



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 501 OF 2007

BIGOT FLOWERS (K) LIMITED.....PLAINTIFF

VERSUS

KENYA ALLIANCE INSURANCE COMPANY LTD....1ST DEFENDANT

UAP PROVINCIAL INSURANCE COMPANY LTD...2ND DEFENDANT

RULING

The plaintiff has filed a plaint dated 27th September, 2007 suing the two defendants herein. He alleges that at all material times relevant to this suit various insurance policy covers were subsisting between the plaintiff and the defendant which were enforceable at law and which were renewed annually during their existence between the years 2002 and 2005. And pursuant to the said insurance policies the respective defendants agreed in consideration of the payment of the premiums which premiums were in deed paid by the plaintiff that they would indemnify the plaintiff against any legal liability arising out of injuries by accident or disease on the plaintiff's employees arising out of an ^^ in the course of their employment by the plaintiff during the subsistence of the said insurance policies. It also alleges that it was a condition precedent that the plaintiff would observe and fulfill all the terms of the respective policies which it did and to that extent the respective defendants were to carry out their contractual obligation to the applicant. It is further contended that sometimes in the years of 2003 to 2005 the plaintiff was served with numerous summons to enter appearance by various plaintiffs herein referred to as claimants in various suits filed at Naivasha Law courts claiming compensation for purported injuries that had allegedly arisen as a result of alleged accidents at the plaintiff's premises and in the course of their employment by the plaintiff. The said cases are about 120 civil cases filed before the subordinate court by various claimants.

It is also the position of the plaintiff that at no time prior to being served with the summons notified by any of the claimants of the intentions to sue neither were there demand letters served by the plaintiffs to make good the respective claims. In essence the plaintiff contends that it actually learned of the alleged injuries at the time it was served with various summonses to enter appearance. The plaintiff having been sued as the defendant in the various suits for accidents which allegedly occurred during the respective periods of cover subsisting and the aforesaid insurance policies duly notified the respective defendant of various claims against it and required the defendants herein to deal with various claims as appropriate including entering appearance and filing defences against all cases instituted against the plaintiff. However, it is alleged that the respective defendants in blatant disregard of their respective obligations pursuant to the said contracts of insurance liquidated liability and decline to deal with the claims alleging *inter alia* late reporting of the same by the plaintiff hence the plaintiff was compelled to enter appearance and file its defences in various suits against it.

The plaintiff avers that it has instituted third party proceedings against the respective defendants herein in various suits as filed in the subordinate court and is still in the process of instituting other third party proceedings wherein the respective defendants have in turn filed statements of defence in some of the matters denying liability. Therefore the plaintiff claims that it is entitled to claim indemnity from the respective defendants for any judgement that is entered against it in the subordinate courts. And in deed all liability together with costs and other attendant costs in all subordinate court matters should be met by the respective defendants on the strength of the aforesaid contracts of insurance. And as a result the plaintiff has made 3 prayers in the plaint which are;

(a) A declaration that the reporting of the suits by the Plaintiff to the respective Defendants and forwarding the court Summons and other court processes related thereto as and when the same were received by the Plaintiff was sufficient notice as envisaged in the relevant policy documents between the Plaintiff and the respective Defendants.

(b) A stay be issued in respect of all present and future proceedings filed or to be filed in the subordinate Court involving the Plaintiff herein and the respective Defendants in their capacity as Defendant and Third Parties respectively pending the determination of this suit.

(c) A declaration that the Defendant is liable to pay the claimants directly in case of any successful case and/or to indemnify the Plaintiff in all the lower court cases as enumerated herein and further that the Plaintiff is entitled to be indemnified by the defendant for any judgements that may be entered against it in the enlisted claims together with all attendant costs incurred by the Plaintiff in defending the same and any execution in respect of any of those cases pending in the subordinate court do issue directly to the Defendants jointly and severally.

The defence of the 1st defendant is as follows: that the enforcement and/or performance of respective insurance policies was subject to the terms and conditions set out in the respective insurance policies. It also avers that the Plaintiff did not fulfill and/or comply with all the terms and conditions as set out in each particular insurance policy. And it alleges various breaches of obligations on the part of the plaintiff which are;

(a) Failing to notify or communicate to the first Defendant in writing or at all of any accident(s) or diseases(s) affecting the respective insurance policies/covers.

(b) Failing to take any or any reasonable precautions to prevent the occurrence of any accidents or diseases affecting the respective insurance policies/covers.

(c) Failing to furnish to the first Defendant in writing or at all of any insured occurrences which could give rise to a claim under any of the respective insurance policies/covers.

(d) Failing to co-operate with the first Defendant to ensure the performance and or enforcement of the respective insurance policies/covers.

(e) Admitting liability for any accidents or diseases affecting the respective insurance policies/covers without the first Defendant's written consent.

(f) Failing to keep full and proper records of all its permanent and or casual employees as required under the respective insurance policies/covers or at all.

