

TANZANIA / JUDGMENT

RULING 3RD PART

COURT
TANZLIIDECIDED
20 March 2025

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N THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB
REGISTRY) AT DAR ES SALAAM CIVIL CASE NO 117 OF 2020 Ref 20200902000297713 NIXON
BANDAGO HAULEPLAINTIFF VERSUS AIRTEL (T)
PLC.....DEFENDANT OGILVY TANZANIA
LIMITED.....FIRST THIRD PART TONGWE
RECORDS2ND THIRD PART

RULING:

14 Feb, 20th March 2025 KIREKIANO J, The Plaintiff claim against Defendant among other reliefs Tanzania Shillings 390,000,000/— (Three hundred and Ninety Million only) being sped he damage for copyright infringement for unlawfully use of Plaintiff's voice in Defendant Commercial Advertisement. The defendant denies liability, stating that the Defendant entered into an agreement with Ogilvy Tanzania Limited, 1st third part for provision of advertisement and communication, media planning and space acquisition services in Tanzania. Upon receipt of instructions from the Defendant to procure 1 jingles for its various campaigns Ogilvy Tanzania Limited, commissioned the services of the Production House Tongwe Records (2nd third part) Both parties filed their respective pleadings. After the hearing of the suit had begun, with testimony of PW1 the counsel for the plaintiff Mr Mikidadi, posed a pertinent issue that since this suit involves third parties, according to record of the proceedings no direction was given about the third parties in this case as required under Order 1 Rule 18 (1) Civil Procedure Code. PC cap 33. For quick reference the rule provides to the effect that where a third party has presented a written statement of defence, the court shall fix a date for the giving of directions, if satisfied that there is a proper question to be tried as to the liability of the third party in respect of the claim made against him by the defendants. Both parties are at one page that in view of decisions in Sunlon General Enterprises & Building Contractors vs Hosein Dhawabu (Civil Appeal No. 234 of 2020) [2023] TZCA 17280 (26 May 2023) and January Nshimba vs The Registered Trustees of Daughters of Mary Immaculata & Collaborators (Civil Appeal 127 of 2018)

[2022] TZCA 225 (28 April 2022, where a third-party procedure has 2 not been complied with particularly on issue of direction, the consequence is the nullification of the proceeding from the date of the omission. Given the state of affairs, that hearing had began this ruling address the issue whether this court can give direction at this stage and the way forward.

The parties were all heard on this. Mr. Mikidadi citing CAT decision in January Nshimba vs The Registered Trustees of Daughters of Mary Immaculata & Collaborators (Civil Appeal 127 of 2018) [2022] TZCA 225 (28 April 2022) was of the stance that, lack of such direction is fatal but the CPC is silent on when to give direction as stated under the order. He thus argues this court should fix a date and give direction. He also cited a paper Third Part Procedure: by Utamwa Deputy Registrar (as he then was), delivered to Mzumbe University in 2007. Citing a decision in Brooks Vs Isher Kaur (1932) 14 KLR 103, that Direction may be sought at later stage though judgment has been entered against the defendant. On her part, Miss Mukangara for the defendant, took a view that fixing direction at this stage is not the proper procedure was of the opinion that the remedy is for the plaintiff to seek revision in the CAT, under rule 4 of CAT rules, which would allow the plaintiff to seek that direction. 3 Mr Kazungu, for the first third part took another view that as a general rule, the court has to give direction pursuant to Order 1 Rule 18 CPC upon application of the plaintiff, defendant, or court itself. Reading from Order 1 Rules 17 and 18, CPC he argued that there is an implied exception: where a defence is filed against the plaintiff, it is thus automatic that there will be no need to give a direction under Order 1 Rule 18. CPC. He said the purpose of the third-party procedure is for the court to determine how to treat the third party, or by separate suit. In this case, the first and second third parties did file their defence, contesting the claims against the defendant. Mr Kazungu therefore, suggested that the third parties' liabilities are to be tried simultaneously in the main suit and not separately as if they had filed the written statement of defence. He therefore suggested that the direction was presumed under section order 1 Rule 18 CPC. As to the question of timing he said, since there are already issues framed that suggest the third parties' positions and liabilities, the issues suggest the same direction in the treatment of the parties. He thus took a stance that the court proceed with the hearing and, alternatively, vacate the proceedings and give direction so that the third-party procedure is 4 complied with. He beseeched this court to take the latter option as per the oxygen principle; no part will be prejudiced, Mr Ipilimo Holding brief of Miss Kevea for 2nd third part had nothing to respond on this. In his rejoinder Mr Mikidadi was of the view that revision does not lie in the interlocutory orders. He partly agrees with Mr Kazungu in the position in the CRDB case that the liability may be determined at any stage. He reiterated the lack of direction will be fatal and he insisted that this court can make good of this now without vitiating the proceedings. On my part, it is noted from the record that the first and second third parties presented their defence deputing the plaintiff claims and their liabilities on indemnity or contribution in the event the defendant is held liable. I have also revisited the record, it is correct that there was not such application by the plaintiff or defendant or the third part on the direction on the liability of the third part. I have given thought to the parties' submission on the timing on such direction. I have revisited order I rule 18(1) CPC, the same provides thus; Where a third party has presented a written statement of defence the court shall on the application of the defendant presenting the third party notice or on the application of the 5 third party or, where the third party has disputed the plaintiff's claim against the defendant, on the

