REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 487 OF 2012

DR. J.P. NATHWANI……………….............…………………………………APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA)

T/A THE MATER HOSPITAL……..….......…………………………......1ST RESPONDENT

DUNCAN KIPKOECH SALBEY……………………………………...2ND RESPONDENT

JUDGEMENT

By a plaint dated 8th November, 2006 and amended on the 7th March, 2007 the 2nd respondent (plaintiff) filed a suit in the Chief Magistrate's court at Milimani against the 1st Respondent (defendant). In the said suit the 2nd respondent claimed damages against the 1st respondent for injuries arising from a medical procedure for the disimpaction of the left 3rd molar carried out at the 1st respondent's facility on 1st December, 2003. The first respondent filed an amended defence on the 23rd March, 2007.

The case was set down for hearing on 26th February 2008 when the second respondent's case was partly heard and on 11th May, 2009, he concluded and closed his case. That the matter came up again, on 10th June 2009, for the hearing of the 1st respondent's case when it applied for an adjournment for the reason that it required to re-amend its defence which amendment would show that the appellant was not an employee as pleaded but rather he was a consultant

The application for adjournment was disallowed and the defendant (1st respondent) was ordered to proceed with its case. The reason for declining to grant the application was that it was made too late in the day and that it would be prejudicial and unfair to the 2nd respondent who had already closed its case.

That the 1st respondent proceeded with its case and it called the appellant as its witness who completed his evidence in Chief save for the cross-examination which was deferred to 10th July, 2009. Three days before the date scheduled for further hearing the 1st respondent filed an ex-parte application under certificate of urgency seeking leave to institute third party proceedings against the appellant. The said application was heard by A. Ireri (Mrs) who was on duty and she allowed the same. She further erroneously ordered that the third party notice be served upon the appellant and the application was scheduled for hearing, a day prior to the hearing of the main suit on which date, the trial magistrate Hon. W. Mokaya restated her directions that the hearing would be on 10th July 2009. On the said date the matter was deferred.

On the 2nd December, 2010, the 1st respondent made an application to have directions issued with respect to liability between it and the appellant which was opposed by the appellant, and in a ruling delivered on the 14th August, 2012, the court allowed the same. That ruling is the subject of this appeal.

The appellant herein has raised the following grounds of appeal;

(1) That the learned magistrate erred in not striking out and/or dismissing the third party proceedings herein.

(2) That the learned magistrate failed to appreciate or take into account the effect of the following matter:-

a. The defendant/1st Respondent's concealment of material facts when it appeared ex-parte and obtaining the orders for leave to issue a Third Party Notice.

b. The Defendant/1st Respondent's failure to institute the Third Party proceedings in time.

c. The Defendant/1st Respondent's failure to explain its delay in bringing the Third Party proceedings when it applied for such leave.

d. The defendant/1st Respondent's failure to lay any or any proper basis before the court for its case for indemnity against the appellant.

e. The Defendant/1st Respondent's case against the Appellant conflicted with the provisions of its own pleaded defence.

f. The defendant/1st Respondent obtained the orders for leave to issue a Third Party Notice by abusing the process of the court.

(3) That the learned magistrate failed to appreciate that, by virtue of the foregoing matters and the stage at which the main trial between the plaintiff and the defendant had reached the effect of his order amounted to prejudicing the Third Party from properly defending the proceedings brought against him.

(4) That the learned magistrate failed to appreciate or record the Appellant's Advocate's oral submissions.

(5) That the learned magistrate misapprehended, misunderstood and misapplied the law and procedure relating to Third Party proceedings.

(6) That the learned magistrate erred in law in failing to give directions as required in Third Party proceedings.

Parties agreed to canvass the appeal by way of written submissions.

In his submissions, counsel for the appellant has collapsed the six grounds of appeal into three as hereunder.

(i) Material disclosure as the basis of the application.

(ii) Delay in presentation of the application.

(iii) No merits in the application for directions.

He submitted that there was material non disclosure at the time of issuance of the leave to institute third

party proceedings against the appellant in that the 1st respondent did not inform the court of the actual status of the proceedings, the denial of leave to amend and the fact that the appellant had already testified as the 1st respondent's witness.

