



**Mbogo v Kariuki (Civil Appeal E050 of 2023)  
[2024] KEHC 7506 (KLR) (Civ) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7506 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CIVIL  
CIVIL APPEAL E050 OF 2023  
CM KARIUKI, J  
JUNE 20, 2024**

**BETWEEN**

**ATANUS MAINA MBOGO ..... APPELLANT**

**AND**

**PETER CHARAGU KARIUKI ..... RESPONDENT**

**JUDGMENT**

1. Before the Court is an appeal against the ruling delivered by Hon V. Kiplagat by 21/10/2021 according to an application dated 12/5/2021 where the Appellant, then the defendant/applicant, had sought for orders that they be granted leave to issue and serve a third-party notice upon Resolution Insurance Company Limited as per the annexed third-party notice.
2. The Respondent opposed the application, stating that the purported third party was not a party to the agreement and that the suit did not relate to any insurance claim. Consequently, the Court dismissed the application because the application was brought by way of notice of motion instead of chamber summons as required by the rules. This did not meet the legal threshold for a grant of leave to issue a third-party notice.
3. The Appellant contends that the Court did not look into the merits/demerits of the application. The Appellant, in his memorandum of appeal dated 2/6/2022, raised the following grounds of appeal:-
  - a. The learned trial magistrate erred in law and found that the Appellant did not meet the legal threshold for granting leave to issue a third-party notice.
  - b. The learned trial magistrate erred in law and found that the application dated 12/5/2021 is entirely defective on the face of it and that the same lacks merit.



- c. That the learned trial magistrate erred in law and, in fact, in finding that the defect is not one that is not curable in law.
- d. That the learned trial magistrate erred in law and, in fact, dismissed the application to enjoin a third party.

### **Appellant's Submissions**

4. The Appellant submitted that third-party proceedings are provided under Order 1 Rule 15. It was stated that the application is supposed to be *ex parte*, and the participation of persons already parties to the suit is not required like in the instant suit.
5. The plaintiff's claim was for kshs. 450,000/- compensation for the diminution in value of his motor vehicle registration no. KBU 585K after it was involved in a road traffic accident on 11/7/2019. Resolution Insurance Co. Ltd insured the vehicle; the Appellant was the only insurance agent who helped the Respondent insure the motor vehicle. The insurance refused to settle the claim, and in the undertaking to pay dated 16/8/201, the Appellant undertook to facilitate filing the suit against Resolution Insurance Co. Ltd, which repudiated liability after the accident.
6. The Respondent sued the Appellant seeking compensation, and he failed to enjoin the insurance company in the suit as a defendant. The defendant blamed the insurance company for failing to settle the claim, and the only way he could have had the insurance company enjoined in the suit was through third-party proceedings, which he did through the application dated 12/5/2021 and that his only mistake was to move the trial court through a notice of motion instead of chamber summons. Reliance was placed on *K. Baur v Shashikant Shamji Shah & Anor* [2011] eKLR, *Patrick Kabue Muchene v Hannab Wangari Kinuthia & Anor* [2021] eKLR & *Samuel B. Kangogo & 3 Others v Daniel Ndungu* [2009] eKLR
7. The Appellant urged the Court to find that the error was not fatal, warrant the striking out of the application dated 12/5/2021, and allow the appeal to be allowed with costs.

### **Respondent's Submissions**

8. The Respondent stated that the intended third party was not a party to the agreement dated August 18, 2019 and that the only mention of the intended third party in the contract was that the Appellant would pursue the said insurance company, which has repudiated liability after the accident due to failure to remit the entire premium. The Appellant, an insurance agent, had failed to remit the premium received from the Respondent, and when the risk occurred, the insurance company failed to settle. It is then that the Appellant agreed to cater to the risk as it was his fault personally, and therefore, the insurance company is not liable and cannot be added as a third party.
9. It was asserted that the application did not meet the threshold for a grant of leave to serve a third-party notice because
10. The application was brought through notice of motion instead of chamber summons as set out in the rules.
11. The cause of action in this trial suit relates to a contract between the plaintiff and the defendant, who partially performed part of the contract by paying a sum of kshs. 40,000 to the plaintiff. The proposed third party is not privy to the said contract; hence, no issue of liability or otherwise will stand for determination against the third party.



12. The said application had not been served upon the proposed third party, violating the procedure and natural justice rules.
13. The cause of action in the trial court suit relates to a breach of contract and not an insurance claim. There was no indemnity clause in the said contract, and hence, the proposed third party is not a necessary party to these proceedings.
14. Reliance was placed on Order 1 Rule 15 of the Civil Procedure Rules, 2010
15. The Respondent contends that this appeal lacks merit and is only intended to delay the execution of the terms of the agreement dated 16.08.2023 and seeks that the same be dismissed with costs and the trial court's matter proceed for hearing as the proceedings therein have been stayed pending the determination of this appeal.

### **Analysis and Determination**

16. The Appellant asserted that his only mistake in filing third-party proceedings, which he did through the application dated 12/5/2021, was moving the trial court through a notice of motion instead of a chamber summons. On the other hand, the Respondent contended that The application was brought by way of notice of motion instead of chamber summons as set out in the rules. The trial court magistrate agreed with the Respondent and stated in his ruling dated 21<sup>st</sup> October 2021 that the application is entirely defective on the face of it and thus the same lacks merit and, therefore, fails.
17. Order 1 Rule 15 (1) of the Civil Procedure Rules stipulates as follows:-

“

“1. 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.”

18. In the instant applicant, the Appellant approached the Court through notice of motion instead of the prescribed manner by way of chamber summons. However, I am afraid I have to disagree with the Respondent and the trial court that the defect mentioned above is incurable. The above default on the applicant's part should not have robbed the Appellant of the right to consider their application on its own merits. The default is curable in law not only under the inherent power of the Court and the overriding objective principle of the Court but also under the now crystallized non-technicality



principle in the delivery of justice enshrined in Article 159(2)(d) of *the Constitution* which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities.

19. In the light of the foregoing, this Court makes the following findings and determinations: -
- i. The lower Court's ruling read on 21/10/2021 be and is hereby set aside, and the application subject herein is reinstated.
  - ii. That application be heard afresh on its merits by a magistrate other than Hon. V. Kiplagat.
  - iii. That each party bears its costs.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 20<sup>TH</sup> DAY OF JUNE 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**CHARLES KARIUKI**

**JUDGE**

