



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL CASE NO. 01 OF 2019**

**THE KENYAN ALLIANCE INSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**1. EUNICE NYABOKE NYARIBARI.....1<sup>ST</sup> RESPONDENT**

**2. CLEOPHAS NYAMONGO.....2<sup>ND</sup> RESPONDENT**

**RULING**

There are two applications before me for determination. The first is the Ex-parte Chamber Summons dated 2<sup>nd</sup> July 2020 filed herein on 8<sup>th</sup> July 2020 under a Certificate of Urgency of even date. In that Chamber Summons the plaintiff/defendant in Counterclaim seeks leave to issue a Third Party Notice against NIC Insurance Agency Limited. That application is premised on grounds that: -

“(a) **THAT** the Counterclaim’s cause of action is premised on the existence of a Contract of Insurance between her and the Applicant.

(b) **THAT** the Counterclaimant alleges that her motor vehicle was insured for as a Motor Commercial (General Cartage) Comprehensive, which allowed her to use her vehicle for hire and reward.

(c) **THAT** the Applicant disputes the nature of insurance cover advanced to the Counterclaimant and avers that the Counterclaimant’s motor vehicle was insured for private commercial use and was not to be used for hire and reward or for any other purpose for receiving payment, including being used to carry fare paying passengers.

(d) **THAT** as a result of the disagreement between the Counterclaimant and the Applicant, the Counterclaimant has therefore accused the Applicant of being fraudulent and having engaged in illegalities and unfair business practices in its dealings with her.

(e) **THAT** the Applicant’s position is that the allegations of fraud, illegality and unfair business practices levelled by the Counterclaimant could only be carried out by the 2<sup>nd</sup> Defendant to Counterclaim’s Agent, NIC Insurance Agency Limited, as the 2<sup>nd</sup> Defendant to Counterclaim’s Agent, NIC Insurance Agency Limited, was the only party responsible for drafting the documents signed by the Counterclaimant and the 2<sup>nd</sup> Defendant to Counterclaim’s Agent, NIC Insurance Agency Limited, was the only party that interacted with the Counterclaimant.

(f) **THAT** therefore, Applicant’s position is that it (sic) at all there were any fraudulent or illegal dealings or any unfair business practices, then the 2<sup>nd</sup> Defendant to Counterclaim’s Agent, NIC Insurance Agency Limited, falsified the policy documents forwarded to the Applicant and any finding on liability against the applicant ought to be indemnified by the 2<sup>nd</sup> Defendant to Counterclaim and its Agent, NIC Insurance Agency Limited.

(g) **THAT** in the circumstances, the Applicant has a legitimate claim of contribution and/or indemnity against the intended Third Party, NIC Insurance Agency Limited, in the event that liability is found against it.

(h) **THAT** in the circumstances, it is fair and just that this Court grants the Applicant leave to issue a Third Party Notice against NIC Insurance Agency Limited.

(i) **THAT** the presence of NIC Insurance Agency Limited is necessary for the expeditious determination of the issue of liability and/or contribution in the suit.”

The application is premised on the affidavit of Kiongo P Murimi, Advocate, sworn on 2<sup>nd</sup> July 2020.

The second application is a Notice of Motion dated 1<sup>st</sup> July 2020 under Certificate of Urgency of even date and also filed herein on 8<sup>th</sup> July 2020. The Notice of Motion seeks leave to amend the Defence to Counterclaim. The application is premised on grounds that: -

**“(a) THAT the Applicant intends to raise issues that go to the core-substance of the suit herein and the Applicant ought to be given an opportunity not only to raise these issues for full and final determination in the main suit but for determination of these issues at the preliminary stage as well.**

**(b) THAT the amendments sought are triable issues and necessary in the interests of justice in that the amended pleadings will then bring out with finality and clarity to the Court the precise and full lines of the Defence being pursued by the Applicant and enable the Court to adjudicate over the matter in one suit once and for all.**

**(c) THAT the Counterclaimant has advanced allegations of fraud, illegality and unfair business practices against the Applicant.**

**(d) THAT the Applicant's position is that the allegations of fraud, illegality and unfair business practices under paragraph 12 Of the Counterclaim could only be carried out by the 2<sup>nd</sup> Defendant to Counterclaim as the 2nd Defendant was the only party responsible for drafting the documents signed by the Counterclaimant and the 2nd Defendant was the only party that interacted with the Counterclaimant.**

**(e) THAT therefore, Applicant's position is that the 2<sup>nd</sup> Defendant falsified the policy documents forwarded to the Applicant and any finding on liability against the Applicant ought to be indemnified by the 2nd Defendant to Counterclaim.**

**(f) THAT the Applicant therefore seeks to amend its pleadings to reflect the falsification of the policy documents by the 2<sup>nd</sup> Defendant to Counterclaim.**

**(g) THAT further, the Counterclaimant's cause of action is premised on the existence of a Contract of Insurance between her and the Applicant**

**(h) THAT the Counterclaimant alleges that her motor vehicle was insured for as a Motor Commercial (General Cartage) Comprehensive, which allowed her to use her vehicle for hire and reward.**

**(i) THAT the Applicant disputes the nature of insurance cover advanced to the Counterclaimant and avers that the Counterclaimant's motor vehicle was insured for private commercial use and was not to be used for hire and reward or for any other purpose for receiving payment, including being used to carry fare paying passengers.**

