REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION 1146 OF 1999

[FROM ORIGINAL SENIOR RESIDENT MAGISTRATE'S COURT AT THIKA

CIVIL SUIT NO. 1159 OF 1995]

1. SILAS KAMAU

2. JOEL NGUGI

3. STEPHEN NJENGA

4. SHADRACK NDUNGU

5. JAMES NDUNGU ……..…….....PLAINTIFFS/RESPONDENTS

[all minors suing by their next friend)

and fathers Peter Ndungu Kiruri;)

James Njoroge Kamau;)

Joseph Ndungu Gachau;)

Peter Ngugi Kirori; and)

Jackson Kamande Ndungu])

-VERSUS

KENYA NUT COMPANY LIMITED.....DEFENDANT/RESPONDENT

KENINDIA ASSURANCE CO. LTD.....THIRD PARTY/APPLICANT

AND

[FROM ORIGINAL SENIOR RESIDENT MAGISTRATE'S COURT AT NAIROBI CIVIL CASE NO. 9451 OF 1995]

STEPHEN MWAURA.....PLAINTIFF

-VERSUS

FANUEL OMBONDO NGAIRA.....1ST DEFENDANT

KENYA NUT COMPANY LIMITED.....2ND DEFENDANT

KENINDIA ASSURANCE COMPANY LTD.....THIRD PARTY

RULING

The third party's application by Chamber Summons, dated 21st October, 2003 and filed on 29th October, 2003 was brought under Order I, rules 10 and 13, and Order VI, rule 13(c) and (d) of the Civil Procedure Rules. The prayers in this application are as follows:

(i) that, the defendant's third party notices and statement of claim against the third party be struck out;

(ii) that, the costs of this application be awarded to the third party.

The application is premised on the following grounds:

(a) that, the plaintiff's claim against the 2nd defendant is based on tort, while the alleged claim by the 2nd defendant against the third party is based on contract; so the 2nd defendant is not entitled to indemnity in these proceedings;

(b) that, the defendants, if they have any claim against the third party, had abandoned it through their failure to refer the matter to arbitration;

(c) that, the defendant's third party notices and statement of claim against the third party may prejudice, embarrass or delay the fair trial of the action between the plaintiffs and the defendant.

Evidence to support the application is in the depositions of Emily Omondi, a legal officer employed by the third party, dated 27th October, 2003. She depones that the 2nd defendant had applied for a commercial vehicle insurance cover for a motor vehicle Registration No. KUT 154 and the third party issued the defendant with Policy No.114/080/100503/94/7 for a period of one year commencing on 1st August, 1994. The policy was subject to the normal terms and conditions offered by the third party and the cover was limited in scope by the terms of the policy and as stipulated. It was not expressly or impliedly provided or contemplated that the third party would indemnify the defendant against any claims by any person in the employment of the 2nd defendant arising out of and in the course of such employment.

The 2nd defendant had also applied for an insurance cover under the Workmen's Compensation Act (Cap. 236), and the third party issued Policy No. 114/110/101387/94/7 for a period of one year commencing on 1st August, 1994. The policy was subject to the normal terms and conditions offered by the third party.

The 2nd defendant further applied for an insurance cover under the employer's common law liability; and the third party issued Policy No. 114/111/101388/94/7 for a period of one year commencing on 1st August, 1994. This policy was subject to the normal terms and conditions offered by the third party.

Under clause (i) of the exceptions to the employer's common law liability policy, any injury caused or contributed to directly or indirectly by the deliberate or wilful act of the insured was excluded. Under clause (k) of the exceptions, the third party would not be liable in respect of injury, loss or damage caused by, or through, or in connection with the ownership or possession or use by or on behalf of the injured of any vehicle which is insured for the benefit of the insured, under any form of motor vehicle insurance

policy.

On 2nd December, 1994 the 2nd defendant's motor vehicle was involved in an accident in which it is alleged that the plaintiffs sustained bodily injuries and, as a result, suffered pain, loss and damage.

The 2nd defendant made claims under the common law liability policies, but made no claims under the Workmen's Compensation Policy. The third party repudiated liability to the 2nd defendant's claim under the employer's common law liability policy (by letters dated 17th May, 1995 and 28th June, 1995). The plaintiffs having failed to recover damages/compensation from the third party and the 2nd defendant upon their claims, filed suit against the 2nd defendant on 31st August, 1995 and 25th September, 1995; and the plaintiffs in Thika SPMCC No. 1159 of 1995 amended their plaint on 21st November, 1995.

