



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 57 of 2006**

**MJENGO LIMITED..... PLAINTIFF**

**VERSUS**

**KENYA ORIENT INSURANCE LTD..... DEFENDANT**

**BTB INSURANCE BROKERS LIMITED.....THIRD PARTY**

**R U L I N G**

The plaintiff claims from the defendant the sum of KShs.3,013,709.00 being the amount due and owing to the plaintiff from the defendant on account of loss suffered by the plaintiff which loss was covered by insurance policies issued by the defendant. Interest on the said sum is also claimed. It is averred in paragraph 7 of the plaint that to indemnify the plaintiff the defendant duly prepared and forwarded Discharge Vouchers in respect of the said loss suffered by the plaintiff who executed and returned the same to the defendant but the defendant has wrongfully and in breach of the terms of the said policies failed to pay the plaintiff the said sum of KShs.3,013,709.00 being the assessed loss suffered.

The defendant denies the claim but without prejudice avers that all the claims made by the plaintiff were settled through credit notes issued to BTB Insurance Brokers Limited who were the plaintiff's brokers/agents and against whom it would seek indemnity. In the reply to the said defence the plaintiff avers inter alia that if the defendant settled the said claim through credit notes to the said BTB Insurance Brokers then the same was without the express authority and/or consent in writing of the plaintiff and the defendant had no right to credit the account of the said insurance brokers and its actions were improper and illegal.

On 7.6.2006, the defendant was granted leave to serve a 3<sup>rd</sup> party notice upon the said B.T.B. Insurance Brokers Limited which was done and the 3<sup>rd</sup> Party entered appearance on 26.6.2006. On 14.7.2006 the defendant lodged an application by way of chamber summons under Order 1 Rule 18 of the Civil Procedure Rules seeking primarily that the question of liability of the said 3<sup>rd</sup> Party to indemnify the defendant be determined simultaneously with the question of the defendant's liability to the plaintiff. It is that application that was canvassed before me on 25.9.2006.

The application is based on one ground that it is fair and just that the issue of liability be determined between all the parties simultaneously. The application is supported by an affidavit sworn by James Gitau Singh Counsel for the defendant. It is deponed in that affidavit that the defendant has legitimate claim against the 3<sup>rd</sup> party B.T.B. Insurance Brokers Limited and it is fair and just that directions be given pursuant to Order 1 Rule 18 of the Civil Procedure Rules.

The application is opposed and there are Grounds of Opposition filed by the advocates for the plaintiff and the 3<sup>rd</sup> party. The position taken by both the plaintiff and the 3<sup>rd</sup> Party is that the claim by the plaintiff against the defendant is distinct from the defendant's claim against the 3<sup>rd</sup> party and should be tried separately. The plaintiff contends that the discharge vouchers prepared by the defendant and duly executed by the plaintiff clearly indicated that payments were to be made to the plaintiff directly and the plaintiff did not advise the defendant that the 3<sup>rd</sup> party was authorized by it to receive any monies owed to it by the defendant. In the premises the issue of liability arising between the plaintiff and the 3<sup>rd</sup> party does not arise.

The 3<sup>rd</sup> party on its part contends that its liability vis-a-vis the defendant cannot be tried simultaneously with the question of the defendant's liability to the plaintiff. The 3<sup>rd</sup> party admits that whereas the discharge vouchers were signed by the plaintiff and transmitted to the defendant it was the duty of the defendant to obtain the plaintiff's consent to enable the defendant pass any credit notes in favour of the 3<sup>rd</sup> party. The 3<sup>rd</sup> party further contends that it has a substantial claim against the defendant which is unconnected with the plaintiff and a simultaneous trial will only result in confusion to the prejudice of the third party and the plaintiff.

I have considered the pleadings, the application, the supporting affidavit and the Grounds of Opposition. I have also given due consideration to the submissions made to me by the counsels appearing. Having done so, I take the following view of this matter.

Section 105 of the Insurance Act (Cap 487) reads as follows:-

**“105. Where a claim arising under a policy is paid, no deductions shall except with the consent in writing of the claimant be made on account of premiums or debts due to the insurer under any other policy”.**

It is clear from this provision that any sums due to the plaintiff under the policy issued by the defendant are protected and any dispute between the defendant and the 3<sup>rd</sup> party is irrelevant. The defendant has averred in paragraph 7 of the defence without prejudice that all claims alleged by the plaintiff were settled through credit notes issued to B.T.B Insurance Brokers Limited. There is no averment that the credit notes were issued with the consent of the plaintiff. In paragraph 4 of the reply to the defence, the plaintiff has averred that the defendant had no right to credit the account of the said B.T.B. Insurance Brokers Limited and that that action was improper and illegal. The position taken by the plaintiff seems to be supported by Section 105 of the Insurance Act aforesaid and the authority of the Court of Appeal in Civil Appeal No.330 of 2001 Nairobi: **Kenindia Assurance Company Limited and Alpha Knits Limited and another (UR)**. In that case Kenindia had appealed against an order striking out its defence by the High Court. Although I am not dealing with such an application in this case the observations of the Court of Appeal suggest that the liability of an insurer to its insured is distinct and should not be clouded by any dispute between the insurer and third parties.

I should not say more otherwise I may prejudice the trial of this matter or the pending application to strike out the defence. From the above analysis it is clear that I am of the view that the question of the liability of the third party to indemnify the defendant should not be determined simultaneously with the question of the defendant's liability to the plaintiff. The question of such liability as between the defendant and the third party should be determined after the trial of this suit or independently of the trial of this action.

Costs shall be in the cause.

Orders accordingly.

**DATED at NAIROBI this 24<sup>TH</sup> day of OCTOBER, 2006.**

**F. AZANGALALA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2006.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-