial, from establishing liability in tort as between the plaintiff and the defendant first, and then proceed to make a pronouncement on the liability between the defendant and the 3<sup>rd</sup> party on indemnity and upon pronouncement on the existence of the right to indemnify the defendant against the plaintiff as having arisen and then proceed further, and rule that it's the 3<sup>rd</sup> party to meet that claim in favour of the plaintiff. In this courts' opinion, such a trial would be beneficial to the plaintiff as it would shorten his journey in the pursuit of a claim for damages. It will also save on costs as well as judicial time.

**(5)** As regards the ingredients of any other sufficient reason or cause, this was not urged before this court, and so the same was not considered and ruled upon.

**(6)** The respondent raised the issue of amended issues, having been agreed upon and filed and the issues that the applicant is raising was one of the issues for determination. The court perused the record and traced an amended statement of issues signed by counsels for all the parties on board namely the plaintiff, the defendant and the first and second 3<sup>rd</sup> parties dated 15<sup>th</sup> July 2005, and filed on 18<sup>th</sup> July 2005 long before the application for review. As submitted by the respondent issue number 4 and 5 contain matters subject of the review;

*“4 Is the claim by the plaintiff against the defendant covered under the insurance policy issued by the 1<sup>st</sup> or the 2<sup>nd</sup> 3<sup>rd</sup> party or is it covered by the policies of both third parties?”*

*5. Is the defendant entitled to be indemnified by the 1<sup>st</sup> 3<sup>rd</sup> party or the 2<sup>nd</sup> 3<sup>rd</sup> party or both the 3<sup>rd</sup> parties or at all?”*

The inclusion of the above issues is proof that parties had agreed that a joint trial in the manner ruled

by the learned judge was feasible, and in this courts' opinion the applicants' about turn in filing the preliminary objection and then upon advise the application subject of this ruling is nothing but an after thought.

7. Indeed as contended by the respondents counsel the applicant failed to disclose in the affidavit and submissions that they had also raised a preliminary objection which was declined. However, since the preliminary objection was disposed off by the Judge on a point of technicality it cannot be said that non disclosure was done in bad faith to an extent that it can be used to deny the applicant the relief sought had they succeeded.

8. As regard the ingredients of there being a requirement that the application for review be presented without undue delay, this court, has ruled in the body of the ruling, that this ingredient was not urged before the court. No explanation for presenting the application 11 months later was advanced either in the supporting affidavit, or the written skeleton argument, explaining why the applicant chose to file a preliminary objection, and then the application for review as at that point in time. Failure to offer an explanation and then invite the court to excuse the delay if any is, established, leaves the respondents contention that the delay is in inordinate and un due uncontroverted.

For the reasons given in conclusions, number 1, 2, 3, 4, 5, 6, 7 and 8, the court is of the opinion that the applicants' application dated 23<sup>rd</sup> November 2005 and filed on 24<sup>th</sup> November 2005 has no merit. The same is dismissed with costs to the respondent.

**DATED READ AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2008.**

**R. N. NAMBUYE**

**JUDGE**