



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL SUIT NO. 11 of 2019

AFROPLAST INDUSTRIES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SANLAM INSURANCE CO. LTD.....1ST DEFENDANT/RESPONDENT

MVULI INSURANCE AGENCY.....2ND DEFENDANT/APPLICANT

RULING

1. **Afroplast Industries Limited**, the Plaintiff herein has sued **Sanlam Insurance Co. Ltd** (hereafter the 1st Defendant) and **Mvuli Insurance Agency** (hereafter the 2nd Defendant) seeking inter alia a declaration that the two Defendants are obligated to indemnify the Plaintiff in the terms of the policy of insurance issued on 23rd march, 2018. It is averred in the plaint that the 1st Defendant, an insurance company, had *partnered* with the 2nd Defendant, an insurance agency to provide insurance products. The Plaintiff's claim allegedly arises from the Defendants' failure to indemnify the Plaintiff for losses amounting to Kshs. 228,667,000/= following an alleged arson incident at the Plaintiff's business premises on the night of 26th August 2018.

2. Both Defendants filed their respective defences denying liability, the 1st Defendant for its part denying that it partnered with the 2nd Defendant or that it received premium payments in respect of the alleged policy through the 2nd Defendant. On its part, the 2nd Defendant admitted that it was an insurance agency which upon being approached by the Plaintiff had in turn approached the 1st Defendant to offer insurance services to the Plaintiff culminating with the policy cover for which the Plaintiffs paid the policy premium to the 1st Defendant through it as an agent.

3. On 9th July, 2019, the 2nd Defendant filed a motion expressed to be brought inter alia under Order 1 Rule 10(2), (14) and (25) of the Civil Procedure Rules, seeking that the 2nd Defendant be struck out of this suit on grounds among others that the said Defendant has no legal interest in the subject matter of the suit and is not a necessary party to the suit; that the plaint does not disclose a reasonable cause of action against the 2nd Defendant. By its supporting affidavit and submissions, the 2nd Defendant asserts that the said Defendant being an insurance agent of the 1st Defendant, was not party to the contract between the Plaintiff and 1st Defendant the principal, and that no cause of action against it is disclosed in the plaint. The 2nd Defendant took the position that since the principal is disclosed, there is no justification for its joinder as the agent and is therefore wrongly sued.

4. By the replying affidavit sworn by **Joseph Antony Maina**, the Plaintiff opposed the motion. Reiterating the averments in the plaint, the deponent asserted that the 2nd Defendant acted as an agent of the 1st Defendant in the transaction that has given rise to the suit and that the 2nd Defendant is a necessary party because the 1st Defendant denied any partnership with the 2nd Defendant. The submissions emphasize the 1st Defendant's alleged denial of the agency relationship with the 2nd Defendant and stated that the 2nd Defendant was therefore sued as an agent. The 1st Defendant though served with the motion elected not to respond thereto and ruling date was reserved after the above submissions.

5. While the ruling was pending, the 2nd Defendant filed a second motion on 11th June, 2020 seeking that the court stays the ruling in the motion dated 8th July, 2019 and reopens the matter for hearing, to allow the 2nd Defendant to introduce new evidence in support of the motion dated 8th July, 2019. The motion is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act. The chief grounds on the face of the motion and supporting affidavit sworn by the 2nd Defendant's advocate **James Wanjeri** are that certain crucial evidence earlier unavailable at the hearing of the main motion had since been recovered from the 2nd Defendants email system which had allegedly crashed, and that the said evidence will assist the court in arriving at a proper decision in the main motion.

6. Though served on the Plaintiff and 1st Defendant, the second motion only elicited a response from the Plaintiff through grounds of opposition dated 10th August, 2020. Therein, the Plaintiff asserted that the notice of motion is incompetent and supported by an affidavit that is incurably defective for contravening Order 19 Rule 3(1) of the Civil Procedure Rules and containing facts and statements whose source is

not stated. Further that the reason given for the failure to produce the intended evidence is false as the 2nd Defendant could have accessed its Gmail email account from any other computer. Although the court had on 28/10/2020 directed parties to file submissions on this second motion, none were filed.

7. The court therefore proposes to deal first with the second motion on the basis of material filed thereon. The court agrees with the Plaintiff's objections so far as the propriety of the affidavit supporting the motion is concerned. The deponent of the said affidavit is the Counsel for the 2nd Defendant. It is apparent from a cursory reading of the said affidavit that the key facts deposed to are not matters within the knowledge of the advocate and are contentious. These facts ought to have been deposed to by an officer of the 2nd Defendant who is able, of his knowledge to prove such facts. While the advocate deposes at paragraph 19 that the material "*is true to the best of his knowledge save as to matters deposed to on information, sources whereof have been disclosed and matters deposed to on belief, the grounds whereupon----- given*", no such source of information or disclaimer is to be found in the individual depositions on the body of the affidavit. This clearly offends the provisions Order 19 Rule 3 Civil Procedure Rules.

