IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Law V-P & Musoke JA)

CIVIL APPLICATION NO NAI 9 OF 1977

SAVJI HARJI VARSANI ………………..………….. APPLICANT

VERSUS

KANJEE NARANJEE (KENYA) LTD…………….RESPONDENT

JUDGMENT

This is an application for leave to appeal against two decisions of the High Court refusing to set aside an *ex parte* order giving leave to issue a third-party notice. Application was duly made in the first instance to the High Court but was refused.

Briefly the facts are that Marguerite Ltd, the plaintiff in the suit, rented a shop in a building in Government Road, Nairobi, from Kanjee Naranjee (Kenya) Ltd, the defendant in the suit, in which they carried on business as dealers in photographic and electronic equipment. A fire had destroyed part of the building including the roof over the tenant's premises and certain repairs were being carried out on behalf of the landlord by a firm known as Kay Construction Co. The tenant's goods were damaged by rain water through the ceiling and he brought an action against the landlord to recover damages for nuisance or negligence in failing to prevent rain water causing the damage whilst the repairs were being carried out. The landlord, who is the respondent in this application, issued a third-party notice to the two partners in Kay Construction Co, one of whom is the applicant, claiming:

> (a)Contribution and indemnity in full in respect of the claims for damages (both special and general) interest and costs made against the [landlord] by the [tenant] ...
>
> (b)Damages for breach of contract and negligence together with costs and interest thereon.
>
> (c)Such further or alternative relief that this Court may deem fit to grant.

The notice went on to refer to the contract governing the repairs and alleged breaches of that contract as well as negligence on the part of the applicant.

By chamber summons the applicant applied to the High Court to set aside the third-party notice or discharge the order on the grounds that:

> (a)There is no basis in fact and in law for claiming any alleged contribution or indemnity of any kind as between the [landlord] and third parties.
>
> (b)There is no question proper to be tried as between the [landlord] and the third parties ...

At the end of his ruling Kneller J in the court below said:

> I refuse, in the exercise of my discretion, to entertain this application of the second third party. He has brought it in the wrong way and he has not persuaded me it has any merits on the facts and the law in this case. It must be rejected.

The reference to the wrong procedure presumably led the applicant to renew the application on the summons for directions on the third-party notice. The application was again rejected. It is intended to appeal against both rulings of the High Court, hence this application.

Mr Khanna for the applicant argued that the Court erred in two respects: first, on the question how the application to rescind the *ex parte* leave to issue a third-party notice should be made; and, secondly, on the interpretation of order I, rule 14(1), of the Civil Procedure Rules. On these two issues it was submitted that leave to appeal should be granted. Counsel argued that the decisions of the lower court are *prima facie* erroneous; that rule 14(1) was being interpreted for the first time; that it was in the public interest for this Court to clarify the proper procedure to be adopted; that the opinion of this Court should be given on these points for the, guidance of the legal profession. Mr Harris, for the landlord, opposed the application.

On the issue of procedure Kneller J said in his ruling:

> The second third party, in my view, has adopted the wrong procedure. He has come by way of summons in chambers and under the court's inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court ... The other remedy available is to wait for the summons of the [landlord] in chambers for third-party directions and then persuade the judge to refuse to give them which would mean that the judge dismisses him being a third party to the action ...

The law on third-party notices seems to us quite clear. Under order I, rule 14, a party claiming against any other person not a party to the proceedings issues a third-party notice with leave of the court applied for by summons in chambers *ex parte*. Under rule 15 of order I, the third party is required to enter an appearance if he disputes the claim against him. Where he enters an appearance rule 18 of order I provides:

> ... 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, 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.

It would appear therefore that on a summons for directions the Court has to be satisfied that there is a triable issue before giving directions. If not so satisfied it follows, in our view, that the third party must be dismissed from the proceedings. Spry V-P put it quite plainly in *Sango Bay Estates Ltd v Dresdner Bank AG* [1971] EA 17,20:

> On an application for directions, a judge may decide that there is an issue to be tried, when he gives directions; he may decide that the third party has no defence, when he gives judgment in favour of the defendant; but he may decide that the defendant has failed to show any claim to contribution or indemnity against the third party and in such case he must be able to dismiss the application.

The law under consideration in that case was limited to contribution or indemnity; but we see nothing. different in principle in construing the wider provisions of rule 14(1) of order I. We note also that Spry V-P was commenting on a matter which had been raised as a preliminary point, although not pressed, in a Uganda case. The relevant law was virtually the same as in Kenya. We would reject Mr Khanna's

argument that the Court had no power to dismiss the third party from the proceedings on a summons for, directions, in view of the express requirement that the Court has to be satisfied that there is a triable issue. The position would otherwise be ridiculous. We agree that the provision could have been more happily worded but we have no doubt as to its import. It would have been sufficient if the rule had ended with the words, "if not so satisfied may order such judgment as the nature of the case may require". The words at the end "to be entered in favour of the defendant giving the notice against the third party" are not only superfluous but are confusing, and could well be omitted.

