



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO. 47 OF 2001

KIMAYUE ARAP TAITO PLAINTIFF
VERSUS
JOSEPH KIPKOECH CHEPKWONY 1ST DEFENDANT
NATIONAL BANK OF KENYA LTD 2ND DEFENDANT

RULING

The application herein is premised on **Order 1 Rule 14**. The Rule applies only to cases where the defendant claims to be entitled to contribution or to indemnity against a Third Party. The Right to damages is not, in law, a right to indemnity. Where a Third Party is not liable to be sued by the Plaintiff, Third Party proceedings cannot be said to be proper.

The 1st Defendant in this suit, **Joseph K. Chepkwony**, seeks leave that the 2nd Defendant be granted leave to issue a Third Party Notice on the District Land Registrar at Kericho and the Attorney General of the Republic of Kenya. David Otieno & Co. Advocates went on record for the 2nd Defendant (**National bank of Kenya Ltd**) on 4th July, 2001. They filed defence for the 2nd Defendant on 9th July, 2001. They were replaced by Otieno Ragot & Co. Advocates on 20th June, 2003.

On perusal of the file, I observe that the 1st Defendant has not appeared or filed defence hitherto.

The application for leave to issue a Third Party Notice is made by counsel on record for the 2nd Defendant who purports to be acting for the 1st Defendant and seeks leave that the 2nd Defendant be granted leave to issue Third Party Notice. Otieno Ragot & Co are still the advocates for the 2nd Defendant. While the Plaintiff has repeatedly changed his advocates, the 1st Defendant does not appear to have entered appearance and no advocate has gone on record as representing him. The reference by Messrs Otieno Ragot & Company Advocates in the Chamber Summons (dated 15th July, 2010) to “... **On the hearing of an application by counsel for the 1st Defendant for orders that ...**” is misleading because Otieno Ragot & Co are not the advocates on record for the 1st Defendant. As advocates for the 2nd Defendant, they can only make the application on behalf of the 2nd Defendant. But it is not for the 1st Defendant, even if he had entered appearance, to seek leave on behalf of the 2nd Defendant. To the extent to which the 1st Defendant is said to be the party applying for leave for the 2nd Defendant to issue a Third Party Notice, the application is defective.

Moreover, not having entered appearance, the 1st Defendant is not entitled to participate in the proceedings. To this extent also, the application is defective.

Under **Order 1 Rule 14**, it is the Defendant who claims to be entitled to contribution or indemnity who is entitled to apply for leave to issue a Third Party Notice. Although one **Damaris Gitonga** who avers that she is the “Manager- Legal Services” of the 2nd Defendant has sworn an affidavit (on 15th July, 2010) in support of the application, the application itself clearly shows that it is the 1st Defendant who has applied for leave (for the 2nd Defendant to issue the Third Party Notice). In the circumstances, the application is flawed and is defective as it does not conform with **Rule 14 of Order 1** which requires the particular Defendant wishing to claim contribution or indemnity to (itself) apply for leave.

Moreover, the circumstances stated in the application as the basis for the leave to issue a Third Party Notice do not show to my satisfaction that there exists evidence and material on which it can be said that

the 2nd Defendant is entitled to indemnity or contribution. I started in this ruling by stating that a claim for damages does not entitle a Defendant to seek indemnity or contribution. No doubt if the 2nd Defendant were to find that the security it got from the 1st Defendant was bad security in that the title was not that of the 1st Defendant or was fraudulently obtained, a claim for damages would probably lie. But this is not a matter for my decision now. Suffice it to state that the issue of contribution or indemnity would not arise. I am not also satisfied that **Rule 14A of Order 1** has been satisfied.

In these circumstances I decline to grant the leave sought by the 1st Defendant on behalf of the 2nd Defendant to issue the Third Party Notice. I hereby strike out the application as incompetent.

DATED at KERICHO this 29th day of July, 2010

G.B.M. KARIUKI, SC

RESIDENT JUDGE

COUNSEL APPEARING

D. Otieno Advocate for the 2nd Defendant

W. O. Gai Advocate for the Plaintiff

N/A by the 1st Defendant