

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A, SEHEL, J.A. AND MWAMPASHI, J.A.)

CIVIL APPEAL NO. 234 OF 2020

SUNLON GENERAL ENTERPRISES

& BUILDING CONTRACTORS APPELLANT

VERSUS

HOSEIN DHAWABU RESPONDENT

**(Appeal from the decision of the High Court of Tanzania, Land Division
at Dar es Salaam)**

(Mutungi, J.)

dated 08th day of July, 2015

in

Land Case No. 275 of 2009

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JUDGMENT OF THE COURT

02nd & 26th May, 2023

MWAMPASHI, J.A.:

The land matter from which this appeal arises was instituted in the High Court of Tanzania (Land Division) at Dar es Salaam (the High Court), vide Land Case No. 275 of 2009, by the respondent, Hosein Dhawabu. In the said case where the appellant herein, Sunlon General Enterprises and Building Contractors, was the defendant, the respondent claimed that the appellant had trespassed on part of his sisal farm at Mbaghai Village, Chekeleni Ward in Korogwe District, Tanga Region, excavated murram therefrom and also that it vandalized and uprooted

his growing sisal plants. He thus prayed, among other things, for a declaration that the appellant is a trespasser, payment of Tshs. 140,446,000/= as compensation for the said vandalization and uprooting of sisal plants and Tshs. 81,000,000/= for loss of future income.

In its written statement of defence, the appellant, did not deny to have entered into the appellant's farm for excavation of murram. Nevertheless, it disputed the claim that it had committed trespass. It was averred by the appellant that, in execution of the contract it had entered with Korogwe District Council (the Council) for the rehabilitation of Mkuyuni - Zege Mpakani road belonging to the Council, the disputed part of the respondent's farm was identified and allocated to it by the Council as a location from which murram for the rehabilitation of said road would be excavated.

It is also worth noting that, believing that it had a bona fide claim of indemnification or contribution against the Council, should the High Court allow the respondent's claim against it, the appellant filed an application before the High Court for leave to present a third party notice in terms of Order I rule 14 (1) of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC), for purposes of joining the Council to the proceedings as a third party. The said application was granted on 07.02.2011. Thereafter, pursuant to Order I rule 16 (1) of the CPC, the

trial Court ordered for the third-party notice to be served on the Council. What followed thereafter, particularly on whether the third-party notice was duly served on the Council and on whether the procedure pertaining to third party notice was fully adhered to or not, has turned out to be a bone of contention and a pivotal decisive issue in this appeal. It suffices however, to just point out at this juncture, that the hearing and determination of the suit proceeded without the Council being made a party to the proceedings as a third party.

Having heard the evidence for both sides, the High Court concluded and decided in the respondent's favour. It was found that the respondent had proved his case against the appellant to the required standard. The appellant was thus declared a trespasser, ordered to pay Tshs. 140,446,000/= as compensation for the vandalization and uprooting of sisal plants, Tshs. 10,000,000/= as general damages, interest on the decretal sum from the date judgment to the date of full payment and costs.

As for the issue in regard to the third party, the High Court observed that though the appellant had made some attempts to serve the third party notice to the Council and had even prayed to proceed *ex parte* against the said third party, there was no evidence that the Council was ever served.

Aggrieved, the appellant has preferred this appeal predicated upon ten grounds of complaints which, for reasons which will soon become apparent, will not be recited herein except for the 3rd ground.

Having looked at the grounds of appeal and examined the entire record of appeal including the written submissions filed for and against the appeal and also having considered oral submissions made by the counsel for the parties, we have observed that this appeal can be disposed of on a single procedural ground of complaint in regard to the issue of the third party procedure. In our deliberations and determination of this appeal, we will therefore confine ourselves to the facts and submissions on the issue whether or not the third party procedure was adhered to and in particular whether the third party notice was duly served on the Council, the issue which is raised on the 3rd ground of appeal as follows:

3. *That the learned trial Judge erred in law in holding that the procedure for joining Korogwe District Council as a third party was not followed. The trial judge ought to have held that following the service of the third party notice to Korogwe District Council and in the absence of any objection from the said Council and the Respondent, the third party procedure was followed.*

When the appeal was called on before us for hearing, Messrs. Tazan Keneth Mwaiteleke and Benedict Pius Chang'ambwe, both learned advocates, appeared for the appellant and respondent respectively.