We are of the view that Kneller J was quite right in saying that the proper time for the third party to apply to be discharged was on a summons for directions when the Court makes up its mind whether, after the third party has appeared, he has a case to answer. There may well be cases where a third party may bring an application by chamber summons to be discharged otherwise than on a summons for directions, for example if there was a deliberate or undue delay on the part of the defendant to ask for directions to the prejudice of the third party. In the case before us, however, we are informed that when the applicant made his application for discharge by chamber summons the landlord had already taken out a summons for directions the hearing of which had been adjourned on a number of occasions, and it is not suggested that the adjournments were operating to the detriment of the applicant. We can find no *prima facie* error here as to the procedure to be considered by this Court on appeal. Besides, we note that the judge went ahead and heard the application notwithstanding his view that the wrong procedure had been adopted and gave a reasoned ruling. This being so, the question of the procedure in this case is of academic interest and cannot affect this court's decision on the merits of the application. Mr Khanna argues that the holding at that stage was judicial to the applicant. We do not agree. Right or wrong the judge gave reasons for his decision and we do not agree with Mr Khanna's submission that, having held that the wrong procedure had been adopted, the judge's reasons for dismissing the application should be regarded as *obiter*. He made it clear that although he considered the procedure by way of chamber summons to be wrong, he would nevertheless deal with it, and this he did.

As regards the second issue, Mr Khanna has strongly argued that the landlord's application for a third-party notice did not satisfy any of the requirements of order I, rule 14(1). In particular, that clause 14 of the contract between the parties specifically provided that any works on the roof were excepted. There were no contractual obligations between the parties, breach of which could have given rise to any claim by the landlord. The question of contribution or indemnity was therefore ruled out. Counsel went on to say that the landlord had failed to show that he was entitled to any relief or remedy connected with the original subject-matter of the suit. The relationship between the plaintiff and the defendant as tenant and landlord was very different from the relationship between the defendant and the applicant, the latter being an independent contractor; and that any liability between the two different sets of parties involved very different principles of law. The issues between them were not related or connected or substantially the same. That they all wanted damages was not enough. He suggested that the test was whether success by the tenant automatically spelt success for the landlord against the third party. He referred to a number of authorities which we have considered.

Kneller J in the court below was mindful of the requirement that any application must be fitted within either paragraph (a), (b) or (c) of rule 14(1) of order I for it to succeed; because he said so. The judge, however, did not say which of these paragraphs was applicable to the case before him. Mr Harris argued that the judge did not rule out contribution or indemnity by his reference to the absence of express terms to that effect in the written part of the contract, and that these could be implied. It was counsel's case that the third-party notice fell within all the three paragraphs.

Be that as it may Kneller J was satisfied that, in his words:

> The [tenant], [the landlord] and third parties are bound together by the same facts. The issue in the end will be who is ultimately liable for the damage, if any, suffered by the [tenant]? It is better to have all these matters thrashed out in one suit ...

In other words, the judge was satisfied that the landlord's claim against the applicant as third party was connected with the original subject-matter of the suit and that there was a question relating to, or

connected with, the original subject-matter which was substantially the same and should be properly determined not only between the tenant and the landlord but also between the landlord and the third party. The cause for complaint is the same: damage to property by rain water. All the parties were, so to speak, at the scene. The relief sought is the same: damages. The causes of action are the same: negligence and nuisance. Mr Khanna dwelt on the issue of the contract; but we would say that it does not follow, in the circumstances of this case, that the absence, if any, of any contractual obligations as regards the works to be executed, would automatically exonerate the applicant from liability in negligence or nuisance as to the manner of execution of the agreed works. We find it impossible to determine this question unless evidence is heard. *Prima facie* grounds for negligence were shown. We find useful the case of *Myers v N & J Sherick Ltd* [1974] 1 All E R 81 referred to by the judge. It is based on different facts, but involves the principles relevant to this application on somewhat similar law. We do not think that the second point raised by the applicant is arguable either.

We must now deal with two other matters raised. Mr Khanna criticized the evidence by the landlord in the lower court consisting of an affidavit sworn by Mr Harris (instead of his client) at the hearing of the application in that Court. This point was not taken in the lower court and there was no evidence or argument on it and we are unable to say whether or not Mr Harris's affidavit comes within the *proviso* to rule 18 of order I (which in effect permits hearsay evidence, provided that the sources are disclosed). We find it immaterial, however, as any prejudice caused to the applicant cannot possibly survive the trial where proper evidence will have to be adduced.

The second point was raised by Harris as to the novel nature of the relief sought by the applicant "to rescind" the *ex parte* order to issue the thirdparty notice. We must confess we thought we were in the realm of semantics. The record indicates quite clearly that the applicant wished to appeal against two orders both of which refused applications to discharge him as a third party. The notice of motion filed in this Court could have been more carefully worded, but we think its intention was clear.

For the reasons stated in this ruling, the applicant has failed to make out a case for granting him leave to appeal to this Court. We dismiss the application with costs.

Application for leave refused with costs.

Dated at Nairobi this 13th day of October 1977

S.W.W.WAMBUZI

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PRESIDENT

E.J.E LAW

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VICE - PRESIDENT

J.S.MUSOKE

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JUDGE OF APPEAL