



**JTG Enterprises Limited v China Gezhouba Group Company Limited & 3 others (Civil Case E649 of 2021) [2022] KEHC 264 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E649 OF 2021  
DAS MAJANJA, J  
MARCH 31, 2022**

**BETWEEN**

**JTG ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**CHINA GEZHOUBA GROUP COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PRINCIPAL SECRETARY MINISTRY OF WATER, SANITATION AND  
IRRIGATION ..... 2<sup>ND</sup> DEFENDANT**

**SMEC INTERNATIONAL PTY ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. There are two applications before the court for determination. The first application is the 1<sup>st</sup> Defendant's Chamber Summons dated 23<sup>rd</sup> September 2021 made under Order 1 Rule 14, 15, and 16 of the *Civil Procedure Rules* ("the Rules") seeking leave to issue Third Party Notices against the Ministry of Water and Sanitation and the Principal Secretary, State Department for Irrigation as the 1<sup>st</sup> and 2<sup>nd</sup> Intended Third Parties. The application is supported by the affidavit of Xiong Wentao, an authorized agent of the Defendant, sworn on 23<sup>rd</sup> September 2021. This application by its nature is ex-parte.
2. The second application is the Plaintiff's Notice of Motion dated 14<sup>th</sup> January 2022 made, inter alia, under Order 8 Rule 3 and 51(1) of the Rules principally seeking leave to further amend its amended Plaint dated 24<sup>th</sup> November 2021 by removing the Principal Secretary, Ministry of Water, Sanitation and Irrigation, SMEC International PTY Limited ("SMEC") and the Attorney General being the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and reintroducing them as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to this suit. This



application is supported by the affidavit of Daniel N. Kihiko, the advocate in conduct of matter on behalf of the Plaintiff sworn on 13<sup>th</sup> January 2022 and it is opposed by SMEC through the replying affidavit of its Legal Officer, Samuel Oroko, sworn on 3<sup>rd</sup> February 2022.

3. The facts giving rise to this dispute are straightforward. On or about the 2<sup>nd</sup> July 2019, the Plaintiff and the 1<sup>st</sup> Defendant entered into a sub-contract known as CTH-ENG-2019-014 for Thwake Multipurpose Water Development Programme Phase 1 where the 1<sup>st</sup> Defendant engaged the Plaintiff as a sub-contractor for specific work known as Excavation and Support for Main Spillway Project. This sub-contract was later adjusted by three supplementary agreements in the same month of July 2019 and August 2020. Under the Main Contract Agreement dated 15<sup>th</sup> November 2017 between the Plaintiff and 2<sup>nd</sup> Defendant, SMEC was also the project consultant. The Plaintiff claims that it has completed the works and now seeks payment in the sum of KES. 796,392,402.26, which claim is disputed by the Defendant and forms the substance of this suit.
4. The 1<sup>st</sup> Defendant filed a Statement of Defence and Counterclaim dated 1<sup>st</sup> September 2021. In essence, the 1<sup>st</sup> Defendant denied the claims against it. The thrust of its defence is that the Plaintiff's claim amounts to a variation which could only be implemented upon the issuance of a valid variation order from the employer, the 2<sup>nd</sup> Defendant. It asserts that since it does not have any powers to authorize a variation, the Plaintiff cannot make any claim before successfully claiming payments from the employer. The 1<sup>st</sup> Defendant also denies the court has jurisdiction to hear and determine the suit as the contract was signed in China and under the contract, it is required to be settled by the court in China. The 1<sup>st</sup> Defendant also claims inter-alia, KES. 478,426,993.79 being accrued liquidated damages for delay of the project from 1<sup>st</sup> September 2021.
5. If the application for amendment is allowed, the 1<sup>st</sup> Defendant may be required to amend its statement of defence hence its application to join third parties will be held in abeyance pending amendment. I will therefore deal with the Plaintiff's application first.

### **The Plaintiff's Application**

6. The Plaintiff intends to remove the Principal Secretary, Ministry of Water, Sanitation and Irrigation ("the Principal Secretary"), SMEC and the Attorney General as defendants and join them as interested parties. It avers that the addition of these parties has been necessitated by reasons that the Principal Secretary accepted and consented to the nature of the Sub-Contract as evidenced by a letter dated 4<sup>th</sup> June 2019 in compliance with the requirements of the Main Contract between the 1<sup>st</sup> Defendant and the Ministry of Water, Sanitation and Irrigation. The Plaintiff submits that the amended Plaintiff seeks to bring into focus the real parties to the dispute and thereby assist the Court arrive at a just decision in the resolution of the dispute. It maintains that the 1<sup>st</sup> Defendant will not suffer any prejudice if the Court allows the application. It contends that it is in the interests of justice, fairness and proportionality that the prayers sought by the Plaintiff be granted and that it is willing and ready to abide by any directions and conditions that this Court may give or as provided under the law and that this application has been brought without unreasonable delay.
7. SMEC opposes the Plaintiff's application on the grounds that it is not party to the Sub Contract. It states that there is no privity of contract between it and the Plaintiff and that from the draft amended Plaintiff, no reliefs are sought against SMEC and consequently, its joinder will not assist the Court determine the dispute.
8. SMEC depones that it does not fall within the description of an interested party as it has no stake in the proceedings and will not be affected by the Court's decision when determining the Plaintiff. In this regard, SMEC avers that there are no allegations against it indicating what the cause of action is against



it and that the prayer to enjoin it as an interested party lacks merit and is an abuse of the court process and it will be in the interest of justice and the overriding objective of this Court if SMEC is not joined in the suit.

