

**IN THE COURT OF APPEAL OF TANZANIA  
AT MTWARA**

**(CORAM: OTHMAN, C.J., MBAROUK, J.A. And BWANA, J.A.)**

**CIVIL APPEAL NO. 6 OF 2012**

**BETWEEN**

**HASNAIN M. MURJI.....APPELLANT**

**VERSUS**

**ABDULRAHIM A. SALUM t/a**

**ABDURAHIM ENTERPRISES.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Mtwara)**

**(Mipawa, J.)**

**dated 26<sup>th</sup> February, 2010**

**in**

**Civil Appeal No. 14A of 2009**

---

**JUDGMENT OF THE COURT**

**22<sup>nd</sup> & 29<sup>th</sup> JUNE, 2012**

**OTHMAN, C.J.:**

This second appeal arises from the decision of the High Court (Mipawa, J.), which allowed the appeal by the respondent, Abdulrahim A. Salum t/a Abdulrahim Enterprises against the judgment and decree of the Resident Magistrates' Court at Mtwara in Civil Case No. 10 of 2005 wherein he was the plaintiff, Tandahimba District Council (hereinafter referred was

T.D.C.) was the Defendant and the appellant, Hussain M. Murji and one Uwesu Ahmad Chipaka were respectively impleaded as the 1<sup>st</sup> and 2<sup>nd</sup> third parties.

The respondent's claim at the trial court was for unpaid balance of charges amounting to Tz. Shs. 5,011,038/= for fumigation and pest control services rendered to T.D.C. in 1999, Tz. Shs. 25,000,000/= as general damages and interest. On 26/02/2009, the trial court dismissed the suit with costs.

At the hearing of the appeal, Mr. Henry Chaula, learned Counsel represented the appellant. The respondent appeared in person, unrepresented.

In our considered view, Grounds 1 and 2 the appellant's memorandum of appeal are sufficient to determine this appeal, namely, that the High Court:

*Ground 1. Erred in law for holding that the appellant who was brought in the suit as a third party is responsible to pay Tz. Shs. 4,910,817.20 with 12% interest to the respondent while the person who brought him as a third party is held not liable to the respondent.*

*Ground 2. Misdirected itself in treating the appellant as a defendant in the original suit thereby leading it to a wrong conclusion.*

Mr. Chaula succinctly submitted that, on appeal to the High Court, the respondent had wrongly joined the third parties as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. In determining and allowing the appeal, the High Court erroneously held the appellant liable to pay the respondent Tz. Shs. 4,910,817.20 with interest and costs at both courts below. By doing so, it had relieved T.D.C. and the 2<sup>nd</sup> third party of any liability and placed it on the appellant who was not a party to the original suit.

Mr. Chaula submitted that the learned Judge had failed to properly analyse the facts and to interpret Order 1 rule 14 of the Civil Procedure Act, Cap 33 R.E. 2002 (hereinafter referred to as the Act) by which the appellant was brought to the proceedings at the trial court. That he wrongly treated him as a co-defendant with T.D.C., contrary to the holding in **Zanfran V. Duncan and Others** (1969) H.C.D. No 163 that:

*"A third party is not a defendant unless the plaintiff decides to make him one and he is not concerned with the claim but the contribution to the defendant".*

Mr. Chaula went on to submit that since the respondent had failed at the trial court to establish his case against T.D.C., there was no way the

High Court could have found the appellant, who was not a party to the suit, liable. The High Court had substituted the appellant for the Defendant in the trial court.

He invited the court to allow the appeal with costs.

On his part, the respondent, a lay person did not have much to say, apart from insisting that the appellant had been properly impleaded under Order 1 rule 14 of the Civil Procedure Act.

Having regard to the whole matter and the submissions, in our respectful view, **Order 1 rule 14 of the Civil Procedure Act** governing third party procedure is central to the determination of this appeal.

**Order 1 rule 14** provides:

*"14.-(1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party")-*  
*(a) any contribution or indemnity; or*  
*(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff, the defendant may apply to the court for leave to present to the court a third party notice. (Emphasis added).*

Furthermore, Order 1 Rules 16 and 17 provides:

*16-(1)The court shall cause to be serve a copy of third party notice presented to it on the third party in accordance with rules relating to service of summons.*

*(2) A copy of the third party notice shall also be served on each of the other parties to the suit in accordance with the provisions of rule 2 of Order VI as if such notice were a pleading other than a plaint.*

*17. Where a third party notice has been served on the third party, the third party shall, if he wishes to dispute the plaintiff's claim in the suit against the defendant presenting the third party notice or his own liability to the defendant, within twenty-one days of the service of the third party notice upon him or such longer period as the court may have directed or as the court may, on the application of the third party, direct, present to the court a written statement of his defence."*

On third party procedure, the learned author, **Mulla, Code of Civil Procedure**, Vol II, 15<sup>th</sup> Ed, p. 1303 has this to say:

*"In invoking the third party procedure what is material is not the plaintiff but the right of the defendant to indemnity from the third party".*

*"The policy behind this rule is that the defendant who has got a claim against a third party need not be driven to a fresh suit against the third party to put the*

