

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS FRIDAY, THE 26TH DAY OF FEBRUARY, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

**SUIT NO: CV/1204/13
MOTION NO: M/9300/17**

BETWEEN:

1. SKYE BANK PLC PLAINTIFF/RESPONDENT

AND

**1. I.B.T ASSOCIATES LIMITED }
2. IBRAHIM AHMED TIJJANI } DEFENDANTS/APPLICANTS**

AND

**1. ADB AIRFIELD LIGHTING SYSTEMS }
LIMITED } THIRD PARTIES/
2. STEFAN BENKERT } RESPONDENTS**

RULING

By a motion on notice dated 29th August, 2017 and filed on 11th September, 2017, the Defendants to Counter-claim/Applicants seek for the following Reliefs:

1. An Order giving directions to the parties in respect of the third party proceedings.

2. And for such other orders or further orders that this Honourable Court may deem fit to make in the circumstance.

Grounds upon which this application is based are as follows:

- 1. That on 18th January, 2017 this Honourable Court granted leave to the defendants/applicants to serve Third party Notice on the third parties herein pursuant to Order 10 Rule 18 of the Rules of this Honourable Court.**
- 2. That subsequent upon the above, the third parties were served with the said notice.**
- 3. That Order 10 Rule 24 of the Rules requires the defendants/applicants to apply to this Honourable Court for directions as per the nature proceedings.**
- 4. That this application is brought to seek directions of this Honourable Court as to the liability of the third parties to the defendants or whether there are issues to try between the plaintiff, the defendants and the third parties in this case.**

The application is supported by a 24 paragraphs affidavit with seventeen (17) annexures marked as **Exhibits MM1 – MM17**. A brief written address was filed in which one issue was raised as arising for determination to wit:

“Whether this application has satisfied the requirement of the law?”

The address on the issue forms part of the Record of Court to the effect that from the materials attached that the Applicants have fulfilled the requirements under Order 10 Rule 24(1) to allow the court to hold that the third parties in this case are liable to the defendants in respect of the loan facility collected by the defendants from the counter-claimant for the benefit of the third parties.

At the hearing, counsel to the Defendants/Applicants relied on the paragraphs of the supporting affidavit and adopted the submissions in the written address in

urging the court to grant the application and hold that the third parties are liable to them for the indebtedness incurred on their behalf from the counter-claimant.

The third parties/respondents filed in opposition a 35 paragraphs counter-affidavit with two (2) annexures marked as Exhibits PTP1 and TP1 joining issues with the Applicants on issues related to the indebtedness and indeed asserted that they are not privy to any loan contract between defendants and counter-claimant.

A brief written address was filed in which no issue was precisely streamlined but the address which equally forms part of the Record of court is simply to the effect that in view of the challenge or denial of the averments in the affidavit of Applicant, that the claims of the applicant will be better ventilated when parties file their pleadings and lead evidence in support of the contested assertions.

At the hearing, counsel to third parties/respondents similarly relied on the contents of the counter-affidavit and adopted the submissions in the written address in urging the court to refuse the contentions of Applicants and allow parties to lead oral evidence.

I have carefully considered the processes filed and the contrasting submissions made on both sides of the aisle. There appears to be some confusion with respect to the proper remit and application of a third party proceedings. Its correct import must therefore be streamlined.

The late learned author **Fidelis Nwadiolo** in his book **“Civil Procedure in Nigeria”** referred to third party proceedings as **“a special type of joinder, special in the sense that it is only a defendant or a plaintiff who is also a defendant to a counterclaim that can apply for it and the primary purpose of joining a party under it is not for contesting the suit between the original parties but for contesting another new suit, somehow related to the pending one, but between him and the party that joins him.”**

Before delving into the procedure involved in third party proceedings, it is important to note that the joinder of a third party does not ipso facto make the third party a defendant to the main action, but makes him only a defendant vis-à-vis the original defendant. In the case of **Okafor V. ACB Ltd** the court affirmed that the rights of the plaintiff and defendant to the main suit are determined without

reference to the defendant's claim against the third party. It is after these rights have been ascertained that the matter between the defendant and the third party is resolved.