In his submission on the issue in regard to whether the third party procedure was followed or not, Mr. Mwaiteleke faulted the High Court's finding that the procedure was not followed and also that there was no evidence whether the Council was ever served. He pointed out that the appellant sought leave to present the third party notice to the court as it is required by the law, which was granted by the High Court. He went on arguing that after leave had been obtained, it was directed by the trial Court that the third party notice be served on the third party, that is, the Council, which was done but the Council neither appeared nor filed its written defence. Mr. Mwaiteleke argued further that the appellant also sought leave to proceed *ex parte* against the Council, only to be told by the High Court at the late stage in the judgment, that the procedure was not followed. He argued that the Council having failed to appear, the High Court ought to have entered judgment against the Council and not against the appellant. He thus urged us to find that the High Court erred and that we should allow the appeal with costs.

The submissions by Mr. Chang'ambwe on the issue in question was brief to the effect that the High Court rightly found that the third party

procedure was not followed. He argued that the appellant failed to serve the Council and did not take necessary measures to join the Council to the proceedings. He prayed for the appeal to be dismissed with costs for being baseless.

It is important to preface our deliberations by expounding, *albeit* in brief, the essence of the third party procedure as provided under Order I rule 14 of the CPC. The procedure is based on the principle of contribution and indemnity upon the defendant being found liable to the plaintiff. See **Metropolitan Tanzania Insurance Co. Ltd v. Frank Hamad Pilla**, Civil Appeal No. 191 of 2018 (unreported). Under the procedure, a defendant is permitted to bring into the case a person who is not a party to the case whom he believes he has a right to indemnity or contribution in the event he is found liable in the suit preferred against him by the plaintiff. The person brought into the case in such a manner becomes a third party and not a defendant. See- **The Registered Trustees of Viginan Education Foundation, Bangalore, India and Another v. National Development Corporation and Others**, Civil Application No. 88 of 2020 (unreported).

The policy behind the third party procedure is explained by the learned author, **Mulla, Code of Civil Procedure**, Vol II, 15th Ed, at page 1014, in the following words:

"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 the indemnity in his favour into operation or to establish his entitlement to contribution from the third party. The claim and the rights inter-se the defendant and the third party have to be decided in the third party proceedings."

It is part of the third party procedure under Order I rule 16 (1) of the CPC, that after leave to present a third party notice has been obtained, the third party notice has to be served upon the third party. According to Order I rule 17 of the CPC, it is upon being served with the third party notice, that the third party is required, if he wishes to dispute the plaintiff's claims in the suit against the defendant on whose behalf the third party notice was issued or his own liability to the defendant, to present to the court a written statement of his defence. Service of the third party notice to the third party is therefore crucial in the third party procedure.

In the instant case, the order for the third party notice to be served on the Council was made by the High Court on 02.05.2011. After the issuance of the said order for service, the proceedings in the record of appeal show that the matter had to be adjourned four times, on 06.07.2011, 10.10.2011, 27.02.2012 and on 07.06.2012 because for one reason or another, it was not certain or there was no proof that, service of the third party notice on the Council had been effected. On 24.07.2012 when the matter was again called on for mention, the Council was again absent and the counsel for the appellant one, Mr. Rwegoshora, made the following submission:

"The matter is for mention and on the last hearing date we undertook for (sic) notify the 3rd party that the matter was being today. Upon visiting the law we have learnt that the proper way under order I rule 19 (1) which provide that under (sic) default of the 3rd party to file defence the court may proceed ex parte against 3rd party the court (sic) whereby in the end the defendant suffers judgment the defendant may at any time before satisfaction of decree apply for ex parte judgment against the 3rd party in respect of the suit. We intend to pray to proceed ex parte against the 3rd party. However, we have filed a P.O and we pray the same to be disposed first

before the matter proceeds and we [pray] that the same be disposed by way of written submission."