The 2nd defendant, upon being sued, served third-party notices dated 15th December, 1995 and 1st July, 1996 on the third party, as well as the 2nd defendant's statement of claim against the third party dated 25th October, 1996, in the Nairobi Senior Resident Magistrate's Court case. The third party filed its defence to the 2nd defendant's claim on 1st March, 1999 and amended its defence on 17th August, 1999.

The deponent expresses her belief, that the 2nd defendant's claim against the third party is based on contract, while the suit between the plaintiffs and the 2nd defendant lies in negligence. The deponent believes the advice from her advocates, that the two causes of action are distinct and separate; and that the 2nd defendant is not entitled to seek indemnity from the third party in respect of the contractual matter.

The deponent further avers that the 2nd defendant had failed to abide by the conditions set out in all the three policies issued by the third party: requiring that any disputes under the polices be referred to arbitration.

An advocate for the 2nd defendant, ***Mr. Kimamo Kuria,*** swore a replying affidavit on 3rd December, 2003. He avers that this Court had made certain orders on 24th November, 1999 which the third party had not complied with. The deponent states that the instant application is intended to cause delay in the finalisation of several cases filed by plaintiffs against the 2nd defendant and in which the third party has been joined.

On the first occasion of hearing this application, learned counsel, ***Mr. Ogunde,*** who represented the third party/applicant observed that several suits had been filed following a motor vehicle accident, which also involved the 2nd defendant/respondent's motor vehicle.

Thus facing a multiplicity of suits, the 2nd defendant issued several third-party notices; and what is being sought thereby is indemnity. The 2nd defendant claims that indemnity will arise from various insurance policies which had been issued by the third party. Counsel stated that the various claims were essentially in tort. But the claims being contested by the third party are in contract; and the third party contends that it is improper to join action against the 2nd defendant (in tort) with action against the third party (in contract). Counsel submitted that only matters from the same cause of action, or which can be tried together, can be joined in the same suit. The third-party notice, counsel submitted, offended this principle of the trial process.

Learned counsel sought to buttress his submission with the authority of Yafesi Walusimbi v. ***The Attorney-General of Uganda*** [1959] E.A. 223. ***Lyon, J*** stated in that case as follows (p.225):

> ***"In my opinion two things are clear in third party procedure: (1) in order that a third party may be legally joined the subject matter of the suit must be the same and (2) the original cause of action must be the same. In the instant case the plaintiff's claim is based on negligence. On the other hand the defendant's claim as against the third party is based on a different tort —fraud — while the third party's claim as against the fourth party is based upon fraud and/or breach of contract.***
>
> ***"The subject matter is not the same as between the four parties because the third party sold***

and transferred to the fourth party only a part of the land which, it is not in dispute, he had already agreed to sell and transfer to the plaintiff. That being so, and as the cause of action is not the same between the four parties, I hold that the two orders giving leave to serve the third and fourth parties with third party notices must be set aside."

These principles, counsel submitted, have already been fully adopted in the decisions of this Court, as bears witness the case, Anne Wanjiku Muraria v. Benson Wanjiba, Civil Case No. 1170 of 1987. The following words of Mbito, J are worth quoting:

"As is now depressingly common, the arties did not refer to any legal authorities, on this matter which raises a point of great legal interest, namely whether or not the word 'indemnity' is restricted to indemnity arising from the same cause of action or includes those from other independent causes of action, such as the one in this application. As a general rule only matters arising from the same cause of action or which can be conveniently 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 and a third party notice cannot be issued unless the issuer seeks contribution and indemnity based on facts arising from the same cause of action."

On 24th November, 1999 a consent order, in relation to the defendant's Notice of Motion of 6th September, 1999 had been recorded by Mr. Justice V.V. Patel. The content of this order was as follows:

(a) Civil Suit No. 1159 of 1995 pending before the Senior Resident Magistrate's Court at Thika, and Civil Suit No. 9451 of 1995 pending before the Senior Resident Magistrate's Court at the Milimani Commercial Courts, Nairobi, be withdrawn from the two Courts and be transferred to the High Court;

(b) the two suits be consolidated, for the purposes of hearing;

(c) upon consolidation, the suit be tried as a test suit, in respect of the issue of the Third Party's liability to indemnify the defendant: and the decision therein be binding in all the suits;

(d) pending the hearing and final determination of the test suit, the proceedings of the plaintiff's claims in all the suits or any other suits arising from the same accident, be stayed;

(e) the Third Party to be at liberty to challenge the third party proceedings in their entirety.

Learned counsel stated that the instant challenge to the third-party notices was in keeping with the terms of the said consent orders.