**(j) THAT the Applicant therefore avers that its obligation with regard to the use of the Counterclaimant's motor vehicle is only limited to the repair of the Counterclaimant's motor vehicle.**

**(k) THAT the Applicant has since conducted an assessment of the Counterclaimant's damaged motor vehicle, with the motor vehicle assessor concluding that the repairs to the Counterclaimant motor vehicle would cost approximately Kshs. 300,000.00.**

**(l) THAT the Applicant therefore seeks to amend its pleadings to include the Assessment Report with regard to the Counterclaimant's motor vehicle.**

**(m) THAT the Applicant seeks to amend its pleadings in order to give this Honourable Court an opportunity to evaluate the available evidence in totality, for a full and final determination of the suit on merit.**

**(n) THAT the Counterclaimant/Respondent will not be prejudiced in any way if the amendments sought are allowed, rather justice will be done holistically.**

**(o) THAT the instant application has been brought timeously.**

**(p) THAT the amendments sought are necessary for the interest of justice and for the Court to conclusively determine the real issues, full lines of defence and extent of liability between the parties herein.**

**(q) THAT it is just and fair that the Applicant is granted leave to amend its Defence to Counterclaim as sought.”**

The application is also supported by the affidavit of Kiongo P Murimi, Advocate, sworn on 1<sup>st</sup> July 2020.

In response to the applications, the **defendant/plaintiff in the counterclaim** filed a replying affidavit sworn by Ouma Maurice Otieno, Advocate on 17<sup>th</sup> July 2020.

It is also instructive that on 16<sup>th</sup> July Makori & Karimi Company Advocates filed a Memorandum of Appearance for NCBA Bank Kenya

PLC.

Due to the Covid-19 pandemic guidelines the application was heard via video link. Mr. Oriku who had joined the session to represent the intended third party was excused as the court was yet to make a determination on the third party proceedings.

Mr. Odoyo, Learned Counsel for the defendant in the counterclaim/applicant seemed to have abandoned the application to enjoin the NIC Insurance Agency Limited as a third party because he did not urge the *ex parte* chamber summons application but only urged the Notice of Motion for leave to amend the defence. Mr. Odoyo submitted that the **defendant/plaintiff in the counterclaim** had made serious allegations of fraud which the plaintiff/defendant in the counterclaim wishes to respond to. He submitted that the proposed amendment shall assist this court to determine the real issues in controversy between the parties; that the application is based on the principle of fairness and that no prejudice is likely to be suffered by the defendant/plaintiff in the counterclaim that cannot be compensated by an award for costs.

The application was vehemently opposed. Mr. O M Otieno, Learned Counsel for the defendant/plaintiff in the counterclaim submitted that the application is not made in good faith; that the applicant was well aware of the pleadings touching on fraud and hence they are not new and that it will be difficult to recall the witnesses who have already testified. Mr. O M Otieno submitted that at no time during the hearing did the applicant indicate they wanted NIC to be a party to the proceedings. Citing the maxim that equity does not aid the indolent, Mr. O M Otieno submitted that the plaintiff/defendant in the counterclaim has been very careless in its handling of this case and that the defendant/plaintiff in the counterclaim had advanced plausible grounds in the replying affidavit to demonstrate the application has no merit and the same should be dismissed with costs.

In reply, Mr. Odoyo submitted that whereas the applicant was aware of the pleadings of fraud from the start, the applicant had not included a defence against the allegations on fraud and illegality that emerged during the hearing and as such the application for amendment should be allowed. Mr. Odoyo submitted that the plaintiff/respondent has sought orders in favour of a third party not a party to this case. Mr. Odoyo also reiterated that no prejudice that cannot be remedied by an award for costs is likely to be suffered by the respondent.

I have carefully considered the two applications, the grounds thereof, the supporting and replying affidavits and the rival submissions. The application to enjoin NIC Insurance Agency Limited does not lie and this is for two reasons: - first, such applications are required to be made within fourteen days after the close of pleadings (**Order 1 rule 15 (1) of the Civil Procedure Rules**). The last pleading in the counterclaim is the **Reply to the Defence to Amended Counterclaim**. The said reply was filed on 18<sup>th</sup> December 2019 and so the pleadings in the counterclaim closed more than six months ago. This application is therefore made hopelessly out of time and it ought not to be entertained. Secondly, the application was not urged leading this court to conclude that it was abandoned.

On the application for amendment, Counsel for the applicant has clarified that by the amendment the applicant wishes to plead a defence to the allegations of fraud and illegality which had not been included in the defence to the counterclaim. I have considered the rival submissions carefully and I am persuaded that amending the defence to the counterclaim shall assist this court to determine the real issues in controversy between the parties and as this court has power to grant leave to a party to amend its pleadings at any stage of the proceedings (**see Order 8 Rule 1 of the Civil Procedure Rules**) and as no prejudice is likely to be suffered by the respondent which cannot be compensated by an award for costs, the application is allowed. The amended Defence to Counterclaim shall be filed and served within fourteen days of this order and thereafter the respondent shall have fourteen days to file and serve her reply to the amended defence. In the light of the above order this case shall inevitably be taken out of the cause list for 29<sup>th</sup> July 2020 and shall instead be fixed for further hearing on 22<sup>nd</sup> October 2020.

The applicant shall bear the costs of both applications. It is so ordered.

**Signed, dated and delivered in Nyamira this 28<sup>th</sup> day of July 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement delivered Electronically via Video Link**