Following the submission by the counsel for the appellant as above reproduced, the High Court made no order or directive in regard to the status of the third party but went on to fix a day for the hearing of the Preliminary Objection (the P.O) After disposing the P.O, the High Court, without reverting to the determination of the status of the third party, proceeded with the hearing and determination of the respondent's suit against the appellant. The issue regarding the third party on whether it had been duly served or not and on how to proceed against it in accordance with the rules governing the third party procedure, was therefore completely abandoned on 24.07.2012. Nevertheless, basing on the record of appeal, it is our observation, as it was also rightly found by the High Court in its judgment, that up to 24.07.2012, the third party notice had not been served on the third party. There was no proof of service upon the third party. The intimation by the counsel for the appellant that there was an undertaking to notify the Council of the date the matter was coming for mention, does not necessarily mean or prove that the third party notice had been served on the Council. It should be borne in mind that while the proceedings in question were being conducted in Dar es Salaam, the third party (the Council) is located in

Korogwe Tanga. For this reason and under the circumstances where there had been several abortive attempts to serve the third party notice on the Council, the mere claim by the counsel for the appellant that the Council had been notified of the matter without any further proof on the manner the Council had been notified, could not be taken as a conclusive proof that the Council had been served with the third party notice or that it had notice of the mention date.

It is therefore our firm finding that contrary to the appellant's complaint on the 3rd ground of appeal, the High Court rightly found that the third party procedure was not followed. The Council was not served with the third party notice as it is required by Order I rule 16 (1) of the CPC. The only fault on part of the High Court is failing to observe the said procedural infraction at the right point or stage of the proceedings, that is, on 24.07.2012, and take necessary measure in accordance with the rule governing the third party procedure. As we have alluded to above, having ordered the third party notice to be served on the Council, the High Court was enjoined to make sure that service is duly effected and in case of service being duly effected but upon the default by the Council, directions ought to have been given on how the suit had to proceed against the defaulting Council.

The failure to serve the third party notice on the Council which resulted into the non-joinder of the Council to the suit, is a fatal procedural infraction which, under the circumstances of this case, prejudiced the appellant's case in defence. As no written statement of defence was filed by the Council for it was not served with the third party notice, we cannot tell what would have been its defence. One cannot tell with certainty if, pursuance of Order I rule 17 (1) of the CPC, the Council would have opted to dispute the appellant's claim against it or the respondent's suit against the appellant. What would have been the directions of the trial Court on how to proceed with the suit is something which cannot also be predicted. Considering the defence which was put forward by the appellant against the respondent's claims, proceeding with the determination of the suit in the absence of the Council involvement, prejudiced the appellant because we do not know how the respondent's case against the appellant would have fared, if, for instance, the defence by the Council would have been against the respondent's case.

Having found that the third party procedure was not complied with for the failure to serve the third party notice to the Council, we also find that the infraction vitiated part of the High Court's proceedings and the judgment. In the event and for the above reasons, we invoke our

revisional powers in terms of section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and nullify the High Court's proceedings of 24.07.2012 and all the subsequent proceedings therefrom, quash the resultant judgment and set aside the decree. We return the file to the High Court for continuation of the trial from where it ended on 07.06.2012 and further order full compliance of the rules governing the third party procedure beginning with the requirement of serving the third party notice to the Council. The trial should be expedited by another judge of competent jurisdiction. Considering that the High Court had its part in the infraction in question, we make no order as to costs.

DATED at DAR ES SALAAM this 19th day of May, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Judgment delivered on this 26th day of May, 2023 in the presence of Mr. Seni Malimi, counsel for the Appellant also holding brief of Mr. Jamhuri Johnson, counsel for the Respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL