

**SUPREME COURT OF NIGERIA**  
17TH JULY, 1998, SC. 69/1994.  
**CORAM: A. B. WALI, I. L. KUTIGI, U. MOHAMMED,**  
**S. U. ONU, A. I. IGUH, JJSC.**

BANK OF IRELAND ..... THIRD PARTY/APPELLANT  
AND  
UNION BANK OF NIGERIA LTD. .... DEFENDANT/RESPONDENT  
ESKOL PAINTS (NIGERIA) LTD. .... PLAINTIFF/RESPONDENT

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***JURISDICTION*** - Third Party Notice - Jurisdiction of the High Court over a 3rd party which is resident abroad - The court has jurisdiction.

***JURISDICTION*** - Third Party Notice - Jurisdiction of the Court - Challenged thereof based purely on procedural law - Can be waived - But not when it is a matter of substantive law.

***PRACTICE & PROCEDURE*** - Third Party Notice - Object - The main object of the procedure is to prevent multiplicity of actions.

***PRACTICE & PROCEDURE*** - Third Party Proceedings - Has a life of its own - So that even where the main action has been settled - The 3rd party proceedings may proceed.

***PRACTICE & PROCEDURE*** - Third Party Notice - Procedural requirements - Where the 3rd party has already taken steps in the proceedings - He must be taken to have waived all irregularities in that respect.

***PRACTICE & PROCEDURE*** - Third Party Notice - Defect in service - Once the notice is validly issued - Any defect in service becomes a mere irregularity.

***PRACTICE & PROCEDURE*** - Third Party Notice - Unconditional appearance - Entering of - Indicates an intention to defend the suit.

***PRACTICE & PROCEDURE*** - Appearance - A party who has entered an appearance may at any time withdraw with leave of court - Under Order 29 Rule 1 of the Edo State High Court (Civil Procedure) Rules.

### **FACTS**

The Plaintiff/respondent issued a writ of summons against the defendant/respondent in the Benin High Court seeking for a declaratory order and an order directing the defendant to pay the current value of the sum of \$566,250.00 (US. Dollars) together with interest to the plaintiff. The genesis of the matter is that sometime in 1981 the plaintiff company entered into a contract with another company Kingscourt Construction Group (Export) Limited, Ireland, for the supply of some products at an agreed price. The plaintiff was required to make an advance payment in the sum of \$566, 250.00 (US. Dollars). In line with the prevailing rules of the Central Bank of Nigeria, the plaintiff was required to obtain a guarantee from a reputable bank abroad before the advance payment could be made.

The plaintiff approached the defendant (Union Bank ) its bankers, which then obtained the necessary guarantee from the Bank of Ireland, the 3rd party/appellant. The foreign currency was thereafter remitted by the defendant through the 3rd party to be paid over to the ultimate beneficiary, the Kingscourt Ltd, which has since failed in breach of its contract to supply any goods to the plaintiff. The plaintiff averred that the defendant bank had been negligent in the handling of their contract with them. The defendant denied that and it is holding the 3rd party to its guarantee under which it undertakes to repay the said money. The defendant consequently applied ex parte to the high court to have both the 3rd party and Kings Court Ltd. joined as third parties to the action. The application was granted.

Upon being served with the Third Party Notices, the Bank of Ireland (Third Party) by its learned counsel entered full appearance. He then filed a motion wherein he sought to strike out the 3rd party from the suit or alternatively granting the 3rd party leave to withdraw its appearance in the suit. This motion was later withdrawn and struck out with

costs by the court upon the application made to that effect by the counsel. However, before that day learned counsel had filed another Motion on Notice wherein the 3rd party sought for reliefs similar to those earlier withdrawn and struck out. The application was dismissed by the learned trial judge. Dissatisfied, the 3rd party appealed to the Court of Appeal, Benin Division, which unanimously dismissed the appeal. Still dissatisfied with the judgment of the Court of Appeal, the 3rd party has further appealed to the Supreme Court raising four issues.

