Case Number:	Civil Case 4828 of 1987
Date Delivered:	23 May 2008
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Erastus Mwaniki Githinji
Citation:	PAN AFRICA INSURANCE COMPANY LTD & 2 others v CLARKSON & SOUTHERN LIMITED [2008] eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 4828 of 1987

PAN AFRICA INSURANCE COMPANY LTD. …….…..…… 1ST PLAINTIFF

AMERICAN LIFE INSURANCE CO. LTD. ……..……..…….. 2ND PLAINTIFF

HERITAGE INSURANCE COMPANY LTD. ……..……..…… 3RD PLAINTIFF

VERSUS

CLARKSON & SOUTHERN LIMITED …….. DEFENDANT

AND

KENYA NATIONAL ASSURANCE COMPANY LTD

INTRA AFRICA ASSURANCE COMPANY LTD

JUBILEE INSURANCE COMPANY LTD…….....THIRD PARTIES

J U D G M E N T

The Plaintiffs' suit against the defendant was heard and judgment was entered for the plaintiffs against the defendant on both liability and quantum of damages on 12th February, 1993.

In the suit, the defendant had with leave of the court issued a third party notice against the three third parties (KNAC, INTRA AFRICA, JUBILEE respectively) claiming indemnity for the plaintiffs' loss and damage under a professional indemnity policy dated 1st April, 1980. On 18th February, 1991, Bosire J. (as he then was) ordered that the trial between the plaintiffs and the defendant should precede the trial between the defendant and the third parties.

This judgment concerns the defendant's claim for indemnity against the third parties. Since the third parties contend, among other things, that the defendant was not liable to the plaintiffs and further that the plaintiffs' loss is not covered by the professional indemnity policy, it is necessary to restate the facts which gave rise to the plaintiffs' claim against the defendant and the tenor of the judgment delivered by the court.

According to the re-amended plaint, the 1st plaintiff claimed Shs.7,087,770/= together with interest from the defendant while the 2nd and 3rd plaintiffs claimed Shs.5,060,969/= and Shs.3,514,562/= respectively. The sum claimed by each plaintiff is the decretal sum paid by each plaintiff to *First National Bank of Chicago* (the bank) pursuant to a decree in *High Court Civil Suit No. 1422 of 1982* which suit was brought by the bank against each of the three plaintiffs to recover a sum of Shs.15,000,000/= advanced by the bank to *Silvester Holdings LTD* (SHL) and guaranteed by each plaintiff proportionately. The following passage from the judgment of the court delivered on 12th February, 1993 contains the essential facts:

"Sometimes in early 1980 SHL through the defendant approached the bank for a bridging loan of

Shs.20,000,000 for construction of luxury apartments on plot No. L.R. No. 209/4808 along Ngong Road allegedly owned by SHL. The bank agreed to advance the money on condition that the loan was guaranteed by SHL and by Insurance companies. SHL then instructed the defendant, an insurance broker, to arrange a syndicated Insurance guarantee up to Shs.20,000,000 against the security of the land. The defendant then negotiated with five insurance companies (including the three plaintiffs) who agreed to give the guarantee provided that SHL offered security over the land on which the housing scheme was to be developed. They also required payment of premium and that all the insurances connected with the project would be placed with them rateably. They also agreed to pay the defendant 10% commission.

SHL and the five insurance companies thereafter executed the Bond (guarantee) which was forwarded by the defendant to the bank by a letter dated 2.4.80.

By a letter dated 28.5.80 the defendant on behalf of SHL instructed Mr. Rahimtulla an advocate to draw a floating charge over the assets of SHL in favour of anyone or more of the specified five insurance companies. The defendant in that letter informed Mr. Rahimtulla that SHL owned plot No. L.R. 209/4808 Ngong Road which was shortly to be developed into a luxury apartments complex. The floating charge was to be approved by the five co-sureties (Doc. No. 17).

There was some delay by the bank in releasing the money to SHL. In the meantime, Mr. Silvester Kuria of SHL then met the defendant and gave it instructions that the Bond already executed be transferred to the Mombasa Road project. Formal instructions were given to the defendant by a letter dated 8.7.80 by which a detailed plan and site plan of the proposed project was forwarded to the defendant. The defendant then held a meeting with the underwriters. The underwriters agreed to execute a new bond for Shs.15,000,000 on the previous terms and conditions.

The bank was advised by the defendant of the new development and asked to return the original bond while accounting for a fresh new bond. The defendant drew up the new bond but informed SHL by a letter dated 15.7.80 copied to the underwriters that it was unable to release the bond until legal changes have been completed. Nevertheless the bond was executed by four underwriters on 1.8.80 and lodged with the bank by the defendant. The bank forwarded the bond to its lawyers and eventually the bond was amended and re-executed by the plaintiffs only on the 12.2.81 restricting the plaintiff's liability to 39%, 36% and 25% respectively. The bank then disbursed the entire Shs.15,000,000 to SHL before 3.6.81. Pressed by the three plaintiffs for a copy of the charge, the defendant wrote to Mr. Silvester Kuria on 22.4.81 urging him to impress upon Mr. S. Rahimtulla to implement the floating charge. Mr. S. Rahimtulla by a letter dated 25.4.81 informed the defendant that the floating charge was executed on 1.6.80 but it was not stamped or registered as the defendant did not pay the stamping charges.

The defendant then instructed M/s. Archer & Wilcock (its current lawyers) to act for it on behalf of the sureties. M/s. Archer & Wilcock wrote to both SHL and Mr. S. Rahimtulla. Mr. R. Rahimtulla denied that he had been instructed by the defendant to search the title but confirmed that on a subsequent search he discovered that title to L.R. 209/8790 had not been granted (to SHL) and that property was being developed by Kuster Developers, an associated company of SHL and S. Rahimtulla released five copies of the unstamped and unregistered floating charge to M/s. Archer & Wilcock vide a letter dated 20.5.81.

