

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO.19 OF 2021

(ARISING FROM COMMERCIAL CASE NO.120 OF 2020)

HOUSES AND HOMES LIMITED 1ST APPLICANT
SIMBA MOTORS (T) LIMITED 2ND APPLICANT
BHAVESH CHANDULAL LADWA 3RD APPLICANT
NILESH JAYANTILAL LADWA 4TH APPLICANT
AATISH DHIRAJILALA LADWA 5TH APPLICANT

VERSUS

JITESH JAYANTILAL LADWA RESPONDENT

Date of last Order :6/7/2021

Date of Ruling: 04/08/2021

RULING

MAGOIGA, J.

The applicants and respondent are all co-defendants in Commercial Case No.120 of 2020. The applicants have preferred this application against the respondent under the provisions of Order 1 Rules 14(1), (2) and 23 of the Civil Procedure Code [Cap 33 R.E. 2019] praying that this court be pleased to grant the following orders, namely:

- i. The applicants be granted leave upon which to present and issue a third party notice against the respondent herein who is co-defendant in the main suit;
- ii. Costs of this application;
- iii. Any other relief and or direction the court shall deem fit to grant.

The application was accompanied with the affidavit deposed by Mr. Patrick Toyi Kaheshi, learned advocate for the applicants stating the reasons why this application should be granted. The main reasons being illegal conduct and frustration exercise by the respondent when recovery measures were initiated by the plaintiff (not in this application). On the above reasons, the applicants prayed that this court be please to grant leave to enable them to file third party notice for indemnification by the respondent upon judgement by the court in favour of the plaintiff.

Upon being served with the application, the respondent filed a counter affidavit stating the reasons why this application should not be granted. The main reasons being that the said loan was fraudulently obtained by forging the signature of his late father, one Jayantilal Walji Ladwa (deceased) and as such the order of indemnification will amount to allowing the forgers to

benefit from their own wrongs and invited the court to refuse the grant of this application.

When this application was called on for hearing and upon oral discussion with the parties trained minds, Mr. Sisty Benard and Elly Msyangi, learned advocates for the respondent eventually conceded to the grant of the leave for in their reply to the notice will be able to file their defence which will give the court an opportunity to know exactly what happened.

Mr. Rutaiwa, learned advocate for the applicants had nothing to submit and but thanked the learned advocates for the respondent by commending them for not resisting the application as such implored the court to grant the application with costs in the cause. I would have given my order immediately, but I reserved my ruling because the notice is to a party who is already a party to a case and my tiresome research could not get a case where a co-defendant has issued such a notice, hence this ruling.

The instant application was preferred under rules 14(1) and 23 of Order 1 of the Civil Procedure Code. For easy of reference, the said provisions provide:

14. Leave to file third party notice:

(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.

(2) An application under subrule (1) shall, unless the court otherwise directs, be made ex parte and be supported by an affidavit stating—

(a) the nature of the claim made by the plaintiff in the suit;

(b) the stage which proceedings in the suit have reached;

(c) the nature of the claim made by the applicant against the third party and its relation to the plaintiff's claim against the applicant; and

(d) the name and address of the third party.

(3) Where, upon an application made under sub rule (1), the court is satisfied that the defendant's claim against the third party is in respect of a matter referred to 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 just, make an order granting the defendant leave to present a third party notice.

(4) An order granting leave to present a third party notice shall contain directions as to the period within which such notice may be presented and as to such other matters as the court may think just.

23. Co-defendant as a third party:

Where in any suit a defendant claims against another defendant in the same suit (hereinafter referred to as "the co-defendant")–

(a) any contribution or indemnity;

(b) any relief or remedy relating to or connected with any subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff against the defendant,

such defendant may present a third party notice against the co-defendant in the same manner and subject to the same conditions as if the co-defendant were a third party and the same procedure shall be adopted for the determination of the claims made against the co-defendant as if the co-defendant were a third party.

An application for third party procedure is not new in our jurisdiction but when it comes to a co-defendant applying for leave to file a third party notice against a fellow defendant, it is not that much used in our courts. Our parliament when enacting the provisions of Rule 23 had in mind in its wisdom that, there are situations where co-defendant may have a claim against another co-defendant in the same suit and may seek for contribution or indemnity of any relief or claim against such defendant. Therefore, reading between the lines of Rule 23 and my interpretation and understanding of the

above rule two factors have to be considered, that the party making an application for leave must aim at asking for, namely:

- i. claim for contribution or indemnity;
- ii. Any claim of any relief or remedy relating to or connected with any subject matter of the suit and substantially the same as relief or remedy claimed by the plaintiff against the defendant.

In our instant case, the facts as stated in the affidavit shows that, what the applicants want is to be remedied or rather indemnified on the payment of the money claimed by the plaintiff against the defendants in case adjudged by this court in favour of the plaintiff.

In the case of VIETEL TANZANIA PUBLIC LIMITED COMPANY vs. IVANNA FELIX TERI, MISC. CIVIL APPLICATION NO.30 OF 2019 (HC) MOSHI (UNREPORTED) though was not co-defendant, it was observed that the purpose of third party procedure is to avoid multiplicity of suits in courts and the procedure is limited to claim of indemnity, contribution or any relief relating to the subject claim by the plaintiff against the defendant.

Therefore, the above quoted Rule (Rule 23 of Order I of the CPC) opened room for third party procedure not to be limited to parties not in a suit but goes further to allow the procedure to cover even in situation where there

are more than one defendant to a suit to bring a third party notice against a co-defendant to avoid multiplicity of cases and serve the same purposes when applied to the stranger to the suit.

According to Utamwa, J.H. K, Deputy Registrar of the High Court, Mbeya (as he then was) in his paper titled "Third Party Procedure" in lecture notes at Mzumbe University (Mbeya Campus) observed that rule 23 of Order 1 of the CPC operates as an exception to Order I rule 14.

My further re-reading of the provisions of rule 23 shows the legislature had intended, in my opinion, same manner and conditions to apply in the determination of the third party procedure.

Therefore, having regards to the procedure for third party procedure for court to grant leave to serve a third party notice, it must be guided by the following:

1. That the person to be joined is indeed a party to the suit;
2. That the fellow defendant(s) who want to present third party notice must claim for contribution or indemnification from the fellow co-defendant; and
3. That claim must be for contribution or indemnity and any relief or remedy relating to or connected with the subject matter of the suit and

must be substantially the same relief as claimed by the plaintiff against the defendants.

In our case, the applicants claim for contribution or indemnity on reasons that the amount claimed has gone high because of delays made by the respondents due to long accruing interests and penalties. I have gone through the affidavit in support of the application and the circumstances of the whole case and I find that grant of the leave is imperative than not.

Be that as it may, I allow this application, and proceed to direct and order that, the applicants present the third notice and serve the respondent within 14 days from the date of this order. The respondent, upon being served with third party notice, is equally ordered and directed to file defence within 14 days from the date of service to him.

The costs of this application be in the cause.

It is so ordered.

Date at Dar es Salaam this 04th August, 2021.



S.M. MAGOIGA

JUDGE

04/08/2021