



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 96 OF 2004

**H.A.H J.S.A and A.S.A (suing as the Administrators of the estate of
A.S.A(DECEASED).....APPELLANT**

VERSUS

CORPORATE INSURANCE COMPANY LTD.....PLAINTIFF

RULING

By a Plaint dated 13th February, 2004, the Plaintiffs filed this suit against the Defendant. In it, the Plaintiffs pleaded thus:

“3. At all material times the deceased was the registered owner of an aircraft. Registration number [...], serial Number [...], Manufactured by Beech Aircraft and Manufacturer’s designation of aircraft as BEECH KINGAIR 200 (hereinafter referred to as “the insured aircraft”)

4. By a policy of insurance dated 8th November 1996, the aircraft Beech King Reg. [...] was insured by the Defendant under policy No. AVN/901/0073/96 until 7th November 1997, in consideration of premiums paid and to be paid to it by the Plaintiff, the defendant insured the aircraft for Hull value US Dollars 1,200,000 against loss of, or damage to, the insured aircraft. The Defendant renewed the policy cover and the last renewal was for the period 8th November, 1998 to 7th November, 1999.

7. On or about the night of 20th September 1999 and while the policy was in force, the insured aircraft was at its parking outside the Hangar where it had been for some days without moving following a court order, the insured aircraft mysteriously got burnt and it was completely destroyed by the explosion as a consequence whereof the Plaintiff became entitled to full indemnity under the policies as follows:-

a) Under the policy the value of the aforesaid insured aircraft at the time when the same was destroyed by the said fire or at the deceased’s option, replacement of the aircraft.

10) By reason of the aforesaid, the Plaintiff’s claim against the Defendant is for the sums of US Dollars one million two hundred thousand (US \$ 1.2. million) together with interest at the commercial rates prevailing from the due date until payment in full.

By a Defence dated 10th and amended on 14th June, 2004, the Defendant admitted having insured the subject aircraft but denied its ownership as claimed by the Plaintiffs. It further admitted issuing the policy of insurance over the aircraft on 8th November, 1996 and pleaded that the policy holder was a minor one B.S, amongst other Defences. On 22nd July, 2005, the Defendant applied to dismiss the suit for want of

prosecution but the same was dismissed on 6th July, 2006 and the Plaintiff was ordered to finalize discovery within 45 days and list the suit for trial.

On 23rd April, 2010, the Defendant made an application for leave to join a total of seven (7) Insurance Companies as Co-Defendants in these proceedings. These proposed Co-Defendants are APA Insurance Co. (representing Apollo Insurance Co. Ltd and Pan Africa Insurance Co. Ltd) Kenindia Assurance Co., ICEA, Africa Re-Insurance Co. Ltd, Kenya Re-Insurance Co Ltd, the Monarch Insurance Co. Ltd. Nancy Shikuku swore an affidavit in support of the application wherein she swore that the Defendant was a member of an incorporated body known as Kenya Aviation Insurance Group (KAIG), that the proposed defendants were also members of the said KAIG, that KAIG used to deal with aviation insurance but later ceased to exist, she produced a copy of the constitution of KAIG and stated that the Defendants had co-insured the aircraft in issue in equal proportions whereby the Defendant was the lead insurer, that the proposed co-Defendants should be joined in the proceedings so that they can participate in the proceedings. A further Affidavit sworn by Mark Joseph Obuya was filed by the Defendant wherein it was confirmed that Kenindia Insurance Co. Ltd., Apollo Insurance Co. Ltd, Jubilee Insurance Co. Ltd and P.A Securities for Pan African Insurance Co. Ltd had executed an indemnity for which the application before court was made. The proposed Co-Defendants who had declined to execute the indemnity are African RE-insurance Co, the Monarch Insurance Co, ICEA and Kenya Re-Insurance Corporation Ltd, a copy of the said agreement was produced.

It was submitted on behalf of the Defendant/Applicant that the said KAIG was established by an Agreement dated 26/8/97 that by virtue of the said Agreement the proposed Co-Defendants co-insured the subject aircraft, that the said Co-Defendants are necessary parties and they ought to be joined for purposes of the Defence, that the Co. Defendants opposition to be joined on the basis that no claim has been raised by the Plaintiff against them does not bar them from being joined as they are necessary parties as the relief being sought by the Plaintiff has direct legal implications on the proposed Defendants, that their presence would enable the court to effectually and completely adjudicate on all the issues in controversy, that there is a distinction between joining a party against whom a relief is sought and joining a party whose presence is necessary for the court to make an effective and final determination of the case before it, that the proposed Co-Defendants would be liable to the plaintiff since they were Co-Insurers of the Aircraft the subject matter of the suit. The Defendant relied on the cases of **Departed Asians Property Custodian Board vs Jaffer Brothers Ltd (1999) IEA 55** and **Amon vs Raphael Tuck & Sons Ltd (1956) 1 All ER 273**. As regards the delay in bringing the application, the Defendant contended that under **Order 10 Rule 2**, the application can be made at any stage of the proceedings, that the dissolution of KAIG did not absolve the proposed co-defendants from liability that PA Insurance would be a proper party having taken over the assets and liabilities of Apollo Insurance and Pan African Insurance Co. Ltd, the Defendant thus urged the court to grant the application.