**ISSUES FOR DETERMINATION**

*"1. Whether the Edo State High Court could properly exercise jurisdiction over the appellant Bank.*

*2. Whether the Third Party Notice was properly issued and served on the appellant and if not, whether it should have been set aside.*

*3. Whether the fact of entry of Appearance would deprive the appellant of the right to challenge the Court's jurisdiction.*

*4. What principles guide the withdrawal of appearance and whether the Court of Appeal ought to have allowed the Appellants to withdraw its appearance."*

**HELD** (Unanimously dismissing the appeal per lead judgment of KUTIGI, JSC)

***Jurisdiction - Third Party Notice.***

*1. I think it is not true as contended Mr. Mbanefo, SAN., that both the High Court and the Court of Appeal failed to pronounce on the jurisdiction of the High Court over the 3rd party which is resident abroad and carries on no business here. The learned trial judge delivering his ruling said amongst others as follows:-*

*"In considering the submission urged in respect of prayer 1, one must bear in mind the provisions of Order 10 Rule 4. The entire application failed and so were the prayers above. The Court of Appeal in its own judgment said:-*

*"In the ruling of the learned trial judge it is clear that he only adverted to the provisions of Order 10 Rule 4 of the Bendel State Civil Procedure Rules in upholding the order of his learned brother Obi, J.,*

without regard to the provisions of the rules governing joinder of a party upon order of a Third Party Notice. The Court of Appeal thereafter set out in full as well as considered the provisions of Order II Rules 17 (1) and (2) and came to the conclusion that the High Court was right to have dismissed prayer (1) in the application before it. In other words the Court has jurisdiction in the matter. I have read through the Rules above myself, I think both the High Court and the Court of Appeal were right, this being a Third Party Notice application and the defendant which is resident and carries on business within the jurisdiction having made it abundantly clear that it is seeking for:-

" an order that the bank of Ireland do indemnify Union Bank of Nigeria Ltd. wholly for any award made in favour of the plaintiff in this suit against the defendant". (p. 2140 E)

### ***Third Party Notice - object***

2. The main object of the procedure is to prevent multiplicity of actions and prevent the same issues being decided upon in two different proceedings. Therefore where it is not shown that there is an obligation on the part of the 3rd party in law or in equity to indemnify the defendant, then an order will not be made (BENECKE V. FROST (1876) 1 QBD 419). (p. 2142 F)

### ***Third Party Proceedings***

3. In addition 3rd Party proceedings has a life of its own , so that even where the main action has been settled, the 3rd party proceedings already begun may proceed (U.B.A. V. EDIONSERI (1988) 2 NWLR 93). The 3rd party is not a defendant in the main action, but a defendant of the party at whose instance he has been joined (U.B.A. V. EDIONSERI (supra). (p. 2142 H)

### ***Third Party Notice - Procedural requirements***

4. As to the complaint about the non-prescription of the mode of service as well as the non-endorsement of the Third Party Notice as required by the High Court Rules 1988 and the Sheriffs and Civil Process act, the

simple answer is that having regard to the steps already taken in the proceedings by the 3rd Party to wit:-

(1) Causing an appearance to be made by its counsel after being served with the Third Party Notice;

(2) Filing a motion dated 4th November, 1991; B

(3) Withdrawing the said motion which was consequently struck out with costs;

(4) filing another motion dated 6th February, 1992 which was argued and now subject matter of this appeal.

the 3rd Party must be taken to have waived all irregularities in respect of procedural requirements (see EZOMO V. OYAKHIRE (1985) 1 NWLR (Part 2)195; ADEGOKE MOTORS LTD. V. ADESANYA (1989) 3 NWLR (part 109 250). (p. 2143 A) C

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***Third Party Notice - Defect in service***

5. Once the writ or Third Party Notice in this case is validly issued, any defect in service becomes a mere irregularity which can be cured or waived. The Third Party Notice in this case was properly issued with leave of the Court. Validity of the Third Party Notice itself was not an issue here. (p. 2143 D) E

***Third Party Notice - Jurisdiction of the court***

6. I must say that neither the High Court nor the Court of Appeal said anywhere that entry of appearance deprived the 3rd Party of the right to challenge the jurisdiction of the Court. Of course it did not; even though the decision would depend on whether or not the jurisdiction being challenged is purely on procedural law or as a matter of substantive law. The former can be waived but not the latter (RE ORR-EWING (1882) 22 CH.D 456). That issue is therefore not properly before us. I hereby strike it out. (p. 2144 A) F

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***Third Party Notice - Unconditional appearance***

7. By entering an unconditional appearance, counsel gave an indication of the intention to defend the suit and he also submitted to the jurisdiction H

of the court as having waived any procedural irregularity such as the manner of service of the Third Party Notice as distinct from a constitutional or statutory irregularity which can freely be taken up after appearance (RE ORR-EWING, WILKINSON V. BARKING CORPORATION

B (1948) 1 K.B. 721). (p. 2145 A )

***Appearance - May be withdrawn with leave***

8. There is no doubt that under Order 29 Rule 1 of the Edo State High Court (Civil Procedure) Rules (supra), a party who has entered an appearance may at any time withdraw the appearance with leave of court. "Leave" clearly implies authorization of the court. That is how it should be if only (*sic not*) to create chaos and confusion. I hasten to say that whether or not a court will grant leave in any particular case will largely depend on the facts and circumstances of the particular case. Courts will certainly show sympathy in a proper or genuine case of improper or wrong entry of appearance by a party in an action. Normally the appearance entered by Mr. Mbanefo, SAN., will be presumed to be on the instruction of the 3rd party, but if the court is satisfied that the 3rd party had no knowledge of, nor did it give its consent to such appearance, it may vacate such appearance on a proper application (YONGE V. TOYNBEE (1910) 1 K.B. 215). (p. 2145 C)

F **REPRESENTATION**

L. N. Mbanefo, SAN with C. Ozoh for the 3rd Party/Appellant  
Debo Akande, SAN., with L. O. Akhidenor for the Plaintiff/Respondent

G **CASES REFERRED TO**

National Bank Of Nigeria Ltd. V. Shoyoye (1977) 5 SC. 181

Nwabueze V. Okoye (1988) 4 NWLR (Part 91) 664

Craig V. Kansen (1943) 1 KB 256

H Derby Pools Ltd. V. Ocheme (1991) 7 NWLR (Part 203) 323

Skenconsult (Nig) Ltd. V. Ukey (1981) 1 SC. 6

Ndaeyo v. Ogunnaya (1977) NSCC Vol. 25

U.B.A. v. Edionseri (1988) 2 NWLR 93

Olaogun Enterprises Ltd. V. S. J. M. (1992) 4 NWLR (Part 235) 361

Wilkinson v. Barking Corporation (1948) 1 K.B. 721).

Yonge v. Toynbee (1910) 1 K.B. 215).

**LEAD JUDGMENT BY KUTIGI JSC**

B

Sometime in 1981 the plaintiff company entered into a contract with another company Kingscourt Construction Group (Export) Limited, Ireland for the supply of some products at an agreed price. The plaintiff was required to make an advance payment in the sum of \$566,250.00 (US. Dollars). In line with the prevailing rules of the Central Bank of Nigeria, the plaintiff was required to obtain a guarantee from a reputable bank abroad before the advance payment could be made. The plaintiff approached the defendant (Union Bank) its bankers, which then obtained the necessary guarantee from the Bank of Ireland, the 3rd party herein. The foreign currency was thereafter remitted by the defendant through the 3rd party to be paid over to the ultimate beneficiary, the Kings court Ltd. which had since failed in breach of its contract to supply any goods to the plaintiff. It had also failed to refund the money paid. Accordingly, the plaintiff issued a writ of summons against the defendant in the Benin High Court seeking for a declaratory order and an order directing the defendant to pay the current value of the aforesaid sum together with interest to the plaintiff. The plaintiff averred that the defendant bank had been negligent in the handling of their contract with them. The defendant denied that. The defendant is holding the 3rd party to its guarantee under which it undertakes to repay the money herein. It is doubtless therefore that the 3rd party featured prominently in the pleadings of both the plaintiff and the defendant. The defendant consequently applied ex parte to the High Court to have both the 3rd party and Kingscourt Ltd. joined as third parties to the action. The ex-parte motion was heard on 16th May, 1991 and in a considered ruling, the learned trial judge granted the application thus:-

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*"Accordingly, the application is granted as prayed. The proposed third party notices are to issue for service outside jurisdiction within 7 days from today and the defendant thereafter, shall effect service of*

*same together with copies of the writ of summons, statement of claim and statement of defence and other relevant processes, within 14 days of the issue of the said notices. And upon due service, the third parties shall enter an appearance within 30 days of the date of service. Case adjourned to 16th and 17th July, 1991 for hearing."*

Upon being served with the Third Party Notices, the Bank of Ireland (Third Party) by its learned counsel Mbanefo, SAN,. entered full appearance. He then filed a motion dated 4th November, 1991, wherein he sought to strike out the 3rd party from the suit or alternatively granting 3rd party leave to withdraw its appearance in the suit. This motion was later withdrawn and struck out with costs by the court upon the application made to that effect by its counsel, Mbanefo on 9th March, 1992.

Before that day learned counsel had filed another motion on Notice wherein the Third Party sought for reliefs similar to those earlier withdrawn and struck out. It reads:-

*"TAKE NOTICE that this Honourable Court will be moved on Friday the 7th day of February, 1992 at the hour of 9 0' clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the Third Party/Applicant for an order striking out the name of the Third Party /Applicant from the suit and / or setting aside the Third Party Notice and / or Writ served on the Third Party/Applicant or alternatively granting the Third Party/Applicant leave to withdraw its appearance in this suit on the following grounds:*

*1. That the Third Party Notice/Writ served on the Third Party/ Applicant is null and void for no-compliance with the Rules of this Honourable Court as well as the Sheriffs and Civil Process Act concerning service out of the jurisdiction.*

*2. That the alleged cause of action did not arise within the jurisdiction of this Honourable Court.*

*3. That this Honourable Court has no jurisdiction over the Third Party/Applicant who is neither resident nor carrying on business within the jurisdiction whether through an agent or otherwise.*

*4. That the proper place for the defendant to sue the Third Party/*

*Applicant is in the courts of the Republic of Ireland Since any Order made or judgment given by this Honourable Court will be nugatory and unenforceable.*

5. *That the action against the Third Party/Applicant cannot conveniently be tried with the action filed by the plaintiff/respondent in this suit.* B

*AND for such further or other Orders as this Honourable Court may deem fit to make."*

Counter affidavits were filed and arguments were received. In a reserved ruling the learned trial judge dismissed the application with costs against the 3rd Party. The Ruling concluded thus:- C

*"As stated above, the Applicants were brought in by an Order of this Court pursuant to an application for the purposes. After the applicants were served, they formally filed a memorandum of appearance and took the steps set out in paragraphs 4, 5 and 6 of the Further And Better Counter Affidavit set out above in this ruling.* D

*In Katto v. CBN (1991) 9 NWLR the SCN held inter alia as follows:*

15. *"Where there is a breach of the Rules of Court and which E  
breach may amount to an irregularity ..... the complainant must be  
deemed to have waived the said irregularity since he took steps in that  
court.....":*

*(Underlining is mine for emphasis only.)*

*In view of the provisions of Order 10 Rule 4 and the recent F  
decision of the SCN in Katto v. CBN (supra) it cannot be said that the  
ruling of this Court delivered herein on 16/5/91 and attached to the mo-  
tion papers as Exh. 002 is a nullity.*

*Arising from all the above, therefore, this application must fail G  
and it is hereby dismissed with N100.00 costs against the applicant in  
favour of defendant respondent."*

The 3rd Party not satisfied with the ruling of the High Court, Then appealed to the Court of Appeal, holden at Benin. In a unanimous H  
judgment the Court of Appeal dismissed the appeal and confirmed the  
ruling of the trial High Court.

Still dissatisfied with the judgment of the Court of Appeal, the

3rd Party has further appealed to this Court. In compliance with the Rules of Court, the parties filed and exchanged their briefs of argument. These were adopted and relied upon by counsel at the hearing of the appeal. Additional oral submissions were also made at the time.

B In the brief filed on behalf of the 3rd Party, Mr. Mbanefo, SAN., has identified four issues as arising for determination in this appeal as follows:-

- C *1. Whether the Edo State High Court could properly exercise jurisdiction over the appellant Bank.*
- 2. Whether the Third Party Notice was properly issued and served on the appellant and if not, whether it should have been set aside.*
- 3. Whether the fact of entry of Appearance would deprive the appellant of the right to challenge the Court's jurisdiction.*
- D *4. What principles guide the withdrawal of appearance and whether the Court of Appeal ought to have allowed the Appellants to withdraw its appearance."*

E Issues (1) and (2) were argued together, the main contention being whether the Third Party is properly before the Edo State High Court and whether that court has jurisdiction. He said both the High Court and the Court of Appeal failed to make any pronouncement on the issue of jurisdiction of the High Court over the 3rd Party. Instead they preferred to base their decisions solely on the fact that the 3rd party had entered an appearance. He referred to pages 68, 166 and 167 of the record and submitted that even if the 3rd party were deemed to have irrevocably entered appearance in the suit, it is still entitled to challenge the jurisdiction of the court as it is trite law that issues of jurisdiction can F be raised at any stage of proceedings and be determined forthwith. He cited the case of NATIONAL BANK OF NIGERIA LTD. V. SHOYOYE (1977) 5 SC. 181. I agree with this last submission. He contended that because the 3rd Party does not reside in nor carry on business in any part G of Nigeria, no suit can be commenced against it and that being so, the High Court erred in ordering service of 3rd Party Notice on the 3rd Party who is out of jurisdiction. He referred to Order 10 Rule 4, Order 12 Rules 12, 13 and 14 of the Bendel State High Court (Civil Procedure

