REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 799 OF 1975

BHUNDIA PROPERTIES LTD …….…… PLAINTIFF

VERSUS

EAST AFRICAN AIRWAYS CORPORATION ….....…RESPONDENT

JUDGMENT

The plaintiff company instituted this suit for recovery of Shs 81,600 being three months' agreed rent admittedly payable by the defendant corporation to the plaintiff company in respect of sixteen maisonettes leased by it from the plaintiff company.

The defendant corporation entered an appearance in the suit on 14th may 1975, and filed its defence on 27th May 1975. The plaintiff company's reply to the defence was filed on 4th June 1975. In the meantime, the plaintiff company on 16th May 1975 applied under order XXXV, rule 1, of the Civil Procedure (Revised) Rules 1948 for summary judgment to be entered against the defendant corporation as prayed in the plaint.

Both in its written statement of defence and in an affidavit in reply filed in answer to the plaintiff company application for summary judgment sworn on 28th May 1975 by Mr John Muhanuka, claiming to be the chief administrative officer of the defendant corporation, the defendant corporation pleaded that it paid Shs 81,600 to the plaintiff company through the plaintiff company agents, Equity Estates Ltd, the third party. Chesoni J, who heard the application for summary judgment, in his ruling delivered on 24th September 1975, rejected this plea and entered judgment for the plaintiff company as prayed in the plaint. The judge in his ruling said: In his affidavit John Muhanuka admits that the defendant corporation paid Shs 81,600 to [the thirdparty] and that the payment was made on behalf of the plaintiff company-that is, it was intended to go to the plaintiff company. There is no disputed that the rent was due to the plaintiff company. It is also admitted by the defendant corporation that [the third-party] has refused to pay the money over to the plaintiff company.

The defendant corporation had no instructions to pay to [the third-party], and, in fact, the payment was made in the face of standing instructions that the rent be paid into the plaintiff company's bank account.

The defendant corporation paid the rent to [the thirdparty] at its own risk. The defendant corporation may have a good case against the [third party] for money had and received, but that is besides the point. The defendant corporation cannot, for the reasons I have given, especially in the absence of special and express authority to receive payment, claim to have paid the plaintiff company through the plaintiff company's agents as stated in paragraph 10 of the defendant corporation's affidavit.

Some of the circumstances and facts giving rise to this litigation between the parties emerge from the pleadings, copies of the correspondence attached to the written statement of the defendant corporation and the affidavits which have been filed in Court. It would appear from their letterhead dated 8th April 1974 that third party is a firm of land and estate agents and development consultants. This was a letter which the third party wrote to the defendant corporation on behalf of the plaintiff company (in the letter referred to as "Bhundia Investment Ltd"), saying that the third party had been instructed by the plaintiff company to renegotiate the lease with the defendant corporation for the sixteen maisonettes. The plaintiff company on 10th July 1974 wrote to Mr Muhanuka that they had withdrawn the option given to Mr Ravi D Prinja of the third party and Mohindra & Associates for negotiation of new terms and rents of the maisonettes on lease to the defendant corporation. The plaintiff company also asked for a meeting with Mr Muhanuka to discuss fresh terms and rent for the maisonettes. It is not clear who Mohindra and Associates are, or how they figure in this matter. There is no further mention of them.

Mr Muhanuka wrote back to the plaintiff company fixing a meeting for 10.00 a.m. on 24th July 1974. According to paragraph 4(d) of the written statement of defence, the plaintiff company failed to turn up for the meeting on that date; Mr Ravi D Prinja came instead. On being shown the plaintiff company's letter of 10th July 1974, he assured the defendant corporation that he had authority to negotiate on behalf of the plaintiff company. It is also said in the defence that the defendant corporation then asked the plaintiff company over the telephone whether this was true and the plaintiff company confirmed that it was so. This is challenged in the affidavit of Mr Dahyalal Bhimji Bhundia a director of the plaintiff company sworn on 10th June 1975, who claims to have attended at the appointed place for the meeting at 10.00 am on 24th July, 1975; that his name was duly entered in a register of callers, but he came away as he did not find Mr Muhanuka there. This deponent has sworn that neither he nor anyone else deputed Mr Ravi D Prinja or anyone else to attend or hold discussion on that day, or at all, on behalf of the plaintiff company with the defendant corporation. This deponent has also sworn that neither he nor anyone else of the plaintiff company spoke over the telephone to anyone representing the defendant corporation on that day, nor did he or anyone else from the plaintiff company confirm to the defendant corporation over the telephone (as claimed in the defence) that Ravi D Prinja had authority to represent the plaintiff company to renegotiate the terms of a new lease.