8. I agree with the sentiments expressed by the Court regarding a similar situation in **Magnolia PVT Limited V. Synermed Pharmaceuticals (K) Ltd, [2018] eKLR**, to the following effect that:

"Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasion may be very unpleasant. By swearing an affidavit or such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be pipe stem through which such an averment is transmitted."

9. Equally in this case, the advocate for the 2nd Defendant cannot substitute himself to become the mouth piece of his client and the court will not countenance an affidavit sworn by the said advocate concerning contentious matters. Thus, the supporting affidavit to the second motion cannot be relied on and is struck out for being sworn by counsel for the applicant. Consequently, the motion must be dismissed as it is unsupported.

10. Turning now to the main motion Order 1 Rule 10(2) provides that:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out..."

11. The court has considered the material canvassed in respect of the motion and perused the pleadings on record. There is no dispute that the insurance (policy) contract upon which the Plaintiff's suit is premised was executed between the Plaintiff and the 1st Defendant. There is therefore no privity of contract between the 2nd Defendant and the Plaintiff. As a rule of common law, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not party to it. See **Halsbury's Law of England 4th Edition. Vol. 9(1) Paragraph 748**.

12. In **Agricultural Finance Corporation V. Lengetia (1982 -88) 1KAR 772** the Court of Appeal held that:

"As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

13. The Plaintiff, despite acknowledging at paragraph 10 that the 1st Defendant was bound under the contract of insurance to indemnify it for fire and burglary, and pleading generally at paragraphs 4 of the plaint that the 2nd Defendant was an insurance agency and that it had "*partnered*" with the 1st Defendant to offer "*general insurance products to their customer*" nevertheless proceeds to aver at paragraph 17 of the plaint that the Defendants (1st and 2nd) had breached the contract of insurance. The Plaintiff in a bid to oppose the 2nd Defendant's motion claimed that paragraph 4 of the plaint was effectively asserting an agency relationship between the 1st and 2nd Defendant and that the denial of such relationship in the 1st Defendants defence but admitted in the 2nd Defendant's defence meant that the agency relationship was disputed.

14. The averments in the pleadings are plain enough. Paragraph 4 of the plaint does not, firstly, aver an agency relationship, and secondly, does not state specifically the transaction leading to this case was one based on such agency. This is surmised from other averments. So that it is not available to the Plaintiff to claim that since the 1st Defendant has denied the averments concerning a general *partnership* (as pleaded at paragraph 4 of the plaint) with the 2nd Defendant it means that the *agency* relationship is denied.

15. The 1st Defendant did not deem it necessary to file an affidavit of reply to controvert the depositions at paragraphs 2 – 5 of the affidavit in support of the motion, which principally assert the agent/principal relationship between the 1st Defendant and 2nd Defendant. Those depositions are deemed to be admitted and it is disingenuous for the Plaintiff to attempt to distort the clear pleadings of parties to justify the retention of the 2nd Defendant in the suit when the principal (1st Defendant) has not denied the agency relationship with the 2nd Defendant. There can be no running away from the Plaintiff's pleading that the 2nd Defendant was sued as an agent of the 1st Defendant. See the

description of the 2nd Defendant at paragraph 4 and 12 of the plaint.

16. In **City Council of Nairobi V Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR**, the Court of Appeal stated that:

“In Antony Francis Wareham t/a Wareham & 2 others V. Kenya, Post Office Savings Bank, Civil Application No. NAI 5 and 48 of 2002 at page 10, this court unanimously held as follows:

“It was also prima facie imperative that the court should have dismissed the respondents claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.

Furthermore, the court having found on the evidence that the second and third appellant were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the appellant who had been sued as a principal.

In the circumstances of this case, the 2nd respondent cannot be sued as an agent when there is a disclosed principal.....There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued...There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinder of the 2nd respondent in this case is unwarranted”.

17. Similarly in this case, there is no pleaded privity of contract pleaded between the Plaintiff and the 2nd Defendant, the principal herein is disclosed, and contrary to the assertions of the Plaintiff, the agency relationship is not disputed by the 1st Defendant. Ultimately, there is no cause of action against the 2nd Defendant and there was no justification for the Plaintiff enjoining the said Defendant. Accordingly, the court finds merit in and allows the motion dated 8th July, 2019 with costs to the 2nd Defendant.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021

C. MEOLI

JUDGE

In the presence of:

N/A for Plaintiff

Mr Thuo for the 1st Defendant

N/A for 2nd Defendant

Court Assistant: Kevin