The defendant and its lawyers in the process discovered that Kuster Developers had infact mortgaged plots Nos. L.R. 209/4808 – Ngong Road and L.R. 209/8790 to Prudential Insurance Company and that SHL had no assets and no security was therefore forthcoming.

SHL on its part did not implement the project or pay the loan to the bank. The bank then filed civil

suit No. 1422 of 1982 in the High Court against SHL and the plaintiffs which resulted in a decree against each plaintiff in the sum earlier mentioned which sum each plaintiff duly paid to the bank".

The plaintiffs' suit against the defendant was founded on breach of contract and tort of negligence. The court however, held that the plaintiffs had not proved the existence of any contract between the plaintiffs and defendant which the defendant had breached.

Regarding defendant's liability in tort, the plaintiffs pleaded that the defendant owed a duty of care to the plaintiffs in the circumstances of the case and that the defendant had breached the duty of care by negligently assuring the plaintiffs that SHL was the owner of the land on which the development was to take place; that SHL wound grant a legal charge over the property to secure the liability of plaintiff under the guarantee (performance bonds); that legal charge over the property had been executed and lastly by releasing the bond executed without first making sure that the legal charge over the land had been completed. The particulars of negligence pleaded included failure by defendant to take any reasonable steps to ascertain whether or not the property was owned by SHL and failure to take any reasonable steps to ascertain whether or not SHL had executed a legal charge over the property in favour of the plaintiffs.

The defendant denied negligence and pleaded, among other things, that each of the plaintiffs were acting on their own judgment in entering into the transaction without being influenced by the defendant; that the assistance the defendant gave in trying to obtain security in favour of plaintiffs was done gratuitously; that the defendant was instructing S. Rahimtulla, SHL's advocate; that plaintiffs as prudent insurers acted in the transaction within their own judgment and relied on their own financial advisers. The defendant pleaded in the alternative, that, the plaintiff provided the performance bond carelessly and were negligent in failing to ascertain the value of the security offered and in executing the guarantee before the security had been perfected.

The court found the defendant liable in tort under the *Hedley Byrne & Co. v Heller & Partners* [1963] 2 All ER 575 principles saying in part:

"Although the plaintiffs and defendant were not dealing in relation to a contract of insurance, the identity of defendant as a reputable insurance brokers was well known to the plaintiff and it was reasonable for the plaintiffs to expect the defendant to discharge its duties and obligations expected of an insurance broker.

We have also evidence that financial guarantees are very risky unless secured by a physical security and that the Law of Kenya do not as now allow Insurance companies to undertake financial guarantees. These facts were within the knowledge of the defendant as an insurance broker.

It is evident from all the above that the defendant knew that the bond must be secured by a charge, over SHL's land; that defendant undertook the task of providing the security as required on behalf of the plaintiffs to its completion; that plaintiffs role with regard to the provision of security by SHL was merely to approve or otherwise the charge documents when transmitted by the defendant and that the defendant knew that it was being trusted by the plaintiff to perform the task competently. As it is the defendant which had instructions regarding the lands of SHL and their value and also knew that plaintiffs required the Bond to be secured, it must have made the representations or given assurances in paragraph 8 (a) – (c) of the plaint to the plaintiffs.

Even if there was no formal undertaking by the defendant towards the provision of security, the fact that the defendant, as conceded, gratuitously embarked on that task on behalf of the plaintiffs is enough

to create the special relationship on which tortious duty is founded.

The defendant and the plaintiffs had a close and direct relationship and the defendant knew that an unsecured financial guarantee was very risky. It released the Bond to the Bank before seeing the charge and before approval of the charge by the plaintiffs contrary to its assurances. The plaintiffs' loss was clearly foreseeable ……".

The court ultimately entered judgment for 1st, 2nd and 3rd plaintiffs for Shs.7,097,770/=, 5,060,969/= and 3,514,562 respectively plus costs and interest. The total decretal sum inclusive of interest was about Shs.30,000,000/=.

The defendant being aggrieved by the decision filed a notice of appeal signifying an intention to appeal against the whole of the judgment. Thereafter, the defendant filed an application for stay of execution of the decree pending appeal. This court (Pall J – as he then was) allowed the application on 4th May, 1994 on condition that the defendant provided a security bond from a reputable bank in favour of the decree holder for the entire amount and interest. The defendant, after failing to obtain the security bond, filed *Civil Application No. Nai. 84 of 1994* in the Court of Appeal for stay of execution of the decree pending appeal. On 4th May, 1997, the Court of Appeal allowed the application on some stringent conditions including the condition that the decretal sum should be secured by legal charges in respect of two properties. The defendant could not satisfy the conditions as they were two onerous. After consulting its lawyers, the defendant was advised that the intended appeal did not have much chances of success. The defendant then abandoned the intended appeal and decided to negotiate with the decree holders for the settlement of the decretal sum. The decree holders ultimately accepted Shs.15,500,000/= in full and final settlement of the claim. The defendant's advocate informed the third parties' advocates of the intention to abandon the appeal and proceed with the settlement and suggested to them that they could take over the appeal. The advocates for the third parties ultimately informed the plaintiffs' advocates that the third parties had refused to take over the appeal for the reason that no liability attaches to them under the policy. The defendant and the plaintiffs ultimately executed a Deed of Settlement on 6th September, 1994 by which the decretal sum was settled at Shs.15,500,000/= on conditions, *inter alia*, that the defendant should withdraw the notice of appeal and pay the decretal amount in two instalments of Shs.3,000,000/= and Shs.12,500,000/= the last instalment to be paid on or before 6th September, 1994.