Mr Bhundia has further deponed (paragraph 8) that instructions were given to the defendant corporation as regards the payment of rent into the plaintiff company's bank account and not otherwise by a letter from the plaintiff company's advocates to the defendant corporation dated 5th November 1974; that these instructions were never revoked or varied. Still according to paragraph 4(d) of the defence, negotiations proceeded between the defendant corporation and the third party who wrote to the defendant corporation on 3rd August 1974 proposing a monthly rent of Shs 1,700 per maisonette which the defendant corporation accepted by its letter of 3rd August 1974 addressed to the third party. The third party's letter of 3rd August 1974 shows that it was copied to the plaintiff company. The third party by its letter of 1st October 1974 acknowledged receipt of the defendant corporation's letter of 23rd September, and asked that the first quarterly rent of £85 per month per maisonette be paid to the third party; this letter is not sworn to have been copied to the plaintiff company. The written statement paragraph 4(f) also claims that the defendant corporation subsequently paid on behalf of the plaintiff company a sum of Shs 81,600 being the rent for the first quarter to the third party who refused, failed or otherwise neglected to pass on the money to the plaintiff company. There would seem to be no doubt that the defendant corporation paid the sum of Shs 81,600 being the rent for the first quarter to the third party who refused, failed or otherwise neglected to pass on the money to the plaintiff company. There would seem to be no doubt that the defendant corporation paid the sum of Shs 81,600 to the third party as stated.

These averments were made in the written statement of the defendant corporation and these details of what transpired between the parties are sanctified by Mr Muhanuka's two affidavits sworn on 21st and 28th May 1975.

The defendant corporation on 23rd May 1975, applied under order I, rule 14, for a notice to issue against the third party in which it claimed to be indemnified by the third party to the extent of Shs 81,600, the costs of the suit and costs of third party proceedings. This application was granted by the Court on 4th June 1975. The third party entered an appearance to the notice served upon it on 19th June. The defendant

corporation did not give the third party any notice of the application for summary judgment made against it by the plaintiff company or serve the third party with a copy of its own defence or of the plaintiff company's reply to defence. Order I, rule 18, provides:

If a third-party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the Court by summons in chambers for directions, and the Court upon the 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 the 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 manner, at or after the trial of the suit, as the Court may direct; and, if not so 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 defendant corporation took no further step against the third party after the latter entered an appearance pursuant to the third-party notice until by summons filed on 11th October 1975 it applied under order I, rule 18, for third-party directions. This application which for some unexplained reason was not served upon the third-party was supported by an affidavit sworn on 10th October 1975 by Mr Aloysius Tibamanya who claimed (no doubt accurately) to be the principal assistant counsel in the chambers of the counsel to the Community and who is the counsel appearing for the defendant corporation in this case. In this affidavit Mr Tibamanya deponed that the sum of Shs 81,600 was paid by the defendant corporation to the third party in circumstances outlined in the affidavit of the chief administrative officer of the defendant corporation, Mr Muhanuka; presumably the affidavit sworn on 28th May 1975 in reply to the plaintiff company's application for summary judgment, which he (ie Mr Tibamanya) verily believed to be correct and which he adopted together with its annexures. Mr Tibamanya further deponed that he verily believed that the third party has no defence to the defendant corporation's claim against it and judgment should be entered against the third party.

It is open to question whether Mr Tibamanya as counsel appearing in the case, or any counsel appearing for a defendant in a case who has issued a notice against a third party, could properly swear an affidavit in support of an application for third-party directions especially when such application includes a prayer for judgment to be entered against the third-party, or whether the supporting affidavit should come from the defendant himself or someone authorised on his behalf.

Be that as it may, the third party has raised no objection, the defendant corporation's application for third party directions came up for hearing on 10th November 1975, when it was adjourned generally at the defendant corporation's request; thereafter it lay dormant until Mr Tibamanya came merrily along and filed another application of similar effect on 19th February 1976, which is now before the Court and which asks for directions as follows: (1) A declaration that the defendant corporation is entitled to be indemnified by the third-party against all sums payable by it under the judgment dated 24th September 1975 in this action. (2) An order that the defendant corporation do recover against the third party all amounts so payable by it as aforesaid and paid by it under the said judgment. (3) Payment by the third party to the defendant corporation of the costs of the defendant corporation in defending this action and the costs as between party and party of the third party proceedings in this action, including the costs of this application. Alternatively, but without prejudice to the foregoing, for an order for third-party directions as follows: (1) That the defendant corporation do deliver a statement of his claim within twentyone days from this date to the third-party, who shall plead thereto within seven days. (2) That the question of liability of the third-party to indemnify the defendant corporation be tried as soon as possible.