He contended that in granting the application for third party directions the learned magistrate Hon. C. Obulutsa failed to appreciate the application of the Court of Appeal decision in the case of ***"Uhuru Highway Development Limited Vs. Central Bank of Kenya and 3 others(Civil Appeal No. 126/1995) where the court reiterated the principle in RVs Kensington Income Tax Commissioner exparte princess Edmond de polignac which was applied in the owners of motor vessel "Lillian" Vs. Caltex Oil (K) Limited Civil Appeal no. 50 of 1989 wherein Kwach JA held."***

"it is perfectly well settled that a person who makes an ex-parte application to court- that is to say, in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure, of all material facts within his knowledge and if he does not make that fullest possible disclosure, he can not obtain any advantage from the proceedings and he will be deprived of any advantage that may have already been obtained by him. That is perfect plain and requires no authority to justify it.

He also cited the case of ***"official Receiver Continental Bank of Kenya Limited Vs. Mukunya, East African Law Reports(2003) 1EA 209 (CAK)"*** in which the court held that failure to disclose material facts can render an order obtained ex-parte subject to be set aside. He asked the court to set the third party notice aside as the same was obtained by concealment of material facts.

On the issue of delay, it was submitted that, the learned magistrate in declining to grant leave to re-amend the defence, stated in her ruling that it was far too late and that it would be prejudicial and unfair to the plaintiff who had already closed his case. That the application for third party proceedings was presented 2 years and 7 months after filing of the plaint and only 3 days to the date scheduled for cross-examination of the appellant.

That no reasons were given for the delay in initiating the third party proceedings and in support of this contention he relied on the case of ***"courtenay Evans & Another Vs. stuart passey & Associates & another (greater London council third party) 1968. IALLER.932".***

He averred that the magistrate failed to consider the implications of the delay and prejudice this would occasion to the 2nd respondent and the Appellant.

On the merits of the application for directions, it was submitted that under order 1 Rule 18 of the Civil Procedure Rules (applicable at that time) and order 1 Rule 22 of the Civil Rules 2010) once leave to issue 3rd party notice has been given, the court is required to give directions on third party notice and argued that the learned magistrate was required to establish whether there was a basis for the alleged liability against the appellant and how the question would be determined. He contended that the 1st respondent relied on indemnity against the appellant citing the decision in ***"Birmingham and District Land Company Vs. North Western Railways Company (1887) 34 CHD 261 which was considered in Sanyo Bay Estates Limited Vs. Dresdner Bank A.G (2) (1971) E. A 307"*** where the court held that there must be a contract in order for a party to assert the right to indemnity which the learned magistrate failed to appreciate.

He submitted that there was no contract of indemnity between the appellant and the first respondent. According to him, the remedy that would be available to the 1st respondent would be damages for breach of contract which in his submission is time barred.

He averred that no basis was disclosed before the Hon. Magistrate for the third party notice and for those reasons, he urged the court to allow the appeal.

On the part of the first respondent it was submitted that in the application for third party proceedings, it

made full disclosure of material facts in that the 1st respondent had denied vicarious liability with regard to the appellant as he was neither its employee nor agent, that the information had by then been readily brought to the attention of the 1st respondent, that the appellant was an independent contractor, the fact was not known to the 1st respondent's advocate, the attempt to amend the defence to bring forth this information was declined by the court and that the 1st respondent filed third party proceedings so that the issue of liability between it and the appellant can be addressed.

On what is material and what is not, it relied on the case of ***"Baha durali Ebrahim Shamji Vs. Al Noor Jamal & 2 Others Civil Appeal no 210/1997"*** Wherein the court set out what to consider in determining whether there has been material non disclosure.

It was further submitted that the scales of justice would tilt more in favour of the evidence tendered by the appellant being struck off the court's record and allowing the 1st respondent to proceed with its defence case without the benefit of the evidence of the appellant rather than denying the 1st respondent the right to pursue a case against the appellant where there is cause to do so. To emphasis on the general purpose of third party proceedings, counsel for the 1st respondent relied on the case of ***"Dilcon Constructure Ltd V. ANC Developments 1994 ABCA 245"*** in which the learned Judge referred to the case of ***"Dery Vs. Wyer (1959) CA 2 N.1 265 F2d 804"*** Where the court held.

To avoid two actions which should be tried together to save the time and cost of reduplication (sic) of evidence to obtain consistent results from identical evidence, and to do away with a handicap to a defendant of a time difference between a judgment against him and a judgment in his favour against the third party defendant".

It was averred that the appellant's argument that he would be prejudiced as he would not have the opportunity to cross- examine the 2nd respondent can not stand as the 2nd respondent can be recalled at any point during the trial to facilitate cross- examination.