(g) Failing to take any or any reasonable and proper care in the selection and employment of steady, sober and competent employees.

(h) Failing to supply fresh declarations of wages payable to its employees at the commencement of each period of insurance.

On its part the 2nd defendant denies any policies of insurance subsisted between it and the plaintiff as

alleged. It also states that no premiums were paid by the plaintiff to the 2nd defendant. And that it has no knowledge of the occurrence of any accident as alleged by the plaintiff and does not admit the existence of the insurance policies alleged by the plaintiff.

Now the plaintiff has filed an application dated 27th September, 2007 which was simultaneously filed with the plaint. The application is brought under Order XIV Rule 2, Order XXXVII Rules 1 and 2 of the Civil Procedure Rules and Section 3A and 63 of Civil Procedure Act. The prayers in the application are;

(1) THAT a stay do issue in respect of all present and future suits filed or to be filed in the subordinate court against BIGOT FLOWERS (K) LIMITED – the applicant herein or the applicant’s predecessor VIAFLOR PRODUCTION LIMITED, as particularized in but not limited to the schedule of cases annexed to this application, pending the determination of this suit on the issues to be determined by the court on the question of law regarding indemnity and particularly liability as between the Plaintiff/Applicant and the respective Defendants/Respondents herein.

(2) THAT the present suit be selected as a test suit for the determination of the common questions of law and fact that are precisely similar to all the pending third Party Proceedings in the subordinate court and directions with regard to those proceedings that have been instituted or will be instituted by the Applicant against the respective Respondents herein.

(3) THAT all Plaintiffs in the subject subordinate court matters as per the annexed list be enjoined in this suit as interested parties and all court process herein be served upon them through their respective Advocates on record in the subordinate court matters.

(4) THAT the court do order that this suit be determined on the question of issues of law relating to indemnity by an insurer to its insured on an existing policy and more particularly on the issue of liability as respects all the subordinate court matters filed by the various Plaintiffs therein against the Plaintiff/Applicant herein.

(5) THAT the issues for determination be filed within 15 days of the close of pleadings and a date be given on a priority basis for the determination of the said issues once a formal application has been filed.

(6) THAT the costs of this application be in the cause.

The application is supported by the affidavit of **Josphat Kimani Ngaruiya** who is the Human Resource Manager of the plaintiff/applicant. He enumerates the various insurance policies that were in force between the applicant and the two defendants herein. He avers that pursuant to the respective policies enumerated in the supporting affidavit the applicant and the respondents were bound to observe and adhere to the terms of the said policies which were meant to provide and/or indemnify the applicant against any legal liability arising out of injuries by the accidents or disease on the employees of the applicant. He also contends that various summons to enter appearance and complaints in several suits where the various plaintiffs were claiming as against the applicant herein and employers liability for alleged accidents and consequential injuries allegedly sustained in the course of their employment were served on the applicant and/or its predecessor **VIAFLOR PRODUCTION LIMITED**. And in paragraph 9 the gist and/or thrust of the plaintiffs cause of action against the defendant is captured as follows:

“THAT upon service of summons to Enter Appearance and Complaints upon it, the applicant through its insurance brokers duly notified the respective Respondents of the various claims filed against it in anticipation that the respective Respondents would perform their obligations in accordance with the terms of the said respective Insurance Policies and further requiring that the respective Respondents take over the conduct of the various suits on the applicant’s behalf as per the respective contracts of insurance aforesaid . However, the respective Respondents refused, declined and/or neglected to take over and/or proceed with the conduct of all the suits in the subordinate court and actually returned summons to Enter appearance to the applicant whenever the same were forwarded to it alleging *inter alia* late reporting of the same by the applicant. Annexed hereto

and marked “JKN4” are sample copies of various letters related thereto”.

The applicant now seeks that this court determines the suit on issues of law and fact on third party notice and particularly on question of liability in the present suit as a test suit in respect of all the other suits pending for determination in subordinate court. The plaintiff contends that the purpose would be to avoid a multiplicity of varying decision and to save the court’s time. It therefore seeks this court to issue directions on the 3rd party notices as served to enable the issues of liability therein to be canvassed and the matters adjudicated upon and to this end the applicant seeks direction and/or liability be issued in this test suit and the same do apply on all the other suits pending in the subordinate court.

