IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 892 OF 2000

JOSPHAT NJUGUNA KARIUKI …… PLAINTIFF

VERSUS

SIMON KARICHU IRUNGU ……..…….. DEFENFANT

R U L I N G

The suit herein was instituted by the Plaintiff, in his capacity as the legal representative of James Kariuki Njuguna who died following an accident. The Defendant was the registered owner of the motor vehicle in which James Kariuki Njuguna was travelling, as a passenger, at the time of the accident.

After the Defendant had filed his Defence, he applied to this court for leave to issue a Third Party Notice. Although I have failed to trace the proceedings in which the court granted leave, I do not doubt its existence. In any event, the parties herein have not made that an issue before me. I will therefore presume that the court did grant the requisite leave.

The court records show that the Third Party Notice was served upon the Third Party on 24th November 2000. After the Third Party entered appearance, the Defendant filed an application pursuant to the provisions of Order 1 rule 18 of the Civil Procedure Rules, seeking directions. The said application for directions is dated 2/3/01, and was filed on the same date. The Third Party responded by filing a Notice of Preliminary Objection, and also by lodging an application to strike out the Third Party Notice.

The matter before the court today is the application by the Third Party to strike out the Third Party Notice. The said application, which is dated 6th March 2001 also seeks consequential orders, to set aside any Third Party proceedings, as well as the costs of the said proceedings.

Miss Munene Advocate who appeared for the applicant submitted that pursuant to the provisions of Section 10(1) of The Insurance (Motor Vehicles Third Party Risks) Act Cap. 405, an insurer could only be liable after judgment had been entered against its insured.

Therefore as this claim against the insured was still at the stages of infancy, the Third party proceedings would be an abuse of court process. The applicant cited the case of Carpenter V. Ebblewhite [1938] KB 41 as authority for the submission that where there was no dispute between the insurer and the insured, the Third Party proceedings would be deemed frivolous.

Having read the Carpenter V Ebblewite case, I have noted that the Plaintiff in that case had incorporated into his statement of claim, a prayer for a declaration that the insurance company was liable to satisfy any judgment which the plaintiff obtained against the Defendant. To that extent therefore the case is distinguishable from the matter before me. However, I deem it instructive to recite here the editorial note, which reads as follows:

> **"It has long been the policy of the law that an action for personal injuries should be contested in ignorance of, and regardless of, the fact the defendant is insured. … This addition to the**

parties of that action would avoid a subsequent action between the successful plaintiff and the insurance company, and would do much to reduce the costs in such cases; but as the judgments herein clearly demonstrate, such addition is in many respects contrary to the policy of the law".

It is my considered view that the policy of the law was, and still is, that a claim against a defendant ought to proceed to trial regardless of whether or not the said defendant is insured. The presence or lack of an insurance policy must not be allowed to influence the mind of the trial court when it is called upon to adjudicate on the issues of liability of the defendant, and the quantum, if any, to be awarded. Similarly, even in the event that the defendant was insured, I think that the court handling the case ought not to be influenced, (at the time when it is handling the dispute between the Plaintiff and the defendant), by such considerations as to whether the insurance policy is valid, void, voidable or is otherwise the subject of a dispute between the Defendant and the insurer. I have made these observations not by way of concluding this application, but only to illustrate one point: that notwithstanding the outcome of the present application, I strongly believe that it would be undesirable for a court to hear a case between the plaintiff and the defendant, at the same time as a claim between the said defendant and his insurer.

Even from a more practical approach to the matter, I ask myself what role the insurance company would be playing on the issue of liability between the Plaintiff and Defendant. Would an insurance company have any evidence on such matters save that which it obtained from the insured and possibly from an investigator? I do not think so. Of course, I recognize the fact that an insurance company would most probably have greater financial resources that would make the life of an insured more comfortable if the said insurance company gave full backing in investigations and legal representation. However, the insurance company, as far as I am aware is not generally under an obligation to provide logistical support to the insured. The fundamental legal responsibility imposed by the statute (Cap 405) is to pay to the persons entitled to the benefit of a judgment obtained against the insured. For these reasons, an insurance company might deem it prudent to actively participate in legal proceedings involving its insured, as by so doing they would be an active participant in proceedings that would possibly have a direct impact on them. But the law does not generally impose an obligation on the insurance company to provide legal representation to the insured. However, I do recognise the fact that an obligation to provide legal representation may arise contractually, if so provided for in the policy of insurance.

The Third Party has submitted that the Notice issued to it should be struck out because the subject matter between the Plaintiff and Defendant is completely different from that between the Defendant and the Third Party.

As between the Plaintiff and Defendant, the claim is founded on tort, and it arises out of a road traffic accident. On the other hand, the subject matter between the Defendant and the Third Party arises out of a contract of insurance. In support of its arguments, the Third Party has cited the decision of Lyon J. in Yafesi Walusumbi V. The Attorney General of Uganda [1959] E.A. 223.

