REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 476 of 1999

AMI DEVELOPMENT SERVICES LTD……..……..……..1ST PLAINTIFF

HAND CARVERS DEN LIMITED ……..……..……2ND PLAINTIFF

AKSES INDUSTRIAL COMPANY LTD……..……..……..3RD PLAINTIFF

HARUN EDWARD MWANGI ……..……...…..4TH PLAINTIFF

HELEN PILALE NKAISSERY……..…….……5TH PLAINTIFF

NDABA & ASSOCIATES ……...…….……6TH PLAINTIFF

BUREAU GRAPHICS ……...……..……7TH PLAINTIFF

VERSUS

DAVID KAHUHUA GITAU

ROBERT JAMES KIGUNDA

PHILLIP MWANGI GATHERU

JOSEPH KAMAU MUCHEKEHU

ELIJAH MORRIS WANJE

Sued as THE TRUSTEES OF THE KENYA LOCAL GOVERNMENT

OFFICERS SUPERANNUATION FUND ……...……1ST DEFENDANT

KENYA COMMERCIAL BANK NOMINEES LIMITED…….....…2ND DEFENDANT

And

L Z ENGINEERING CONSTRUCTION LIMITED …..…….....……....3rd PARTY

TS NANDHRA trading as NANDHRA & ASSOCIATES……..……..2nd PARTY

R U L I N G

Two applications came up before me. At the very beginning the 2nd third party counsel informed the court that he did not oppose the defendant's application dated 27th May 2003. The counsel for the 1st third party was absent from court and the plaintiff's counsel did not participate in the hearing of the application. Accordingly I do hereby grant the defendant prayer No. 1 of the Notice of Motion dated 27th May 2003.

The application that was then argued before me is the one filed by the 2nd third party dated 9th July 2002. Counsel only argued prayer No. 2 of that Notice of motion namely: -

"**That the claim made by the defendants against he 2nd third party be dismissed as the alleged cause of action made against it in its capacity as the Architect of the suit premises did not arise within 3 years before this action was commenced or the third parties notice was issued and is barred by section 4 (2) of the Limitation of Action Act (Cap 22)."**

By their amended plaint filed in court on 11th May 2001, the plaintiff alleged that a fire broke out on 21st September 1998 at the suit property. As a consequence of that fire the plaintiff, tenants of the defendants, allege that they suffered losses and damage.

The defendants issued third party notice against the 1st third party who was the developer and owner of the suit property at the time of construction of the building; and against the 2nd third party who was the architect.

It is that third party notice which the 2nd third party seeks to have dismissed for being time barred.

In support of the application counsel for the 2nd third party stated that the third party notice was time barred under the limitation of Action Act Cap 22; that although the plaintiff's had not stated the date of construction of the building on the suit property it was common ground that it was constructed more than three years before the suit was filed; that since a claim in negligence was time barred within three years the plaintiffs claim was time barred because the acts of negligence alleged were visible to the plaintiff. In this regard 2nd third party counsel read out the particulars of negligence in the amended plaint such as paragraph 14 (a) which provides: -

"**Allowing or failing to enclose in conduits, loose overhanging wires and other carelessly done electrical connections and fixtures**.

This particular and others in the amended plaint, 2nd third party's counsel argued that it was clear the act of negligence was visible from the time the plaintiff took possession and accordingly time began to run from the date of possession. Counsel further argued that the issue of loose wires was not the responsibility of the architect, the 2nd third party, who counsel said was also a stranger to the contract between the plaintiff and defendants. counsel further argued that the cause of action was from 3 years after completion of the construction of the building on the suit property. He further stated that the Nairobi City Council issued a certificate of occupation, which certificate certified that all requirements of the building code had been complied with by the 2nd thirds party, in conjunction with all the other consultants involved in the construction. Once that occupation certificate is issued counsel argued that it could not be attacked. Counsel for the 2nd third party therefore concluded by stating that the plaintiff's claim against the defendants is unsustainable and the defendants cannot therefore seek indemnity from the third parties. Counsel sought that the court would strike out the 1st and 2nd third parties from these proceedings under Order 1 rule 10 (2).

The defendant counsel opposed the application and argued that, to strike out third parties notice, the end result would be to strike out the whole suit. He further argued that whether there was a case against the defendant and whether the defendant was entitled to issue third party notices was a question of evidence, that the court in the absence of evidence being adduced, could not decide on the present application. Defence counsel submitted that the cause of action did not arise until loss had occurred. He relied on the case of ANNS AND OTHERS AND MERTON LONDON BOROUGH COUNCIL 1976 A.C. 728. The brief facts of the case were that long lessees brought action against the builder of a building and against the local authority for negligence in construction, thereof, which resulted in cracks in the wall and slopping floors. In their defence the defendants pleaded that the claim was statute barred because time began to run from the date of the first conveyance. The decision of the court of appeal held in part as follows:

"That on the facts as pleaded none of the actions were barred by the Limitation Act 1939, since the cause of action arise when the sate of building was such that there was present or imminent danger to the health or safety of the person occupying it……."

Defence counsel also relied on the case SHARHAM – SOUTER AND ANOTHER – VERSUS – TOWN AND COUNTRY DEVELOPMENT (ESSEX) LTD AND ANOTHER [1976] IQB 858. It was held in that case as follows: -

"The cause of action for negligence accrues, not at the date of the negligent act or omission but at the date when the damage is first sustained by the plaintiff, and the time under the statute of Limitation cannot begin to run unless there are present a party capable of suing and a party liable to be sued….."

Defence counsel submitted that under the law Reform Act (Cap 26) Section 3 (1), a tortfeasor is entitled to claim compensation from a joint tortfeasor and the limitation thereof is 2 years after judgment under Section 5 (1) Limitation of Action Act (Cap 22). Counsel therefore argued that the defendant was entitled to claim indemnity from the third parties as joint tortfeasors.

2nd third party counsel denied that the defendants and the third party were joint tortfeasors.

That is the summary of the arguments presented before me. The 2nd party's arguments that the cause of action began to run from the date of construction of the building is I believe wrong. I am of the respectful opinion that the cause of action in negligence accrued at the time when damage was sustained as a result of negligence that is when the fire broke out. To hold otherwise would I believe result in the absurd, in that the persons who were tenants when the fire broke out and who allege they suffered loss, might not have been the tenants of the suit property three years after construction, when the 2nd third party alleges the action became time barred. I am of the view that the duty of care is owned to all future tenants of the suit property. For that reason alone I find that the 2nd third party's application must fail. My finding that it must fail cannot be affected by the fact that the particulars of negligence alleged by the plaintiff related to loose wire that were visible. Those loose wires did not necessarily give rise to a cause of action until the fire broke out. The 2nd third party's argument that the issuance of a certificate of occupation barred the court to look behind that certificate is wrong and without any legal foundation. I am therefore not persuaded that there is merit in the 2nd third party's application. I do therefore grant the following orders: -

(1) That the 2nd third party's Notice of Motion dated 9th July 2002 is hereby dismissed with costs to the defendant.

(2) That the defendants application by Notice of Motion dated 27th may 2003 is granted in the following terms.

"***That the time for filing the Notice of claim against the 1st and 2nd third parties is hereby extended to 5th November, 2001.***"

(3) **That there shall be no order for costs of the application dated 27th May 2003.**

Dated and delivered this 28th September 2005.

MARY KASANGO

JUDGE