



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

SUIT NO.296 OF 2010

MARTIN MWANGI NYUTHO (the administrator of the estate of the late

BENSON NYUTHO MWANGI).....PLAINTIFF

-VERSUS-

ALKASON TRANSPORTERS LTD.....1ST DEFENDANT

MOSES NJEHIA.....2ND DEFENDANT

-AND-

METROPOLITAN CANNON INSURANCE

(Formerly CANNON ASSURANCE (K) LIMITED).....THIRD PARTY

R U L I N G

1. The subject of this **Ruling** is the **Chamber Summons** application dated **16th February, 2022** brought under the provisions of **Rule 22** of the **Civil Procedure Rules, 2010** and **Section 10(1)** of the **Insurance (Motor Vehicles Third Party Risks) Act Cap 405** of Laws of Kenya. It seeks for the following orders:-

a) That the claim between the Plaintiff as against the 1st Defendant and the claim between the 1st Defendant and the Third-Party for indemnity be determined concurrently at the hearing of the suit.

b) That costs of the application abide the outcome of the Third-party proceedings.

2. The application is premised on eleven (11) grounds on its face which are further explicated in the **Supporting Affidavit** of the 1st Defendant's Director, **Mohammed Abubakar**.

3. In a brief summary, the 1st Defendant's case is that it took out a **Third-Party Insurance Policy Cover** with the Third Party Insurance Company effective from **27th March, 2007** which and subsisted all the way to **26th March, 2009**. However, on **6th December, 2008** while the policy was still in force, the 1st Defendant's insured vehicle was involved in a road traffic accident and the end result was that multiple suits were filed against the Defendant with respect to the said accident. The 1st Defendant then notified its insurer who is the third party herein of the accident but vide a **letter** dated **9th October, 2009**, the Third Party turned down the request to take up the matter on grounds that the 1st Defendant was in breach of the policy. Indeed, the third party instituted a Declaratory suit in **HCCC No.925 of 2009** seeking to avoid the policy but the said suit was dismissed vide a **Judgment** dated **22nd June, 2017**.

4. Further, the 1st Defendant adds that pursuant to **Order 38, Rule 1** of the **Civil Procedure Rules**, a test suit was selected in the series of the suits filed against it. On **25th February, 2015**, the court determined liability in the test suit in the ratio of **60:40** as between the 1st and the 2nd Defendants respectively. Thereafter, the 1st Defendant successfully sought leave to issue a **Third Party Notice** upon the Third-Party herein and it maintains that the Third-Party has a statutory duty under **Section 10(1)** of the **Insurance (Motor Vehicle Third Party Risks) Act** to satisfy the claims arising out of this suit and indemnify it of the expenses thereto. It is averred that if the suit against the 1st Defendant on

quantum is heard together with the suit against the third party on indemnity it will save on judicial time and avoid a multiplicity of suits.

5. The Third Party opposed the application on basis of the affidavit sworn by its legal officer, **Esther Waiya**. She maintained that the third party had issued to the 1st Defendant the policy to cover losses which may occur in carriage of its own goods but not the kind of losses incurred with respect to the present suit. That whereas the Plaintiff's claim is founded on the tort of negligence, the 1st Defendant's claim against the third party is based on the contract of insurance policy and there is therefore no nexus between the two claims for an order of joinder to issue. Given that the Plaintiff was not privy to the insurance contract, the third party proceedings are misjoinder to this suit.

6. The deponent further averred that the Third Party's statutory duty under **Section 10(1)** of the **Insurance (Motor Vehicles Third Party Risks) Act** can only arise once Judgment has been delivered on both liability and quantum. Therefore, since the final Judgment is yet to be delivered in this matter, the Third Party's obligation is yet to arise.

7. The application was canvassed by way of oral submissions on the **14th March, 2022** with **M/S Agwata** appearing for the Applicant and **M/s Mshila** appearing for Respondents. I have considered those submissions and they reiterate each party's respective position as summarized above and I do not wish to reiterate the same here.

Analysis and Determination

8. Having carefully considered the application, the affidavits sworn in support and opposition of the same as well as the oral submissions by the parties' respective counsel and the authorities relied on by **M/S Mshila**, counsel for the Third Party, I find that the key issue for determination is whether the claim by the 1st Defendant against the Third Party can be heard jointly with the Plaintiff's claim.

9. In my understanding, a third party proceeding is the converse of a Counter-claim or a set off and it ought to be an action involving the Plaintiff's claim taken by the Defendant for contribution or indemnity against the Third Party. Ideally, the cause of action in the Third Party proceedings must be similar to the main action founding the Plaintiff's claim. In such circumstance, it would be in the interest of justice, and for saving on judicial time, that the Third Party proceedings are heard in contemporaneity with the main action. Can such directions issue in circumstances of the present case? The answer lies on the facts of the case and one of the undisputed facts is that the Plaintiff's claim is premised on the tort of negligence and both Defendants in this case have already been found liable for the accident in question.

10. In that respect, the 1st Defendant claims that its portion of liability should be borne by the Third Party by virtue of the third party insurance policy issued to it by the Third Party. In the plain eyesight therefore, the claim by the 1st Defendant is premised on the insurance policy which guarantees its right to indemnity in line with **Section 10** of the **Insurance (Motor Vehicle Third Party Risks) Act**. That Section provides as follows:-

“If, after a policy of insurance has been effected, Judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (Being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the Judgment any sum payable thereunder in respect of the liability; including any amount payable in respect of costs and any sum payable in respect of interest or that sum by virtue of any enactment relating to interest on Judgments”

11. In deliberating on a similar issue, the court in the case of **Laichard Shah & Another –vs- Kenindia Insurance Company Limited [2005] eKLR** rightfully stated thus:-

“The insurance company according to Law are never enjoined as a party in a tort suit. This is because the cause of action against an insurance company arises after liability and quantum has been determined by a court of law. All the party suing requires to do before trial is to issue a statutory notice to the insurance company to notify them that a suit will be filed against their insured where the tort case is finalized and there is no pending appeals, review application and any issues. The insurance company on behalf of its insured would be obliged to pay. If it fails to do so, the plaintiffs are to file a declaratory suit in the High Court seeking for the court to pronounce that they are owed the award”

12. I wholly concur with the above decisions because in terms of **Section 10** of **Insurance (Motor Vehicle Third Party Risks) Act** reproduced above, the Insurance Company is only liable in respect of any insurance policy to pay a specified sum to the persons entitled to the benefit of a Judgment against the insured. It is only until the Insurance Company fails to pay the sums specified in the Judgment that a cause of action can lie against it.

13. In the premises, since the final Judgment encompassing both liability and quantum is yet to be delivered in this matter, it would be premature to proceed with an action against the Insurance Company for indemnity as the 1st Defendant proposes. In view of that, I agree with the Third Party's counsel's submissions that until the delivery of Judgment on Liability and Quantum, the Insurance Company is under no obligation to pay any money to indemnify the 1st Defendant. Such proceedings can only be taken up after the Judgment is delivered.

14. In the upshot, I find no merit in the **Chamber Summons** application dated **16th February, 2022** which I hereby dismiss with no orders to costs.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED and SIGNED at NAIROBI this 24th DAY OF MARCH, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Agwata counsel for 1st Defendant/Applicant

Mr. Safari counsel holding brief for M/S Mshilla counsel for 3rd Party

Court Assistant - Adika