As to whether it was proper in law to challenge the third-party proceedings, counsel cited the Court of Appeal ruling in ***Rahilu Mohamed Khan v. Standard Chartered Bank (K) Ltd. & Another,*** HCCC No. 297 of 1997, in which it was held that third party notices are in the same category as pleadings — and thus could be contested in a different party's pleadings. Their Lordships held:

"…we agree…that the application for a third party notice is not a pleading but we are unable to agree with him that a third party notice is not a pleading. A third party notice is a manner prescribed in the Civil Procedure Rules for instituting a suit and cannot be anything else, but a pleading. The definition of the term 'pleading' in section 2 of the Civil Procedure Act is not exhaustive, and must be read with Order 4, rule 1 of the Civil Procedure Rules to get its full meaning."

Learned counsel contended that the 2nd defendant had no good cause for pursuing claims against the third party, because no recourse had been made to a dispute resolution avenue that had been provided

for: arbitration. This argument was reinforced with the principle established in case law, that Courts will not re-write contracts for parties; their task and obligation is to enforce agreements voluntarily made by the parties, on the basis of their own perceived interests. Counsel cited the case, ***Rift Valley Textiles Ltd. v. Cotton Distributors Incorporated*** [1982] KLR 427, where the Court of Appeal Had stated (p.433):

> **"The term 'arbitration agreement' [is]… a written agreement to refer present or future differences to arbitration.**
>
> **"Mr. Deverell's submission on this point is that the words 'party to reference to arbitration' … do not refer to an existing dispute only, but also cover a future dispute, and he relies on the judgement of Scarman, J … in The Merak [1965] 1 All E.R. 230 at p.233. Scriven, J dealt most fully with this point…He concluded with some hesitation, that where in a contract there is an agreement that disputes shall be arbitrated, that is in itself a submission, or a reference, to arbitration without any further step being required. I am of the same view [i.e. Law, J.A.]. In my opinion 'a reference to arbitration' … means both an actual reference of an existing dispute and an agreement to refer future disputes."**

And in another Court of Appeal decision, ***Fina Bank Ltd. v. Spares and Industries Ltd*** [2000] 1 E.A. 52. The pertinent passage appears in the (dissenting) judgment of ***Shah, JA*** (p.66):

> ***"What the learned Judge did was to fall into a serious error by considering the matter before him from the standpoint of a sympathiser. Whilst it is human to so feel, the function of the Court is to enforce what is agreed between the parties and not what the Court thinks ought to have been fairly agreed between the parties. I agree [with] what was stated by Rimer, J in the case of Clarion Ltd & Others v. National Provident Institution [2000] 2 All E.R. 265 at 281 J; he said:***
>
> ***"The thrust of NDI's complaint is simply that [it] made a bad bargain from which it now wants to be released. It is, however, of the essence of business transactions that each party is bargaining in his own interest and for his own benefit and that each has to look after his own interests and that in most cases neither owes any duty of care or disclosure to the other. It is inherent in such a system that there will be those who will make bad bargains, but that is the risk which in my view each bargaining party must be assumed to be willing to take and which the law must be regarded as having allocated to him'."***

Learned counsel submitted that the 2nd defendant's attempt to litigate by way of third-party procedure was contrary to the insurance policy contracts. He urged that the 2nd defendant's third-party notices amount to an abuse of the process of the Court and should be struck out under Order VI, rule 13(c) and (d).

Learned counsel, ***Mr. Kuria***, for the 2nd defendant recounted how the 2nd defendant had taken out three insurance policies with the third party, and while these policies were in force an accident occurred involving the 2nd defendant's vehicle. In the accident the passengers, who were workers in the coffee-picking industry, were injured and they filed suits in different Courts in Kenya, seeking compensation for injuries suffered. The 2nd defendant then approached the third party requesting them to take up the claims, in accordance with the insurance policy contracts. The third party, however, declined to take action as requested. The 2nd defendant then filed applications for leave to issue third-party notice upon the third party. The applications were allowed, and third-party notices were served upon the third party; whereupon the third party entered third-party appearance and filed defences. But thereafter the third party filed applications to strike out the third-party notices, on the basis of s.6 of the Arbitration Act, 1995 — on the grounds that there was an arbitration clause which had the effect that no cause of action could arise against the third party before the matter was referred to arbitration.

