



DK (Suing on own Behalf and Next Friend of (LMK) (Minor)) v Otieno & another; Njoroge (Third party) (Civil Case E003 of 2022) [2024] KEHC 15534 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL CASE E003 OF 2022
AK NDUNG’U, J
DECEMBER 5, 2024**

BETWEEN

**DK PLAINTIFF
SUING ON OWN BEHALF AND NEXT FRIEND OF (LMK) (MINOR)**

AND

**DR ENOCK OTIENO 1ST DEFENDANT
NANYUKI COTTAGE HOSPITAL 2ND DEFENDANT**

AND

DR DAVID NJOROGE THIRD PARTY

RULING

1. On 15/02/2024, the 1st Defendant counsel made an oral application to wit, to file and serve a third party notice and the third party notice filed be deemed as properly filed and served. The Plaintiff’s and the 2nd Defendant’s counsel did not object and this court proceeded to grant the order as prayed by stating that;

‘The 3rd party notice dated 01/02/2024 is deemed as properly filed and the 3rd party be served as well as the other parties in the matter...’
2. Upon service, the third party herein filed a preliminary objection on the following grounds;
 - i. The 1st Defendant did not seek leave to issue 3rd party notice pursuant to Order 1 Rule 15(c) of the Civil Procedure Rules.
 - ii. The claim against the 3rd party is both time and statute barred under section 4(2) of the *Limitation of Actions Act* having been brought more than three(3) years from the date of cause of action.



3. It is the said preliminary objection that is subject to this ruling. The parties herein were ordered to canvass the P.O by way of written submissions and the po really concerns the 1st defendant and the 3rd party and who have filed their respective submissions.
4. The third party submitted that Order 1 Rule 15 of the Civil Procedure Rules makes it mandatory for a person seeking to enjoin a third party to seek leave before issuing a third party notice by way of an ex parte chamber summons and that leave shall be within 14 days after close of pleadings. That by the use of the word shall, it means that the procedure is mandatory and should be adhered to during the enjoyment of a third party. Therefore, the 1st Defendant failed to file a chamber summons to enjoin the 3rd party and the same was not done within 14 days after the close of the pleadings. That the pleadings were closed on 06/10/2022 thus 14 days lapsed on 20/10/2022 but the 1st Defendant waited until 01/02/2024 to take out a 3rd party notice. Reliance was placed on the case of *Ethics and Anti-corruption Commission v Hartland Enterprises Limited & 5 others (Anti-Corruption and Economic Crimes Civil suit E030 of 2022)*. He prayed that the third party be struck out from the suit for un-procedural enjoinder.
5. As to whether the claim as against the 3rd party is time barred, he submitted that the suit was commenced out of a tortious act that arose on 14/12/2019 and therefore the 1st Defendant was bound to enjoin a 3rd party on or before the 14/12/2022. The 1st Defendant enjoined him on 15/02/2024 more than 1 year after the lapse of time for institution of the 3rd party notice. Therefore, the 3rd party notice dated 01/02/2024 was time barred. Reliance was placed on the case of *Kiambaa Coffee Growers Co-operative Society Limited v Valentine Growers Limited; Attorney General (Third Party) (Civil Suit 981 of 2004) [2020] KEHC 6408 (KLR)*.
6. He Further submitted that the 1st Defendant has no claim as against the 3rd Party since he was absolved of any wrong doing by the Medical Practitioners and Dentists Council vide a ruling dated 02/12/2021 after making an inquiry to the case.
7. In rejoinder, the 1st Defendant submitted that he filed a 3rd party notice dated 01/02/2024 and made an oral application to the court for leave to file the same and that the said notice be deemed as properly filed which application was allowed by the court. The order has not been appealed against or vacated. That when he was making the oral application, the pleadings had been closed but the same were re-opened after filing the third party notice.
8. On whether the claim against the 3rd party is time and statute barred, he submitted that the suit was filed on 13/04/2022 and the 1st Defendant was served with the pleadings in the month of August, 2022 and he filed his defence on 01/09/2022 and on 01/02/2024, he filed a 3rd party notice hence 1 year and two months had lapsed and therefore, the 3rd party notice is not time barred. The suit was also filed by the Plaintiff and not the 1st Defendant.
9. I have considered the issues raised in the preliminary objection and the submissions by the counsels for the third party and the 1st Defendant. The 3rd party has argued that the issuance of the third party notice was unprocedural for want of compliance with Order 1 Rule 15 of the Civil Procedure Rules. The said Order states 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.

