



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 1889 OF 1999

JOSEPH OMUOMBO OWITI..... PLAINTIFF

VERSUS

MAGADI SODA COMPANY LTD DEFENDANT

THE HERITAGE A.L.I. INSURANCE COMPANY LIMITED.....1ST THIRD PARTY

LION KENYA INSURANCE COMPANY LIMITED..... 2ND THIRD PARTY

RULING

The Defendant herein, Magadi Soda Company Limited has moved the Court under Order I Rule 18 of the Civil Procedure Act for directions on Third Party Notices issued by itself upon the Heritage A.I.I. Insurance Company Limited (1st Third Party) and Lion of Kenya Insurance Company Limited (2nd Third Party) on 17th January 2002. The Defendant applicant prays also for orders that the said third party notices be deemed to be the Defendant's claim against the Third Parties, that the question of indemnity between the third parties and the Defendant be tried and determined at the same time as the trial on liability and that the Court gives directions as to the filing of defences and or any relevant or necessary pleadings by the Plaintiffs.

The Defendant's application is founded on the grounds that at the time of the accident, the subject matter of this suit, the Defendant had valid insurance policies with the two third parties herein under which the 3rd parties contracted to indemnify the Defendant against claims arising out of the risks insured therein including the risk giving rise to this suit and that the third parties having refused and/or neglected to handle the Plaintiff's claim when notified of the accident the question of indemnity ought to be determined in order

“to enable all parties involved and the Defendant in particular to effectively address the Plaintiff's claim.”

The Plaintiff has opposed this application on the grounds that the defendant's defence being only that the accident was inevitable raises no issues for the Court to determine as required under Order I Rule 18, that the Defence filed herein does not plead any indemnity and that the policies referred to should have been produced for perusal by the Court.

Mrs Ameka for the Plaintiff further submitted that the question of indemnity should not come up before judgment and the suit ought to be heard first independent of whether there is a question of indemnity or not. She argued further that the third party proceedings are only intended to delay the suit which had previously been ordered to be heard on priority. Counsel for the 1st Third Party adopted Mrs. Ameka's submissions and is of the like view that the application should be dismissed.

For the sake of clarity I find it necessary to expound the relevant provisions of Order I Rule 14 which governs the taking out of third party proceedings and states as follows:

14 (1) Where a defendant claims as against

any other person not already a party to

the suit (hereinafter called the third party) –

(a) that he is entitled to contribution or

indemnity

or (b)

or (c).....

he may by leave of the Court issue a notice

(hereinafter called a third party notice)

to that effect and such leave shall be applied for by

summons in Chambers ex parte

Rule 15 provides that once served the third party if desiring to

dispute the Plaintiff's claim in the suit as against the Defendant

on whose behalf the notice is given or his own liability to the defendant

he must enter an appearance as required in the notice and in default

of so doing shall be deemed to admit the validity of the decree

obtained against such defendant and his own liability to

contribute or indemnify as the case may be to the extent claimed in

the third party notice .

The wording of Order 1 Rule 14 (a) (b) and (c) being in the alternative means that the very contention that the defendant is entitled to indemnity by the third parties is sufficient to avail the defendant a right to take out third party proceedings independently of the requirements of (b) and (c). It is not necessary therefor to consider whether or not the issues in dispute as between the Plaintiff and the Defendant are substantially the same as between the Defendant and the third party. It matters not therefore that the question or issue between the Defendant and the Plaintiff are in tort (negligence) and/or that the relationship between the Defendant and the Third-party may be in contract.

The Third parties having entered appearances on the Third Party notices, the Defendant has now applied to the Court for directions under Order I Rule 18 which from its wording does not make such an application mandatory. The Court upon hearing the application may, "if satisfied that there is a proper question to be tried as to the liability of third party and the defendant giving notice, order the question ... 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."

I am unable to see from the above provisions how the Plaintiff can claim a right to challenge the application for directions. It seems to me that the matter is between the Defendant and the third parties upon whom notice has been served and in response to which appearance has been entered.

A contract of insurance being one of indemnity I find that since the existence of the policies is not in dispute, there exists a proper question to be tried as relates to the third parties' liability to indemnify the Defendant for any judgment that may be awarded against it in favour of the Plaintiff. I do not agree with the Counsel for the Plaintiff that the question of indemnity can only be raised after a judgment is entered since order I rule 18 is very clear that the Court may decide whether such question be tried either

“.....at or after the trial of the suit.”

I am of the view that since the Defendants claim that risk insured is in all circumstances connected with the cause of action herein it is best for the question of indemnity to be tried at the same time as the issue of liability in order that the proceedings herein can be brought to an earlier end. I find that such an approach, if anything, will be beneficial to the Plaintiff since the question of who compensates him will have been determined without need for further applications.

In the premises, having considered the submissions by Counsel and the authorities cited herein, I allow this application and make the following orders.

- 1. The Third Party Notices dated 17 th January 2002 be and are hereby deemed to constitute the Defendants claim against the Third Parties, namely Heritage A.I.I. Insurance Company Limited and Lion of Kenya Insurance Company Limited.*
- 2. The question of indemnity between the Third Parties and the Defendant shall be tried and determined at the same time as the trial of the action.*
- 3. The Third Parties to proceed to file and serve on all parties their respective defences to the Defendants claim against them and to do so within the next 14 days failing which they shall be deemed to have admitted the claim.*
- 4. The Plaintiff may if he so wishes file any necessary pleadings as may be necessitated by these Third Party proceedings within 14 days of service.*
- 5. Costs of this application shall be in the cause .*

Orders accordingly.

Dated and Delivered at Nairobi this 10 th day of December 2004

M.G. Mugo

Judge

In the presence of

Muthiu for the applicant

Ms wanga h/b for Ms. Janmohamed for 1 st 2nd Interested Party

Mrs Ameka for the plaintiff