

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CP. 237/92

BETWEEN : MISA FONI REIZLAFF of Puipala,
Barrister & Solicitor

INTENDED THIRD PARTY

A N D : LEVABLA SAMUELI LAI
Solicitor

DEFENDANT

A N D: TITO SIMO'0 TE'0 of Vaie'e
Safata

PLAINTIFF

Counsel : T. Malifa for intended third party
in support
K. Sapolu for defendant to oppose
P. Fepulea'i for plaintiff

Hearing : 14 December 1992

Judgment : 15 June 1993

JUDGMENT OF SAPOLU, C.J.

As it will appear in the course of this judgment, this judgment will be an interim judgment.

What the intended third party (hereinafter referred to as "the third party") is really applying for in this case, is for the Court to refuse the application by the defendant for leave to issue and serve a third party notice on the third party. The grounds relied on in the application for refusal of leave are that the defendant's application for the issue and service of a third party notice discloses no cause of action and is speculative, frivolous and vexatious. The application for refusal of leave was supported by affidavits.

The defendant on the other hand purported to file his application for a third party notice pursuant to Rule 43 of the Supreme Court (Civil Procedure Rules) 1980. The grounds on which the defendant's application is based resembles to a certain degree the grounds for a third party notice application set out in Rule 43.

The Court has done much research on the applications by both the third party and the defendant. That research work will not be reflected in this judgment but has accounted to a certain degree for the delay in delivering this judgment. However, it is in the course of that research that it occurred to the Court that, much if not all of the difficulties confronted and raised by the third party to the defendant's application, stem from the fact that the defendant's application for a third party notice does not comply with the requirements of Rule 43.

Rule 43(4) provides:

"The (third party) notice shall be in the Form 4 and shall state the nature and grounds of the claim or the nature of the question or issue sought to be determined, and the nature and extent of any relief or remedy claimed".

Form 4, the prescribed form for a third party notice, then sets out the matters which a defendant may claim in a third party notice and requires the defendant to state the grounds on which his claim is based. It appears from the contents of form 4 that the defendant has to inform and put the third party on notice as to the nature of the claim against him as well as the grounds for that claim. The third party notice in this case does not comply with form 4 as provided by Rule 43(4).

Is this non-compliance by the defendant with Rule 43(4) fatal to its application?

Rule 202 provides:

"Non-compliance with any of these rules shall not render the proceedings void, but the proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and on such terms as the Court may deem just".

I realise that the defendant's non-compliance with the Rules in this case is non-compliance as to form. I also realise that the third party has not suffered any undue prejudice which could not be cured by costs as a result of the defendant's non-compliance with the Rules.

In the circumstances, I will set aside the defendant's third party notice of 1 October 1992 and order the defendant to file within 10 days a third party notice as required by Rule 43.

The question of costs on the application by the third party is reserved. This case is adjourned to 28 June 1993 for re-mention.

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CHIEF JUSTICE