

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 286 OF 2002

MARIO SCIANNA PLAINTIFF

VERSUS

1. EVA MAR THIES..... 1ST DEFENDANT

2. KLAUS THIES 2ND DEFENDANT

RULING

The matter came up for hearing of the main suit but before the same could commence, Mr. Kasmani for the Plaintiff sought the court's directions as to which party should call its evidence first. This was prompted by the fact that the Defendant in their defence denied they owed the amounts claimed as they had fully paid the Plaintiff and filed a counter-claim for amounts to be spend on a Third Party to complete the works. Order 17 rule 1 of the Civil Procedure is clear and reads as follows:

“The Plaintiff shall have the right to begin unless the Defendant admits the facts alleged by the Plaintiff and contends that either in point of law or on some additional facts alleged by the Defendant the Plaintiff is not entitled to any part of the relief which he seeks, in which case the Defendant shall have the right to begin.”

In the current case the Defendant denies the Plaintiff is entitled to the amounts claimed under the contract and raises issues of breach of the said contract.

In the circumstances in my view and in the light of the provisions of Order 17 rule 1 the defence is to start and tender its evidence first.

Dated this 29th day of May 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE