

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE
DISTRICT REGISTRY AT MWANZA CIVIL CASE NO. 23 OF 2006 ROBERT JUMANN~
MAGIGE PLAINTIFF VERSUS

1. DISTRICT EXECUTIVE DIRECTOR } . CUM RETURNING OFFICER..... . DEFENDANTS
2. THE ATTORNEY GENERAL
3. NIMROD E. MKONOTHIRD PARTY

RULING

4/3/2010 & 4/5/2010 NYAN GARI KA, J. The third party has raised an objection in limine litis against the Third Party notice in his defence filed on 22/9/2009. The background, in short, is that, sometimes in the year 2005 both the plaintiff and the third party were contesting for parliamentary seats in the 2005 General Election, Musoma Rural -/ Constituency from different parties. ~ _ 1 The plaintiff was contesting through the opposition party (Chadema) and the third party was contesting through the ruling party (CCM). Before the campaigns for election commenced, the third party raised an objection before the 1st defendant that the plaintiff did not I . . qualify to contest for the election in that constituency. The objection was upheld and the plaintiff was indeed disqualified. The third party won the said parliamentary seat unchallenged. Dissatisfied with the disqualification, the plaintiff had now filed the present suit on 5/12/2006 against the 1st ~nd 2nd defendant. On 26/5/2009, the 1st and 2nd defendant presented a third party notice which was allowed by this court on the same date and served to the third party who raised the objection, the subject of this ruling. The preliminary objection reads as follows:- At the first hearing of this suit, the third party will raise a preliminary objection on a point of law and urge the Honourable court to reject the third party notice with costs on the ground that the 1st and 2nd defendant are not legally entitled to any claim of identity or contribution or relief or remedy that is connected ~ the subject matter of this suit, ~ _/, from a Third Party ,f---:--:7__ 1 2 ,.

- ~ : ' , " : " . ~ ' , ' , . : ~ t . ~ - ~ . ~ ~ ~ ~ ; ~ ~ ~ ~ . - When the objection was called for hearing, Mr. Nicholas Moris, solicitor, appeared for 1st the defendant, Mr. Muyuge and Mr. Kidando, State Attorneys appeared together and jointly for the 2nd defendant while, Mr. Gallati, Learned counsel, appeared for the third party. The thrust of Mr. Gallati objection is that

since the 1st defendant made an independence decision regarding the third party objection, then, that decision does not qualify for the issuance of a third party notice, as the third party has no obligation whatsoever in that decision. He submitted that in disqualifying the plaintiff to contest for the parliamentary seat, the 1st defendant was an independent person basing his decision from the facts he had gathered from both sides and on his own investigation and discretion. Mr. Gallati submitted that, under the provisions of order 1 rule 14 of CPC, a third party notice, applies only where a party has a right indemnity or contribution or other remedy or reliefs, in case the 1st defendant is held liable by the court. In other words, the counsel submitted that the liability arises where there is a contractual duty or equitable right by the defendants, as against the third party. Further, The Learned counsel for the third party referred me to the case of *Edward Kironde Kagwa V. L. Costaperaria & another*

[1993] EALR213 at page 214 saying that I be guided with that decision from Uganda jurisdiction while interpreting the provisions of order 1 rule 14 of the CPC which is pari-materia with order 1 rule 14 of the Civil Procedure Rules of Uganda where it is held: "A right indemnity generally, arises from contract express or implied but it is not confined to cases of contract. A right of indemnity exists where the relationship between the parties is such that either in law or equity there is an obligation upon one party to indemnify another." The Learned counsel, submitted that in our case at hand, there is no contract between the third party and the defendants under which the defendants can claim indemnity from the third party. He said that the third party exercised his legal right to raise an objection against the plaintiff under section 53 {1} of National Election Act {Cap 343 RE 2002} and the first defendant performed his duty under section 53 {4} of the National Election Act {Cap 343 RE} 2007 in deciding the objection. The Learned counsel submitted that under those circumstances, no duty arises on equity to require a third party to indemnify the 1st defendant who was exercising his powers and duties. The counsel went on by saying that, the tort of defamation in respect of what was published is a tort which might have been committed by the 1st defendant and therefore the third party was neither a third party to the tortfeasor nor a joint tortfeasor with the 1st defendant to the extent of being claimed to indemnify or contribute through a third party notice. Further, Mr. Gallati submitted that even the 1st defendant has not pleaded indemnify or contribution from the third party on the basis of defamation. The learned counsel for the third party concluded by inviting me to discharge the third party against the defendants under order 1 rule 18 {1} of the CPC. On his party, Mr. Muyuge, Senior Learned State Attorney, on behalf of the defendants submitted that the preliminary objection raised by the third party is not justified to discharge him from his obligation in the suit under the 3rd party notice. He submitted that the preliminary objection raised is not a pure point of law because it goes into the pleadings which need the facts to be ascertained. The Learned State Attorney submitted that, Para 9 and 10 of the plaint as well as other paragraphs, disclose different basis of the case including but not limited to the disqualification of the

plaintiff from contesting for the parliamentary seats, the basis of which, is a letter written to the 1st defendant by the third party. The Senior Attorney further said that the written statement of defence of the 1st and 2nd defendant on Para 5,6,7, and the others paragraphs clearly states that the decision to disqualify the plaintiff was based on the letter of the third party, which, the third party, pleaded to have issued to the 1st defendant as stated in Para 6 of the amended written statement of defence of the third party. The Attorney referred me to the case of Mukisa Biscuits M Co. Ltd V. West End Distributors Ltd [1969] EA at page 696 which was also cited by my sister Rweyemamu, J in her ruling in this case which was delivered on 19.9.2008. In the alternative, the Learned Senior State Attorney submitted that, under Para 6 of the amended written statement of defence of the 3rd party, the 3rd party had agreed that he wrote a letter dated 21/8/2005 and gave information which is the basis of the disqualification of the plaintiff. He said that the 3 party has a duty to give correct information and that is the very duty which can put him to task, if, at the end of the day, that information will be proved to be false after it has been relied or acted upon by the one who received it, who is now the first defendant. The Senior Learned State Attorney referred me to the doctrine of estoppel under the provisions of section 123 of the Law of Evidence Act (cap 6 RE 2002) and the case of Francis Ngairi V NIC Ltd [1972] HCD NO. 134 at page 137 reported also in EALR, 1973 and Hed/ey_Byrne versus Heller and partners

- [1964] AC at page 465 The Attorney submitted that, the decision of the 1st defendant was prompted and pegged on page 3 of the letter of the 3rd party and therefore, if the 1st defendant is found liable, then, the 3rd party should also be held liable. He said that indemnity or contribution is not only based on contract as there is no right without obligation. He further submitted that, if the 3rd party has a right to object, then, he
- has also an obligation to give correct information. He said that the rights of someone end where rights of others begin. The State Attorney submitted that the plaintiff could have sued the 3rd party alone under tort without joining 1st and 2nd the 7 defendant but the same remedy which is sought under order 1 rule 18 of CPC can be given at the end of the case, if the 3rd party, will be found answerable, but, all the same, at this stage, the 3rd party
 - should be made a party so that the court can hear evidence from him. The State Attorney submitted in the alternative, that, if the prayer to discharge the 3rd party is allowed, then, under the provisions of order 1 rule 10 {2} of CPC, this court should order the 3rd party to be joined as a necessary party so that this court can finally and conclusively determine the suit upon having an advantage of seeing the letter written by the 3rd party. Mr. Nicholas Moris, solicitor for the 1st defendant and the plaintiff has nothing to say but in his short rejoinder, Mr. Gallati, Learned counsel for the 3rd party, submitted that the issue whether the 3rd party is entitled to indemnify or contribution on the liability of the 1st and 2nd defendants is a legal issue which has to be determined by this court under order 1 rule 18 of CPC and therefore it is a necessary stage under the 3d party procedure. The Learned counsel distinguished the ruling of Rweyemamu, J cited by saying that the Judge in the ruling dealt

only with the issue as to what is a preliminary point of law but not the issue in this case. /

- f'~c_ . 8 He said that the decision of the 1st defendant was a quas judicial decision arrived at by a~ independent mind upon corrent and clear investigation. He said that the 3rd party information given is not connected to what has been written in the newspapers. The Learned counsel referred me to the case of Yasefi Walusimbi V. A. G o_f Uganda [1959] EA 224 {HC) {U) which held that the word indemnity in order 1 rule 14 does not include ., the right to damages arising from a contract or tort. I have given careful thought to arguments fqr and against the preliminary objection. There are three main contention between the parties in this objection, namely:- ONE: Whether the preliminary objection raised by the third party raises pure points of law or fads which has to be ascertained. TWO: Whether the objection raised can be determined by this court as a preliminary objection or at the stage provided for under order 1 rule 18 of CPC. THREE: Whether the 1st defendant is entitled to any claim of indemnity or contribution or relief or remedy connected to the subject matter of this suit from the 3rd party. "- 9 • I will start to resolve the second contention regarding the application of order 1 rule 1B of CPC The main reasons for a third party procedure is to avoid multiplicity of suits between the same parties having substantially the same interest or relief or remedy rela.ting to or connected with the subject matter of the suit against each other. Therefore, in order to decide how to deal with the two suits which arose out of a third party notice, the court is called upon under the provisions of order 1 rule 18 of CPC to give directions on the manner the two suits will be tried. However, before the court gives directions it has to satisfy itself whether there is a proper question to be tried as to the liability of the 3rd party, in respect of the claim made against him by the defendants. If the court is satisfied that there is a proper questions to be tried regarding liability of the 3rd party, then, it may order the question of suth liability to be tried at or after the trial of the suit but if the court is not satisfied, it may pass such decree or make such other order as the nature of the case may require. I, therefore, agree with the counsel for the 3rd party, that the preli~inary objection raised can be determined at the stage as _ / . provided for under order 1 rule 1B of the CPC ~ ~L 10 .. ~- ... I now move to the first contention as to. whether the objection raised, is a pure point of law or not as argued by the Learned Senior . . State Attorney. The words "Legal entitled" as put in the notice of objection, in my view, means, whether the kind or the nature of the claims by the 1st and 2nd defendant put forward against the 3rd . . party, is as provided for- by the law, or, in other words, "whether the kind of the suit facing the 1st and 2nd defendants legally allows the defendants to claim against the 3rd party any contribution or indemnity or relief or remedy. Therefore, the points here, in my view, is regarding the right of the 1st and 2nd defendants to issue a 3rd party notice which is related or connected with the subject matter of the suit and substantially the same as the relief or remedy claimed by the plaintiff. For me, I think the objection raised has been misconceived because under the provisions of order 1 rule 18 of CPC, before giving such directions, the court must always be satisfied, whether there is a proper question to be tried as to the liability of the 3rd party to contribute or indemnify the claim in whole or in part. Therefore, that question, do not require to' be raised as a preliminary point of law but rather