Rules, 1988. Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria by Aguda, paragraph 5.15 at page 70 and a number of decided cases including NWABUEZE V. OKOYE (1988) 4 NWLR (Part 91) 664; CRAIG V. KANSEN (1943) 1 KB 256; DERBY POOLS LTD. V. OCHEME (1991) 7 NWLR (Part 203) 323; SKENCONSULT (NIG) LTD. V. UKEY (1981) 1 SC. 6; NDAEYO V. OGUNNAYA (1977) NSCC Vol. 25. It was further contended that since no alleged action by the 3rd Party was done within Nigeria because the funds were received in Ireland and paid to an Irish company and that the guarantee was given in Ireland, the 3rd Party could only be sued in Ireland. He said the learned trial judge having failed to advert his mind to the pre-conditions to the issuance of a Third Party Notice out of jurisdiction and having also failed to prescribe the proper procedure for the service of the Third Party Notice, the proceedings are a nullity and should be set aside. That the learned trial judge did not only fail to prescribe any mode of service of the 3rd Party Notice but failed also to endorse it as required by section 97 of the Sheriffs and Civil Process Act cap. 189 of the Laws of the Federation of Nigeria, 1958. It was finally submitted that if the court were to proceed with case, any judgment it might give against the 3rd Party will be unenforceable because Nigeria has no reciprocal judgment enforcement agreement with Ireland.

Responding Chief Debo Akande, SAN., learned counsel for the plaintiff submitted that all the necessary pre-conditions prescribed for the issuance of the Third Party Notice were complied with. He said because the contract was made within the jurisdiction of the trial High Court any claim for damages arising from its breach is also within the jurisdiction of the Court. He referred to Order 12 Rule 13 of the Edo State High Court (Civil Procedure) Rules, 1988. That it was necessary to make the 3rd Party a party to the action so that it should be bound by the result of the action and the questions to be settled. That courts have a duty to do justice to all the parties in any matter before them without undue regard to technicalities. He cited in support the cases of PEENOK INVESTMENT LTD. V. HOTEL PRESIDENTIAL LTD. (1982) 12 SC. I; GREEN V. GREEN (1987) 2 NWLR (Part 61) 480; ODUA INVEST-

2140 Bank of Ireland v. Union Bank (1998) 7 KLR Kutigi JSC  
MENT CO LTD. V. TALABI (1991) 1 NWLR (Part 170) 761.

B It was further submitted that since the plaintiff placed the order  
for goods in Benin and effected payment through the defendant bank in  
Benin, the cause of action must therefore have arisen in Benin. It there-  
fore did not matter whether the 3rd Party was not resident nor carried on  
business in Benin and the cases of NWABUEZE and NDAEYO (supra)  
relied on by the 3rd party would not help it. That there is no law which  
said a foreign company cannot be sued in this country where the cause  
C of action as in this case arose in Nigeria. He referred to Order 10 Rule 4  
of the High Court Rules and to the case of OLAOGUN ENTERPRISES  
LTD. V. S. J. M. (1992) 4 NWLR (Part 235) 361, to the effect that a suit  
can in fact be commenced in any of the jurisdictions of one of the defen-  
dants where the defendants are more than one as in this case. He said a  
D judgment given in this country and registered in England or Ireland has  
always been enforceable and there is no basis to hold that joinder will be  
useless because the judgment will be unenforceable in Ireland

I begin by warning myself that being an interloctory appeal, I  
E must avoid making any comment or observation in the judgment which  
might appear to prejudge the issue or issues yet to be tried in the substan-  
tive suit before the trial High Court. I therefore intend to be as brief as I  
can.

F **I think it is not true as contended by Mr. Mbanefo, SAN.,  
that both the High Court and the Court of Appeal failed to pro-  
nounce on the jurisdiction of the High Court over the 3rd party  
which is resident abroad and carries on no business here. The  
learned trial judge delivering his ruling said amongst others as fol-  
G lows:-**

*"In considering the submission urged in respect of prayer 1,  
one must bear in mind the provisions of Order 10 Rule 4 which is as  
follows:-*

H *"4 All other suits shall be commenced and determined in the  
Judicial Division in which the defendant resides or carries on business  
or in which the cause of action arose. If there are more defendants than  
one resident in different Judicial Divisions, the suit may be commenced*

in any one of such Judicial Divisions: subject however to any order which the Court may, upon the application of any of the parties, or on its motion, think fit to make a view to the most convenient arrangement for the trial of such suit."

(Underling is mine for emphasis only) As stated above, the applicants were brought in by an order of this court pursuant to an application for the purpose."

Needless to repeat that the applicant's prayers before the High Court were for:-

"an order striking out the name of the 3rd Party/Applicant from the suit and/or setting aside the Third Party Notice and/or writ served on the Third Party Applicant, or alternatively granting the Third Party/Applicant leave to withdraw its appearance in this suit."