It is also contended by the applicant that the respective respondents’ refusal to indemnify applicant amounts to breach of the terms of the respective subject policies and as such the applicant is entitled to indemnity, damages for breach of contract and costs of this application as well as costs of all suits that have been brought against it by employees relating to injuries that were allegedly sustained during the subsistence of respective policies. The plaintiff therefore contends that this court has jurisdiction to stay proceedings in all the pending suits against the applicant in the subordinate courts and to further order the respective suits in the subordinate courts against the applicant in respect of causes of action arising during the subsistence of the aforesaid insurance policies between the applicant and respective respondents to stand stayed immediately upon the filing of appropriate defences thereto pending the hearing and determination of issues raised in this application and suit. The beneficial result of such action is alleged to be;

- (1) This will assist to determine the common issues that are germane in all the 3rd party proceedings that have been commenced and/or are yet to be commenced by the applicant against the respective respondents.
- (2) The finding of this Honourable court in this matter will assist the parties to a great deal by saving on individual time as well as judicial time that would otherwise be expended by the subordinate court at Naivasha in individually determining the aforesaid issues in its endeavour to dispose of the numerous suits before it.
- (3) This will further assist the concerned parties in saving the legal costs which will certainly be colossal given that more than 100 suits against the applicant are pending before the Magistrate’s court at Naivasha so far and in all these suits the applicant has either already commenced and/or seeking leave of the court to commence 3rd party proceedings against the respective respondents on grounds supplied herein.

The 1st defendant filed a replying affidavit through one **Janerose Gitonga** who is the Head Claims Services in the 1st defendant company. The said affidavit captures what is contained in the defence and adds that the plaintiff failed to promptly notify the 1st defendant of any occurrences which could lead to a claim under the respective policy covers. The deponent also accuses the applicant of not being fully cooperative to the 1st defendant in the due performance of contractual obligation under the various policy covers. The 1st defendant also accuses the applicant of not admitting liability for any alleged claim which would ordinarily fall within the ambit of the various insurance policies. Further the deponent states that this is not a proper case to be made a test suit and the requirements of Order XXXVII of the Civil Procedure Rules have not been satisfied by the applicant.

The 2nd defendant on its part filed grounds of opposition stating that the applicant is not entitled to the orders sought under any of the provisions cited. The 2nd defendant also contends that the present defendants are not parties to the suit in the subordinate court and therefore the orders sought cannot be granted since the plaintiffs in the suits in the subordinate court are not also parties to this suit.

I have considered the submissions of the learned counsels for all the parties in this proceedings. I have also taken into consideration the pleadings and affidavits filed by the parties in this application. First and foremost I start by saying that as a general rule only matters arising from the same cause of action or

which can conveniently be tried together should be joined in the same suit. Consequently it would appear that actions not based on the same cause of action should not ordinarily be tried together. I must also state that it is no business of the courts to rewrite contracts for parties, their task and obligation is to enforce agreement voluntarily made by the parties on the basis of their own perceived interests.

I have noted the first prayer in the application is for a stay of all present and future suits filed or to be filed in the subordinate court against the applicant or his predecessor pending the determination of this suit on the issues regarding indemnity and particular liability as between the plaintiff and respective defendant herein. My answer is that such an order cannot be granted because the parties who are plaintiffs in the 120 cases before the subordinate court in Naivasha are not parties in this suit and it would not be fair to issue adverse orders against parties who are not enjoined in this suit. The plaintiff herein having failed to join those relevant parties then this court has no jurisdiction to entertain the prayer for staying suits which are not pending before it. It seems to me that the matter between the plaintiff and the defendants substantially affects the rights of the claimants in the 120 cases already filed and pending before the subordinate court. The grounds for the application are that the issues to be tried in this suit and the issues to be tried in the 120 cases before the subordinate court are the same or similar. That may be true and that the outcome of the present suit would have a bearing on the other pending suits but it must be understood that the suits pending before the subordinate court cannot be an issue to be entertained by this court. To challenge the issues before the subordinate court through a separate suit like the one before me would radically change the status and direction of the suit pending the lower court. The issues before the lower court are extraneous to the matters before me.

I agree this court has unlimited original jurisdiction but that cannot extend to determine issues against the parties and matters pending for determination before the lower court. Parties can only challenge matters and issues before a lower court in the High court through the proper channel and mechanism. I do not think I have jurisdiction to stay proceedings filed before the lower court when there is no allegation that the lower court has no pecuniary or necessary jurisdiction. I am therefore in agreement with **Mr. Kiragu Kimani** learned counsel for the 2nd defendant that the issues in this matter would cause great prejudice to the plaintiffs in the 120 cases pending before the lower court. I am also in agreement with him that the issues in this matter would muddle the issues in the 120 cases pending before the subordinate court.

In my view the prayers in the application as far as it touches or makes reference to parties who are not part of these proceedings is superfluous and speculative. The plaintiff appears to be inclined to stop proceedings before the lower court in the High court when the necessary jurisdiction has been invoked. I therefore make a finding that I have no jurisdiction to determine issues which are the subject matter of proceedings before the lower court. In particular prayer No.4 the applicant wants this court to determine the issue of indemnity and the issue of liability as in respect of all matters pending before the subordinate court and/or filed or to be filed by various plaintiffs. In my humble view this court cannot exercise original jurisdiction over matters which the lower court is empowered by law to determine. In the premises it is my judgement that this application is misconceived and an abuse of the court process.

ORDER: The application dated 27th September, 2007 is hereby dismissed with costs to the defendants.

Dated and delivered at Nairobi this 10th day of April, 2008.

M. A. WARSAME

JUDGE