9. Order 1 Rule 10(2) of the Rules, grants the Court discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. In *Pravin Bowry v John Ward & Another* NRB CA Civil Appeal No. 70 of 2009 [2015] eKLR the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55(SCU) where the Supreme Court of Uganda observed that:

A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

10. Likewise, the Supreme Court, in *Francis Kariuki Muruatetu & Another v Republic & 4 Others* SCK Petition No. 16 of 2015 [2016] eKLR, summarised the following principles regarding the joinder of interested parties which are relevant to this case:

- (i) Personal interest and/or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is nearly peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replica of what the other parties will be making before the court.

11. I agree with the submissions by counsel for SMEC that there no allegations or reliefs sought against the proposed interested parties. The Plaintiff's cause of action is grounded on a contract between it and the 1<sup>st</sup> Defendant. The doctrine of privity of contract circumscribes the interests of third parties in the relationship between the parties. No demonstrable purpose will be served by permitting interested parties to be joined to this suit as their relation with the Plaintiff is governed by the Main Contract. It is also clear that for the same reason, the proposed third parties cannot be Defendants in the suit and for avoidance of doubt they are struck out. I now turn to consider the 1<sup>st</sup> Defendant's application.



## The 1<sup>st</sup> Defendant's Application

12. The 1<sup>st</sup> Defendant's application is for leave to issue third party notices against the Ministry of Water, Sanitation and Irrigation and the Principal Secretary, State Department for Irrigation as the 1<sup>st</sup> and 2<sup>nd</sup> Intended Third Parties. It is grounded on the fact that the Ministry of Water, Sanitation and Irrigation is the employer of the 1<sup>st</sup> Defendant pursuant to the Main Contract whereas its Principal Secretary is the Chief Accountant of the Ministry which authorizes payments in the Project.
13. The 1<sup>st</sup> Defendant avers that the Intended Third Parties are the only persons and/or entities that can authorize a variation in the Project and that the 1<sup>st</sup> Defendant has no powers whatsoever to authorize a variation or authorize additional payment for such a variation. It further states that it is not in a position to authorize and/or make extra payment claimed by the Plaintiff and detailed in the present case as it is only the Intended Third Parties who can authorize and make the payments claimed by the Plaintiff. The 1<sup>st</sup> Defendant therefore urges that it is necessary to have the Intended Third Parties in this suit to enable the court adjudicate this matter effectively.
14. Inclusion of third parties as parties in a suit is provided for by Order 1 Rule 15(1) of the Rules as follows:
  15. Notice to third and subsequent parties [Order 1, rule 15.]
    - (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
      - (a) that he is entitled to contribution or indemnity; or
      - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
      - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
15. From the third party notice, the 1<sup>st</sup> Defendant seeks full indemnity and or contribution for any amount which may be paid to the Plaintiff as a result of a court order. The claim is found on the fact that under the Main Contract between the 1<sup>st</sup> Defendant and proposed third parties, the variation can only be made by the employer and in this instance the request for variation was made by the 1<sup>st</sup> Defendant but not approved. On the basis of the facts pleaded, I do not see any reason to reject the application.
16. At the hearing of the matter, I drew attention to the parties that the right to sue the Government is protected by section 3 of the *Government Proceedings Act* (Chapter 40 of the Laws of Kenya) and is exercised by instituting proceedings against the Attorney General as provided in section 12 thereof unless there are statutory provisions that provide otherwise. In this case therefore, both the proposed third parties as instrumentalities of the Government of Kenya cannot be sued in that capacity but through the Attorney General. This is the reason why, as a prelude to filing a civil suit against the Attorney General, a notice with full particulars of the Government Department or Office required



is to be served on the Attorney General. Although section 13A of the Government Proceedings Act was declared unconstitutional to the extent that the requirement was mandatory, the reasons for its existence still remain valid (see *Kenya Bus Service and Others v Minister of Transport and 2 Others* HC COMM 504 of 2008 [2012] eKLR).

17. I therefore exercise the court's general power of amendment to substitute the Ministry of Water Sanitation and Irrigation and its Principal Secretary with the Attorney General. In the circumstances, the application is allowed on terms that the Third Party Notice shall issue against the Attorney General in terms of the draft Third Party Notice. The Attorney General shall have 15 days to enter appearance.

### **Disposition**

18. In light of the findings I have made above, I now make the following orders:
- a. The Plaintiff's Notice of Motion dated 14<sup>th</sup> January 2022 is dismissed with costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  - b. For avoidance of doubt the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are struck out from the suit.
  - c. The 1<sup>st</sup> Defendant's Chamber Summons dated 23<sup>rd</sup> September 2021 is allowed on terms that a Third Party Notice shall issue to the Attorney General in terms of the draft Third Party Notice. The Attorney General shall have 15 days to enter appearance from the date of service of the said notice.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH 2022.**

**A. MABEYA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Kihiko instructed by Muthee, Kihiko Soni and Advocates LLP for the Plaintiff.

Mr Maroa instructed by Maanza and Company Advocates for the 1<sup>st</sup> Defendant.

Mr Rao instructed by Kaplan and Stratton Advocates for the proposed third interested party.

