



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.408 OF 2013

DANIEL ISAIAH NTHURIMA.....PLAINTIFF

VERSUS

THE JUBILEE INSURANCE

COMPANY OF KENYA LIMITED.....DEFENDANT

AND

EAST AFRICA INSURANCE BROKERS LIMITED....THIRD PARTY

RULING

1. The Notice of Motion dated **19th July, 2016** was filed herein on 7th September, 2016 by the Defendant, Jubilee Insurance Company of Kenya Limited, for orders that the Court be pleased to give directions that the issue of liability between the Defendant and the Third Party herein be determined jointly with the issue of liability between the Plaintiff and the Defendant; and that costs of the application be provided for. The application is based on the following grounds:

(a)The third party herein has entered Appearance and filed a Defence having been served with a Third Party Notice;

(b)The cause of action herein emanates from the repudiation of a claim lodged by the Plaintiff with the Defendant which policy was negotiated by the Third party, Messrs Eagle Africa Insurance Brokers Limited (formerly known as Alexander Forbes Insurance Brokers Kenya Limited) in terms of the Binder Policy made between the Defendant and the Third Party.

(c)That the scope and limitation of the authority of the Third Party set out under the said Binder policy and the Defendant's liability for any acts of its agent can only be if the act was done within the scope of the authority donated.

(d)The Defendant/Applicant now seeks directions from this Honourable Court with respect to liability given the Policy sought to be enforced was inter alia negotiated by the Third Party in excess of powers donated to it.

(e)The application is aimed at expediting the process herein.

(f)Such other or further grounds to be adduced at the hearing hereof.

2. The Application has been filed pursuant to Sections 1A and 1B of the Civil Procedure Act, Chapter 21, Laws of Kenya, Order 1 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

3. The Third Party, **Eagle Africa Insurance Brokers (K) Limited**, opposed the application on the basis of their averments in the Replying Affidavit sworn on **3rd August, 2016** by **Ahmed D. Jelle**, an Advocate of the High Court, who deponed that the Defendant's proposal to have the issue of liability between the Third Party and the Defendant heard within the main dispute between the Plaintiff and the Defendant would only serve to muddy the waters by confusing the real issues in contention. The Third Party's case is that there is only one question for determination by the Court with regard to the Third Party claim made by the Defendant as opposed to the multitude of more complex issues arising between the Plaintiff and the Defendant. Thus, it was averred on behalf of the Third Party that it would be infinitely more expedient if the single question of liability between the Defendant and the Third Party were to be determined prior to the commencement of the trial of the suit.

4. The Plaintiff's cause of action herein emanates from the repudiation of a claim lodged by him with the Defendant for settlement following a fire accident that razed his property known as **Pamentino Villas**. The Defendant has denied liability vide its Statement of Defence filed herein on 8th November 2013, contending that the insurance cover in respect of the suit property was conditional on the structures thereon meeting the classification of a "**first class construction Building**" and not any other kind of construction.

5. The defendant thereafter caused a Third Party Notice to issue against the Third Party herein, positing that, as the broker of the transaction between the Defendant and the Plaintiff, the Third Party deliberately failed to disclose that the villas in question, were not of "**first class construction.**" What the Defendant seeks from the Third Party is therefore contribution and/or indemnity in respect of any relief as may be awarded herein against it.

6. The Third Party proceeded to file both its Memorandum of Appearance and Defence on **15th July 2016** denying the Defendant's claim, contending that the Domestic Binder Policy has no such specific provision as has been alleged by the defendant. It further contended that it merely acted as a mercantile agent whose sole purpose was to create the connection between the Plaintiff and the Defendant, and therefore no such liability as claimed against it by the Defendant is tenable. It is therefore the Third Party's posturing that it would be unfair and in gross violation of their right to a fair hearing under **Article 50 of the Constitution** if they were to be dragged into a suit without the Court establishing beforehand whether there is a legitimate claim against them; and that under Order 1 Rule 15 of the Civil Procedure Rules, the Court has a duty to determine whether there is a triable issue of liability against the Third Party, as the Third Party's participation in the trial would otherwise be superfluous.

7. The Court has considered the Defendant's Notice of Motion dated **19th July, 2016** and the Replying Affidavit sworn by **Ahmed D. Jelle** on **3rd August, 2016**, the Amended List of Authorities filed herein by Counsel for the Third Party as well as the oral submissions made herein by Learned Counsel. Whereas Counsel for the Defendant submitted that the issue of liability between the Defendant and the Third Party be dealt with at the hearing as the same was related and could not be separated from the issues in controversy between the Plaintiff and the Defendant, Counsel for the Third Party, on his part, was of the view that the question of liability between the Defendant and the third Party ought to be tried separately.

8. **Order 1 Rule 22** of the **Civil Procedure Rules**, pursuant to which the instant application has been brought, stipulates thus:-

"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 the notice against the third party. (*Emphasis supplied*)

9. Thus, the Court is mandated by the aforesaid provision to consider the pleadings and give directions on the following two issues:

(a) Whether there is a triable issue between the Defendant and the Third Party as to the liability of the Third Party; and if so,

(b) In what manner the dispute between the Defendant and the Third Party is to be tried.

10. In the present case, the Defendant has raised an issue about its insurable interest in the suit property. The Third Party, on the other hand, has filed a Defence contending that the Domestic Binder Policy did not make any specific provisions for contribution or indemnity against it. In addition, the Third Party denied in its Defence that it failed to disclose to the Defendant that the villas in question were not of "**first class construction**". The Domestic Binder Policy is as much at the core of the dispute between the Plaintiff and the Defendant as is the question about the quality of the insured property. In the premises, it is manifest that there is a triable issue of liability to be determined as between the Defendant and third party; which issue has a bearing on the dispute between the Plaintiff and the Defendant.

11. In the light of the provisions of **Order 1 Rule 22** cited above, which gives the Court the discretion Court to determine whether the issue of Third Party liability is to be tried either at the trial or after the trial of the suit, I would, having given due consideration to pleaded facts herein, take the view that it would be more efficacious and efficient use of resources to have all the issues herein determined at the trial. I am further satisfied that no prejudice will be occasioned to the Third Party if the issue of liability as between them and the Defendant is determined at the main trial of this suit. Doing so would accord not only with **Article 50 of the Constitution**, but also further the Overriding Objective of the Civil Procedure Act as set out in **Sections 1A** and **1B** thereof.

12. In the result, I find merit in the Defendant's application dated **19th July 2016**, and would allow the same in terms of prayer 1 thereof, with an order that the costs thereof shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4th DAY OF NOVEMBER 2016

OLGA SEWE

JUDGE