application of the plaintiff, or on its own motion, fix a date for the giving of directions and may on such date, if satisfied that there is a proper question to be tried as to the liability of the third party in respect of the claim made against him by the defendant, order the question of such liability to be tried in such manner, at or after the trial of the suit, as the court may direct or, if the court is not so satisfied, pass such decree or make such order as the nature of the case may require. From what may be gathered from the above rule is that, requirement on direction arise after a third party has presented written statement of defence, two upon application or the parties, third part or the court own motion. When there is already a defence by third part, the rule does not give a time frame of such application by the parties or court's direction on its own motion. It is my considered view that, such direction may be made during first pre trial conference, however if this is not done, this may still be done at later stage. Reasoning on propriety of doing the same at later stage has to consider among other aspects the purpose of the direction by the court. 6 Reading from the same rule it shows that direction is aimed at, ascertaining the role/liability of each part in the proceeding allowing the third part to participate in the case, knowing how they will be bound by its outcome but also to allow the court to have a focused trial. I have, reflected on the paper by Utamwa DR as he then was (RIP), I subscribe to the position that, even after the hearing have taken off such direction may be given. To be precise, this will depend on circumstance of each case. Focus should be consideration of the proceeding at issue, attaining justice to parties and avoiding prejudice to any part. Now in this case at hand I have considered the third parties in this case having filed their defence there was regard to their written statement of defence during framing of issues thus; whether the defendant is entitled to be indemnified by the first third part. Whether the first third part is entitled to be indemnified by the second third part. I have considered the decision in Sunlon General Enterprises & Building Contractors cited above. In that case the proceeding were flawed because the third part was treated as defendant. In this case, framing of issues clearly shows the role to contribution or indemnification which is the purpose of the procedure. 7 In this state of affair, I tend to agree with Mr Kazungu that, the third parties impliedly, knew of their role in the suit which is the purpose of the direction. However, it is my view that it has to be clear that the direction was given. As such, having in mind that the trial, have commenced yet this court, if need be, may amend the issue under Order XIV Rule 5 (1) CPC CAP 33, recall the witness who has testified if so requested so as to ensure no prejudice to any the parties. Be it noted that I have also given thought to submission My Miss Mukangara, however I did not subscribe to the option of revision suggested since revision does not lie in the interlocutory orders I will thus end here and hold that having regard to the circumstance of this case, under Order 1 Rule 18 (1) Civil Procedure Code. PC cap 33 the direction on the liability of the third parties will be given at this stage before continuation of hearing of the case. Dated at Dar es Salaam, this 20th March 2025 8 .A J KREKIANO JUDGE COURT Ruling delivered in presence of Mr Mikidadi for the plaintiff, Miss Mukanganra for the defendant and Mr Kazungu for the 1s third party and in absence of the 2nd third part. A J KREKIANO JUDGE 20.3.2025 9

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