Mr. Kuria contended that there was no provision in the Arbitration Act for striking out pleadings, and that only stay could have been sought where there was an arbitration clause. Learned

counsel went on to argue that in the circumstances of this matter, the third party was no longer entitled to stay of proceedings under s.6 of the Arbitration Act, because it had already taken a step in the proceedings beyond the contemplation of that section. It was contended that under the Arbitration Act, 1995 an application for stay of proceedings could not be made after entering appearance. The third party, it was urged, had already taken a step by filing the application to strike out the proceedings, as well as a second step of filing an application for an amendment of that first application — by substituting "stay" in place of "striking out." Counsel submitted that these applications amount to steps in the proceedings, and thus the applicant had thereby lost the opportunity to apply for stay of the third-party proceedings. When the 2nd defendant had applied in the various Courts for thirdparty directions (under Order I, rule 18), the applicant had been duly served, and its advocate attended and participated in the proceedings for directions. Some of the directions had been given on the consent of the 2nd defendant and the third party. One of the directions had been that the issue of liability as between the 2nd defendant and the plaintiffs, be tried simultaneously with the issue of liability as between the 2nd defendant and the third party, and in this regard consent orders were made. Following these developments, the 2nd defendant made an application in the High Court to stay all the suits in the various Courts, pending determination of the issue of liability between the 2nd defendant and the third party, under the various insurance policies in force as at the time the accident occurred. *In this application, the third party had supported the 2nd defendant; and the Judge stayed all the other suits, with a test suit being selected to be* heard.

After the matter had progressed thus far, the third party now came up with the present application, seeking to strike out the third-party notices. The grounds relied upon by the third party: that the cause of action between the various plaintiffs and the third party is based on tort, while that between the 2nd defendant and the third party is based on contract. This application, counsel submitted, was not brought in good faith. Counsel cited for challenge the ground set up by the third party: that to proceed with the test suit would embarrass fair trial. On the contrary, counsel submitted, it is precisely the third party's application which would embarrass the trial process. *When the current application was filed on 29th October, 2003 it put on hold the hearing of all the plaintiff's suits.*

Counsel submitted that although the supporting affidavit claimed that the third party had repudiated liability, the correspondence between the 2nd defendant and the third party does not show any repudiation of the insurance contract.

Mr. Kuria acknowledged that the third-party claim was based on contract; *but it would only materialise if the tort claim succeeds. If the claim in tort failed, then similarly the claim in contract would fail; because the insured cannot prosecute a claim under the policy independent of the existence of a tort claim.* Hence the third-party notice by the 2nd defendant merely puts the third party on notice: notice that the tort claims have arisen; and on notice that should the plaintiff succeed in the tort claim against the 2nd defendant, then the third party would be called upon to fulfil the contractual obligations under the insurance policy. The content of the insurance contract is such that it contemplates claims in tort. The insurer undertakes to indemnify the insured in case a claim arises in tort. Such is a policy of indemnity, and it is the very hallmark of an insurance policy contract.

Against that background of explanation, learned counsel questioned the rather bald claim made for the third party, that contract and tort causes of action cannot be heard together. Counsel urged that the case relied on by the third party, ***Yafesi Walusimbi v. The Attorney-General of Uganda [***1959] E.A. 223 be distinguished; for there, the causes of action in question were fraud and negligence, which were not related in any way. By contrast, in the instant case the contract of insurance contemplated claims in tort: hence the contractual obligation to indemnify; and liability to indemnify by an insurance company is well recognised even by statute, the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405).

Counsel also observed that in the ***Walusimbi*** case the opposition to third-party notice had arisen during the third-party directions: and this was always the right time to challenge third-party proceedings. The third-party notice is always issued ex parte; and so the first opportunity to challenge it was during the directions. In the Walusimbi case the objection had been upheld. In the instant case, counsel submitted, things had gone a bit too far. The applicant had participated in the proceedings and had consented to the contract and tort causes of action running together.

In ***Anne Wanjiku Muraria v. Benson Wanjiba,*** Civil Case No. 1170 of 1987, no third-party direction had been taken as required under Order I, rule 18. The third party's position there, was that the policy of insurance was invalid. It is clear that the said case does not carry the principle that causes of action, to be tried together, must be the same. In the words of Mbito, J:

> ***"As a general rule only matters arising from the same cause of action or which can be conveniently tried together should be joined in the same suit."***

Learned counsel submitted, I think, quite meritoriously, that in the instant case, the two issues of contract and tort can be conveniently tried together.

On the question whether the third party had reserved its rights to challenge the thirdparty proceedings, learned counsel submitted that the challenge would have been during the trial itself, rather than through an interlocutory application such as the present one. Counsel went further to submit that estoppel ought to apply against challenge by the third party of orders made by consent — especially as the third party had led the 2nd defendant to make concessions on the agreed mode of disposal of the issues in dispute; and the third party's position had conduced towards the acceptance of the principle that the tort and contract issues would be tried together. If the third party was allowed to resile from that position it would be detrimental to the 2nd defendant.

