



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Suit 102 of 2001

RICARDI LUIGI.....PLAINTIFF

VERSUS

PORCONI EMILIETTA

GUERRI CLAUDIA.....DEFENDANTS

RULING

The applicant in this application by a Notice of Motion filed on 3rd February, 2005, is seeking orders that the Third Party Notice dated 25th September, 1996 be struck out.

The grounds upon which the application is based are set out in the body of the application and in the affidavit in support of the application sworn by counsel for the Third Party.

These grounds are that the Third Party Notice was issued without leave or at all, hence all proceedings up to the entry of a default judgment were a nullity as the third party, and no orders could issue against it.

To these averments, the plaintiff filed grounds of opposition in which it was argued that the Third Party Notice was issued pursuant to a Court order of 3rd May, 1997. It was also argued that the defendant and the plaintiff having entered into a consent, and the same adopted by the Court, it became an order of the Court that remain in force and binding unless otherwise set aside.

That the firm of Muli and Ole Kina Advocates having participated in the proceeding are estopped from challenging the validity of the Third Party Notice. A very brief background of this application is necessary to plot it in perspective.

By a plaint filed on 13th December, 1995, the plaintiff sued the defendants for damages for negligence arising from a fire which started from the defendants' Cottages and spread to the plaintiff's house destroying it completely.

In their defence, the defendants admitted that indeed the fire started from their premises but blamed it on a construction company, I call Pandora Construction Co, which they alleged had, without their authority leased the property to Hawa Enterprises that must have ignited the fire. The defendants then filed, on 9th October 1996, Third Party Notice.

On 30th June, 1997 the Deputy Registrar extracted a consent order in which the defendants and the plaintiff are alleged to have consented to set aside an interlocutory judgment entered against the defendants in default of defence. The two parties also agreed that the defendants would file, within two weeks from the date of the consent, their defence and 30 days thereafter commence Third Party proceedings. Finally, it is purported that the parties agreed to have a caveat or prohibition on plot No. 1825/originally No. 54/11 Malindi until further orders. Nearly one year after the above consent was recorded, the firm of Muli and Ole Kina Advocates entered appearance, on 25th June 1998, for the Third Party – Pandora Construction Ltd. On 29th October, 2001 the Court recorded a further consent which was communicated in a letter dated 17th September 2001, filed in Court on 20th September, 2001 and signed for the firm of Ben Ochieng and Company Advocates for the defendants and Swaleh and Co. Advocates for the plaintiff. In that consent it was agreed that; the defendants to transfer to the plaintiff Plot No. 1825 (original No. 542/11). Malindi, in full and settlement of the plaintiffs claim against the defendants. The defendants pay to the plaintiff, upon the consent being recorded in Court, the sum of Italian Live Two Million equivalent to Kshs. 70,000/= in costs of the suit. The defendants are free to pursue Third Party proceedings against Pandora Construction Co.Ltd. to its logical conclusion and the earlier consent order vacated.

Following these events and pursuant to these consent orders, the defendants filed summons for direction under Order 1 rule 18 of the Civil Procedure Rules. Judgment was thereupon entered for the defendants against the Third Party. The Third Party then moved the Court with two applications 26th January, 2005 seeking orders to set aside the aforesaid judgment and the second application being the instant one. The core issue in this application is whether or not there are valid Third Party proceedings in this suit. Third party proceedings are commenced and prosecuted in accordance with the provisions of Order 1 rules 14, 15, 16, 17, 18, 19 and 22 of the Civil Procedure Rules. A defendant who has any claim against a third party may issue a notice in the prescribed form – Form 22 in Appendix A to the Civil Procedure Rules. The notice can only be issued by the leave of Court as provided under Order 1 rule 14 of the Civil Procedure Rules. Form 22 aforesaid requires that the order and the date of issuance be endorsed at the top of the form. It follows that Third Party proceedings are commenced with Court's leave. In the instant case it is alleged that Court's leave was obtained on 11th September 1996. This is the date endorsed on the Notice filed by the defendants on 9th October, 1996.

An order extracted on 3rd May 1997 and issued on 30th June, 1997 by the Deputy Registrar is to the effect that certain orders were made before Mr. Justice Waki (as he then was) In chambers on 11th September 1996. Indeed from the Court record, Mr. Justice Waki was seized of the file on that day. The record shows further that there was appearance for Swaleh & Company Advocates for the plaintiff/applicant. Similarly there was no appearance from Kupalia and Lughanje Advocates for the defendants/respondent. These were the orders made by Mr. Justice Waki on that day

“CT. There is no appearance for either party. Matter is Stood Over Generally. Both parties to share Court Adjournment Fees Shs. 500/=

Waki 11.9.96”

These were the only orders made on the day it is alleged that leave to commence third party proceedings within 30 days of the defendants filing their defence was issued. It is clear from the record that a draft consent order was forwarded to the Court on 27th June, 1997 which appears to suggest that the consent orders in question were endorsed by Mr. Justice Waki. The draft consent order is shown to have been drawn by the firm of Swaleh and Company Advocates to be approved the same firm of advocates and that of Kupalia and Lughanje Advocates. The same was approved and forwarded to the Deputy Registrar, who without confirming whether or not such order had been endorsed by the judge proceeded mechanically and casually to issue the Orders of 3rd May, 1997. But that is not all. If leave was indeed granted on 11th September 1996, the same was not issued until 30th June 1997 nearly one year after the Third Party Notice had been issued.

Finally on this point, Mr. Ochieng for the defendants conceded that, although there was oversight in filing a formal application for leave, that omission was subsumed when the Court adopted the Consent Order

between the plaintiff and the defendants. It is a Mandatory requirement under rule 14 that application for leave to issue third party notice must be made by summons in chambers supported by affidavit. The granting of leave cannot be an exercise to be undertaken by parties. It is a province of the Court to be exercised in accordance with the laid down procedures. Having found that there was no leave before the third party procedure was commenced, it inevitably follows that the third party proceedings herein are a nullity.

The Third Party Notice filed on 9th October, 1996 is hereby struck out with costs. Leave is granted to the defendants to commence afresh third party procedure within 30 days from today.

Dated and delivered this 14th day of July 2005 at Malindi.

W.OUKO

JUDGE

14.7.2005

Ruling delivered in the presence of

Mr.Ochieng.

Mr.Ole Kina

C.C. Mr.Matu and Lindah

W.Ouko

Judge