The defendant had paid the first instalment of Shs.3,000,000/= by the date of the execution of the Deed of Settlement. To raise the Shs.3,000,000/= the defendant recalled a fixed deposit before maturity. It borrowed the Shs.12,500,000/= from Southern Credit Banking Corporation Ltd (Southern Credit) at interest rate of 32% p.a. which rate of interest was renegotiated at 28% p.a. The defendant subsequently realized that the balance of Shs.12,500,000/= would grow to a colossal sum because of interest and decided to sell its house L.R. No. 530/Section I/Mainland North situated at Nyali, Mombasa, which it sold for about Shs.12,000,000/= sometime in early 1995 and repaid the full loan to Southern Credit by 31st March, 1995.

I now turn to the present dispute.

By the Third Party notice, the defendant claimed indemnity against the third parties on the ground that the plaintiffs' claim against the defendant falls within the insurance cover under the professional indemnity policy. The three third parties entered appearance and filed a joint defence under protest. The third parties raised only three substantive defences in the defence, firstly, that the dispute had not been referred to arbitration in accordance with the arbitration clause in the policy; secondly, that the defendant had not notified the third parties of the plaintiffs claim in breach of the policy and thirdly, and

more importantly:

"…… that no actionable loss have been occasioned by the defendant as alleged in the plaint or at all; and all the particulars of negligence in the plaint are denied. The Third Parties also deny the alleged breaches of any duty set out in the plaint".

On 15th November, 1995 the defendant's counsel and the Third Parties counsel agreed on the following issues.

1. Are the Third Parties liable to indemnify the defendants under the policy of insurance referred to in the Third Party Notice in view of the following:

(i) Repudiation of the claim by the Third Parties for breach of policy conditions by the defendant in failing to notify the Third Parties of the claim.

(i) (a) Is the defendant's claim covered under the policy"

(ii) That the condition precedent requiring any matter in dispute being referred to arbitration has not been complied with.

(iii) Is (ii) above applicable in all the circumstances of this case including repudiation of the claim by the Third Parties for breach of policy conditions"

(iv) Are the Third Parties estopped from raising (ii) above and/or have they by their conduct and acts waived the same"

(v) If the Defendants are entitled to be indemnified under the policy then in what amount"

(vi) Who should pay the costs of the suit"".

On 18th December, 1995 the respective counsel further agreed that issue No. 1 (1) be decided on the basis of submissions and documents in bundle A and B without oral evidence; that no oral evidence would be called on issues Nos. 1 (ii); 1 (iii) and 1 (iv); that defendant would call evidence on issue 1 (v) – on the issue of reduced amount for which they have settled decretal amount, the Deed of Settlement and interest and costs.

However, the learned counsel for Third Parties intimated that he would call evidence on issue No. 1 (1) (a) relating to the scope of cover and insurance practice. The defendant's counsel gave notice that he would raise an objection to the calling of oral evidence.

Indeed, on 28th February, 2002 after the defendant's case had been heard for sometime, the counsel for Third Parties orally applied for leave to call oral evidence on issue no. 1 (i) (a). The counsel for the defendant duly objected to the calling of oral evidence and the court upheld the objection in a ruling dated 23rd May, 2002: The court further ruled that the issue whether or not the defendants claim is covered by the policy be determined on the basis of the policy, counsels submissions and on the basis of the findings of facts made by the court in the trial between plaintiffs and the defendant.

The 1st Third Party, KNAC, went into liquidation before the trial was concluded and on 24th July, 1997 the Defendant obtained leave of the court to continue the suit against KNAC.

Sometime in May, 2000 the defendant's counsel served the counsel for Third Parties with a request for particulars dated 12th May, 2000 of paragraphs 2 and 6 of the Third Parties' Defence. The Third parties filed the particulars dated 19th September, 2000 and further particulars dated 2nd February, 2001.

By a Professional Indemnity Policy No. 790113 signed on 21st August, 1980 the three Third Parties insured the defendant for the aggregate sum of Shs.25,500,000/= the liability of each of the three Third Parties being limited as follows:

KNAC LTD - 50%,

INTRA AFRICA - 30%,

JUBILEE - 20%.

By a letter dated 16th June, 1981, the defendant informed KNAC of the circumstances which had arisen and which could possibly give rise to a claim under the policy. The letter was copied to Intra Africa and Jubilee. By a letter dated 20th December, 1988, the three Third Parties repudiated the policy for three reasons, firstly, that the defendant had failed to notify the underwriters of the possible claim, secondly, that the defendant's employee – Mr. Boorman was essentially fraudulent in the transaction and, thirdly, the defendants assurance to the plaintiffs that the counter guarantees and charges over the assets of SHL had been executed were a gross misrepresentation. By that letter the underwriters' advocates further informed the defendant, that they had been instructed to withdraw from the pending suit and advised the defendant to arrange for independent defence.

Thereafter the defendant instructed M/s. Archer & Wilcock Advocates who by a letter dated 13th February, 1989 informed the underwriter's advocates that there were no reasons whatsoever for the repudiation of liability under the policy and that unless the underwriters admitted liability, the defendant would file third party proceedings for indemnity in the pending suit. That is a brief survey of the circumstances pertaining to the defendant's claim for indemnity.

I should first consider the issue that the counsel for the Third Parties has persistently raised – that is, the issue of the defendant's liability for negligence or for breach of duty to the plaintiffs. The issue was first raised in paragraphs 6 of the defence of the Third Parties where the Third Parties denied all the particulars of negligence and breach of duty in the plaint and averred that no actionable loss has been occasioned by the defendant as alleged in the plaint. When the defendant sought particulars of this defence long after the determination of the suit as between the plaintiffs and the defendant, the Third Parties filed further particulars on 2nd February, 2007 setting out several facts relied on to show that the defendant was not in the circumstances of the case liable to the plaintiffs. In the course of trial of the defendant's claim against the Third Parties the counsel for the third parties again sought leave to call oral evidence to show in effect that the defendant's acts in the transaction were not the proximate cause of the plaintiff's loss; that the duty of utmost good faith was on SHL and never shifted to the defendant and that by trade usage, a broker is not required to act as a lawyer. On 23rd May, 2002, the court ruled that the defendant's case was fully and ably presented to court and said in part.

"Well, the court heard the suit in full and indeed found that the defendant owed a duty of care to the plaintiffs in the particular transaction and that the defendant negligently performed the transaction. That decision is still subsisting. The defendant has satisfied the decree. The court has no jurisdiction to re-hear the issue of whether or not defendant was infact liable to the plaintiffs. The court became functus officio when it pronounced the judgment. Any oral evidence to re-open the issue of defendant's

negligence would be inadmissible".

In the course of oral submissions to augment the written submissions, the learned counsel for Third Parties again re-visited the issue of the proximate cause of the plaintiffs loss and upon objection being raised, I ruled on 17th December, 2005, partly as thus:

"The Professional Indemnity Policy in issue has specified the claims against which the defendant would be indemnified and the claims that Third Parties are not liable to indemnity the defendant. The third parties are perfectly entitled to show in this dispute that the acts of negligence for which the defendant was found to be liable or the whole transaction which defendant was found to have negligently performed in relation to the plaintiff are not indemnifiable under the Professional Indemnity Policy.

What the Third Parties cannot do, as I have already said in the ruling dated 23/5/2005, is to re-open the issue of defendant's liability to the plaintiff for negligence which has already been judicially determined. If the counsel for the Third Parties intend to show in his submissions that the defendant was, inspite of the findings of the court, not liable to the plaintiffs, then, those submissions would be irrelevant and inadmissible. But if the counsel for the Third Parties intend to concentrate on the activities of the defendant for which defendant was found negligent and show that those activities are not covered under the Professional Indemnity Policy then submissions in that direction would be relevant and appropriate".

The counsel for Third Parties has submitted at length on the question of the defendant's liability for negligence or breach of duty to the plaintiffs in the particular transaction. He has reviewed the evidence on basis of which the defendant was found liable to the plaintiffs and contended that, contrary to the findings of the court, the defendant did not on the facts or in law owe a duty to the plaintiffs either in tort or in contract. He further submitted that the findings of fact in the case between the plaintiffs and the defendants do not bind the Third Parties in the suit against them and urged the court to review its decision on the liability of the defendant.

The following submissions by the counsel for the Third Parties raised important legal and procedural issues pertaining to third party proceedings.

"At this stage, we have to bring it to your notice that the Third Parties never participated in the earlier trial between the plaintiffs and the defendant.

Submissions by counsel for the defendant in this case, that the third Parties must ***never*** *question your …… finding on tortious negligence cannot be correct. It is a cardinal principle of our law that every person must be given a reasonable opportunity of being heard. The Third Parties were never heard in those earlier proceedings because there were on record orders of Hon. Mr. Justice Bosire (as he then was), that the trial between plaintiffs and the defendant precede those between the defendant and the Third Parties. This has never been upset despite plaintiffs' initial threat to appeal the order.*

It is absolutely important that our submissions above be considered in this light.

Further, in view of decision in Murphy vs.Brentwood District Council [1990] 2 All. E.R. 908), aforesaid, we owe a duty as officers of this Honourable court to point out that the reliance placed upon Ann's case [1977] 2 All. E.R. 492) cannot now stand; hence, this Court is obliged to review its decision on liability of the defendant, particularly, in view of the doctrine of the utmost good faith and the duty it places on the insured throughout the period of the insurance. That duty cannot at any stage be shifted by insurers and placed on the brokers as in this case".

On his part Mr. Nagpal, for the defendant submitted in part:

"We have noted a recurrent theme in the said submission, learned counsel for the Third Parties repeatedly urges you to reverse and or review your own judgment dated 12th February, 1993 and the findings made therein. This is absurd. The judgment is unimpeachable, has not been appealed against and therefore stands unchallenged. The 3rd parties if they so wished or felt dissatisfied with the same had a right to appeal therefrom under their right of subrogation. They did not choose to do so. In addition they had the right under the Policy to take over the defence of the defendant and urge all those points which they now belatedly seeks to urge. In fact at one time the Third Parties advocates represented the defendant but later chose to withdraw from representing them and switched over to third parties and came on record as representing them. There are several reasons given for their doing which have been deal with in our previous submissions. They also had the right to appeal from any ruling or order made by your Lordship in relation to the current proceedings but they did not do so".

The third party proceedings in the present case were instituted by the defendant under ***order 1 rule 14*** of *Civil Procedure Rules* (CPR). By *order 1 rule 15*, CPR a third party can dispute a plaintiffs' claim in the suit as against the defendant or dispute his own liability to the defendant or dispute both. In the present case the third parties disputed both claims. By *order 1 rule 18* CPR, after the third party enters appearance, the defendant giving third party notice is required to apply to the court for directions and if the court is satisfied that there is a proper question to the tried as to liability of the third parties:

"Order the question of such liability as between the third party and the defendant giving notice, to be tried in such manner, at or after the trial of 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".

Mr. Nagpal has correctly submitted that the purpose of third party proceedings is firstly, to prevent multiplicity of actions and to enable the court to settle the disputes between all parties to them in one action, and, secondly, to prevent the same question from being tried twice with possibly different results (see *Standard Securities Ltd v Hubbard and Another* [1967] 2 All. E.R. 622 at page 623 paragraph G; *Brice v Wackerbarth* [1974] 2 Lloyd's L.R. 274 at page 276.

Although *Rule 18* of *Order 1* does not, unlike its English equivalent – *Order 16 rule 4 (4)* RSC, specify the nature of the directions that the court can give on third party summons for directions it is apparent that the judge has very wide and flexible powers. In *Bundia Properties Ltd vs. E. A. Airways Corporation* [1976] KLR 98 Madan J (as he then was) said in part at page 103 paragraphs H – I:

"I think rule 18 (like Order 16, Rule 4 (4) of English Rules of the Supreme Court) confers on the court very wide and flexible powers to give all such directions as may appear proper for having the rights and liabilities of the parties most conveniently determined and enforced …… The court may even rescind or vary the third party directions given".

