



**Ngatia & 61 others v Moi University; University of Eldoret (Third party)  
(Civil Suit 83 of 2002) [2023] KEHC 18565 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18565 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 83 OF 2002  
RN NYAKUNDI, J  
JUNE 15, 2023**

**BETWEEN**

**AGNES NGATIA & 61 OTHERS ..... APPELLANT**

**AND**

**MOI UNIVERSITY ..... DEFENDANT**

**AND**

**UNIVERSITY OF ELDORET ..... THIRD PARTY**

**RULING**

1. The third party filed a preliminary objection dated January 10, 2022 seeking to strike out the third-party notice dated December 7, 2021 premised on the following grounds;
  1. The notice is statutory time barred as it offends the mandatory provisions of section 4(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya the limitation of time as provide by law applies mutatis mutandis to the third-party procedure.
  2. That the claim for contribution and or damages , costs and interest arising from this matter is on the basis of a report/agreement dated December 15, 2014 and issuance of the notice is therefore barred by law.
  3. Under these instructions of the law therefore, the limitation of time in respect of the third-party procedure applies as if;
    - a. The third-party notice was a summons to defend.
    - b. The defendant presenting the notice was a plaintiff and the third party was a defendant.
  4. That the notice is incompetent as it offends the mandatory provisions of the law.



5. That the third-party notice dated December 7, 2021 be struck out or in the alternative the third-party notice and the arising consequential implications therefrom be dismissed with costs.

### **Applicant's Case**

- 2 Learned counsel for the third party submitted that the third-party notice is defective by virtue of the fact that it was filed after the statement of defence by the defendant. Further, that the indemnity sought by the defendants is contractual and since it is hinged on an agreement between the defendant and the third party dated December 15, 2014, the same cannot be sustained after the expiry of the 6-year limitation period for enforcement of contractual obligations. Counsel cited the case of *Bosire Ogero v Royal Media Services* (2015) eKLR in support of this submission.
- 3 Counsel urged that the leave to file third party notice had to be filed within the time prescribed within the law as the law does not contemplate for a delay of filing the third-party notice. He cited order 1 rule 13 of the civil procedure rules in support of this submission and relied on the case of *Obondo vs Akech* (1995) LLR 5427(HCK). Counsel urged that the third-party notice be dismissed with costs.

### **1<sup>st</sup> Respondent/Claimant's Case**

- 4 The claimant filed submissions in opposition to the preliminary objection, stating that in order to determine whether the third-party notice is time barred a factual exercise is required and therefore that defeats the purpose of a preliminary objection. Further, that section 4(1) of the *Limitation of Actions Act* is to be looked at from a point when joinder was allowed.
- 5 Further, that the issue on contribution can only be ascertained from adducing evidence and testing the veracity of evidence. Counsel urged that the objection should be dismissed with costs.

### **Issues for Determination**

#### **Whether the preliminary objection is merited**

- 6 In the Court of Appeal case of *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd* [1969] E.A. 696 stated as follows with regards to a preliminary objection:  

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.
- 7 In order to determine whether the preliminary objection is merited, this court must discern whether the points raised are pure points of law.

#### **Whether the third-party notice is time barred**

- 8 Order 1 Rule 15 of the Civil Procedure Rules provides;
  - (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.

9 The upshot of these provisions is that leave to enjoin a third party must be applied for within 14 days after the close of pleadings. However, the court already rendered its verdict on the issue of third-party notice and found the application for the same merited therefore, determining the same at this juncture would be tantamount to sitting on appeal on its own decision. I am in agreement with the respondent that the court is functus officio on this particular issue.

10 The notice of preliminary objection is further premised on the grounds that the indemnity sought by the defendants is contractual in nature as it is hinged on a supposed agreement between the defendant and the third party dated 15<sup>th</sup> December 2014. The defendants urge that the third party is estopped from claiming limitation on the basis that there were ongoing negotiations between the parties. I am guided by the decision in Gabriel Smith Otieno Awiti -v- Homabay County Assembly & Another (2013) eKLR where the Court of Appeal held that the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by previous action or statement of that person --- that where one party by his words or conduct made to the other party a promise or assurance which was intended or affects the legal relations between them and to be acted on, the other party --- the party who gave the promise of assurance cannot afterwards be allowed to revert to the previously legal relationship - he must accept their legal relations subject to the qualifications which he has himself introduced.”

11 It is trite law that a preliminary objection should be on a pure point of law that does not require ascertainment of facts. In order to determine whether there were negotiations and consequently, whether the third-party notice is time barred the court would have to delve into factual issues. Further, this court addressed the issue of the contract between the applicants and the third party and whether they were privy to the same was tackled in the ruling allowing the injunction. It is my considered view that these are issues that should be addressed in the main suit as well.

12 In the premises, this preliminary point of objection fails in its entirety. Costs shall be in the cause.

**DELIVERED VIA E-MAIL DATED AND SIGNED AT ELDORET ON THIS 15<sup>TH</sup> DAY OF JUNE 2023**

**R.NYAKUNDI**

**JUDGE**

office@nyairoadvocates.com

sanditi@uoeld.ac.ke

kiplawyers@gmail.com