The third party is liable in the action only to the extent of his obligation to the party joining him. **Order 10 Rule 20 of the High Court Civil Procedure Rules of the FCT** is to the effect that the service of the third party notice on a third party makes same a party to the action with the same right of defence against any claim made against him. The import of this is that any dispute as may arise from such joinder remains between the third party and the party making a claim against him, which is the defendant.

The proceedings between the third party and the defendant will still proceed if the main action is struck out or determined. In the same vein, the third party proceedings may be dismissed for want of diligent prosecution even where the main suit is ongoing. The rationale for this position is that the main suit is distinct from the subsequent one emanating therefrom. The Court of Appeal captured this in the case of **Okonkwo V Mode Nig. Ltd** where it stated that 'as a general principle, third party proceedings are basically a contest between the defendant in an action, on the one hand, and the person who is joined to the action at instance of the defendant for the purpose of obtaining contribution, indemnity or other remedy or relief against that person called the third party, on the other hand.'

In the main action, the rights of the plaintiff and the defendant are determined without reference to the defendant's claim against the third party, but when those rights have been ascertained, it is then open to the person brought in as a third party to have all relevant disputes determined between him and the person serving the notice.

Have conceptually clarified the different positions of the main claim vis-à-vis the third party proceeding, let me now move straight to the extant situation where a defendant applies to court for third party directions as to subsequent conduct of the proceedings. The application for direction is asking the court for the course of action to be taken by the parties, and the court is to make any of the orders as provided under:

(a) This application takes the form of a motion on notice, supported with an affidavit and written address, in accordance with the rules of the Court.

During the hearing of the application for directions, the Court may make any of the following orders/directions:

(a) Enter judgment against the third party in favour of the defendant giving notice.

(i) This order is made where the liability of the third party to the defendant is established on the hearing of the application (just as the court determines every other motion brought before it) Order 10 Rule 24 (2) (a).

(b) Order that any issue to be tried between the plaintiff, defendant and the third party be tried.

(i) This order is made where the court is satisfied that there is an issue to try between the plaintiff, the defendant and the third party as to the liability of the defendant to the plaintiff or the liability of the third party to make any contribution or indemnity claimed, in the whole or part, or as to any relief or remedy claimed in the notice by the defendant. Order 10 Rule 24 (2)(b). Therefore, this occurs when the defendant is unable to establish the liability of the third party at the hearing of the application for directions.

(c) Dismiss the action Order 10 Rule 24 (2)(c) i.e. the action between the defendant and the third party.

The Rules of the Court further provide that any of the above directions may be given either before or after any judgment has been entered in favour of the plaintiff against the defendant in an action, and may be varied from time to time or rescinded.

On the state of the contested assertions vide the conflicting depositions in the affidavits of the parties subject of the extant application, it is clear that liability of the third parties cannot be determined or established on the basis of these conflicting documentary evidence. The direction under (a) above cannot be

availing in the circumstances. It is therefore clear to me that the directions to be made by court must be dictated by the facts and justice of each particular case.

In the overall interest of justice, the directions that will accord more with fairness is to:

1. Determine the main substantive claim of the counter-claimants and defendants and then;
2. After a determination of the main claim, then the claims of the defendant to the counter-claim and the third party shall be resolved. The point to reiterate is that the third party is liable in the action only to the extent or his obligation to the party joining him.

The defendant to the counterclaim and the third party should according properly streamline their respective claims and lead oral evidence in proof. That appears to me to be the only fair basis in the circumstances to situate whether contribution, indemnity, or other remedy is availing against the third party.

Finally, I call on all parties in both the main claim and the third party proceedings particularly in view of the age of the case to now act post haste and ensure that this matter is determined with minimum of delay.

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Hon. Justice A.I. Kutigi

Appearances:

1. **Chinasa Maduka for the Counter-Claimant.**
2. **D.S. Dzege, Esq. for the Defendants to the Counter-Claim/Applicant.**
3. **P.C. Ogochukwu, Esq. with N. Akuneto, Esq., T. Onolu, Esq. and K. Ogbulafor, Esq. for the Third Parties/Applicants.**