



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 296 OF 2010
MARTIN MWANGI NYUTHO.....PLAINTIFF
V E R S U S
ALKASONS TRANSPORTERS LIMITED.....1ST DEFENDANT
NJEHIA SAMUEL.....2ND DEFENDANT

RULING

The Plaintiff herein has applied by **notice of motion dated 11th March, 2015** for judgment on liability in this suit to be entered in terms of the judgment delivered on **26th February, 2015** in the **“test suit” (Nairobi HCCC NO. 166 OF 2009)**, whereupon the liability was determined at 40% against the 2nd Defendant and 60% against the 1st Defendant.

The 1st Defendant has opposed the application by **replying affidavit filed on 5th June, 2015**. It is sworn by **Mohamed Abubakar**, the 1st Defendant’s director. Grounds of opposition include -

- i. That it has lodged HCCC No. 925 of 2009 whereby it claims indemnity from its insurer in terms of its contractual obligations with regards to that Judgement.
- ii. That formal proof proceedings should be held in abeyance until that suit is formally heard and decided.
- iii. That a notice of appeal has been duly lodged against the apportionment of liability in the judgment in the test suit and hence proceedings herein should wait for that appeal to be heard and determined.

Submissions of the learned counsels appearing were filed and authorities cited.

It is conceded that the judgment in the test suit has been challenged and notice of appeal in that regard lodged. However, it has not been shown whether execution of the decree flowing from that judgment was stayed pending disposal of the intended appeal.

The other matter mentioned by the 1st Defendant where it is pursuing its insurer has no effect on this and

other matters related to the liability of the 1st Defendant as it involves performance of the contract between it and the insurer.

In the circumstances I hold that it is appropriate to grant the reliefs sought. Accordingly this application is allowed. As the stay barring this matter from proceeding was lifted when Judgement on liability was proclaimed, it should now proceed to formal proof.

Costs shall be in the cause.

It is so ordered.

Dated and delivered at Nairobi this 22nd Day of October, 2015.

A.MBOGHOLI MSAGHA

JUDGE