In that case the court held that in order that a third party be lawfully joined, the subject matter between the third party and defendant must be the same as the subject matter between plaintiff and defendant and the original cause of action must be the same.

In answer to the application, the Defendant's advocate, Mr. Kahonge submitted that the Civil Procedure Rules do not set out any procedure for striking out Third Party Notices. He said that the only provisions that address the subject of striking out pleadings is order VI rule 13. He therefore urged me to dismiss the application. However, I do not find merit in this particular submission. As far as I am concerned, the absence of any specific rule for filing an application to strike out a Third Party Notice would not be a bar to such an application. I fully accept Miss Munene's submission on this point; that Order L rule 12 provides a complete answer to the matter. The said rule provides as follows:

> "Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule".

The Defendant also submitted that this application was premature. Their contention is that the application should be dismissed, or at the very least be stayed pending the hearing of the Defendant's application for Directions. As far as the Defendant is concerned, the Third party ought to canvass the issues raised by this application at the stage of Directions. It was pointed out to the court that in the Yafesi case the issue was dealt with during the summons for Third Party Directions.

I agree with the Defendant's observation that in the Yafesi case the issue was dealt with at the stage of Third Party Directions. But as I have noted earlier in this Ruing, I do not believe that the lack of a specific provision for making the application would be fatal to the said application. I also believe that it is not mandatory that relief has to be sought in exactly the same manner as was done in previous cases. In any event I find it hard to reconcile the Defendant's submission on this point, to the earlier submission to the effect that the Civil Procedure Rules do not have any specific provisions for an application to strike out a Third Party Notice.

If there are no specific provisions as stated by the Defendant, why should the Third Party wait until the hearing of the application for directions to put forward its case for wanting to cease being party to this suit? But I believe that the answer is to be found in Order 1 rule 18, which provides as follows:

> "If a third party enters an appearance pursuant to the third party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving notice against the third party".

In the Yafesi case, when the court was commenting on the scope of the legal provisions governing the grant of directions, it had the following to say:

> "The powers of the court on the application for directions are now very wide. The master may at any time set aside third party proceedings".

Thus, I do come to the conclusion that Order 1 rule 18 does provide the Third Party an opportunity at which they can have the third party notice set aside. It does therefore follow that this application was, strictly, not necessary. The third party could have canvassed the same issue at the hearing of the defendant's application for directions. The said application for directions is still pending before this court. To that extent I must agree with the defendant's assertion that the application to strike out the third party notice was premature.

The manner in which the application has been drawn up gives the court only 2 options; to either strike out the third party notice, or otherwise hold that it should remain in force.In contrast, the provisions of order 1 rule 18 give the court several options. The court could strike out the third party notice; or it could direct that the issue of liability be tried at the trial. The 3rd option is for the court to direct that the issue of liability be tried after the trial of the suit. In effect, the rule provides a much more conducive opportunity to address the issues pertaining to the manner in which the third party notice can be dealt with.

But in the final analysis, I cannot see the purpose that would be served by my putting off my decision on this matter, and asking another judge to deal with a matter that has been fully canvassed before me, only for the reason that the matter ought to be dealt with at the hearing of the application for directions. I am fortified in my decision to make a substantive decision on the application, (even though it may have been brought prematurely, and under the wrong procedure), by the decision of the Court of Appeal in Savji Havji Varsani V Kanjee Naranjee (Kenya) Ltd [1977] KLR 171, at 174. In that case the Court of Appeal expressed itself thus;

> "Besides, we note that the judge went ahead and heard the application notwithstanding his view that the wrong procedure had been adopted and gave a reasoned ruling. This being so, the question

of the procedure in this case is of academic interest and cannot affect this court's decision on the merits of the application. Mr. Khanna argues that the holding at that stage was judicial to the applicant.

We do not agree. Right or wrong the judge gave reasons for his decision and we do not agree with Mr. Khanna's submission that, having held that the wrong procedure had been adopted, the judge's reasons for dismissing the application should be regarded as obiter. He made it clear that although he considered the procedure by way of chamber summons to be wrong, he would nevertheless deal with it, and this he did".

Section 10 (1) of Cap 405 imposes a duty on the insurer to satisfy a judgment against the insured. The insurance company herein does not wish to participate in the trial of the dispute between the Plaintiff and the Defendant. I cannot see any justification for forcing them to continue to participate in the said proceedings. I do therefore grant the prayers numbered 1, 2 and 3 in the Chamber summons dated 6/3/00. But the Defendant should nonetheless take comfort in the provisions of Section 10 (1) of The Insurance (Motor Vehicles Third Party Risks) Act, Cap 405. By striking out the third party notice, the court has not in any way dimished the duty imposed on the insurance company to satisfy the judgment (if any), that may be passed against the Defendant.

In conclusion, I do strike out the Third Party Notice. However, each party will bear its own costs of the application.

Dated at Nairobi this 24th day of February 2004.

FRED A. OCHIENG

Ag. JUDGE