**The entire application failed and so were the prayers above. The Court of Appeal in its own judgment said:-**

**"In the ruling of the learned trial judge it is clear that he only adverted to the provisions of Order 10 Rule 4 of the Bendel State Civil Procedure Rules in upholding the order of his learned brother Obi, J., without regard to the provisions of the rules governing joinder of a party upon order of a Third Party Notice. It is my view that the learned trial judge ought to have considered the application in the light of the provisions of the Rules governing the order of a Third Party Notice on a person who was not already a party to the suit."**

**The Court of Appeal thereafter set out in full as well as the considered the provisions of Order II Rules 17 (1) and (2) and came to the conclusion that the High Court was right to have dismissed prayer (1) in the application before it. In other words the Court has jurisdiction in the matter. Order II Rule 17 (1) and (2) read:-**

**"(1) Where in any action a defendant claims as against any person not already a party to the action (in this section called "the third party")**

**(a) that he is entitled to contribution or indemnity or;**

(b) that he is entitled to any relief or remedy relating to, or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and defendant but also as between the plaintiff and defendant and the third party or between any or either of them; the court or a judge in Chambers may give leave to the defendant to issue and serve a third party notice.

2. The Court or a Judge in Chambers may give leave to issue and serve a third party notice on an ex parte application supported by affidavit, or where the court or judge in Chambers directs a summons to the plaintiff to be issued upon the hearing of the summons: provided that leave shall not be granted in cases where the action was begun and an order for pleadings made before the date of the commencement of these rules."

I have read through the Rules above myself, I think both the High Court and the Court of Appeal were right, this being a Third Party Notice application and the defendant which is resident and carries on business within the jurisdiction having made it abundantly clear that it is seeking for:-

"an order that the bank of Ireland do indemnify Union Bank of Nigeria Ltd. wholly for any award made in favour of the plaintiff in this suit against the defendant."

The main object of the procedure is to prevent multiplicity of actions and prevent the same issues being decided upon in two different proceedings. Therefore where it is not shown that there is an obligation on the part of the 3rd party in law or in equity to indemnify the defendant, then an order will not be made ( BENECKE V. FROST (1876) 1 QBD 419). In addition 3rd Party proceedings has a life of its own , so that even where the main action has been settled, the 3rd party proceedings already begun may proceed ( U.B.A. V. EDIONSERI (1988) 2 NWLR 93). The 3rd party is not a

defendant in the main action, but a defendant of the party at whose instance he has been joined (U.B.A. V. EDIONSERI (supra)).

As to the complaint about the non-prescription of the mode of service as well as the non-endorsement of the Third Party Notice as required by the High Court Rules 1988 and the Sheriffs and Civil Process act, the simple answer is that having regard to the steps already taken in the proceedings by the 3rd Party to wit:-

(1) Causing an appearance to be made by its counsel after being served with the Third Party Notice;

(2) Filing a motion dated 4th November, 1991;

(3) Withdrawing the said motion which was consequently struck out with costs;

(4) filing another motion dated 6th February, 1992 which was argued and now subject matter of this appeal.

the 3rd Party must be taken to have waived all irregularities in respect of procedural requirements (see EZOMO V. OYAKHIRE (1985) 1 NWLR (Part 2)195; ADEGOKE MOTORS LTD. V. ADESANYA (1989) 3 NWLR (part 109 250). Once the writ or Third Party Notice in this case is validly issued, any defect in service becomes a mere irregularity which can be cured or waived. The Third Party Notice in this case was properly issued with leave of the Court. Validity of the Third Party Notice itself was not an issue here.

The Court of Appeal I believe was also right when it said on page 166 of the record thus:-

*"Having so held, I am also of the view that the other matters raised for objecting to the jurisdiction of the court are matters which have to be decided by the trial court after hearing evidence in the suit as between the appellant and the 1st respondent."*

A careful look at the 3rd Party's motion papers before the High Court would show that issues like whether or not the cause of action arose within jurisdiction or whether or not the 3rd Party or its agent carries on business here or not are still issues to be decided on hearing evidence from the parties. Enough of that.

Issue (1) and (2) therefore fail.

