

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO.178 OF 2000
(Arising from Civil Suit No.97 of 2000)

PATRICK KIMBAREEBA::::::::::::::::::::::::::::::::: PLAINTIFF

Versus

M/S NEWLINES LIMITED::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. MR. AG. JUSTICE P. K. MUGAMBA

RULING

This is an ex parte application brought by the Defendant herein seeking leave of this court to issue a third party notice to the Sovereign state of the United States of America. The application is by Chamber Summons under Order 1 rule 14 of the Civil Procedure Rules.

The facts leading to the application are that the Defendant hired a Toyota double cabin pick-up registration number 038 UDK from the plaintiff for a period of five days; to wit 24th December 1998 to 29th December 1998. The Defendant was hiring the said motor vehicle upon a request by the Embassy of the United States who had instructed the Defendant to provide them with a motor vehicle. It appears the Defendant did not have one of its own to supply. Rental was agreed at Shs.180, 000/= for each of the five days. As fees the Defendant was to get Shs.80, 000/=. The United States Embassy took delivery of the motor vehicle but before the vehicle could be returned it was involved in an accident near Kotido. The vehicle, which by now was damaged, was towed to Kampala where it was parked in the compound of the United States Embassy at Bugolobi. The Plaintiff sues the Defendant in Civil Suit No.97 of 2000 for:

- (a) Pre-accident value of the vehicle of Shs.15, 000, 000/=.

- (b) Loss of earning up to the time of filing this suit Shs.36, 000,000/=.
- (c) Loss of earning from the date of filing this suit at the rate of Shs.100,000/= per day until full settlement.
- (d) Costs of this suit.
- (e) Interest on the above at 30% from the date of filing this suit until final settlement.

In its application for third party notice the Defendant contends that it acted as agent of the intended third party, the United States of America, when it hired the motor vehicle. That the United States of America was principal. It further contends that lack of diligence on the part of the principal led to the accident and consequential damage and that the United States of America is either personally liable or vicariously liable for the acts of its servants or agents or employees as these were acting in the course and scope of their employment.

The third party notice applied for seeks for the United States of America to be joined in order that in the event of the Defendant being found liable there will be indemnity available to it by the United States of America as third party. The position is apparently premised on the law of agency. That being the case, since there is no express agreement between the Defendant and the intended third party the right to indemnity may be implied from the circumstances of this particular case.

In my view of the relationship between the Plaintiff and the Defendant on one hand and the Defendant and the intended third party on the other it would be far-fetched to regard the United States of America as principal, disclosed or undisclosed. The facts show that the Defendant in its own right approached the Plaintiff for hire of a motor vehicle. In turn the Defendant in its sweet time hired out the motor vehicle to the Embassy of the United States of America. Clearly, no principal was disclosed and as such no agency is in existence. Any

reference to an agency is by the Defendant alone. The Plaintiff does not allude to it. I cannot therefore see where the Defendant would be premised to seek indemnity from the intended third party on the basis of agency. I reject such a claim.

Another consideration should be the relationship between the suit against the Defendant on the one hand and what its claim against the intended third party is likely to be. What emerges from the written statement of defence and the application hereto is reference to agency. The written statement of defence goes further to highlight the existence of a contract between the Defendant and the intended third party and breach of the same by the third party. Suffice it to say that the terms of that agreement are yet to be disclosed! The case of the Plaintiff against the Defendant is premised on breach of contract. Clearly the causes of action in the claims of the two parties are at a tangent. They cannot be reconciled. In Yafesi Walusimbi vs. Attorney General [1959] EA 223 at page 225 Lyon J. property put the position thus:

“In my opinion two things are clear in the third party procedure:

- (1) in order that a third party may be legally joined the subject matter of the suit must be the same and
- (2) the original cause of action must be the same. In the instant case the plaintiff’s claim is based on negligence. On the other hand the defendant’s claim as against the third party is based on a different tort - fraud - while the third party’s claim as against the fourth party is based upon fraud and/or breach of contract.”

In the Walusimbi case court ordered that because there subsisted different causes of action orders giving leave for third party notices be set aside. Court quoted with approval the case of Birmingham and District Land Company vs. London and North Western Railway Company (1887), 34 Ch.D 261 concerning a rule similar to our Order 1 rule 14. The court stated:

“in order to bring a case within O.XV1 r 48, it is not enough that if the plaintiff succeeds the defendant will have a claim for damages against the third party, but the defendant must have against the third party a direct right to indemnity as such, which right must-generally, if not always -arise from a contract expressed or implied.”

The words of Bowen L.J. in the Birmingham and District Land Company case (ibid) at page 274 deserve quoting in this matter. He stated:

“- But it is quite clear to my mind that a right to damages, which is all that the Defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.

In the circumstances I am inclined to reject the Defendant’s application as the facts attending it do not support great of such leave.

P.K. MUGAMBA

AG. JUDGE

29/02/2000