is a statutory requirement under 11 the provisions of order 1 rule 18 of CPC. The law under order 1, rule 18 of CPC say what it mean and mean what it say. I will therefore dismiss the objection raised with no orders as to costs for having been misconceived and improperly raised. But that is not all and the matter does not end there because what the parties has submitted before me is what is provided for under order 1 rule 18 of CPC to be considered by this court. Therefore I will now move to the third contention between the parties. The following facts emerge from the pleadings;- The plaintiffs sue the 1st and 2nd defendants for damages arising out of disqualification from contesting for parliamentary seats in Musoma Rural District constituency through the opposition party called Chadema and defamation. The 1st and 2nd defendants in their amended written statement of defence claims that the decision to disqualify the plaintiff was based on the information supplied to them through an objection and evidence presented by the 3rd party. The 1st and 2nd defendants further defend themselves by saying that they couldn't avoid the matter from being published in newspapers. A 3rd party notice was issued by the 1st and 2nd defendants; pursuant to leave granted by this court under the provisions of order 1 rule 14 of CPC against the 3rd party, one, Nimrod E. Mkono, claiming indemnity or contribution or remedy. I must warn myself that in discussing as to whether there is a proper question as to the liability of the 3rd party to indemnify the 1st and 2nd defendants in whole or in part, I must not appear to pre-judge or prejudice the suit itself. Therefore, if I am not exhaustive in some of the points and arguments raised by the parties, it is because I thought I will pre-judge the pending suit at this preliminary stages. I agree with the 3rd party's counsel that the 3rd party exercised his right in raising an objection against the plaintiff under the provisions of section 3(1) of the National Election Act [Cap 343 RE 2002] and the 1st defendant made an independent decision in performing his duty under section 53(4) of the National Election Act [Cap 343 RE 2002] basing his decision from the facts he had gathered from both sides and on his own investigation and discretion. I also agree with the 3rd party's counsel on the application of the principle initiated in the case of Edward Kironde Kagwa [supra] that a right of indemnity is not confined to cases of contract but may as well exist where the relationship between the parties is such that, either in law or equity there is an obligation upon one party to indemnify another. The Learned State Attorney for the defendants on the other hand, submitted that although the 1st defendant is obliged to make an independent decision on the objection raised, the 3rd party had a duty to give correct information, otherwise, he can be held responsible, if the information he has given is proved to be false after it has been relied upon by its receiver. I totally agree with the Learned State Attorney that when the 3rd party opted to exercise his legal right of raising the objection against the plaintiff, he has an obligation to give correct information because where the rights of someone ends, the rights of others begin. My exploration on the pleadings had discovered that this court is not availed with two documents, namely, Fomu Namba 88 which was filed by the plaintiff for contesting in the Election and the plaintiff's letter of 21/8/2005 Kumb. Na RJM/208/15/2005 which responded to the objection raised as disclosed in annexure E attached to the plaint. In my view, the mentioning of documents alone does not improve the situation, in the case.

~ .. -~. -.- -~...- _ . !. ••. • .- The purpose of a trial is to enable the parties to put their case properly and broadly so that the court may hopefully come up with -a fair decision on the crucial issue in the case. Despite the missing documents, still this court, can resolve. the last issue, as to whether there is a proper question to be tried as to the liability of the 3rd party .in respect of the claim made against him by the 1st and 2nd defendants. I have asked myself as to whether the 1st defendant in exercising his powers under the provisions of section 53 (4) of the National Election Act {Cap 343 RE 2002} is bound by the objection raised by the 3rd party or the reply made by the plaintiff on the objection. in the circumstances of this case? section 53 (4) of the National Election Act {Cap 343 RE 2002} provides as follows;- "The Returning Officer shall with the least possible delay, decide on the validity of every objection and inform "the candidate concerned of his decision and, if the objection is _allowe0;. of the grounds of his decision" . 15 :.t.' ,,,_2JJ-::...~:~:t::;))~':r ,~ • . ;1, I agree with Mr. Gallati, Learned Counsel for ~he 3rd party, that st when the 1 defendant made his decision on the objection, he was a free agent, with an independent mind. The 1st defendant had a duty to verify-and scru~inize each and • every information and evidence put forward in the objection so that hopefully he will arrive on .his ow~, a correct and fair decision. In order for the 3rd . party to be held liable for the information given, it must be established not only during trial, but• also in the pleadings that such information was given with a bad intention or motive or negligently or fraudulent in order to mislead or to affect or influence the decision of the 1st -defendant. The Learned Senior State Attorney had prayed before this court for an alternative prayer, that, if the 3rd party is discharged under • order 1 rule •1s of CPC, then, this court should make an -order of • joining him as a necessary party in the suit so that the court can finally and conclusively determine the contraversion regarding the information given in the objection by the 3rd party, which, was relied upon by the 1st defendant in disqualifying the plaintiff. The plaintiff is the dominus litis and he is the master of the suit. The plaintiff cannot be compelled to litigate against someone he does not wis~ to implead and against whom claim any relief. 16 . . ." ~. ... • ~ . - -- ' • . _.,. - < • ~-;,"""• "- :-- . ' . rwould .with respect like to remind the Learned Senior State Attorney that the application of order 1 rule 10 {2} and 18 of CPC • can only come into play if the court is satisfied thc\t without the 3rd party, the question in the suit cannot be completely decided {see the case of Farida Mbaraka and .another Versus •oominca Kagaruki, Civil Appeal No. 136 of 2006 {CA} {unreported} The test for the application of rule 10 {2} and 18 of order 1 of CPC are the same and had to pass in the same bridge as to whether the 3. rd party is connected in one way_ or another with the pending suit. The 3 rd party must be directly or legally interested in the case to be called upon to answer the questions in the action. Therefore, once the 3rd party is discharged under order 1 rule 18 of CPC, he cannot be joined again under the provisions of order 1 rule 10 {2} of CPC, as the bridge has been broken for him to cross over to the pending suit. The question or issue in the pending rd suit can completely be decided without joining the 3 party. As hinted before, the 1st defendant cannot be allowed to ignore his own decision on the pretext that he was misled by the 3 rd party in the objection raised and do so with impunity. If this trend is allowed, the result would be chaos in the administration of justice. The discretion herein bestowed upon the

court is intended to advance the cause of justice. In concluding as above, I was 17 .. , . , ~ f ' , r ~ = appreciated guided by the principle that under whatever law, discretionary powers must be used judicially and not capriciously or arbitrary. I am aware that where the legislature confers wide discretion, it also imposes heavy responsibility. Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and coloured glasses and pretences, and not to do according to their wills and private effective. ~ As I have already pointed out, the plaintiff claim against the defendant's is based on his disqualification from contesting for parliamentary seat in Musoma Rural constituency, and the 1st and 2nd defendants claim that the 3rd party conveyed an information in the objection, which, was the basis of the 1st defendant decision. The plaintiff might have a right to damages against the 1st and 2nd defendants in the action but such a right to damages against them is not an automatic right to indemnify from the 3rd party because the 1st defendant is not bound by the information supplied to him by the 3rd party in deciding the objection as I have already held. The court in this matter may, at any time, set aside third party / proceedings, as I hereby do. ~ .18 . :/ . For the reasons I have expressed , I hereby set aside the 3rd party notice with costs and discharge Mr. Nimrod E. Mkono, (the 3rd party) as no right of indemnify arises against him in the circumstances of this case. Order accordingly. ~ :J{ .M. .Ncumg,cvti&a JUDGE At Mwanza · 4th day of May, 2010 Date 4/5/2010 Coram Hon. K. M. Nyangarika, J Plaintiff Present in person 1 st Defendant 2 nd Defendant } Tibilengwa, SA 3 rd Party . Gallati -Adv. & Koyugi - Adv B/C Mr. Kaijage ORDER Ruling delivered today in chambers in the presence of the plaintiff in person, Mr. Tibilengwa, Learned State Attorney for the 1st 19 t,; ;j'£C::~~ J:11~'. Dr1: ~z-/ , , J(..JIil. .N yanga,tilia JUDGE I ., f 20 i, 1- i

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