Most of the proposed Co-Defendants filed Replying Affidavits and submissions in opposition to the Application. I would consider and summarize their respective responses together. The proposed Co-Defendants argued that the cause of action by the Plaintiff was based on a contract of insurance between the Plaintiff and the Defendant and there was no privity of contract between the Plaintiff and the proposed Co-Defendants, the Plaintiff has not sought any prayers/reliefs against the proposed Co-Defendants, any claim under contract against the Co-Defendants is statute barred, the alleged KAIG was dissolved many years ago and therefore any rights and obligations thereon ceased and cannot be enforced at this point in time, the application was being brought as an afterthought and too late in the day, that under KAIG any issues between the parties should be addressed by way of an arbitration, that APA Insurance Ltd cannot be liable for actions of Apollo Insurance and Pan African Insurance Co. Ltd, that the application was an abuse of the Court, was premature, misconceived and bad in law, that the proposed Co-Defendants are not interveners whose joinder in the proceedings would be necessary. The proposed Co-Defendants referred the court to, inter alia, **Harlsburys Laws of England, 4th Edition Vol 9, Cheshire & Fiffoot Cases on the Law of Contract 7th Edition, Trietel, The Law of Contract 8th Edition, Dunlop Pneumatic tyre Co. Ltd –vs- Selfridge & Co. Ltd (1915) AC 847, Alexander Scott –vs- George Avery 91855 – 56) V.H.C.L. 809**. They urged the Court to dismiss the application.

I have considered the Affidavits, the written submissions on record as well as the case law referred to by

the parties.

ORDER 1 Rule 10 of the Civil Procedure Rules provides:-

“1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit had been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit.

2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms 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, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

To my mind, under the foregoing provision, the court will liberally allow an addition or substitution of a party to a suit:-

a) Where the suit has been filed by mistake and a wrong party has been joined or left out.

b) Where it is necessary for the determination of the real matter in dispute.

c) Where the presence in court of the party to be joined is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in a suit.

d) Where under order 1 Rule 3, a right to relief is alleged to exist against a particular party.

The Defendant submitted that its application is based on grounds (b) and (c) above. Grounds (a) and (d) are therefore not applicable and do not therefore fall for consideration. The Defendant’s application is therefore premised on the allegation that the Co-Defendants are necessary parties in these proceedings to enable the court effectually and completely adjudicate the real matter in dispute.

At the beginning of this ruling I set out the Plaintiff’s claim as set out in the applicable paragraphs of the plaint. I also analyzed the Defendants Defence. From the said paragraphs of the Plaint and Defence the real matter in dispute is:-

a) An aircraft Reg. NO. [...], [...] known as BEECH KING AIR 200,

b) A policy of Insurance No. AVN/901/00073/96 dated 8th November, 1996.

The Plaintiff named the Defendant as a party in this case because the policy of insurance was issued by the Defendant. The Defendant has admitted that fact in paragraph 4 of the Defence. Nowhere in the Plaint does the Plaintiff make any allegation or claim a relief against any of the proposed Co-Defendants. In paragraph 5 of the Affidavit in Support of the application, the Defendant has for the first time alleged that the Defendant had co-insured the aircraft in issue in equal proportions! I find that allegation to be untenable. How can the Defendant admit in its Defence that the policy of Insurance was issued by the Defendant then in the Affidavit in Support of the application the Defendant turn around to allege that the aircraft was co-insured in equal proportion with the proposed

Co-Defendants. Why not exhibit the subject policy document as a prima facie basis of that fact. The Defendant is not being candid.

How are the proposed Co-Defendants necessary in the determination of the dispute between the Plaintiff on the aircraft [...] and the Defendant on Policy No. AVN/901/00073/96. I do not think that those parties

are necessary.

My view is a Defendant is a person against whom a relief is sought in a suit. That is why the marginal notes of Order 1 Rule 3 address reads:-

“Who may be joined as a Defendant”.

This is in line with the definition of a ‘Defendant’ as set out in the **BLACKS LAW DICTIONARY, 8th Edition** which defines a Defendant as – “**a person sued in a Civil Proceeding or accused in a criminal proceeding**. To the contrary Order 1 Rule 10 applies where, looking at the issues involved in a case, the court is of the opinion that if a particular party is not joined, the issues in that SUIT as between the Plaintiff and the Defendant cannot be effectively and finally determined. An example is where A sues C whom he alleges to have acquired his (A’s) land out of a fraudulent sale by B, B in that case becomes a necessary party in that B’s title must be impugned first before C’s title can be challenged.. However, in the case before me, I doubt if the relief sought by the Plaintiff have any bearing whatsoever with the proposed Co-Defendants

As regard the agreement between the Defendant and the Co-Defendants that has nothing to do with the Co-Defendants as defendants in this suit. That is a separate matter as between the Defendant and the Co-Defendants not as Defendants in this suit but probably as third parties. I say so because in its Further Affidavit sworn by Mark Joseph Obuya, the Defendant has averred that some of the Co-Defendants have executed an indemnity. Surely, the procedure of claiming indemnity and/or contribution by a Defendant against someone who is not a party to a suit is not by joining that party as a Defendant but as a party in a difference capacity and there are procedures in Order 1 of the Civil Procedure Rules for that.

One other reason why the Co-Defendants cannot be joined in these proceedings as Defendants, is the issue of limitation. The causes of action under Contract and Tort by the Plaintiff against the Defendant as per the Plaint on record are statute barred as against the Co-Defendants as Defendants at this stage. This is so because it is now twelve (12) years since the circumstances giving rise to the causes of action aforesaid occurred. How then can the Co-Defendants be called upon to defend such a claim or claims? In my view, it would be unjust on the part of the Co-Defendants to be joined as Defendants to defend the Plaintiff’s claim. Of course if they were being joined as 3rd parties, different principles would apply and neither the issue of limitation nor locus standi would arise.

The upshot of the foregoing is that the Defendant’s Chamber Summons dated 23rd April, 2010 is without merit and is dismissed with costs to the proposed Co-Defendants who appeared and opposed the same.

DATED and delivered at Nairobi this 24th day of November, 2011

JUSTICE A. MABEYA