Learned counsel cited ***Myers v. N. & J. Sherick Ltd & Others*** [1974] 1 All E.R. 81 as demonstrating that in third-party proceedings it was not required that there be only one cause of action; what was important was that there be a nexus between more than one cause of action. In the words of Goff, J (p.83):

> ***"I turn then to head (b) and it is clear that to qualify under that head one has to show two things: first that the relief or remedy claimed against the third party is one 'relating to or connected with the original subject-matter of the actions'; and secondly, that it is 'substantially the same as some relief or remedy claimed by the plaintiff' ….."***

Mr. Kuria submitted that the third party had lost its opportunity to be discharged from liability at the stage of third-party directions. He relied on ***Savji Harji Varsani v. Kanjee Naranjee (Kenya) Ltd. [1***977] KLR 171 in which the East African Court of Appeal held (pp.173 – 174):

> ***"We are of the view that Kneller, J was quite right in saying that the proper time for the third party to apply to be discharged was on summons for directions when the Court makes up its mind whether, after the third party has appeared, he has a case to answer. There may well be cases where a third party may bring an application by chamber summons to be discharged otherwise than on a summons for directions, for example if there was a deliberate or undue delay on the part of the defendant to ask for directions to the prejudice of the third party."***

In his reply, learned counsel, ***Mr. Ogunde***, contended that the third party's objections could not have been confined to the time of third-party directions, especially because by consent order made on 20th November, 1999 the third party had been allowed to challenge third-party proceedings any time. Consent is at the core of the third party's application. Learned counsel, while acknowledging that the case, ***Savji Harji Varsani v. Kanjee Naranjee (Kenya) Ltd. [***1977] KLR 171 had upheld the principle that an attack on third-party proceedings could only be mounted, as a general rule, during directions, maintained that in the instant case there was a consent order allowing such attack any time.

The crucial elements in the third party's application are: that the third party had been, by consent, given the licence of attack upon the third-party proceedings; and that the 2nd defendant's case was incompetent because it was seeking indemnity while pursuing a melange of a case, in which claims were being made simultaneously in tort and in contract. The order which incorporated the consent of 24th November, 1999 came somewhat abruptly, and is not prefaced by any proceedings that give the context, or record the main considerations. It reads:

"It is further ordered that the…third party be at liberty to challenge third-party proceedings in their entirety."

From the rather skeletal content of this Order, I have found it difficult to recognise that it conferred any overriding right upon the third party, without time-limit, to challenge the third-party proceedings. I believe the third party remained subject to the recognised principles of law such as are set out in ***Savji Harji Varsani v. Kanjee Naranjee (Kenya)*** Ltd [1977] KLR 171. Instead of attacking the third-party proceedings at the directions stage, the third party had voluntarily chosen to support the 2nd defendant, against the opposition of the plaintiff. I take this to mean that the complaint now raised against those proceedings is an afterthought, and the third party will not in any manner be prejudiced if its current position is not allowed.

It is quite clear to me from the case law, notably ***Yafesi Walusimbi v. The Attorney- General of Uganda [1959] E.A. 223 and Anne Wanjiku Muraria v. Benson Wanjiba***, Civil Case No. 1170 of 1987 that the tort and contract claims in this case can conveniently be heard together; indeed they just cannot be separated, as the tort claims between the plaintiff and the 2nd defendant, are precisely what triggers the insurance contract claims, as between the 2nd defendant and the third party. I therefore do not find the applicant's claim, in this regard, meritorious.

Litigation must come to an end. So much progress has been made with the thirdparty proceedings, and with the test suits arranged to lead to a general formula for resolving the multiplicity of claims, that it is most regrettable the third party should have filed the instant application, which would be destined to cause inordinate delay in the completion of the hearings. The application, I would agree with counsel for the 2nd defendant, can only embarrass the fair and expeditious trial of the several suits. It is undesirable therefore, that the instant application should be allowed to proceed.

Although the third party referred to failures on the part of the 2nd defendant to make recourse to arbitration, this point was not seriously argued; and I hold that it has no materiality in relation to the merits of the 2nd defendant's position.

Like counsel for the 2nd defendant, I have serious doubts about the bona fides of the third party's application. I will make the following order: T*he applicant's Chamber Summons application of 21st October, 2003 is dismissed with costs to the defendant.*

Orders accordingly.

DATED and DELIVERED at Nairobi this 17th day of June, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Third Party/Applicant: Mr. Ogunde, instructed by M/s. Hamilton Harrison & Mathews Advocates.

For the Defendant/Respondent: Mr. Kuria, instructed by M/s. Ramesh Manek, Advocate.