As *rule 18* of *order 1* CPR provides the defendant is required to apply for directions, *"if a third party enters appearance pursuant to third party notice"*. The rule does not require that directions be applied for after the third party files a defence. Indeed, the decision of this Court in *Gachago vs. A.G.* [1981] KLR 232 makes it clear that a third party is not required to file a defence unless he has been ordered to serve a defence. It seems to me that it is at the hearing of the third party summons for directions that the third party can apply for leave to file a defence to the defendant's claim. It is also at the hearing of third party summons for directions that the trial Judge should direct whether or not a trial between the defendant and third party should be held, and, if so, at what stage and the extent to which the third party

can participate in the trial between the plaintiff and defendant regarding the defendant's liability to the plaintiff.

In *Brice v Wackerbath* (supra), the Plaintiff Insurers had sued their insurance agents (broker) for damages for breach of contract or of duty of care. The agents filed a defence denying liability and instituted third party proceedings claiming indemnity under a Professional Indemnity Policy against the underwriters. The underwriters denied liability and applied for and obtained an order for stay of third party proceedings until liability between plaintiff and defendant had been determined. On appeal by the defendant, the English Court of Appeal allowed the appeal on the ground that the main suit and the Third Party proceedings raised a large number of different questions of fact which could only be conveniently determined in a single set of proceedings in which all concerned are parties.

In that case, Orr L.J. said in part at page 278:

"We are told that there are many thousands of documents involved. No doubt the next issue will be to order discovery which would take place between all parties. When that has been done the Commercial Judge will be able to determine how the trial should take place and what part the third parties should take in the trial, bearing in mind that one way or another all the issues will have to be tried".

On his part, Lord Denning M.R. said in part at page 275:

"I see nothing in the clause or in the general law which prevents these third party proceedings from going on. Even if they continue, the Judge will give his decision in the main action before he decides in the third party proceedings. So the liability of the insured will have been ascertained – judgment against the insured – before the decision in the third party proceedings".

If the third party disputes the defendant's liability to the plaintiffs like in the present case, the trial Judge at the hearing of the directions may in his discretion allow the third party to cross-examine the plaintiffs' witness (see ***In re Salmon Priest vs. Uppleby*** [1889] 42 Ch. D 351 at page 362 and may also give leave to the third party to call witnesses.

In ***Barton vs. Long and North Western Railway Co.*** [1888] 38 Ch. D. 144, Bowen, L.J. said at pages 153, 154 in respect of a similar rule:

"Then a summons for directions was taken out to regulate what has to be regulated when a third party is brought the mode in which the questions were to be tried; so as, on one hand, not to embarrass the plaintiff in the action, and add to the expenses of his proceedings; and, on the other hand, to protect the interest of the third party who is being brought in that he may be bound by the result of the litigation in which he was not originally introduced. In what way is he to be protected, keeping in mind that the plaintiff is not to be embarrassed" Rule 53 enables the Judge to do all that is necessary. If he thinks it right he may, upon such terms as are just, permit the third party to defend the action, but it would not be reasonable without imposing terms to give him liberty to defend the action, to add himself as a defendant, and to embarrass the plaintiff with a defendant who is not a necessary party to the action, and whose introduction into the action is not the plaintiff's work but the defendant's …….

But, then, the rule goes further. It gives the judge the power, if he does not give liberty to defend the action, still to give liberty to appear at the trial and take such part therein as appears to be just, that is to say, the third party may go to the trial and appear by his counsel and ask leave to cross-examine and call witnesses if he makes a case for doing so".

However, as Cotton, L.J. said in the same case *(Barton's)* at pages 150, 151 although a Judge has discretion to allow a third party to raise a defence which has not been properly raised by the defendant in his defence, nevertheless, the court should not permit the third party to raise such a case where all the material grounds of defence are fairly raised by the defendant.

Lastly, in *In re Salmon* (supra) both Lord Esher, M.R. and Cotton, L.J. made it clear that where a defendant claims indemnity from a third party, it would be contrary to third party rules to try the question of the liability of the defendant to the plaintiff over again as between the defendant and third parties. In that case ***(Barton's)***, the learned Judge refused to allow third parties to cross – examine the plaintiffs' witnesses saying that he would try the case as between the plaintiff and the defendant first and as between the defendant and third parties afterwards Lord Esher, M.R. said of that direction at page 360:

"If the learned Judge meant that he would try the question of the liability of the Defendant to the Plaintiff over again as between Defendant and the third parties, he was in my opinion going contrary to the intention of the Judicature Acts and the third party rules".

And Cotton, L.J. said in the same case at page 362:

"But Mr. Justice Kekewich seems to have made use of some expressions which might be construed to mean that he must try the whole case over again between third parties and the Defendant. That would defeat the intention of the third party rules".

The direction given by Bosire, J. on 18th February, 1991 that the trial between plaintiffs and defendants should precede the trial between the defendant and third parties is the usual direction given in cases where a defendant claims indemnity from a third party under a contract or transaction which is distinct from the plaintiff's cause of action against the defendant.

That direction did not deny the third party a hearing regarding the question of defendant's liability to the plaintiff. What the direction meant is that the plaintiffs claim against the defendant and the claim for indemnity by defendant against the third parties had to be tried separately. As the authorities I have referred to above show, the third parties, if they so desired, could have sought leave of the court at the hearing of the directions to fully participate in the trial between the plaintiffs and the defendant and made any appropriate submissions. They could also have applied to the trial judge at the hearing for leave to raise any defence if it appeared that the defendant was not doing what is necessary to defend the suit effectively.