The 3rd and 4th issues were also argued together since they both relate to the effect of the entry of appearance by the 3rd Party. **I must say that neither the High Court nor the Court of Appeal said anywhere that entry of appearance deprived the 3rd Party of the right to challenge the jurisdiction of the Court. Of course it did not; even though the decision would depend on whether or not the jurisdiction being challenged is purely on procedural law or as a matter of substantive law. The former can be waived but not the latter (RE ORR-EWING (1882) 22 CH.D 456). That issue is therefore not properly before us. I hereby strike it out.** The learned counsel for the 3rd Party contended that the appearance herein was done in this case in order to avoid having judgment in default entered against it and in order to enable it to challenge the jurisdiction of the court. That the defendant having suffered no prejudice thereby, the 3rd party was entitled to withdrawal of its appearance as provided under order 29 Rule 1 which reads:-

*"A party who has entered an appearance in an action may withdraw the appearance at any time with leave of the court."*

He referred to page 105 of the record and to paragraphs 4, 5 and 6 of the Further Counter Affidavit and submitted that the 3rd Party cannot be said to have taken any step in the proceedings. He referred to the cases of EZOMO V. OYAKHIRE (supra) and ADEGOKE MOTORS LTD. V. ADESANYA (supra). He said the fact of entering appearance was a mistake and that it did not mean an irrevocable intent to submit to the jurisdiction of the court. This last point on mistake is clearly an afterthought as it is not among the five grounds listed before the High Court for making an application (see above). It will therefore be discounted by me.

Responding Chief Akande referred to Order 29 Rule 1 (supra) and submitted that leave of court implies authorization by the court. There is therefore no unconditional right to withdraw appearance once entered, and therefore the court is bound to take into cognizance the justice of the case. He referred to page 53, lines 3-6 and lines 21-23 and said the courts rightly refused to grant leave to the 3rd party to withdraw appearance.

The appearance in this case is unconditional and not a conditional one which would have shown from inception that the 3rd party was coming on protest to contest jurisdiction. I think, Chief Akande is right here. **By entering an unconditional appearance, counsel gave an indication of the intention to defend the suit and he also submitted to the jurisdiction of the court as having waived any procedural irregularity such as the manner of service of the Third Party Notice as distinct from a constitutional or statutory irregularity which can freely be taken up after appearance** (RE ORR-EWING, WILKINSON V. BARKING CORPORATION (1948) 1 K.B. 721). B C

There is no doubt that under Order 29 Rule 1 of the Edo State High Court (Civil Procedure) Rules (supra), a party who has entered an appearance may at any time withdraw the appearance with leave of court. "Leave" clearly implies authorization of the court. That is how it should be if only (sic not) to create chaos and confusion. I hasten to say that whether or not a court will grant leave in any particular case will largely depend on the facts and circumstances of the particular case. Courts will certainly show sympathy in a proper or genuine case of improper or wrong entry of appearance by a party in an action. Normally the appearance entered by Mr. Mbanefo, SAN., will be presumed to be on the instruction of the 3rd party, but if the court is satisfied that the 3rd party had no knowledge of, nor did it give its consent to such appearance, it may vacate such appearance on a proper application (YONGE V. TOYNBEE (1910) 1 K.B. 215). D E F

In the instant case the learned trial judge had said in considering the application for leave to issue the Third Party Notice that: - G

*"I am of the firm conviction that there is a one common question that runs through the substantive action between the plaintiff and the defendant on the one hand, and the action as formulated in the proposed Third Party motion on the other .....* H  
*It seems to me therefore that, that common question is best settled once and for all if the 1st Third Party is allowed in."*

So, let it be.

I am of the firm view that the lower courts were right when they refused to accede to the prayer of the 3rd Party to withdraw its appearance at the stage they did. Issue (4) therefore fails.

All the issues having failed, the appeal must also fail. It is accordingly dismissed with Ten Thousand Naira (N10,000.00) costs to the plaintiff.

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**WALI JSC**

I have the privilege of reading in advance the lead judgment of my learned brother Kutigi, JSC and with which I agree.

For the same reasons advanced in the lead judgment, I also hereby dismiss the appeal with N10,000 costs to the respondents.

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**MOHAMMED JSC**

I agree that this appeal has failed. The lower courts were right to hold that the Third Party/Appellant cannot withdraw from the unconditional appearance it put up before the trial High Court when it was served with a Writ of Summons. I therefore dismiss this appeal as has been done by my learned brother, Kutigi JSC, in the lead Judgment just read. I have had the privilege to read the draft of the judgment before now. I also award N10,000.00 as costs to the Plaintiff/Respondent.

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**ONU JSC**

I was privileged to read the judgment just delivered by my learned brother Kutigi, JSC in draft and I agree with him that the appeal lacks substance and therefore fails.

What ought to be remembered in this matter in the first place is that it is an interlocutory appeal and the less said about the merits thereof the better at this stage.

