



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 814 OF 2001

**MARY NJERI [the personal representative of the estate of
KENNETH WANG'ENDO GATIMU
(deceased)].....PLAINTIFF/
RESPONDENT**

VERSUS

**THE AGA KHAN HEALTH
SERVICES
t/a THE AGA
KHAN
HOSPITAL.....DEFENDANT/
RESPONDENT**

AND

**PROF. MUTHURE MACHARIA1ST 3RD
PARTY/APPLICANT
DR. A.W. WAHOME2ND 3RD
PARTY**

RULING

The 1st 3rd party's application by Notice of Motion was dated 26th January, 2005 and filed on 31st January, 2005. The application was brought under Order I, rules 14(3) and 18 and Order L, rules 2 and 17 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). The applicant's prayers were as follows:

- (i) that, the order made herein on 12th October, 2004 be set aside in respect of the defendant's application by way of Chamber Summons dated 19th August, 2004 for third party direction;
- (ii) that, the costs of this application be provided for.

The application was premised on the following grounds:

(a) pursuant to leave being granted by the Court on 19th December, 2003 to the defendant, based on an application of 3rd November 2003 the defendant served Third party Notice upon the 1st 3rd party on 29th July, 2004;

b) the memorandum of appearance on behalf of the 1st 3rd party was filed and served upon the advocates of the plaintiff and the defendant on 9th August, 2004;

(c) then later the advocates of the 1st 3rd party received a letter dated 12th October, 2004 from the plaintiff's advocates; (d) only from that letter of 12th October, 2004 did the 1st 3rd party's advocates learn that 3rd party directions had already been given by the Court, without the knowledge of the 1st 3rd party; (e) neither the application for Third Party Directions nor the order obtained on 12th October, 2004 had been served upon the 1st 3rd party's advocates; (f) the said order of 12th October, 2004 should be set aside ex debito justitiae

(g) the 1st 3rd party's advocates sent a letter to the defendant's advocates dated 18th November, 2004 stating reasons why the order ought to be set aside; and the recipients in their reply dated 19th November 2004 admitted not having served their application and the order upon the 1st 3rd party; they agreed to a setting aside of the order.

(h) The defendant, however, took no action to have the said order of the court set aside.

Samir Inamdar, an advocate from the firm of advocates having the conduct of the 1st 3rd party's case, swore a supporting affidavit on 27th January, 2005. He depones that his firm had had no knowledge of the application by the defendant which led to the issuance of Third Party Directions, and neither the application nor the order was served upon his firm. He averred that it was necessary for the 1st 3rd party to be present at the hearing of the application for Third Party directions; the reason being that the 1st 3rd party needed a specific order for discovery of documents, to enable him to file his defence. In the grounds of opposition dated 7th February, 2005 the defendant admits failure on their part to serve the 1st 3rd party, but contends that the setting aside of the directions given by the Court is likely to cause unnecessary delay in resolving the issues in dispute. It is also contended that the 1st 3rd party has failed to show how the directions of 12th October, 2004 will adversely affect him. It is contended too that the 1st 3rd party ought to know that discovery of documents cannot be ordered by way of directions under Order I, rule 18.

The application was heard on 7th July, 2005 when Ms. Alela represented the 1st 3rd party, while *Mr. Waigwa* and *Mr. Ojuro* represented the plaintiff and the defendant respectively.

Mr. Waigwa noted that the orders of 12th October 2004 had granted the defendant's application of 19th August, 2004 – and it is precisely those orders which were now the subject of contest. The defendant, by the Chamber Summons of 19th August, 2004 had sought Third Party Directions based on the Third Party Notice issued earlier. On the occasion of hearing that application, on 12th October, 2004 the impression was apparently created that all parties, save for the 2nd 3rd party, had already been served. It now turns out that the 1st 3rd party had not been served – and this is why he was unrepresented in court. As counsel for the plaintiff and the defendant were in agreement, Third Party directions were on that occasion issued as prayed in the Chamber Summons of 19th August, 2004.

Ms Alela for the 1st 3rd party discussed the grounds in support of the application. She submitted that under Order 1, rule 14(3) the Third Party Notice was required to state the nature of the claim, unless the Court directed otherwise; but the instant one had not so indicated the nature of the claim. It was provided under Order I, rule 18 that once appearance was entered in response to the Third Party Notice, the defence was to apply for *summons for directions* on Third Party Proceedings, and *on that occasion the Third Party can challenge the Third Party Notice*. However, in the instant case there was no service effected upon the 1st 3rd party; so he did not come to court to challenge the Third Party Proceedings –

and this was precisely the 1st 3rd party's gravamen.

Learned counsel contended that there had been no contract between the defendant and the 1st 3rd party; and so there was a basis for challenging the Third Party Proceedings if only an opportunity had been allowed. She urged that the order of the Court had gravely prejudiced the 1st 3rd party. She recalled the content of the letter to her firm from the defendant's advocates dated 19th October, 2004. This letter responded to the complaint by the 1st 3rd party, and its relevant part thus admits:

"We agree that you were entitled to participate at the taking of Third Party Directions against your client. You were not served with the application by reason of oversight.

"We will be happy to set aside the directions as given by the Court by consent, if you consider that this is likely to serve any useful purpose, bearing in mind that the taking of directions is a formality not generally contested.

"The directions were taken specifically against your client as the other Third Party has not yet been served with the Third Party Notice. "Finally, the oversight by our office is regretted and we do assure you that the lack of service was not intentional".

Ms. Alela cited the High Court's decision in *Official Receiver Continental Bank of Kenya Ltd vs. Mukunya* [2003] 1 EA 213 to support her submission that the orders of the court be set aside. Mbaluto, J in that case held (p.214):

"An order obtained without serving a party affected by it as per the requirements of Order L, rule 2 of the Civil Procedure Rules, is a nullity and must therefore be set aside ex debito justitiae. Graig v Kanseen [1943] 1 ALL E.R. 108 adopted; Khami v. Kirobe and others [1956] 23 EACA 195 applied."

In *Courtenay – Evans and Another v. Stuart Passey & Associates (a firm) and another* [1986] 1 ALL E.R. 932 it was held in the High Court of England:

"Where a party who is the subject of a third party notice is able to show that special circumstances exist why third party directions under RSC Order 16, r.4 ought not to be given, e.g. because of delay in bringing the third party proceedings, the court may refuse to give such directions. The effect of a refusal to give directions is to make the third party notice a nullity and to put an end to the third party proceedings....."

Learned counsel also relied on this Court's decision (Waki, J (as he then was)) in *Premier Savings & Finance Ltd v. Hamendra Mansukhlal Shah*, Civil Suit No. 205 "A" of 1996(Msa), in which the third party had objections to Third Party Directions on grounds that: (i) the application was misconceived, bad in law and an abuse of the process of the Court; (ii) the nature and circumstances of Order I, rule 18 did not permit the granting of the orders sought; (iii) there existed no common dispute as between the defendant or the plaintiff, and the proposed third party; and (iv) the defendant had not shown that there was a liability of the proposed third party to indemnify the defendant. The learned Judge upheld the objections and ruled:

"I perceive the claim made herein against the third party to be an indemnity which has not been shown to exist in fact or in law; and general damages for alleged misrepresentation which does not give rise to third party proceedings.

"Being of that frame of mind, I uphold the objections made, and set aside the third party notice issued in this matter".

And in *Sango Bay Estates Ltd & Others v. Dresdner Bank AG* [1971] E.A. 18 the East African

Court of Appeal set out the options available to a court when an application for third party directions is made (Spry, V.P at p.20):

“Mr. Wilkinson suggested.... that under Order I, r. 18 a judge has two courses open to him: he may give directions for the trial of the issue between the third party and the defendant or he may enter judgment in favour of the defendant. I would have not hesitation in rejecting that submission. On an application for directions, a judge may decide that there is an issue to be tried, when he gives directions; he may decide that the third party has no defence, when he gives judgment in favour of the defendant; but he may decide that the defendant has failed to show any claim to contribution or indemnity against the third party and in such a case he must be able to dismiss the application”.

Whereas counsel for the plaintiff, Mr. Waigwa, had no objection to the application, he did, while again conceding that the 1st 3rd party had not been served, contend that nonetheless no prejudice had been caused to the applicant. He submitted that Order I, rule 18 entrusted a discretion to the Court, in issuing third party directions, which only related to preparations for the hearing of the suit. He contended that even though the application for directions had not been served upon the applicant herein, the earlier application had none-the-less been before the Court; and only the court was required to satisfy itself that there was an issue for trial; and in this case the Court had already taken the decision that the issue of liability be dealt with at the trial. Counsel submitted that the said issue of liability had not already been decided without the applicant’s participation.

Mr. Ojuro submitted that the applicant’s intentions of applying for discovery was not related to third party directions under Order I; and that no application had been brought to Court under Order X, rule 11A for third party discovery. He stated that discovery had already taken place as between the plaintiff and the defendant. Learned counsel considered the issue of discovery between the defendant and the 1st 3rd party to be immaterial: because the relevant documents were already listed and on record: **“Anyone who wants to inspect can inspect.”** Counsel stated that even though the letter from his firm to that of the advocates for the 1st 3rd party, dated 19th November, 2004 had indicated counsel for the defendant were **“happy to set aside the direction as given by consent”**, it did not say they were giving consent. To this statement, counsel for the 1st 3rd party had an objection; it was not right for counsel (for the defendant) to re-interpret a document which was on the record and was clear on its face (contrary to the Evidence Act (Cap. 80)).

Counsel for the defendant noted that the instant application did not say that the third party notice had not been accompanied by the plaint; and besides, the 1st 3rd party had already complied with Order I, rule 14 by filing a memorandum of appearance on 9th August, 2004. So, counsel urged, the only issue sustaining the instant application was failure of service of the application for third party directions. No service had been effected upon the 2nd 3rd party because he could not be traced; but that non-service did not prejudice the defendant’s rights as against the 1st 3rd party.

Learned counsel stated that following the court order of 12th October, 2004 his firm had served a statement of claim on advocates for the 1st 3rd party, asking that they file pleadings within 30 days. He urged that all the 1st 3rd party should ask for, in the circumstances, is extension of time for pleading – but not the setting aside of the third party directions.

Counsel doubted the relevance of authorities relied on by counsel for the 1st 3rd party : (i) Sango Bay Estates case – for referring to situations where no claim for indemnity is made; (ii) *Premier Savings & Finance* case – because the Court had held that there was no contract; (iii) *Courtney – Evans* case – because there, delay had taken place, third party notice being served after three years, while there was no delay in the instant case; (iv) *Official Receiver Continental Bank of Kenya* case – because there, a party was commencing third party proceedings following entry of judgment; but in the instant case even hearing date has not been fixed.

Learned Counsel, Ms. Alela, in her reply submitted that the defendant’s counsel had failed to

address the most basic question at the root of the 1st 3rd party's application: *how could the Court proceed, in considering an application for third party directions*, in the absence of the third party in relation to whom directions were sought? Counsel drew attention to the defendant's letter which had acknowledged irregularity in effecting service upon the 1st 3rd party.

Ms Alela contested the submission by Mr. Ojuro that setting aside the third party directions would be an exercise in futility and would only serve to delay proceedings: **"How can a party guilty of procedural impropriety call on the Court to ignore its act which by its very nature causes great prejudice to the party against whom such order is obtained?"** Ms Alela submitted that the request made for the defendant **"will only serve one purpose, injustice to the aggrieved party"**.

Learned counsel disputed the claim made for the defendant, that the 1st 3rd party would suffer no prejudice by the order sought to be set aside: "A third party notice by its very nature is a claim of indemnity and/or contribution as against the party issued with the notice. It is trite that the same constitutes a pleading, hence the provisions of Order I, rule 14 read together with rule 15 requiring the third party to enter appearance".

Ms Alela submitted that it would be wrong to accept the essence of the defendant's claim, that third party proceedings constitute a mere formality. Counsel submitted that it was clear from case law that an application such as that which the defendant had earlier made and which led to the orders now contested, **"has a direct bearing on the third party, who so being affected necessarily must be given the opportunity to be present at the hearing....."**. Counsel remarked that the third party directions constituted "a crucial stage for the third party wishing to attack its joinder in the suit". Ms Alela contested the claim made for the defendant that applications for third party directions are usually not opposed; in her words, **"'Usually' cannot be accepted as the yardstick upon which the third party's grievance will be addressed by the court"**.

Learned counsel urged that the 1st 3rd party seeks its day in court to challenge the third party notice issued against it; and hence it was necessary to set aside the ex parte order of third party direction.

Learned counsel referred again to the English authority, ***Courtney- Evans and Another v. Stuart Passey & Associates [1986] 1 ALL E.R. 932***, which makes it clear (p.933) that while the defendant's obligation is to merely make a prima facie case for third party notice, **"it will be for the plaintiff or the third party to show some special circumstances why the directions should not be given"**

. Learned counsel submitted that the opportunity for the third party to attack the third party notice was only available at the time of third party directions.

The defendant had, by Chamber Summons dated 3rd November, 2003 applied for leave to issue third party notice against Prof. Muthure Macharia and Dr. A.W. Wahome, respectively consultant surgeon and consultant anesthesiologist. This application was granted ex parte, on 19th December, 2003 (Visram, J). The defendant then came again before the Court (Ojwang, J) by chamber summons on 19th August, 2004, under Order I, rule 18 seeking third party directions. It was not clear that service had not been effected upon the 1st 3rd party, and the matter was again determined ex parte, the defendant's prayers being granted. It turned out subsequently, as is acknowledged by the defendant, that service had not been effected upon the 1st 3rd party. Since leave to issue third party notice had in the first place been obtained ex parte, it followed, under the law, that the leave remained open to challenge at the following stage of hearing, and such challenge could only be mounted if hearing was conducted inter partes. There was, therefore, a legal duty to serve papers on those affected. Failing to serve at the ensuing hearing stage would in law be both an irregularity and a defect of process. On this account the third party directions obtained by the defendant on 12th October, 2004 were irregularly obtained, and the 1st 3rd party's challenge to the same must succeed.

Learned counsel for the 1st 3rd party has cited relevant and persuasive authority, *Official Receiver Continental Bank of Kenya Ltd v. Mukunya [2003] 1 EA 213*; *Courtney – Evans and Another v. Stuart Passey & Associates [1986] 1 ALL ER 932*; *Premier Savings & Finance Ltd. v. Hamendra Mansukhlal*

Shah, Civil Suiit No. 205 “A” of 1996 (Msa) and Sango Bay Estates Ltd v. Dresdner Bank AG [1971] E.A. 18, which underlines the rights of a party served with third party notice to question the liability connexions between him and the party issuing the third party notice. There is no way such a challenge, which has a clear legal basis, can be mounted without service and a hearing being accorded the aggrieved party.

I am thus entirely in agreement with learned counsel for the 1st 3rd party that her client has wrongly been denied a day in court, to **“show some special circumstances why the [third party] directions should not [have been] given.”** I would also restate the legal principle that a third party notice, insofar as it obliges the recipient of the notice to defend, is in every respect a pleading; the joinder process which brings into the suit the third party must be openly ventilated; and the third party must be properly served and put on notice that he or she will plead and defend, in exactly the same way as the defendant must do vis-à-vis the claims of the plaintiff.

Accordingly, I hereby allow the 1st 3rd party’s Notice of Motion of 26th January, 2005. I will specifically make the following orders:

- 1. The order of this court made on 12th October, 2004 is hereby set aside.**
- 2. The costs of this application shall be borne by the defendant in any event.**

DATED and DELIVERED at Nairobi this 26th day of September 2005.

J.B OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk : Mwangi

For the 1st 3rd party/Applicant : Ms. Alela instructed by M/s Inamdar & Inamdar, Advocates

For the defendant/respondent : Mr. Ojuro, instructed by M/s Mohamed & Samnakay, Advocates

For the plaintiff/respondent : Mr. Waigwa, instructed by M/s. S. Gichuki Waigwa, Advocate