Although the counsel for third parties appeared throughout the trial between the plaintiffs and the defendant, he did not seek leave to participate in the trial in any way. The counsel for third parties was present on 14th October, 1991 before trial started and consented to the order that the suit be determined on the facts in the bundles of correspondence produced at the trial, the oral evidence of experts and submissions on the law and facts. Moreover, there is correspondence to show that both the defendant and Third Parties adopted a common strategy to the plaintiffs suit (see e.g. Folios 21, 22 of Bundle A). The Third Parties even went to the extent of giving sanction to the plaintiff to file suit against the defendant outside the limitation period (see Folio 49 and 50 of Bundle A).

The defendant's defence raised the defences now being raised by the Third Parties and the judgment delivered on 12th February, 1993 shows that the defences now raised by the third parties were effectively raised at the trial by Mr. Ransley who appeared for the defendant in the trial and were comprehensibly considered by the court and rejected. In the circumstance, I cannot see how the third parties were prejudiced in this case.

The authorities that I have referred to above show that in the present case, the question of the defendant's liability to the plaintiff having already been determined cannot be tried over again.

Indeed, I venture to say that where upon being sued by the plaintiff, the defendant denies liability and institutes Third Party proceedings claiming indemnity or contribution from a Third Party and the Third Party disputes the defendant's liability to the plaintiff, the issue of the defendant's liability to the plaintiffs is decided conclusively as between all parties in one trial and upon pronouncement of the judgment on the issue the court becomes *functus officio* and lacks jurisdiction to try the same issue over again as between the defendant and the Third Party. The previous ruling of this court on the issue that the defendant's liability to the plaintiffs cannot be re-opened as the court has become *functus officio* still stands.

It remains to consider the Third Parties' defences to the defendant's claim to indemnity.

I will start with the peripheral defences that the dispute has not been referred to arbitration and that the defendant in breach of the policy did not notify the third parties of the plaintiffs' claim.

Clause 9 of the Professional Indemnity Policy provides in part that:

"Any difference as to the amount recoverable under this insurance shall be referred to the decision of any arbitrator to be appointed in writing by the parties in difference ……. The costs of the reference and of the Award shall be in the discretion of the Arbitrator, Arbitrators or Umpire making the Award whose Award shall be a condition precedent to any liability of the company or any right of action against the company in respect of any claim".

The counsel for third parties did not submit on this defence. However, the arbitration clause is clear. It is only a difference as to the amount recoverable under the policy which is required to be referred to arbitration. The arbitration clause does not refer to any difference regarding liability under the policy.

In this case, the third parties from the outset disputed the defendant's liability to the plaintiffs and also their own liability to the defendant under the policy. In my view, without the admission of liability to the defendant by Third Parties Clause 9 of the policy was inoperative. It is noteworthy that the third parties had earlier purported to repudiate the policy.

Secondly, by *Section 6* of the Arbitration Act (Cap 49) now repealed by the Arbitration Act, No. 4 of 1995, the third parties had a right to apply for stay of the third party proceedings at any time after appearance but before delivering any pleading or taking any other step in the proceeding if the proceedings were brought in breach of the arbitration clause. The Third Parties did not make such an application and by filing a defence, they lost the right to enforce the arbitration clause. The issue of estoppel and waiver raised as issue No. 1 (iv) of the agreed issues only relate to the enforcement of the arbitration clause and not the other matters raised such as the repudiation of the policy. I conclude that by the purported repudiation of the policy, the denial of the liability, the failure to apply for stay of proceedings and by filing a defence the third parties waived their right to enforce the arbitration clause.

Clause 6 of the policy requires the defendant as a condition precedent to their right to be indemnified to give third parties immediate notice in writing of any claim made against them. By clause 7 of the policy, if the defendant during the subsistence of the policy becomes aware of any occurrence which may subsequently give rise to a claim being made against the third parties and gives written notice to the third parties of such occurrence, then any claim which may subsequently made against the

defendant shall for the purpose of the policy be deemed to have been made during the subsistence of the policy.

The letter dated 20th December, 1988 by which the third parties repudiated the policy the advocates for third parties said about the notice.

"…… during the currency of the policy, a possible claim occurred which you were obliged, in accordance with the policy of insurance, to notify your underwriters. Regrettably, no such notification has been filed with Kenya National Assurance Company Limited. We are instructed to advise you which we formally do that this is a breach of policy condition entitling our clients to repudiate any liability".

By using the phrase *"a possible claim occurred during the currency of the policy"*, the letter must have been referring to the provisions of clause 7 of the policy. That clause does not however, refer to claims which have infact arisen but rather to potential claims which may arise after the expiry of the policy. The purpose of the notice envisaged by clause 7, is to bring the potential claims within the policy, if made after the expiry of the policy. Clause 7 does not apply in this case because Third Parties do not say that the plaintiffs' claim against the defendant was made after the expiry of the professional indemnity policy.

In any case, it is evident that, by a letter dated 16th June, 1981 the defendant gave KNAC the requisite notice of the circumstances which had arise and which could possibly give rise to a claim under the policy. Thereafter the defendant kept KNAC fully informed of the progress of the claim as evidenced by letters dated 21st January, 1982; 3rd May, 1982, 24th May, 1982 (folios Nos. 59, 58, 53 of bundle A, respectively). That the defendant indeed notified KNAC of the plaintiffs' claim is verified by letter dated 22nd June, 1989 (folio 35) which further indicates that KNAC indeed engaged M/s. Kangwana & Co. Advocates under their rights of subrogation to represent the defendant. It is apparent from the foregoing that the third parties have not shown that the defendant breached clause 6 of the policy.

I now turn to the main defence pleaded, that is, that no actionable loss has been occasioned by the defendant to the plaintiffs. The defendant in the further particulars filed on 2nd February, 2001 gave particulars of this defence as follows:

"2.1 No actionable loss has been occasioned by the defendant because:-

(a) The defendant were acting for Silverster Holdings limited throughout the transaction and the information received was purely in the knowledge of the said Silverster Holding Limited's directors representatively/ Advocates.

(b) The alleged loss occurred because Silverster Holding Limited appears to have lied to the Defendant that it, Silverster Holding Limited owned assets – along Mombasa/Airport Road.

(c) The alleged loss arose because there were no assets owned by Silvester Holdings Limited.

(d) The duty of material disclosure lay upon Silvester Holding Limited throughout the transaction.

(e) The plaintiffs were under a duty to rely upon their own advisers and not the defendant whom they knew to represent Silvester Holding Limited.

2.2 The third parties deny that the defendant was guilty of any breaches of duty because:-

(a) The plaintiffs issued the first bond for Ngong Road development without the execution of any legal charges thereon. No assurance had been made by the defendant on the value of the property as security for the bond.

(b) Although Silvester Holdings Limited had represented to the defendant that it owned Mombasa Airport Road property, the defendant had no duty to investigate the accuracy/truthfulness of the representation.

(c) No request was ever made by insured Silvester Holdings Limited that its brokers (the defendants - represent a third person – the plaintiffs).

(d) The defendant was the agent of the assured.

(e) The defendant's duty was to obtain cover for the assured while presenting the information supplied by the assured.

(f) The Defendant's duty to the assured was to obtain the best available insurance bond on the best terms with the best available insurers.

(g) The defendant only relayed information that it obtained from the assured and it did not have a duty to investigate the accuracy of the information. It is the responsibility of the assured to ensure that all material facts are put before the insurer".

It is clear from those particulars that the defence that no actionable loss has been occasioned by defendant to the plaintiffs is in effect a denial of the defendant's liability to the plaintiffs for negligence or breach of duty.

I have already considered this defence and have made a finding that the issue of the defendant's liability to the plaintiffs has already been determined and cannot be re-opened in the trial between the defendant and the third parties.

However, the advocates for parties framed the issue whether the defendant's claim is covered by the policy. I have deliberately referred to the full particulars of the main defence in order to show that the third parties never pleaded that the defendants' claim for indemnity is not covered by the Professional Indemnity Policy. Thus, the issue framed is extraneous as it does not arise from the third parties' defence.

It is true that by a letter dated 20th December, 1988 (folio 44 of Bundle A) the third parties informed the defendant that they have repudiated the policy. However when the defendant by a letter dated 22nd June, 1989 (folio 35 of Bundle A) gave notice to the KNAC to confirm its acceptance of its obligations under the policy KNAC replied partly thus:

"We confirmed to your Mr. Opiyo that we hold you covered for negligent acts as well as fraudulent acts by your employees. The policy however covers only those people you have a contractual relationship i.e. those you owe a duty of care.

We pointed out to Mr. Opiyo that you should be defending yourselves along these lines as you owed no duty of care to the three insurance companies who have lodged a claim against you rather than pressuring us to pay their claim".

Later, the advocates for third parties wrote two important letters to the defendant's advocates. First, by a letter dated 28th February, 1991, (folio 22 of Bundle A) the advocates for the third parties doubted that the court would find the defendant liable to the plaintiffs under the *Hedley Byrne* principle and, secondly, by a letter dated 15th March, 1991 (folio 21) the advocates for the third parties assured the advocates for the defendant that:

"…… in the unlikely event that the highest Court in this country was to find against us and in case it is held that the insured was negligent in its professional undertaking as an insurance broker, then in that case our client will be prepared to indemnify the insured".

This court, contrary to the expectations of the third parties, ultimately found the defendant liable to the plaintiffs under the *Hedley Byrne* principle. The third parties had refused to indemnify the defendant solely on the ground that the defendant did not owe a duty of care to plaintiffs but had accepted to indemnify the defendant if the highest Court adjudged the defendant liable to the plaintiffs.

Since there was no appeal against the decision of this court to the Court of Appeal, the third parties should have indemnified the defendant as they had unequivocably admitted that the defendant's negligence was covered under the policy.

I have already said that the issue whether or not the defendant's claim is covered under the policy does not arise from the third parties' pleading. However, since the issue was framed and both counsel have submitted on it. I will briefly deal with it.

The issue whether the defendant's claim is within the scope of the policy is a matter of the interpretation of the policy for the rights of the parties are solely governed by the terms of the policy. In construing the terms of the policy, the court should, among other things, take into account the purpose of a Professional Indemnity Policy, which is to afford cover to the assured against the consequences of his negligent acts or breach of duty as a professional person and should also favour, among other things, a construction which gives business efficacy to the policy. The main indemnity clause in Professional Indemnity policies are similar, although, there are may be slight variations depending on the particular profession. The indemnity clauses like in the present case, generally covers indemnity from claims arising from negligent acts, errors or omissions or breach of duty.

In *Walton v National Employers Mutual General Insurance Association Ltd.* [1974] 2 Lloyd's Rep. 385 Bowen J said at page 392 relating to indemnity clause in Professional Indemnity Policy covering a stock broker:

"The policy is designed to protect the insured against the consequences of negligence in the conduct of business of stock brokers. The condition is met if the claim arises from a want of care or skill in the conduct of that business, whether the cause of action happens to be based on contract or tort".

Again in *West Wake Price & Co. v China* [1956] 3 All E.R. 821 Devin J while referring to indemnity clause not dissimilar to the indemnity clause in the present case stated what I consider to be the correct approach in the construction of indemnity clauses at page 825 paragraph D thus:

"The essence of the main indemnity clause as indeed of any indemnity clause, is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until the assured has been found liable and so sustained a loss. If judgment were given against them for the sum claimed, they would undoubtedly have sustained a loss and the question could then arise what was the cause of the loss. If the proximate cause of the loss ……

was their own neglect, they could recover ……".

It seems that where the court has made a finding as regarding the liability of the assured to the claimants that finding is conclusive as between the insured and his insurers. The authors of *Halsbury's Laws of England,* 4th Edition, vol. 25, 2003 Re-issue state in part in respect of an indemnity clause at paragraph 693 page 364:

"However the case may be framed against the insured by his client, it is the court's duty to ascertain by reference to the ascertainable facts what the real essence of the case is. This can normally be done by waiting until the liability on the part of the insured is made good; the nature of the finding will then be conclusive as between the insured and his insurers, because it is the liability, as ultimately found, of the insured which is the foundation of the liability of the insurers".

In the present case, by the Professional Indemnity Policy dated 21st August, 1980, the Third Parties agreed to indemnify the defendant:

"against any claim or claims for breach of professional duty (as insurance broker) which may be made against them … by reason of any negligent act, error or omission, whenever or wherever the same was or may have been committed or alleged to have been committed on the part of the Firm or their predecessors in business or any insurance, in the conduct of any business conducted by or on behalf of the Firm or their predecessors in business in their professional capacity as specified in the schedule".

The memoranda attaching to and forming part of the policy extends the cover, *inter alia*, to include claims for breach of duty as insurance brokers, insurance consultants or insurance agents by reason of any negligent act, error or omission, on the part of the insured.

Counsel for the Third Parties submitted, among other things, that the proximate cause of the plaintiffs' loss was not due to the actions of the defendant but rather due to the fact that SHL had no assets; that the transaction in this case was not in the nature a contract of insurance; and that the third parties would not be liable under the policy when the defendant was conducting non-insurance business.

It is true that in the transaction which gave rise to the defendant's liability the defendant was not effecting or arranging an insurance cover. The defendant was indeed involved in the task of providing a financial guarantee from the plaintiff insurance companies. Mr. Thomas Kithinji testified in the main trial that the role of the defendant was that of a go – between operating between the three parties.

In the judgment dated 12th February, 1993, the court made a definite finding on this aspect of the dispute, thus:

"The differentiation between a contract of insurance and a contract of guarantee is of no consequence as regards the role of the defendant in this case. Mr. Thomas Kithinji, an experienced insurance broker did not, in his written evidence see the role of an insurance broker as materially different from the role of a broker who negotiates a contract guarantee".

The policy covered the defendant in its profession as insurance brokers, insurance consultants or insurance agents. However, the policy does not define any of those professions. There is no doubt that the defendant was acting in the transaction as an insurance broker and was involved in the provision of an insurance guarantee (also referred to as insurance bond or financial guarantee) from three insurance companies. That was a lawful business of an insurance broker before the law was amended to prohibit insurance companies from providing insurance guarantees.

The policy is wide in scope. It covered liability for any claim made against the defendant for negligent acts, errors or omissions or breach of duty in the conduct of *any business* conducted by the defendant in its professional capacity.

More importantly, the court has already made a finding that the defendant owed a duty of care in the particular transaction; that the defendant breached the duty of care by negligently performing the duty; that the defendant's negligence occasioned loss to the plaintiffs; and that defendant was liable to the plaintiffs for negligence. Thus, the court has already found that the defendant's negligence is the proximate cause of the plaintiffs' loss. Those findings are conclusive as between the defendant and the third parties regarding the third parties' liability under the policy.

The decision in *Hedley Byrne* (supra) no doubt widened the liability of professional people in that they now not only owe a duty of care to their clients or to those with whom they have a fiduciary relationship but also to those who rely on their special skill or judgment and suffer financial loss as a result of their negligent statements. The species of negligence under the *Hedley Byrne* principle is, in my view, covered by the Professional Indemnity Policy in issue.

In conclusion, I find the Third Parties liable under the policy to indemnify the defendant.

The defendant claims total of Shs.44,896,039/= from the Third Parties. This claim comprises of, among other things, Shs.15,500,000/= paid to the plaintiffs; Shs.5,321,424/66 being the interest lost up to 21st May, 2004 on fixed deposit of Shs.3,000,000/= which was withdrawn to pay the first instalment of the settled amount; Shs.14,453/30 being the interest paid to the bank on the loan of Shs.12,500,000/= used to pay the final instalment of the settled amount; Shs.20,691,095/89 being interest the defendant would have earned on the sum of Shs.12,500,000/=, and Shs.1,352,093 being legal costs.

The defendant alternatively claims a total of Shs.25,500,000/= which comprises, among other things, the Shs.15,500,000/= paid to the plaintiffs, Shs.4,440,000/= being loss of rental income from the Mombasa house which was sold and interest of Shs.3,000,000/= fixed deposit which was withdrawn.

It seems that where the policy does not specify the types of claims which are indemnifiable the measure of damages is the loss actually suffered by the assured in so far as, it is not too remote (see *Forney v Dominion Insurance Co. Ltd* [1969] 1 WLR 928 at page 936, paragraph B). In this case, the Memoranda to the policy made it clear that it is a *"claims made policy"*. It is clear from the policy and the memoranda that the policy only covers a claim or claims made against the defendant for breach of professional duty, the defendant's costs and expenses incurred in the defence or settlement of the claim.

I agree as contended by the third parties' counsel that the defendant can only be indemnified for the sum of Shs.15,500,000/= being the claim paid to the plaintiffs and Shs.1,352,093 being the expenses incurred in defending the claim.

The other claims most of which, are in the nature of consequential losses are too remote and could not have been within the contemplation of the parties. In my view, those consequential losses, if recoverable at all, can only be pursued in a separate action.

For the foregoing reasons, I enter judgment for the defendant against the Third Parties for Shs.15,500,000/= being the claim paid to the plaintiffs, plus Shs.1,352,093/= being the expenses of defending the plaintiffs' claim – total Shs.16,852,093/=. There will be interest on the judgment sum at the court rates from the date of this judgment.

In addition, the Third Parties shall pay the costs of the third party proceedings to the defendant. The Third Parties shall pay the decretal sum rateably according to the proportion of their respective liability under the policy subject to the maximum sum recoverable under the policy.

Dated and delivered at Nairobi this 23rd day of May, 2008.

E. M. GITHINJI

JUDGE OF APPEAL