On the issue of delay, it was submitted that the law at that time did not dictate a period within which leave may be sought and therefore the defendant could seek such leave at any point during the subsistence of the suit. On this point, counsel for the 1st respondent cited the case of ***"Ngugi Vs. Kenya Ports Authority (1991) KLR 605"*** where the court of Appeal ordered a re-trial of an entire suit upon finding that the trial Judge had erred in declining to enjoin the Third Party.

It was further averred that the Third Party notice was filed as soon as the evidence of the appellant's relationship with the 1st respondent came to the fore.

On whether the 1st respondent has a case of indemnity against the appellant, it was submitted that it was the duty of the lower court to consider whether or not there was a question on liability to be tried between them and the court found that there is. That the first respondent attached contracts dated 5th December, 2002 and 12th February 2004 in which the appellant entered into as a self- employed Dentist. He relied on the case of ***"Birmingham and District Land Company Vs. London and North Western Railways Company (1887) 34CHD261"*** where the court held that right to indemnity arises from contracts, express on implied, but it is not confined to cases of contracts only. He averred that an implied contract between the Third Party and the 1st respondent was created when the third party continued to carry on his practice between December, 2003 and February 2004 in the same circumstances of an independent contractor as when the contract was in force and by virtue of that relationship the first respondent is vindicated from liability.

On his part, the 2nd respondent submitted that under order 1 Rule 18, the court has wide discretionary powers and to support that submission, he cited the case of ***"Bhundia Properties Limited Vs. E. A. Airways Corporation (1976 - 1980) 1 KLR 118"***. That the court has wide and flexible powers to give such directions as may appear proper for having the rights and liabilities of the parties most conveniently determined and enforced. The 2nd respondent contended that in an application for directions, a Judge

may decide that there is an issue to be tried or the Judge may dismiss an application for directions where the claim for indemnity has not been shown. Reference was made to the case of "***Sango Bay Estates & others Vs. Desdner Bank A.G (1971) E.A. 17".***

It was further submitted that in deciding what form the directions should take, the court must carefully take into account the interests of both, the defendant and the third party and any other party and avoid injustice or prejudice being suffered by any of them.

According to him, the learned magistrate failed to take into account the interest of the 2nd respondent in that he had closed his case and by the learned magistrate's order to have liability of the third party and the defendant heard in this case, has greatly embarrassed him. It was further submitted that where the issues between the defendant and the third party can not be determined in the suit between the plaintiff and the defendant, the learned magistrate ought to have refused to grant the directions as prayed. To support this argument, he relied on the decision of ***"Baxter Vs. France & others (No.2) (1895) 64 L. J. G.B.337 (C.A)".***

According to the 2nd respondent, although there may be an issue or questions to be decided between the appellant and the 1st respondent, the issue /questions are complicated, difficult and embarrassing to the 2nd respondent/plaintiff and the same ought to be tried in another suit other than the suit between the 1st and the 2nd respondents.

In the appellant's replying submissions, it was averred that, it is wholly disingenuous and misleading for the 1st respondent to suggest as it does that it only became aware of the relationship between the appellant and itself in the dates intervening 11th May and 10th June, 2009, considering that the case in the lower court was instituted in the year 2006 and the first respondent had ample time to review the documentation.

That it is the appellant's contention that the application to file third party proceedings by the first respondent was calculated, in bad faith and accentuated by malice in that the 1st respondent made the decision to institute third party proceedings after the court declined its request for amendment and after the appellant was called upon to tender evidence as the 1st respondent own witness. That the appellant has compromised the terms of his defence by giving evidence on behalf and at the behest of the 1st respondent and he also lost an opportunity to cross-examine the 2nd respondent who had testified and closed its case.

The appellant reiterated his submissions on the non disclosure of material facts by the first respondent. On the issue of undue delay he relied on order 1 Rule 14(3) of the old Civil Procedure Rules which provides that the third party notice shall state the nature and the grounds of the claim and shall unless otherwise ordered by the court be filed within the time limited for filing the defence. It was submitted that the third party proceedings were filed out of time and in absence of any order granting leave to extend time to issue Third Party proceedings. Under order XLIX Rule 5 of the old Rules the lower court had no jurisdiction to either entertain or grant the 1st respondents application to issue third party notice or consider the application for directions on the issue of liability.

That by failing to properly canvass and determine if there was indeed a question of indemnity arising out of a contract, the learned magistrate had failed to appreciate and apprehend the nature and purpose of directions hearing in Third Party proceedings and thus failed to address or determine the challenge to third party notice before him.

I have considered the appeal and the submissions filed herein by the learned counsels. Having set out the case by the respective parties, I now proceed to indentify the issues for trial which in my considered view are the following:-

(1) Was there non disclosure of material facts by the 1st respondent at the time of the issuance of leave to file third party proceedings?

(2) Has the applicant/1st respondent established a case for indemnity?

(3) Were the ex-parte orders for third party notice and subsequent directions properly obtained/given?

(4) Was there delay in instituting the third party proceedings?

(5) Will the appellant suffer any prejudice if the orders granted by the lower court are not set aside?

I now proceed to consider the issues set out herein above. The the appeal herein relates to third party notice dated the 7th July 2009 and subsequent third party directions given on the 14th August, 2012 by Hon. Obulutsa vide a ruling of even date.

Before the revised Civil Procedure Act 2010, third party proceedings were provided for under order 1 Rule 14 of the repealed Civil Procedure Rules. Under the said rule, defendant wishing to join a third party may, by leave of the court, issue a third party notice to that effect. Such leave shall be applied for by summons in chambers ex-parte supported by an affidavit and since the application is made ex-parte, an applicant is under duty to make full disclosure of material facts. However, what is material or not must depend on the circumstances of the case but the guiding principles for disclosure are well established in the case of ***"Bahadurali Ebrahim Shamji Vs. Al Noor Jamal & 2 others (Supra)"*** Among those principles are; the order for which the application is made and the probable effect of the order on the defendant, whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application and if material non disclosure is established, the court will be astute to ensure that a plaintiff who obtains an ex-parte injunction without full disclosure is denied any advantage by breach of that duty.

It has emerged from the evidence on record that by the time the application was made, the matter was part-heard. The plaintiff had already closed his case while the defence case was partly heard. The intended third party testified as a defence witness on behalf of the 1st respondent.

The 1st respondent has been accussed of failure to disclose material facts in that it did not inform the court of the actual status of the proceedings and that it had been denied leave to amend the defence. I have perused the third party notice and the certificate of urgency accompanying the same and it is noted that in the certificate of urgency, the 1st respondent has disclosed that it could not amend the pleadings as the matter had already progressed substantially and that the same would have been prejudicial to the plaintiff. In my view the disclosure made herein was sufficient as it brought to the attention of the court the fact that the matter was substantially heard and that the first respondent was denied leave to amend its defence.

On the issue of whether the 1st respondent made a case for indemnity, the appellant has argued that the lower court was required to establish whether there was a basis for the alleged liability against him. The first respondent's claim against the third party is based on indemnity and/or contribution in that the appellant had a contract with the 1st respondent wherein the appellant was to practice as an independent consultant, with the first respondent only providing administrative assistance.

The word indemnity was defined by Waki J. in the case of ***"Premier Savings and Finance Limited Vs. Hamendra Mansukhlal Shah in HCC No. 205 "A" of 1996 in which he referred to the case of Sango Bay Estates Limited & Others Vs. Dresdner Bank A.G (Supra)"*** in which he had this to say;

"when by law is a person entitled to indemnity? It is only when there is a contract express or implied that he shall be indemnified and that can only apply where a third person has contracted to indemnify the defendants". On the authorities, it seems to me that for the defendant to succeed under Order 1 Rule 18 there must be a contract to indemnify, either express or implied. A mere right to claim damages would

not suffice.

In the case of ***"Birmingham (Supra)"*** it was held that a right to indemnity arises from contract, express or implied, but it is not confined to cases of contracts only . A right to indemnity exist even where the relation between the parties is such that either in law or in equity, there is an obligation upon the one party to indemnify the other. In my view, the case of "***Birmingham***" presents the correct legal position and going by the facts of that case, it's the finding by the court that the 1st respondent "Prima Facie" established that it is entitled to claim indemnity from the appellant.

I will consider the three remaining issues together. On the prejudice that the appellant will suffer, I have considered the submissions by the parties and I have also perused the evidence that he tendered in court. He has admitted that he is a dental surgeon and that he knows the plaintiff (the 2nd respondent). That he operated on him which operation forms the 2nd respondents cause of action. He also admitted that he treated him at the 1st respondent (Mater Hospital). It was his further evidence that he is not an employee of Mater Hospital (1st respondent) but a consultant dental surgeon on contract. He even produced the contract as exhibit D3. He further told the court that he does not receive any salary from the first Respondent (Mater Hospital), that the 1st respondent does not control him and he is not bound by its policies. To this extent it is clear that he is confirming the 1st respondent's position that there was a contractual relationship or it can be implied between them and its on that basis that the first respondent is seeking indemnity. It is noted that the case has substantially proceeded. The plaintiff (2nd respondent) has already closed his case while the defendant's (first respondent's) case is partly heard. Though it has been argued that the witnesses who have testified can be recalled, it is important to note that the cause of action herein arose on 1st December, 2003 and the case was filed in the year 2006. The 2nd respondent has been waiting for justice for that long. I agree with the counsel for the appellant that the issues raised in the third party notice are matters that were squarely within the knowledge of the first respondent who seeks to rely on a contract that it was a party to, from the beginning. It is therefore dishonest of it to tell the court that it was not aware of those facts. Courts have said several times and I dare repeat here that Justice belongs to all the parties and the 2nd respondent and the appellant are no exception.

The issues between the 1st respondent and the appellant are contractual in nature and can be tackled after the trial. This argument is supported in the decision of ***"Bhundia Properties Limited Vs. E.A. Airways Corporation (1976 – 1980) 1KLR 118 where Madan J"*** clarified that the liability of the third party and defendant can be canvassed at or after the trial of the suit between the plaintiff and the defendant where it was held

" the court upon hearing of such application, may if satisfied that there is a proper question to be tried as to the liability of the third party to make contribution or indemnity claimed in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such a manner, at or after the trial of the suit, as the court may direct, and if not satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party".

The court in the same case went further to say, in deciding what form the directions should take, the court must carefully take into account the interests of both the defendants and the third party and any other party to avoid injustice or prejudice being suffered by any of them. The court expressed itself.

"in giving or refusing directions, care should be taken that the plaintiff is not unduly embarrassed or put to additional expense or difficulty for he has nothing to do with the questions which have arisen between the defendant and third party".

I quite agree with the holding by Madan J. in the above case. The learned magistrate ought to have considered that by giving the directions that he did, he failed to take into account the embarrassment it would cause to the plaintiff(2nd respondent) and the additional expense he will be put to by availing the witnesses again yet the issues between the 1st respondent and the appellant have nothing to do with him.

Similarly, the court also ought to have taken into account the fact that the appellant has already testified as the first respondent's witness which is likely to prejudice his case. It is therefore not far fetched for the court to find that if the third party proceedings are allowed to go on, the appellant and the 2nd respondent shall suffer prejudice.

Lastly and most importantly, is the issue of limitation which has been raised by the appellant. The third party proceedings were filed on 7th July 2009 when the old Civil Procedure Act was in force. The old Civil Procedure Rules were emphatic that an application for leave to issue a third party notice had to be filed by a defendant within the time prescribed for filing a defence.

Order 1 Rule 14(3) of the old Rules provided as follows:-

"The notice shall state the nature and grounds of the claim and should unless otherwise ordered by the court, be filed within the time limited for filing the defence. Under both the old and the current Civil Procedure Act, where a defendant has been served with summons to appear, he must file his defence within 15 days after he has entered appearance in the suit. It follows therefore that the 1st respondent ought to have filed the third party notice 15 days after it filed its memorandum of appearance. The 1st respondent herein filed the third party notice long after it had filed it defence.

The purpose of filing third party proceedings along with the defence is to give the intended third party adequate notice and time to prepare its defence in the matter. Failure to file a third party notice within the prescribed time is not only prejudicial to the intended third party but it renders such a notice incurably defective. The court in the case of "***Obondo Vs. Akech (1995) LLR 5427 (HCK)"*** expressed itself on this point as follows;

"The Third Party proceedings contained in Order 1 Rule 14 onwards which was introduced in the Civil Procedure Rules in 1975 Vide legal notice Number 119 of 1975 were intended in my opinion to bring to the attention of the court issues that affects the defendant and a third party at an early stage so that the same can be tried at the same time and give the third party advance notice of the impending action and so make preparation to defend himself …… the third party proceedings were incompetently in the court file for the reasons that they were filed out of time and that infringes on the mandatory provisions of order 1 Rule 14(3) and the same is hereby ordered to be struck off".

In the upshot, the final orders with regard to the appeal herein are that the order dated 14th August 2010 is hereby set aside. The third party proceedings are dismissed.

Costs of the appeal are awarded to the appellant and the 2nd respondent.

Dated, Signed and Delivered at Nairobi this 16th Day of February, 2017.

…………………………….

L. NJUGUNA

JUDGE

<u>In the Presence of</u>

…………………………. for the Appellant

…………………………. for the 1st Respondent

…………………………. for the 2nd Respondent