*indemnity in his favour into operation or to establish his entitlement to contribution from the third party. The claim and rights interse of the defendant and the third party have to be decided in the third party proceedings.”*  
(p. 1014)

We think that it is necessary to trace, albeit briefly, the history of the litigation giving rise to this appeal. Going by the record, the respondent's suit was filed on 3/11/2005 solely against T.D.C. as the defendant. T.D.C. filed an amended written statement of defence on 15/02/2005. On 23/12/2005, T.D.C. sought the trial court's leave to issue a third party notice against the appellant and Uwesu A. Chipaka. This was granted on 3/02/2006. The third parties having been duly served notice, entered appearance, filed their written statement of defend on 14/02/2006, conceded that they had been paid by T.D.C. on behalf of Abdulrahim Enterprises, of which the respondent and themselves were alleged to have been partners and participated in the trial of the suit. The trial court dismissed the respondent's suit against T.D.C. on 26/02/2009.

Aggrieved, the respondent on 11/03/2009 filed his memorandum of appeal to the High Court against T.D.C., the appellant and Uwesu A. Chipaka respectfully as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

In its judgment the High Court reasoned and found:

*"I must confess here that the **defendants** did not on the balance of probabilities prove the fact that the money withdrawn as the last payment in the name of the **second defendant one Murji** was used in connection with the ordinary course of business of the company. The **defendants** have only narrated on how the first payment was used in connection with the business of the company. There was no evidence from the co-partners on how the money which was paid to **the second respondent** was used, neither the **third Respondent** nor **the second** had talked of its use. Worse still, **the second Respondent** did not even testify before the lower court. **The three defendants** who were represented by the learned advocate addressed the lower court that he was closing the case for the defendants."*

In faulting the trial court, the High Court reasoned:

*"Had the learned that the magistrate dealt properly on the issue or rather framed the issue(s) properly he could not have reached into the decision of dismissing the suit of the appellant as against **all defendants** whereas the evidence on record shows that the money was paid by the first Respondent in the name of **the second Respondent** Hasnain Murji who did not account the money in the company's account, neither did he use the said money in the business connected with the company or account for the profit he made for using the said money in fumigation business in Newala as it was alleged.".....*

*"In the event and on the foregoing it is my settled view that the appellant was entitled the relief of being paid the amount of money which was taken by **the second Respondent** that is the 4,910,817.20, the money, as I have said earlier which was not used in connection with the company's business. The appellant is also entitled to the interest of the principal sum as above stated at the rate of 12% p.a. plus the cost of this case. **The second Respondent, Hasnain Mohamed Murji shall cough the money, Tshs. 4,910,817.20 to the plaintiff** plus the interest aforesaid and costs of the suit in this court and below thereof. **There was no evidence implicating the other defendants/Respondents**, on the balance of probabilities, with the liability of the money which the **second Respondent** had received from the first Respondent." (Emphasis added).*

It concluded by allowing the respondent's appeal.

Having closely considered the whole matter and bearing in mind the submissions, with respect, we would agree with Mr. Chaula that the learned Judge misdirected himself in treating the appellant as a defendant in the original suit. Moreover, our reading of the High Court Judgment suggests that it completely failed to notice that the appellant had been brought into the suit by T.D.C., the defendant in the main suit, as a third party and not by the respondent (i.e. plaintiff) as a co-defendant. As we have attempted to demonstrate, all along the appellant was impleaded and



took part in the trial proceedings as a third party and a non-party to the suit.

Moreover, the High Court also misdirected itself when it saddled the appellant, a third party with liability for the claim and relieved T.D.C, the defendant in the suit, of liability. The appellant could not be ordered as the High Court did, to “cough the money” directly to the respondent in the absence a successful claim against T.D.C. having been established and decreed. Under third party procedure, a defendant (T.D.C.) brings in a third party (the respondent) so that he or she could be held liable for any contribution or indemnity or any relief or remedy relating to the subject matter of the suit, if the defendant (T.D.C.) loses.

It is plain on the record that T.D.C.’s Chamber summons under Order 1 rule 14 of the Act and which was filed on 23/12/2005 initiated the third party procedure. The appellant and Uwesu A. Chipaka were brought in suit through service by T.D.C., which they acknowledged on 28/12/2005. While it is fair to say that the High Court may have been misled by the respondent’s memorandum of appeal in Civil Appeal No. 14A of 2009 against the decision of the Resident Magistrates’ Court in which T.D.C., the appellant and Uwesu A. Chipaka were referred to respectively, as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, we are however constrained to conclude that the

High Court seriously misdirected itself on the whole matter. With great respect, it violated the basic concept on which third party procedure operates. Accordingly, we find merit in ground 1 and 2 of the appeal.

In sum, and for the above reasons the judgment and decree of the High Court are all set aside.

The appeal is hereby allowed with costs.

**DATED** at **MTWARA** this day of 27<sup>th</sup> June, 2012.

M. C. OTHMAN  
**CHIEF JUSTICE**

M. S. MBAROUK  
**JUSTICE OF APPEAL**

S. J. BWANA  
**JUSTICE OF APPEAL**



I certify that this is a true copy of the original.

  
MBUYA R. M.  
**DEPUTY REGISTRAR**