10. The record of court bears that 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. Certainly this issue cannot in the circumstances be a subject of a preliminary objection but rather, a subject of a review or an appeal. The court is therefore functus officio on this particular issue.

11. On whether the claim as against the 3rd party is time barred, the plaint was filed on 13/04/2022. The 1st Defendant entered appearance on 11/08/2022 and his defence was filed on 01/09/2022. The third party notice was filed on 01/02/2024. The third party contention was that pursuant to section 4 of the [Limitation of Actions Act](#), the timeline for commencing a suit on the tort of negligence is three years. That the instant suit was commenced out of a tortious act that arose on 14/12/2019 and therefore, the claim against the third party is time barred.

12. Section 4(2) of the [Limitation of Actions Act](#) provides that;

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:”

13. The plaint as seen earlier, was filed on 13/04/2022 and the cause of action is said to have accrued on 14/12/2019. The 1st Defendant filed his defence on 01/09/2022. The third party relied on the case of *Kiambaa Coffee Growers Co-operative Society Limited v Valentine Growers Limited; Attorney General (Third Party) (Civil Suit 981 of 2004) [2020] KEHC 6408 (KLR)* where the court held as follows;

“In the submissions, the third party contends that the suit against it violates the [Public Authorities Limitation Act](#) in that the alleged cause of action occurred in November 2002 and the plaintiff filed the suit two years later, in September, 2004. From the record, the third party proceedings were commenced on the 12th March, 2010 which was nearly seven (7) years and 4 months from the time the cause of action arose and six (6) years from the time the defendant filed its defence. The defendant did not submit on this issue. This court has perused the pleadings filed herein. The court notes that by the time the plaintiff filed its claim, a period of 12 months had lapsed. It is important to note that the plaintiff does not have any claim against the third party and therefore the period of 12 months does not affect the plaintiff’s claim against the defendant. However, considering when the defendant filed its defence and the time it took them to enjoin the third party, a period of six years



had lapsed. Even if the court was to give the defendant the benefit of doubt and assume, for purposes of limitation, that its cause of action against the third party started to run from the moment it filed its defence, there is a period of a whole six (6) years. No extension was sought by defendant.”

14. The pertinent question would, in the circumstances of this case be, when does time start to run in considering limitation of time in respect of a claim by a defendant against a 3rd party. The court in *Kiambaa Coffee Growers Co-operative Society Limited v Valentine Growers Limited; Attorney General (Third Party) (Civil Suit 981 of 2004) [2020] KEHC 6408 (KLR)* left this question hanging when it stated;

“ Even if the court was to give the defendant the benefit of doubt and assume, for purposes of limitation, that its cause of action against the third party started to run from the moment it filed its defence, there is a period of a whole six (6) years. No extension was sought by defendant.”

15. The dilemma faced by the court in the above case is discernably one arising from non-existence of a specific law or rule governing the relationship between a defendant and a 3rd party claimed against in so far as limitation of time is concerned.
16. The law of limitation of actions is intended to bar a plaintiff from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them.

Section 4(2) provides;

An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

17. One may then posit, what befalls a defendant who faces a suit filed on the last day of limitation (meaning the same is in time in so far as the claim against the defendant is concerned) and who has a claim of indemnity against a 3rd party? Should a defence of limitation strictly apply against such a defendant who may not have expected the claim against him but now finds himself answering a claim which he believes he ought to be indemnified from by a 3rd party?. This in my view calls for the invocation of the oxygen rule and the principles thereat and more importantly the dictates of article 50(1) of *the constitution* on fair hearing.
18. The court in my view ought to step in and fill the lacuna in the law so long as such accommodation of the defendant is not prejudicial to the 3rd party such that inordinate delay in serving the 3rd party notice like in the case of *Kiambaa Coffee Growers Co-operative Society Limited* should not be countenanced.
19. Granted, the limitation provided in law is directed at a claimant/plaintiff. Once the suit is in existence, I hold the view that a 3rd Party cannot successfully raise the defence of limitation against a defendant who has no control of the timing of a suit against him by a plaintiff. It is only when there is a clear demonstration of inordinate delay that the court may intervene to avoid prejudice likely to be occasioned by a stale claim by a defendant against a 3rd Party, each case being considered in its set of circumstances.
20. In a case like the present one where the 3rd Party notice is served timeously, the defendant ought to be allowed to ventilate his case against the 3rd party. In any event, the law of *Limitation of Actions Act* envision possible extension of time under Section 27 thereof.



21. From, the foregoing, the preliminary objection raised has no merit and is dismissed. In the circumstances obtaining in this matter I direct that each party bears its costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER

2024

A.K. NDUNG’U

JUDGE