This summons is said to be supported by an affidavit and annexures which I have not been able to find on the court file. I think that the intention is to refer to Mr Tibamanya's affidavit of 10th October 1975, parts of which I have already quoted; in particular Mr Tibamanya has deponed that he verily believes that the third-party has no defence to the defendant corporation's claim against it and that judgment should be entered against the third party. It is this affidavit that I will bear in mind for the purposes of the present summons.

Mr Tibamanya has submitted that it is now incumbent upon the third party to show why it should hold on to the defendant corporation's money; unless the third-party can so satisfy the Court, judgment should

now be entered against the third-party under the provisions of order I, rule 18. On the other hand, Mr Tibamanya said that if the third-party can satisfy the Court that it has reason to withhold payment, let the defendant corporation file a statement of claim against the third party who should plead thereto; then the question of liability of the third-party to indemnify the defendant corporation could be determined between the defendant corporation and the third-party. Mr Tibamanya overlooked that the defendant corporation had already filed a sort of statement of claim with its application for the issue of a third-party notice on 23rd May 1975.

Mr Diniz, counsel for the third-party, has argued that the only onus upon the third-party was to enter an appearance to the third-party notice which it did, and which constitutes a denial of the plaintiff company's claim and also a denial of liability to indemnify the defendant corporation. He even said that the third-party does not agree it received the money or has refused to pay it; the third-party not having pleaded yet. Further, that the thirdparty must be given an opportunity to defend. Mr Diniz pointed out that order I, rule 18, lays down that the Court may order the question of the third-party's liability to be tried at or after the trial of the suit as the Court may direct; and, if not so 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.

Mr Diniz has argued that an application for summary judgment is like a trial; that it is a trial, and judgment having been entered the third-party cannot appear at the trial anymore. Therefore the third-party has been completely deprived of an opportunity to take part in the trial. This has made, Mr Diniz continued, the situation highly prejudicial to the thirdparty; more so, because the contest is not between the plaintiff company and defendant corporation; in reality it is between the plaintiff company and the third-party. He said that the third-party was not given an opportunity to appear before Chesoni J to show that it was acting as the plaintiff company's agent. On such showing, the judge might have found otherwise than he did. If the third-party is ordered to plead it would of necessity include the plaintiff company because the agency is alleged to have existed between the plaintiff company and the third-party. Mr Diniz submitted further that this application for judgment to be entered against the third-party cannot stand because the court's directions must come first, and a lot of prejudice will be caused to the third-party if direction are given at a stage after judgment has been given against the defendant corporation, and it might even cause an injustice. I presume Mr Diniz meant that the defendant corporation could file a fresh suit against the third-party if it so wishes.

I think that rule 18 (like order 16, rule 4(4), of the English Rules of the Supreme Court) confers on the Court very wide and flexible powers to give all such directions as may appear proper for having the rights and liabilities of the parties most conveniently determined and enforced (see *Supreme Court Practice* 1967, page 205). The Court may even rescind or vary the third-party directions given.

I am clear that an application for third-party directions may be made and the court may give third-party directions even after judgment has been entered against the defendant in the suit. If the Court is satisfied that there is a proper question to be tried as to the liability of the third party to make the contribution or indemnity claimed, it cannot refuse the defendant an order for third-party directions on the ground that judgment has already been entered against the defendant, as counsel for the third-party seemed to suggest should be done in this case; that would be manifestly unjust. However, 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. 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 the third-party (see 1 *Supreme Court Practice* 1967, page 206). The powers of the court are admirably stated in 30 *Halsbury's Laws of England* (3rd Edn) page 447, paragraph 847, as follows:

If there is a question or issue proper to be tried as between the plaintiff and the defendant and the thirdparty, or between any or either of them, as to the liability of the defendant to the plaintiff, or as to the liability of the third party to make any contribution or indemnity claimed, in whole or in part, or as to any other relief or remedy claimed in the notice by the defendant, or that a question or issue stated in the notice should be determined not only as between the plaintiff and the defendant but as between the plaintiff, the defendant and the third-party or any or either of them order such question or issue to be tried

in such manner as the Court or judge may direct.

