



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 364 OF 2001

HABIMANA SUEDI HEMED.....PLAINTIFF

Versus

KENYA REVENUE AUTHORITY.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

The 3rd party by way of this notice of motion expressed to be brought under Order XVII Rule 12 of the Civil Procedure Rules and section 3 A of Civil Procedure Act seeks orders that the Plaintiff be recalled back to court to appear for cross examination by the 3rd party.

The application is opposed by counsel for the plaintiff on the grounds that it is frivolous vexatious and an abuse of the process of the court and that it is intended to delay the hearing and final determination of the suit.

Briefly the application arises from the following circumstances: on 12th March 2001 the plaintiff filed this suit against the Kenya Revenue Authority and the Attorney General as the 1st and 2nd defendants respectively.

The Attorney General filed a defence in which he maintained that the plaintiff's suit did not disclose any reasonable claim against him. Consequent there to the plaintiff issued notice of withdrawal of his claim against the Attorney General under Order XXIV Rule 1 and 2 (2) of the Civil Procedure Rules. Order XXIV of the Rules allows the plaintiff at any time before the setting down of the suit for hearing by notice in writing to discontinue his suit against the defendant.

On 6th June 2002 the suit against the 2nd defendant was withdrawn with no order as to costs. The Attorney General consented to the withdrawal of the suit against him upon such terms.

The hearing of the suit commenced and witnesses were heard in the presence of the defendant. As an afterthought the defendant decided to join the Attorney General as a 3rd party.

By Chamber Summons expressed to be brought under Order 1 Rule 14 and 14 A of the Civil Procedure Rules and Section 3 and 3 A of the Civil Procedure Act the defendant sought orders for leave to issue 3rd party notice against the Attorney General. The application was based on the ground that the defendant had seized the plaintiff's motor vehicles at the instance of the police and believes that he is entitled to

contribution and indemnity from the 3rd party.

Leave was granted and the Attorney General was joined as a 3rd party. This was after the plaintiff had given evidence and had been released and had travelled back to his home country in the Republic of Rwanda.

Now the 3rd party seeks orders that he be allowed to recall the witness for the purpose to cross-examination. In his submissions counsel for the 3rd party Mr. Sitima submitted that the 3rd party has a good defence that raises triable issues and that the seizure of the plaintiffs motor vehicles was lawful and went on to state that since the 3rd party had not waived his right to cross-examine the plaintiff, then his client would be greatly prejudiced if the court would not grant the 3rd party leave to recall the witness. He requested the court to exercise its discretion and grant the orders sought in the application.

In opposing the application Mr. Muigua for the plaintiff argued that the 3rd party's application is bad in law, it is frivolous vexatious and an abuse of the process of the court and is intended to delay the hearing and determination of the suit.

Further he also challenged the affidavit in support of the application. He submitted that the application was not supported by a valid affidavit in that the same was deponed by Mr. Sitima Counsel for the 3rd Party on matters not within his knowledge. He particularly singled out paragraphs 8, 9 and 10 which ought to be struck out. Mr. Sitima conceded to the paragraphs being struck out and accordingly they were struck out. Mr. Sitima in his affidavit had touched and deponed on matters relating to the evidence of the seizure of the plaintiff's vehicles matters to which Mr. Muigua argued to be resjudicata. On this point I agree with counsel because the issues relating to seizure of the plaintiff's vehicles have already been heard and decided. The vehicles were seized under Seizure Notices issued and subsequently vehicles taken possession of by the Defendant who towed them and stored the same in their premises. The issue having been decided as aforesaid the same cannot be entertainment under this application.

As I had said earlier the defendant contends that it seized the plaintiff 's vehicles at the instance of the police and is entitled to contribution and indemnity from the 3rd Party in the event judgment is entered in favour of the plaintiff. The 3rd Party entered appearance pursuant to 3rd Party Notice. Order 1 Rule 18 of the Civil Procedure Rules provides that "If a third party enters appearance pursuant to 3rd Party Notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon hearing of such an application may, if satisfied that there is a proper question to be tried as to the liability of the Third Party and the defendant giving the notice, to be tried in such a manner at or after the trial of the suit....."

The defendant alleges that he only joined the 3rd Party for the purposes of indemnity in the event judgment is entered in favour of the plaintiff. The issue is purely between the defendant and the 3rd Party. Apparently it is not clear how cross examining the plaintiff by the 3rd Party in respect of indemnity saga will assist the 3rd Party.. However, since counsel for the 3rd Party has asked the court to exercise its discretion to grant him leave to recall the plaintiff for cross examination in my opinion it would not be fair for the court to deny any party to the suit the right to prosecute his case in the manner that he thinks best but in so doing it is prudent that that party keeps in mind the issue of mitigating for costs.

After hearing submissions from counsel for the Defendant it is apparent that the defendant had joined the 3rd Party so that the issue if any between the two could be decided without bringing in another suit later. This suit cannot therefore be decided without the evidence being heard. The fear expressed before the court by the defendant is that of liability in the event judgment is entered in favour of the plaintiff; he would seek indemnity from the 3rd Party.

There is no dispute that the plaintiff's claim is based on the notice of seizure issued by the Defendant under its powers conferred by the Customs & Excise Act Cap 472 Laws of Kenya and this is an admitted fact on which basis therefore it seems that the 3rd Party was enjoined as a convenient party without just reason or disclosed liability.

From the foregoing the 3rd Party is entitled to conduct its defence against the Defendant the best way possible and since justice is a two way affair, I am satisfied that the 3rd Party is entitled to the order sought and I allow the 3rd Party's application in terms of Prayer 1 of the Notice of Motion dated 10th February, 2003.

It has been made clear by Mr. Muigua, counsel for the plaintiff that the witness is a foreigner working and residing in the Republic of Rwanda and would be entitled to travel and accommodation facilities if he has to come to Kenya. I therefore Order that the Applicant does provide the travel facilities that is to say a return Air Ticket to enable the witness to come and his accommodation and counsel for the plaintiff is requested to render any assistance necessary to facilitate the exercise.

The Applicant shall ensure that the witness is availed within 45 days from the date of this ruling failure of which the order will lapse automatically immediately after the lapse of the 45 days. However the suit will proceed except that the moment the recalled witness arrives, he shall be cross examined on priority basis and without delay.

Costs to abide the outcome of the suit.

Dated and delivered at Nairobi this 4th day of July, 2003.

J.L.A. OSIEMO

JUDGE