

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

MISCELLANEOUS CIVIL APPLICATION NO. 17 OF 2022

(C/f Civil Case No. 2 of 2022))

KAPESA BENEDICT MBERESERO A.K.A

PATRICK BENEDICT MBERESERO APPLICANT

VERSUS

NGORIKA BUS TRANSPORT COMPANY LTD. RESPONDENT

4/8/2022 & 24/8/2022

RULING

MWENEMPAZI, J.

The applicant has brought this application under Order 1 Rule 14 (1) (a) and (b) and Rule 2 of Civil Procedure Code Cap. 33 R.E 2019 praying for leave for the applicant to serve a third party notice upon the Respondent herein named so that he is joined as a defendant in the Civil Case No. 20 of 2022 between Ngorika Bus Co. Ltd Vs Boniphace Kapesa. The application is supported by an affidavit.

At the hearing the applicant was being represented by Mr. Daniel Lyimo and he prayed that the affidavit be adopted. In the submission he made, he followed in the line of the contents of the affidavit.

Basically, the affidavit is deposed by Mr. Kapesa Benedict Mberesero who is the defendant in the Civil Case No 2 of 2022. He has stated that on the 3th February 2022 a suit was filed against the applicant praying for an order against him to hand over ten buses, parking yards at Moshi, Toyota Land Cruiser, Motorcycle and truck all being properties of the plaintiff in that suit, to render true the accounts of profit of operating buses for the period of six years and seven months June 2015 to January, 2022, payment of Tshs 765,600,00/= being unremitted profit to the plaintiff for six years and seven months, payment of general damages cost and interest.

According to the applicant after the demise of Benedict Mberesero @ Ali Mberesero, the family members unanimously resolved that some of the members of the family will manage the properties of the respondent in this case. The applicant was made to be the manager of the plaintiff company. He was thus a person Incharge of the plaintiff's properties whereby all the properties were supposed to be transmitted or put under the trusteeship of the respondent upon finalization of the probate proceedings for the estate of the late Ali Mberesero. While performing his duties as the manager, the respondent in this Case sued the applicant in the High Court of Tanzania (Commercial Division at Dar es Salaam in Miscellaneous Commercial Application No 362 of 2017) which arose from commercial case No 176. Among the orders sought was injunction order grounding the buses pending the hearing and determination of the main suit.

The court issued an order on the 22nd November, 2017 grounding all the buses belonging to the plaintiff Company from carrying out business

whereby the said order was extended up to 7th March 2018. Under the circumstances the applicant claim that the Respondent in this application is solely liable for the claims and damages to the tune of Tshs. 765,600,000/= as pleaded by the plaintiff in the main case, Civil Case No 2 of 2022, pursuant to the Court Order dated 22nd November, 2017 which was extended up to 7th March, 2018.

The order of the Court rendered the applicant not to function as the manager, and that was also published in the local newspaper, Mwananchi dated 11th May, 2017.

The applicant therefore prays the applicant be joined to the main case as the defendant. She is responsible to what made the business to be grounded through filing a case as stated.

The third party procedure is regulated by Order 1 Rule 14 (1) of the Civil Procedure Code, Cap 33 RE 2019. The same provides as follows: -

"14(1) where in any suit a defendant claims against any person not a party to the suit (herein after 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.

(c) Where, upon an application made under sub-rule (1), the court is satisfied that the defendant's claim against the third party is in paragraph (a) or (b) of that sub-rule and that, having regard to all

the circumstances of the case, it is reasonable and proper to grant leave to the defendant to present a third party notice, the court shall, upon such terms and conditions as it may think and conditions as it may think just, make an order granting the defendant leave to present a third party notice."

In the case of **Hasnair M. Murji Vs. Abdulrahim A. Salum t/a Abdulrahim_Enterprises, Civil Appeal No 6 of 2022** (unreported) it was held that: -

"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 favor into operation or to establish his entitlement to contribution from the third party. The claim and right inter se of the defendant and the third party have to be decided in the third party proceedings."

In this case it has been pleaded in the affidavit and also submitted by the counsel for the applicant that, the applicant was stopped from management as the result of the Respondents claims and application for an order of injunction by the respondent, which order was granted by the court, in Miscellaneous Commercial Application No 362 of 2017 as deposed and submitted in this court by the counsel for the applicant.

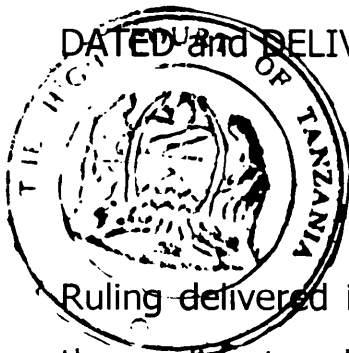
In the case of **Viettel Tanzania Public Limited Company Vs Ivvanna Felix Teri** Miscellaneous Civil Application No 30 of 2019 High Court of Tanzania, Moshi Registry (Unreported) it was observed by Hon. Mkapa, J. that: -

"In order for a third party to be lawfully joined, the subject matter between the third party and a the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must also be the same. The rationale behind is to avoid multiplicity of suits in court and the procedure is limited to a claim of indemnity/compensation and contribution over or against any person not a party to the suit"

I have no doubt that, the facts deposed have shown that the act of instituting a suit against the applicant by the respondent herein, released the applicant of the management of the affairs of the plaintiff through an acquisition from an order of injunction which was published in the Local Newspaper on the 11th May, 2017.

Under the circumstances obtaining I find merit in the present application and therefore leave is granted. Cost be borne by the applicant. Applicant given 14 days to serve the Respondent a third party notice.

DATED and DELIVERED at Moshi this 24th day of August, 2022.




T. M. MWENEMPAZI
JUDGE

Ruling delivered in court this 24th day of August 2022 in the presence of the applicant and Mr. Rajabu Msemu Advocate holding brief for Mr. Daniel Lyimo Advocate for the applicant.


T. M. MWENEMPAZI
JUDGE