On the other hand, if the Court is satisfied that there is no proper question to be tried as to the liability of the third-party to make the contribution or indemnity claimed, in my opinion the Court instead of giving any other directions may order such judgment as the nature of the case requires to be entered in favour of the defendant giving the notice against the thirdparty. It is not requisite that the third-party directions must come before the Court can enter judgment; the Court may deal with the situation in either of the two ways visualised in order 1, rule 18, without such directions having been given. In this sense, the provisions of order 1, rule 18, are akin in effect to the provisions of order XXXV, rule I, which empowers the Court to enter summary judgment against a defendant on being satisfied that there are no triable issues between the plaintiff and defendant. Order I, rule 18, is the counterpart of the provisions contained in order XXXV, rule I; in both cases the Court is empowered to decide whether there are any triable issues between the parties; if not, to enter judgment as the nature of the case may require. Once a third-party notice is issued the defendant assumes the role of a plaintiff against the third-party who is turned into a defendant, and all normal consequences follow.

If a third-party is unable to satisfy the Court that there is a proper question to be tried as to the liability of the third-party to make the contribution or the indemnity claimed, in whole or in part, I think that the Court must 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. This procedure is not to be taken lightly because it is intended to bring about a quick finish to litigation which is in the interest of the society generally.

Some litigants and their counsels do not seem to realise that it is the inescapable duty of the court to enter judgment for the plaintiff if a triable issue is not produced when contesting an application for summary judgment under order XXXV, rule I, or if no proper question is shown to exist, at least *prima facie*, to be tried as to the liability of the third-party to make the contribution or indemnity claimed, when contesting an application for directions under order I, rule 18.

In this case judgment as prayed in the summons ought not to be entered against the third party for, in my opinion, there is a proper question to be tried as to the liability of the third party to make the contribution or indemnity claimed. It will be recalled that in its written statement paragraph 4(f) the defendant corporation claims to have paid the sum of Shs 81,600 being the rent for the first quarter to the third-party on behalf of the plaintiff company. In paragraph 5 of the same document, this payment is expressly stated to have been made to the plaintiff company's agents, the third party.

Mr Muhanuka also deponed to this effect in his affidavits sworn on 21st and 28th May 1975 (paragraph 7 in both affidavits). In paragraph 10 of his second affidavit, Mr Muhanuka has deponed that the defendant corporation paid the plaintiff company a sum of Shs 81,600 through its agents, the third-party, in respect of the first quarter, and the defendant corporation verily believes that it has a defence to the suit and should be granted leave to defend the suit.

Paragraph 2 of the third-party notice dated 23rd May 1975 filed under order I, rule 14, reads:

The defendant corporation claims to be indemnified by you against liability in respect of the aforementioned lease or any breach of the terms thereof on the ground that the renewal of the said lease was negotiated by you on behalf of the plaintiff company as its agent and a sum of Shs 81,600 was similarly paid to you in the same capacity on your request, for you to pass on to the landlord, the plaintiff herein.

If I may digress for a moment, in this third-party notice the defendant corporation has followed the old form for a third-party notice which was in existence before it was deleted and replaced by Legal Notice No 66 of 1973. Although order I, rule 14(3), states that the notice shall be in, or to, the effect of form 22 in appendix A, with such variations as circumstances may require, I would hold that this provision is directory and not mandatory. Nevertheless, with respect to the judge concerned I doubt whether an order should have been made on 4th June 1975 for the issue of third-party notice on the basis it was presented to the Court.

In my opinion this notice is defective in two important respects. First, the second paragraph in the new form 22 requires the defendant corporation, as did the old form now repealed, to state the ground of the claim against the third-party does not in my opinion state the grounds of the defendant corporation's claim against the third-party. It merely says that the sum of Shs 81,600 was paid to the third party as agent for the plaintiff company.

Bearing in mind my already expressed opinion that once a notice is issued the third-party is turned into a defendant and all normal consequences follow, can it be said that paragraph 2 of the defendant corporation's thirdparty notice discloses a cause of action against the third party? I think not. Is the defendant claiming indemnity from the third-party on the ground of money had and received, misrepresentation, fraud, mistake of fact, breach of warranty, or what else on the part of the third-party? An averment which merely states that a certain payment was made to a person who negotiated renewal of a lease as agent for a second person does not single out any cause of action against the first person. The cause of action has specifically to be stated.

The second serious defect, which I see, appears in paragraph 4 of thirdparty notice served by the defendant corporation, which states:

And take notice further that if you wish to dispute the plaintiff company's claim in this suit as against the defendant corporation, or your own liability to the defendant corporation, you must cause an appearance to be entered for you within … days after the service of this notice.

In default of your so appearing, you will be deemed to admit the validity of any decree against the defendant corporation, and your own liability to contribute or indemnify to the extent herein claimed.

In the new form 22 this paragraph is substituted by the following:

And take notice that if you wish to dispute the plaintiff's claim against the defendant, or the defendant's claim against you, you must appear within … days after the service of this notice on you, inclusive of the day of service, otherwise you will be taken to admit the plaintiff 's claim against the defendant and the defendant's claim against you and will be bound by any judgment given in the suit.

