



**Family Bank Limited v Mutisya & another (Civil Appeal
E076 of 2021) [2024] KEHC 5740 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E076 OF 2021**

RK LIMO, J

MAY 13, 2024

BETWEEN

FAMILY BANK LIMITED APPELLANT

AND

FRANCISCAH SYOMBUA MUTISYA 1ST RESPONDENT

BERNARD NTHENGE 2ND RESPONDENT

JUDGMENT

1. This is an appeal that arose from the Ruling of Hon. M. Onkoba Principal Magistrate delivered on 18th November 2021 vide Mwingi Cause No. 8 of 2019. This appeal is related to Civil Appeal No. 076 of 2021 and is also the subject of this judgment because the issues are similar and the parties agreed to have the two-appeals canvassed together and have one common judgment. This judgment shall therefore apply to Civil Appeal No. E076 /2021.
2. Before I delve on the Ruling which is the subject of the appeal herein, I will briefly look into the background of the case that brought about the ruling of the trial court that prompted the appellant to prefer this appeal.
3. The suit in the subordinate court involved the 1st Respondent as the plaintiff and the 2nd Respondent as the defendant. The appellant herein was enjoined in the proceedings as 3rd Party. The 1st Respondent in the case had filed a suit against the 2nd Respondent owing to a road traffic accident involving the 1st Respondent who was travelling a fare paying passenger aboard Motor Vehicle Registration KBU 130U owned owned/driven by the 2nd respondent. The 1st Respondent blamed the 2nd Respondent for negligence and claimed that she sustained injuries as a result of the accident and suffered as a result and sued for damages.



4. The 2nd Respondent on his part blamed the owner of the owner of Motor vehicle Registration KAX 430P claiming that the 3rd Party largely contributed to the accident and took out 3rd Party proceedings against the registered owner of the said motor vehicle who happens to be the appellant herein.
5. The trial court was moved by the 2nd Respondent to enjoin the 3rd (the appellant herein). The 2nd Respondent issued 3rd Party Notice as provided by law to the appellant but the appellant reportedly received the 3rd Party Notice under protest and failed to enter appearance or make any representations to the trial court by way of filing of pleadings.
6. The trial court satisfied that the 3rd Party had been duly served, proceeded with the trial and in its judgment dated 10th March 2021 found that the 2nd Respondent was 70% liable to blame while the 3rd Party (the appellant herein) was found to be 30% liable to blame.
7. Following the trial court's decision, the appellant filed a notice of motion application dated 11th May 2021 seeking to set aside the interlocutory judgment (there was none) and orders entered on 29th July 2019 and also sought to set aside the trial court's judgment entered on 10th March 2021 with respect to liability apportioned against it and the appellant also sought leave to file a defence and establish the issue of liability. The trial court heard the parties on the said application and in the end dismissed it with costs vide its ruling delivered on 17th November 2021. The trial court held the view that the appellant was accorded an opportunity to be heard but opted not to do the same when it failed to enter appearance and participate in proceedings before the trial court after it was served with a third-Party notice. The trial court's ruling is the subject of this appeal.
8. The appellant felt aggrieved by the said ruling and filed this appeal raising the following grounds namely:
 - i. The Honourable Learned Magistrate erred in law and in fact by failing to place due circumspection to the Appellant's motion dated 11th May 2021 and the depositions in support thereof.
 - ii. The Honourable Learned Magistrate erred in law and in fact by failing to consider that the 2nd Respondent while serving the Appellant with the Third- Party Notice is required to also serve a copy of the Plaint pursuant to the provisions of Order 1 Rule 15 (3) of the [Civil Procedure Rules](#) 2010 which would have allowed the Appellant to appreciate the issues being raised by the 2nd Respondent against it.
 - iii. The Honourable Learned Magistrate erred in law and in fact by finding that the Appellant must have been served with a copy of the Plaint by the 2nd Respondent yet no evidence was adduced by the Respondents proving that the Plaint was indeed served on the Appellant as required by law
 - iv. The Honourable Learned Magistrate erred in law and in fact by failing to consider that the return of service dated 30th October 2019 sworn by the 2nd Respondent's advocate admitted that he only served a third-Party notice from the firm of advocates representing the 2nd Respondent and accordingly only served the third -Party notice on the Appellant and not the plaintiff.
 - v. The Honourable Learned Magistrate erred in law and in fact by failing to consider that the appellant was a mere financier of its borrower one Mr. Peter Njuguna Wanjiku who was the legal and beneficial owner of Motor Vehicle Registration No. KAX 438P exercising full control of the subject motor vehicle when it had an accident with the Defendant motor vehicle.



- vi. The Honourable Learned Magistrate erred in law and in fact by making a finding that the applicant was indolent by failing to enter appearance and failed to appreciate the unique circumstances surrounding the Appellant's failure to defend the suit including the fact that the appellant was no longer the registered owner of motor vehicle registration no. KAX 438 p at the time the third-Party notice was issued against the appellant.
 - vii. The Honourable Learned Magistrate erred in law and in fact in refusing to give the appellant a chance to defend the suit and has thus occasioned miscarriage of justice to the appellant.
 - viii. The Honourable Learned Magistrate erred in law and in fact in dismissing the Appellant's motion dated 11th May 2021 without interrogating the Appellant's grounds for setting aside the judgment.
 - ix. The Honourable Learned Magistrate erred in law and in fact by finding that the Respondents are entitled to costs.
9. The appellants is asking this court to set aside the lower court's ruling dated 17th November 2021 and the judgment against so that he can file a defence and defend itself.
 10. In its written submissions through counsel dated 17th July 2023 the appellant has pointed out a number of issues which he contends demonstrated that the trial court erred.
 11. On the issue of service of the third-Party notice, the Appellant admits that it was served with the notice but contends that it was not served with a plaint and accompanying documents which in turn denied it the opportunity to appreciate the issue and facts raised in the suit contrary to the provisions of Order 1 Rule 15 (3) of the *Civil Procedure Rules*. Counsel has cited the following cases in support of the appellant's submission on service of the third-Party notice;
 - a. *Firenze Investment Limited vs Kenya Way Limited* (2001) eKLR on service of pleadings. This case however was in reference to service of summons to enter appearance which is required to be accompanied by a copy of the plaint.
 - b. *Mary Njeri vs Aga Khan Health Services & 2 Others* (2005) eKLR in this matter, service of third-Party notice was challenged and the same was allowed as the court found that the third-Party notice pertaining to hearing of application on third Party directions was not served upon the 1st 3rd Party to the suit.
 - c. *Amina Hersi Moghe & 2 Others vs Diamond Bank Kenya Limited & Anor* (2021) eKLR which was similarly on service of summons to enter appearance. In this matter, the Plaintiff failed to take out summons, consequently, the Defendant sought dismissal of the suit but the trial court declined to grant an order on the same and held that the Defendants were well aware of the suit having participated in the proceedings by filing a defence and several other pleadings.
 12. The appellant further submits that the trial court erred in failing to discharge it from the suit on the ground that it was only a financier and not the registered or beneficial owner of Motor Vehicle Registration No. KAX 438P. The appellant has placed reliance on the cases of *Ali Abdi Dere vs Hash Hauliers Limited & Anor* (2018) eKLR and *Mohammed Hassan Musa & Anor vs Peter Mailanyi & Anor* (2000) eKLR where the two courts discharged financiers from liability following the finding that joint registration of the suit motor vehicles in the two suits was merely for purposes of securing the financier's interest limited to recovery of monies lent.
 13. The 1st Respondent has opposed this appeal vide her written submissions dated 15th September 2023 done through counsel.



14. With regards to service of the Third-Party Notice, the 1st Respondent submits that the same was served upon the Appellant on 27th September 2019 and that the same was in accordance to the provisions of Order 1 Rule 15 (2) & (3) of the [Civil Procedure Rules](#). It is submitted on behalf of the 1st Respondent that the notice contained sufficient details to enable it enter appearance and call for additional pleadings. The 1st Respondent submits that the appellant had an obligation to participate in the suit but elected not to.
15. The 1st Respondent faults the appellant for trying to rely on technicalities to deny her justice and have asked this court not to allow the appellant to wriggle out of judgment owing to procedural technicalities.
16. The 1st Respondent contends that the trial court dealt with the issue of 3rd Party in detail and that the appellant was a joint owner and cannot escape liability citing the provisions of Section 8 of the [Traffic Act](#) Cap 403 regarding the significance of the person in whose name a vehicle is registered. He faults the appellant for not rebutting the presumption that it was the owner of the subject motor vehicle by virtue of being a registered owner. He submits that litigations should be brought to an end and believes that the same is possible if this appeal is disallowed.
17. The 2nd Respondent has also thrown weight to the opposition of this appeal through his written submissions dated 19.9.2023 filed through counsel.
18. The 2nd Respondent maintains that he served the appellant with 3rd Party Notice and claims that a plaint and his defence to the suit filed accompanied the 3rd Party Notice. He faults the appellant on his allegation that it did not have knowledge about the pleadings stating that it should have written to his counsel asking for the pleadings if that was the case.
19. It is submitted that the Appellant was mandated to enter appearance as provided for under Order 1 Rule 17 of the [Civil Procedure Code](#) but the appellant failed to do so. That the appellant was privy to the information of its only being a financier to one Peter Njuguna Wanjiku who was the alleged beneficial owner of the suit motor-vehicle but failed to disclose the same in good time. The 2nd Respondent has placed reliance on the case of [Imani A. Yuman vs Amina Ahmed Abdullah & Anor](#) (2021) eKLR where the court held that failure to enter appearance even after due service of a Third-Party Notice indicated that the applicant admitted liability of a decree obtained against him. It is also submitted that the appellant has failed to demonstrate good cause for setting aside the lower court's judgment.
20. He faults the appellant for taking the 3rd Party Notice served on it for granted and disregarding the claims made against it only to turn around with excuses when judgment as entered against it. He contends that the provisions of Order 1 Rule 17 of the [Civil Procedure Rules](#) caught up with the appellant because of his inaction upon service and that he was deemed by law to admit the claim.
21. He submits that the appellant is the only person who knows the relationship between it and the beneficial owner of Motor vehicle Registration No. KAX 438P as he was the only person privy to that relationship.
22. He contends that the appellant does not deserve any discretion by this court because it abused the right to be heard and then seek to rely on Article 159 (d) of the [Constitution](#). He submits that the Judicial discretion tilts against re-opening the case in the lower Court because the 3rd Party failed to seize its chance to defend itself when it was accorded one.



Analysis and Determination

23. This being a first appeal, the duty of the first appellant court was well stated in *Selle & Anor vs. Associated Motor Boat Co.* [1968] EA 123 where the court of Appeal stated: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

24. This court has laid out the background of the case in the lower court, the appellant’s case and the response by both the respondents. The issues in this appeal calling for determination are:

- i. Whether 3rd Party Notice was issued and served procedurally
- ii. Whether the appellant has made out a case to warrant setting aside the trial court’s Ruling dated 17th November 2021. Put another way whether the trial court exercised its discretion well in its ruling dated 17/11/2021.

25. I will begin with the question of 3rd Party Notice. Third Party Notice proceedings is a procedure where a defendant is allowed to bring in another person to a suit because of a claim against that person. The process is provided under Order 1 Rule 15 of the *Civil Procedure Rules* which provides as follows;

- i. Where a defendant claims as against any other person not already a Party to the suit (hereinafter called the third Party)
 - a. that he is entitled to contribution or indemnity; or
 - b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third Party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third-Party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
- i. A copy of such notice shall be filed and shall be served on the third Party according to the rules relating to the service of a summons.



- ii. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.
 - iii. Where a third Party makes as against any person not already a Party to the action such a claim as is mentioned in sub-rule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third Party shall apply mutatis mutandis as between the third Party and such person, and the court may give leave to such third Party to issue a third Party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions “third Party notice” and “third Party” shall respectively apply to and include every notice so issued and every person served with such notice.
 - iv. Where a person served with a notice by a third Party under Subrule (4) makes such a claim as is mentioned in Subrule (1) against another person not already a Party to the action, such other person and any subsequent person made a Party to the action shall comply mutatis mutandis with the provisions of this rule.
26. The appellant has admitted receiving a 3rd Party Notice but denies receipt of the plaint and defence which was shifting the liability to it. While that issue of not receiving the pleadings is contested there is no contest that the appellant failed to comply with the above cited rules and in particular Order 1 Rule 15(i) of the Civil Procedure Rules. The only issue arising is whether the 3rd Party Notice was issued properly.
27. The 2nd Respondent application for leave to join the appellant as 3rd Party is dated 22nd July 2019. From the proceedings of the lower court that application came up for hearing on 25th September 2019 where the 2nd Respondent’s counsel informed the court that it had not served the application on the 3rd Party. It was incorrect for the 2nd Respondent’s counsel to aver in para 5 of his affidavit sworn on 28/5/2021 in response to the appellant’s application dated 11/5/2021 that leave was granted to enjoin 3rd Party. The averment states;
- “That the defendant filed an application dated 22.7.2019 for joinder of the 3rd Party herein and the application was allowed on 25th September 2019”.
- This court has checked at the proceedings of both filed (No. 8/2019 & 23/19) and the 2nd Respondent’s counsel on 25/9/2019 made the following representations to the trial court;
- “Mr. Mwaniki holding brief for Kinyanjui for the applicant/defendant. The firm of Macharia Waiganjo is on record for the plaintiff. The matter is coming up for hearing of the application dated 22nd July 2019. The same has not been served upon the 3rd Party. I pray for another date”.
28. The trial court satisfied that service had not been effected adjourned the hearing of the said application and rescheduled it for hearing on 30/10/19. On 30/10/2019 there was no appearance of parties and the trial court ordered that a fresh date be taken at the Registry.
29. The proceedings from the lower court does not indicate what transpired on 30/10/2019 but what is apparent from the record indicates that the said application dated 20/7/2019 was never prosecuted



- because what appears on record shows that the 1st Respondent on 18.12.2019 informed the trial court that a request of interlocutory judgment by the 2nd Respondent had been made and requested for a mention date.
30. It is instructive to note that the 3rd Party Notice served on the appellant is dated 22nd July 2019. So when the 2nd Respondent appeared in the trial court on 25/9/2019 stating that it had not served the application dated 22/7/2019 which application was seeking leave to enjoin the appellant as the 3rd Party, it had already issued a 3rd Party Notice. A process server by the name Seth Khisa in his affidavit sworn on 30th October 2019 avers that he served the 3rd Party Notice on 27th September 2019 on the appellant.
31. From the foregoing, the pertinent question to be asked is whether the 2nd Respondent complied with the provisions of Order 1 Rule 15(1) (c) *Civil Procedure Rules* before issuing the 3rd Party Notice. The above provisions makes it mandatory for a defendant to first leave of court to enjoin a Party not named in the proceedings as a 3rd Party. The leave of court is imperative and from the proceedings of the lower court, that leave was formally sought yes but the leave itself was not obtained perhaps through an oversight or inadvertence but it was not granted. In view of express provisions, I have cited above, the 3rd Party Notice dated 22nd July 2019 by operation of law was invalid and irregular for want of leave.
32. This court finds that the appellant of course never did itself any favour by disregarding the 3rd Party Notice without expressing itself in court on the reasons behind receiving the impugned Notice “under Protest”. The appellant ought to have done better because it is reputable company or bank and had it taken up the Notice seriously and make its representations perhaps the proceedings against it might not have been adverse or dragged on for that long.
33. It is also apparent that besides the omission made by the 2nd Respondent which omission appears to have escaped the attention of the trial court, the trial court also appears to have erred by failing to first enter interlocutory judgment against the appellant pursuant to the provisions of Order 1 Rule 19 of the *Civil Procedure Rules*. The same states:
- “Where a third Party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third Party to the extent claimed in the third-Party notice; the court may upon the application of the defendant pass such judgment against the third Party before such defendant has satisfied the decree passed against him.”
- Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just.”
34. The court must be moved to enter judgment against a third Party, either before satisfying the decree or after satisfaction of the decree and the defendant had two options. Either to satisfy the decree passed upon him and thereafter apply for the Judgment to be entered against the 3rd Party and only after such application would the court pass such judgment against the 3rd Party or before satisfying the decree, apply for judgment to the extent of the 3rd Party notice to be entered against the said 3rd Party. This was not done and the court could not enter judgment against the 3rd Party in the circumstances.
35. Before a trial court gives leave to a defendant to enjoin a 3rd Party in a suit it must be satisfied that there is a proper issue raised by the defendant as between it and a 3rd Party that ought to be tried. A trial court ordinarily should give directions on how liability would be tried first as between a plaintiff and defendant between a defendant and a 3rd Party. There is nothing that prevents a court from trying the issue of such liability simultaneously in the trial.



36. In the case of *Kenya Commercial Bank -vs Suntra Investment Bank Ltd* (2015) eKLR the court made the following observations;

“The defence does not even allude to the said third Party; the issue has just propped up in the submissions by the Defendant. In any case, the said third Party is not a Party in the suit and no claim has been laid against it by the Plaintiff or the Defendant. In law, a third Party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third Party is determined between the Defendant and the third Party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third Party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

37. The trial court fell into error when it misapprehended the import of Order 1 Rule 17 of the *civil Procedure Rules* which basically provides that a 3rd Party who defaults to enter appearance upon proper service is deemed to admit liability to contribute or indemnify the defendant. The trial court as observed above ought to have proceeded under Order 1 Rule 19 of the *Civil Procedure Rules*. This of course was only possible if the 3rd Party Notice was obtained regularly as provided by law and served which in this instance was not.

38. From the foregoing, this court finds that the appeal herein the applicant to enjoin the appellant was never heard and the cause of action against the appellant was therefore not established with a view to issuing it a 3rd Party Notice as provided by law.

This appeal is on that ground is allowed. The judgment entered against the appellant was irregular and is set aside. The Ruling dated 17.11.2021 is set aside. And the dismissal order is reversed. In its place the application dated 11th May 2021 is allowed in terms of prayers 3,4,5 & 6 thereof. In addition, the matter is referred back to the Lower Court for the application dated 22.7.2019 and further proceedings as against the appellant herein.

I shall not make any order as to costs because both the appellant and the Respondents were at fault and really cannot afford to throw stones on costs because they are in a glass house so to speak. Each to bear own costs. This judgment shall also apply to Civil Appeal No. 076/2021.

DATED, SIGNED AND DELIVERED AT KITUI THIS 13TH DAY OF MAY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

