



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 309 OF 2011

WANYIRI KIHORO.....1ST PLAINTIFF

MUGURE WANYIRI KIHORO.....2ND PLAINTIFF

(Suing as the Administrators of the estate of DR. WANJIRU KIHORO)

WAIRIMU WANYIRI KIHORO

(Minor suing through Wanyiri Kihoro).....3RD PLAINTIFF

VERSUS

BRITISH AIRWAYS TRAVEL SHOPS LTD.....1ST DEFENDANT

FINANCE INSURANCE CO. LTD.....2ND DEFENDANT

RULING

1. **Wanyiri Kihoro, Mugure Wanyiri Kihoro and Wairimu Wanyiri Kihoro**, the Plaintiffs herein, by a motion dated 4th August, 2021 seek leave to further amend their plaint as set out in the draft further amended plaint annexed to the motion. The motion is expressed to be brought under section 3A of the Civil Procedure Act, Order 1 Rules 3, 4, 9, 10(2) & (4), Order 8 Rules 1, 2, 3 & 5 of the Civil Procedure Rules and Articles 159(2)(d) & 165(3)(a) of the Constitution. The grounds on the face of the motion are amplified in the supporting affidavit sworn by **Wanyiri Kihoro**.

2. To the effect that the Plaintiffs wish to further amend their plaint to enjoin as the 3rd Defendant, **British Airways PLC** being the parent Company of the 1st Defendant and the party that issued the insurance policy which is the subject of the suit; that the proposed amendment would clarify the role of the 1st Defendant and the relationship between it and the proposed 3rd Defendant; that in 2010 the 1st Defendant had voluntarily dissolved; that the proposed 3rd Defendant had continuously been served with pleadings herein and was therefore aware of this suit; and that the offer and issue of the insurance policy the subject of this suit was jointly done by the two companies, in that the policy schedule was issued by the 1st Defendant while the policy document was issued by the proposed 3rd Defendant.

3. The motion was opposed through the grounds of opposition dated 30th September, 2021 which state that there was no privity of contract between the proposed 3rd Defendant and the estate of the deceased; and that in any event, any cause of action arising from the insurance contract would be time barred as six years have lapsed since the cause of action accrued; and that this court lacks jurisdiction to hear and determine this suit, firstly because it is time barred. And secondly, because English law applies to the policy contract, by virtue of the fact that the insurance contract was made in England, was meant to be performed in England where the deceased was working and residing at the material time, while the alleged breach occurred in England and hence, the contract has the closest and most real connection with the system of law in England.

4. The proposed 3rd Defendant also filed a replying affidavit sworn by **Andrew Fleming** who describes himself as the General Counsel and Company Secretary of the proposed 3rd Defendant. He deposed that the deceased **Dr. Wanjiru Kihoro**, the insured under the subject policy was involved in an accident that occurred on 25th January, 2003 and passed away on 12th October, 2006; that the cause of action herein relates to enforcement of the insurance policy issued by **British Airways Travel Shops Ltd** (1st Defendant) which company was dissolved on 7th September, 2010; that there is no privity of contract between the estate of the deceased and the proposed 3rd Defendant no useful purpose will be served by the joinder of the proposed 3rd Defendant.

5. The motion was canvassed by way of written submissions. It was submitted on behalf of the Plaintiffs that the amended plaint seeks to enjoin **British Airways PLC** as the principal company that issued the policy document to the insured and received premiums, hence privy to the contract between the insured deceased and the 1st Defendant. The Court was referred to the cover letter accompanying the policy document as evidence of the involvement of the proposed 3rd Defendant in the issuance of the said policy. It was asserted further that the 1st Defendant is a subsidiary of the proposed 3rd Defendant and that the question of the dissolution of the former only came to fore when the matter of representation of the parties arose before this court.

6. Regarding the legal objections raised in the grounds of opposition, the Plaintiffs took the position that they are premature at this stage and ought to be canvassed after the proposed 3rd Defendant is enjoined in the suit. Citing the provisions of Order 1 Rule 9 of the Civil Procedure Rules and the case of **African Airlines International Ltd v The Eastern & Southern African Trade Bank Milimani HCCC 1391 of 1999** the Plaintiffs submitted that no prejudice beyond the available remedy of costs would be occasioned to the proposed 3rd Defendant. The court was therefore urged to allow the motion.

7. Counsel for the Respondent began by reiterating that the insurance policy the Plaintiffs are seeking to enforce was issued by **British Airways Travel Shops Limited** to the deceased as pleaded at paragraph 6 of the amended plaint, and as such, **British Airways PLC** the proposed 3rd Defendant was not a party to the said contract. Quoting from **Halsbury's Law of England 4th Edn. Vol. 9(1) Paragraph 748**, the decisions in **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR** and **Agricultural Finance Corporation v Lengetia (1982-88) 1 KAR 772** counsel argued that what the Plaintiffs seek by their motion is to impose obligations on **British Airways PLC** when it was not a party to the contract sought to be enforced. And citing the case of **David Mugo Mururia v Le Stud [2017] eKLR** counsel contended that the asserted cause of action against the proposed 3rd Defendant being founded on contract was time-barred the same having arisen on 25th January, 2003 when the deceased was involved in an accident, or when the insured passed away on 12th October, 2006.

8. Counsel emphasized the contents of the decision of the Court of Appeal in the appeal arising from this suit, namely, **Civil Appeal 274 of 2015 Wanyiri Kihoro & Others v British Airways Travel Insurance and Another** where it was held that the law of England applied to the insurance contract herein, and thus the High Court in Kenya lacked jurisdiction to entertain the suit. The proposed 3rd Defendant urged that the motion be dismissed.