Secondly, while it is true that there is or has been a tendency by especially, the defendant/respondent to rely on the fact of entry of ap-

pearance by the third party/appellant as enough pivot to invest in the trial court and a fortiori the Court of Appeal, with jurisdiction to hear the case, the very fact that the question of jurisdiction can be raised at any stage of the proceedings, makes the defendant/respondent's contention in this regard a non-issue.

For, it is trite law that once the question of jurisdiction is raised at any stage of the proceeding, it must be specially dealt with and resolved. See Kasikwu Farms Ltd .v. A.G of Bendel State (1986) 1 NWLR (part 19) 695 and National Bank of Nigeria v. Shoyoye (1977) 5 SC. 181. The Third party/Appellant contends by arguing that it does not reside in nor carry on business in any party of Nigeria and so the High Court had erred by effecting Third Party Notice on it when it is clear that it is outside its jurisdiction vide Order 10 Rule 4, Order 12 Rules 12, 13 and 14 of the Bendel State High Court (Civil Procedure Rules, 1988; Practice and Procedure of the Supreme Court, Court of Appeal and high Courts of Nigeria by Aguda, paragraph 5.15 at page 70 and several cases including Nwabueze v. Okoye (1988) 4 NWLR (part 91) 664; Craig v. Kansen (1943)1 K.B. 256; Derby pools Ltd v. Ocheme (1991)7 NWLR (part E 203) 323; Skenconsult (Nig.) Ltd. v. Godwin Sekondy Ukey (1981)1 SC.6 and Ndaeyo v. Ogunnaya (1977) NSCC vol. 25

What all these submissions on behalf of the Third Party/Appellant overlook are:

(i) that it is premature to raise objection to its liability albeit that the contention that it had entered appearance and so was bound in the Third Party procedure, is invalid and not sustainable.

(ii) The objects of Third Party procedure or Notice being aimed at preventing multiplicity of proceedings and the possibility of the same questions being litigated twice (see Standard Securities Ltd v. Hubbard (1967) Ch. 1056 at 1059) it is best to settle all matters in controversy once and for all. It ought to be noted in addition, that the procedure applies not only to cases of contribution and indemnity but also to cases where any relief or remedy claimed by the defendant relates to or is connected with the original subject matter of the action and is substantially the same as some relief or remedy claimed by the plaintiff and to

cases where any question or issue which relates to or is connected with the original subject matter of the action, should be determined not only as between the plaintiff and the defendant but as between either or both of them and the Third Party. See Chatsworth Investment Ltd. v. Amoco

B (U.K.) Ltd. (1968) Ch.665, C.A.)

(iii) The need to make the 3rd party a party to the proceedings in the overriding need for the third party to be bound by the ultimate result of the action and the questions to be settled or resolved are prime considerations vide Peenok Investment Ltd. v. Hotel Presidential Ltd. (1982) 12 SC. 1; Green v. Green (1987) 2 NWLR (part 61) 480; Odu'a Investment Co. Ltd .v. Talabi (1991)1 NWLR (part 170)761 and Governor of Oyo State v. Folayan (1995) 8 NWLR (part 413) 292.

D (iv) Besides, the provisions or Order 11 Bendel State (Civil Procedure) Rules, 1988 (ibid) allow for third party procedure in Rules 12 (1) and (2) in pari materia with the English RSC order 16) are relevant and applicable as follows:

E *"(1) Where in any action a defendant claims against any person not already a party to the action (in this section called "the Third Party")*

*(a) that he is entitled to contribution or indemnity or;*

*(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or*

F *(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question on the issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and defendant and the third party or between either of them; the court or Judge in Chambers may give leave to the defendant to issue and serve a third party notice.*

G *(2) The Court or Judge in Chambers may give leave to issue and serve a third party notice on an ex parte application supported by an affidavit, or where the Court or Judge in Chambers directs a summons to the plaintiff to be issued upon the hearing of the summons: provided that leave shall not be granted in cases where the action was begun and an order for pleadings made before the date of the commencement of these*

*rules."*

See also Bullen and Leake and Jacob's Precedents of pleadings, Twelfth Edition by I.H. Jacob's at page 1365.

The issue that the place of transaction is in Ireland being premature and a matter to be canvassed at the trial, I deem it unnecessary to B consider now.

It is for these reasons proffered by me and the more detailed ones set out in the leading judgment of my learned brother Kutigi, JSC that I too, dismiss this appeal and make the same consequential orders C inclusive of costs.

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### **IGUH JSC**

I have had the privilege of reading in draft the leading judgment D just delivered by my learned brother, Kutigi J.S.C. and I am in total agreement with him that this appeal lacks substance and ought to fail.

Accordingly, I too, dismiss the same and abide by the consequential orders, including those as to costs, therein made. E

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