The important difference here which I see between the old and the new third-party is that, under the former, a third party making default in appearing would be deemed to admit the validity of any decree passed against the defendant and his own liability to contribute or indemnify to the extent claimed in the third-party notice.

If a third-party fails to appear under the new third-party notice he will be taken to admit the plaintiff's claim against the defendant and the defendant's claim against him without there being a decree of the court against the defendant, and also be bound by any judgment given in the suit which may, for example, be declaratory in part.

To revert to the theme I broke off from, I think that the proper question to be tried here is: did the third party receive the money as agent of the plaintiff company? This is the basis upon which the money is said to have been paid to the third-party by the defendant corporation. At first sight, it might seem that the answer to this question is "no" and this issue has already been decided by the Court. As I read it, the *ratio decidendi* of Chesoni J's ruling is that the third party had no special and express authority to receive payment of the money. This finding was not made in proceedings between the plaintiff company and third-party. It is not *res judicata* between these two parties. Further, the judge did not hold that the third-party was an agent of the plaintiff company. If the third-party was acting as agent of the plaintiff company, this question has not so far been decided between them; the extent of the third party's authority has also not been settled. I venture to think the judge had no material before him to make such a decision. The third party has had no opportunity to ventilate its case against the allegation that it had no special or express authority to receive payment of the money. Our sense of justice demands that it be provided with an opportunity to do so.

What is the best order to make in these circumstances to ensure that none of the three parties will suffer any prejudice? It would have been easy and plain sailing if Chesoni J had not delivered his final judgment against the defendant corporation which can only be reversed or altered, if at all, by the Court of Appeal. I understand no appeal has been preferred against it. An order cannot now be made for the question of liability of the third party to be tried at or after the trial in this suit. The trial has already taken place between the plaintiff company and the defendant corporation. There is nothing left to try between them. The plaintiff company has become a decree-holder against the defendant corporation. Therefore the two courses envisaged in rule 18 have both become blocked.

The third party might have applied, as it may do, before the conclusion of proceedings between the plaintiff company and defendant corporation, to take over the defence of the suit against the plaintiff company instead of the defendant corporation. As a result of the judgment entered against the defendant corporation, the third party has been deprived of an opportunity to do so, it has suffered definite prejudice on this score, whatever the value of the right to take over the defence may be. It may partly be due to the defendant corporation not having served the third party with a copy of the defence, reply to defence and the plaintiff company's application for summary judgment. Even if there was no obligation on the part of the defendant corporation to serve these papers on the third party, it would have been prudent to have done so.

Although there is a proper question to be tried, as the proceedings stand it is not possible (as already expressed) to state what the defendant corporation's cause of action is against the third party. It might be cured by an amendment or by delivery of the defendant corporation's statement of claim to the third party who shall plead thereto as prayed in the summons. If the course suggested in the summons is followed, the plaintiff company would be left out; that would not do. The real issue to be decided is between the plaintiff company and third party whether the third party is entitled to retain the money as against the plaintiff company. The trial of this issue between these two parties has nothing to do with the defendant corporation who is only a middleman in this battle, interested only in not having to pay the claim twice. The third-party could apply in these proceedings to join the plaintiff company as fourth party. If an application succeeds to make the plaintiff company a fourth party in the same suit in which he is already a decree-holder, I have my doubts about it; the procedure will be cumbersome, full of difficulties and increase the number of knots to be untied between these parties. And just suppose that the Court came to the conclusion that the third-party is properly entitled to keep the money as against the plaintiff company, the fourth party, the judgment passed against the defendant corporation would still have to be reckoned with, with no means to set it aside. The defendant corporation's gain out of such proceedings would be nil. No, this procedure is too cumbersome to be entertained. It would be monstrous if the plaintiff company or the third party, as the case may be, should escape its obligations because of technical procedural difficulties.

It is better to make a clean cut with these proceedings which, in so far as third party procedure is concerned, have become tangled as a result of judgment being entered in the suit against the defendant corporation. The defendant corporation may decide to file a fresh suit against the third party setting out the cause of action clearly and specifically. The third party may decide to join the plaintiff company as a third party in this fresh suit, it may even ask for a declaration by the Court (in addition to any other relief or reliefs) that in the event of the Court deciding that the present third party properly received the money on behalf of and as agent for the plaintiff company and that it was legally entitled to keep the money as against the plaintiff company, the same be construed as discharging the decree passed in this suit against the defendant corporation. For these reasons these third-party proceedings are dismissed with costs.

Application dismissed with costs.

Dated at Nairobi this 3rd day of May 1976

C.B. MADAN

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JUDGE