9. The Court has considered the rival affidavits and the respective submissions by the parties in respect of the motion dated 4th August 2021.

Additionally, the court has perused the record herein as well as the decision of the Court of appeal in **Wanyiri Kihoro & Others v British Airways Travel Insurance & Another (2017) eKLR** being an interlocutory appeal arising from the ruling of **Ougo J** delivered in this cause on 16th January 2015. By the said ruling, the High Court struck out the suit against **Finance Insurance Co. Ltd.** (the erstwhile 2nd Defendant herein). The Court of appeal upheld that decision.

10. The principles governing the grant of leave to amend pleadings are settled since the decision of the Court of Appeal for Eastern Africa in **Eastern Bakery -vs- Castellino (1958) EA 461** where it was held that: -

“It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs The court will not refuse to allow an amendment simply because it introduces a new case... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character ... or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ ...

The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

11. In **Central Kenya Ltd. V Trust Bank & 4 Others (2000) eKLR**, the Court of Appeal observed that:

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

"that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

And at page 2248, they continue to say that an amendment merely clarifying the position put forward in the plaint or written statement of defence must be allowed...

It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise, the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rules) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464)... The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between

the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs”.

12. The Plaintiffs’ arguments reiterated these principles. However, upon due consideration of the matters canvassed before me, it is my firm view that the Plaintiffs’ motion solely turns on the issue of jurisdiction, raised by the proposed 3rd Defendant but dismissed as premature by the Plaintiffs. There is no dispute that the suit before the Court was brought to enforce the contract of insurance taken out by the deceased. It is pleaded at paragraph 5A of the draft Further amended plaint annexed to the motion for amendment, that the proposed 3rd Defendant whose registered office is in **Harmondsworth, United Kingdom** issued the policy document while the 1st Defendant issued the policy schedule in that regard.

13. In dealing with the interlocutory appeal from the ruling of **Ougo J**, the Court of Appeal stated that the central issue for determination was **“whether the High Court had jurisdiction to hear the suit that had been filed before it”**. The Court quoted the words famously stated by **Nyarangi JA** (as he then was) in **Owners of the Motor Vessel Lillian “S” v Caltex Oil (K) Limited (1989) 1 KLR 1** to the effect that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. When a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the view that it is without jurisdiction”.

14. The Court of Appeal then proceeded to consider the location of the 2nd defendant’s registered office and whether it carried on business in Kenya, before considering the policy of insurance and the applicable law. The Court observed concerning the latter that:

“Turning to the policy of insurance and the applicable law, the same was entered into in England; the deceased was residing in England; and the 2nd respondent’s registered office was in Middlesex, England. As regards the choice of law, the policy stated as follows:

‘If you buy this insurance in the United Kingdom, you can choose which law will apply to the policy. English law will apply unless we agree otherwise’.

The policy did not state when the election was to be made. There was no agreement between the parties herein as to what the applicable law was. Evidence may therefore have been necessary to determine the issue. But under the principle of closest and real connection, otherwise known as *Forum Non Conveniens* rule, which is applied in the event there is doubt as to whether a court has jurisdiction, English law had the closest and most real connection.”

15. Referring to its decision in **Raytheon Aircraft Corporation & Another v Air Al-Farat Limited (2005) 2 KLR 47** the Court reiterated its holding therein as follows:

[This] Court held that the High Court will not assume jurisdiction in relation to any matter arising from a contract unless the contract is made in Kenya; or if it is governed by the laws of Kenya; or if a breach of contract is committed in Kenya. None of these three factors was applicable to the subject contract. (Emphasis added).

16. The Court of Appeal therefore found that the High Court **“had no jurisdiction to determine the suit”**. The **“subject contract”** considered by the Court of Appeal as shown above, is the same contract that the Plaintiffs now seek to enforce against the proposed 3rd Defendant. And although aware of the findings of the Court of Appeal, the Plaintiffs have not demonstrated in relation to the requirements of Order 5 Rule 21 (e) of the Civil Procedure Rules, that the facts pertaining to the proposed 3rd Defendant are distinguishable from those of the erstwhile 2nd Defendant herein (and 2nd respondent in the appeal). This Court is bound by the decision of the Court of Appeal.

17. Upon a consideration of all the material placed before this Court, it appears that the findings of the Court of Appeal in relation to the erstwhile 2nd Defendant equally apply to the proposed 3rd Defendant, as the Plaintiffs’ claims against each of these parties was founded upon the same insurance contract and basic facts. In the circumstances, it would amount to an exercise in futility to allow the joinder of the proposed 3rd Defendant; courts do not act in vain. In the result, the Plaintiffs’ motion dated 4th August 2021 must fail and is hereby dismissed, but the parties will bear their own costs.

18. As a final note, it is apparent from the record that the Plaintiffs did on 24.06.2011 obtain default judgment against **British Airways Travel Shops Limited**, the sole remaining Defendant in the suit, which company according to the parties herein was “dissolved” in September 2010. The Court while noting that this suit has been pending since 2011 will leave it to the Plaintiffs’ discretion to determine and take the next appropriate course of action in the matter, but to do so expeditiously.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF APRIL 2022

C.MEOLI

JUDGE

In the presence of:

Mr. Wanyiri Kihoro for the Plaintiffs

Mr Mwihuri for British Airways PLC, the proposed 3rd Defendant

C/A: Carol