



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 4589 OF 1991

SOLOMON MWARIMBOPLAINTIFF

VERSUS

KENYA BUS SERVICES LTD..... DEFENDANT

RULING

By its plaint dated the 2nd September, 1991, Solomon Mwarimbo, the plaintiff herein, alleged that while he was travelling as a lawful passenger in motor vehicle registration No KZQ 582, the defendant, Kenya Bus Services Ltd, or its driver, servant and/or agent so negligently drove, managed and/or controlled motor vehicle registration No KUM 688 that the said vehicle collided with the motor vehicle in which the plaintiff was travelling and the plaintiff sustained severe bodily injuries. The plaintiff then set out the particulars of the negligence he alleged against the defendant, its driver, servant and/or agent. On the 11th October, 1991, the defendant filed its defence denying negligence as alleged by the plaintiff and in paragraph 3 of that defence, the defendant pleaded that:-

“The defendant states that the accident was solely caused or in the alternative substantially contributed to by the negligence of the driver of motor vehicle registration number KZQ 582.”

The defendant next set out the particulars of the negligence alleged against the driver of the vehicle in which the plaintiff had been travelling. Following upon the defence, the defendant, not unnaturally, filed an application by way of Chamber Summons under order 1 rule 14, seeking an order that the Court may be pleased to grant to the defendant leave to issue third party notice and the notice was to be issued upon one, Yusuf Lubebe, the driver of vehicle Registration No KZQ 582. On the 6th March, 1992, the Court was pleased to grant and did grant to the defendant the leave to issue third party notice upon Lubebe and it appears the notice was subsequently served on Lubebe and it further appears that he entered an appearance to the notice. Under order I rule 15 of the Civil Procedure Rules, if a person served with a third party notice –

“... desires to dispute the plaintiff’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing, he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be to the extent claimed in the third party notice.”

Under this rule, a third party is entitled to challenge two things namely:-

1. The plaintiff 's claim in the suit as against the defendant on whose behalf the third party notice has been issued;
2. His, ie third party's own liability to the defendant issuing the third party notice.

A third party who wishes to raise either of these issues must enter an appearance either before or on the date specified in the third party notice. The rules do not, thereafter, provide that a third party who has entered an appearance under rule 15 shall file a defence and that he shall do so within any period. Rules 16, 16A(1) and (2), 17(1) and (2) all deal with the situation in which a third party has failed to enter appearance as provided for him under rule 15. It is only rule 18 which deals with the situation where a third party has entered an appearance. Rule 18 provides:-

“If a third-party enters an appearance pursuant to a third party notice, the defendant giving the notice may apply to the Court by summons in chambers for directions, and the Court upon hearing 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.”

I have said that there is no provision in the Rules requiring a third party who has appeared to also file a defence. A defendant who has issued a third-party notice is not, for example, entitled to apply to the Court for an *ex parte* judgment on the basis that a third party who has entered appearance has failed to file a defence.

It appears to me that once a third party has entered an appearance and a defendant wishes to pursue the claim against the third party, then the burden shifts to such a defendant to apply to the Court, by way of a summons in chambers, to give directions and when giving such directions, the Court, if satisfied that there is a proper question to be tried as to the liability of the third party, order such question of liability to be tried at or after the trial of the suit. If there is no proper question to be tried regarding the liability of the third party to the defendant, then the Court is entitled to enter such judgment as it thinks proper against the third party. All these matters are to be determined at the stage where the Court is giving directions and directions can only be given on the application of the defendant.

It is not to be forgotten that the purpose of a third-party notice is to avoid multiplicity of suits and at the hearing of the application for directions, the Court is entitled to determine whether the defendant's claim against the third party should be heard at or after the trial of the plaintiff's claim against the defendant. A defendant who fails to take out a summons for directions after a third party has appeared deprives the Court of its right to decide whether such defendant's claim against the third party should be tried at the same time with, or after the trial of the plaintiff's claim against the defendant. In my view, it is only at the stage of giving directions that the Court, if it thinks it is necessary, can order a third party to file a defence to the claim made in the third party notice.

I, accordingly, hold that Mr Billing was not entitled to take the position that because the third party has not filed a defence though he appeared, the defendant was not bound to take out a summons for directions. As I have pointed out, the defendant cannot, as it were, obtain an interlocutory judgment against the third party because the latter has not filed a defence. Since the third party has appeared and since the defendant is bent on pursuing its claim against the third party, the only way by which the Court can be satisfied that there is a proper question to be tried or there is no proper question to be tried regarding the liability of the third party to the defendant is for the defendant to take out a summons for directions as provided in rule 15. This defendant has failed to do so and Mrs Kamburi for the 3rd party, is right in objecting to the trial of the suit proceeding without the Court's directions. Mr Uryu, for the plaintiff, said he would not mind such directions being given before the suit proceeds to trial. In the circumstances, I order that unless the defendant wishes to abandon its

claim against the third party, then the defendant must apply for directions or after the trial of the suit. It

may well be that, consequent upon this order, the defendant will need an adjournment to enable it file the requisite Chamber Summons upon which directions can be made. In that event, the defendant will have to pay the plaintiff's costs of adjournment and the Shs 600/= adjournment fee. But if the defendant wishes to proceed without pressing its claim against the third party, then it is perfectly entitled to do so. These shall be my orders in the matter.

Dated and delivered this 27th day of January, 1993

R.S.C OMOLO

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JUDGE