



Multi Energy Limited v Anwaralli & Brothers Limited; Takaful Insurance of Africa Limited (Intended Third Party) (Civil Appeal E002 of 2024) [2025] KEHC 593 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E002 OF 2024
AN ONGERI, J
JANUARY 17, 2025**

BETWEEN

MULTI ENERGY LIMITED APPELLANT

AND

ANWARALLI & BROTHERS LIMITED RESPONDENT

AND

TAKAFUL INSURANCE OF AFRICA LIMITED INTENDED THIRD PARTY

(Being an appeal against the Ruling and Order of Hon. A. M. Obura (CM) in Voi CMCC No. E122 of 2023 delivered on 4th December 2023)

JUDGMENT

1. This is an interlocutory appeal from the Ruling of Hon. Obura in Voi CMCC No. E122 of 2023 in which the trial court declined to allow an application dated September 19, 2023 which was seeking to enjoin the insurer of the Defendant as a 3rd Party.
2. The trial court found that having regard to Section 5 and 10 of Cap. 405, this is not a proper case to determine the issue of indemnity as between the Defendant and the 3rd Party.
3. The trial court relied on the case of Kingori =Versus= Chege & 3 Others (2002) KLR 243 where the court said that a 3rd Party cannot be added so as to introduce a new cause of action.
4. The Defendant was aggrieved with the Ruling and has appealed to this court on the following grounds:-
 - i. The learned Honourable Court erred in law and in fact by failing to appreciate that the intended 3rd Party is a principal party in effectively adjudicating the primary suit.



- ii. The learned Honourable Court erred in law and in fact in holding that the intended 3rd Party is not a necessary party to the primary suit therein.
 - iii. In the circumstances of the case, the findings of the Honourable Court are unsupportable in law or facts.
5. The parties filed written submissions as follows:- the appellant submitted that in the impugned ruling the trial court failed to distinguish between a co-defendant and a third party. The defendant insured seeks to join the insurer by way of third-party procedure and join the insurer as a third party and not as a co-defendant.
 6. In support the appellant relied on the Nigerian Supreme Court in the case of *New India Insurance v Odubanjo*, (1971) LLJR-SC held that an insurer can be joined as a Third Party in an action against the insured where the issue of indemnity is challenged by the insurer. The court stated:

“It is true that at one stage soon after the passing of the first English legislation in regard to third party insurance in motor cases it was thought wrong to join the insurers in jury cases as this might affect the mind of the jury, so that this was held to be a reason for non-joinder: see *Carpenter v. Ebbelwhite* [1939] 1 KB 347; [1938] 4 All E.R. 41.

Nonetheless that had changed by 1967, as was shown by the words of Lord Denning, M.R. which appear in the passage referred to in *Post Office v. Norwich Union Fire Ins. Socy. Ltd.* (ibid.), because the practice of hearing such cases by a Judge and jury had changed to a hearing by a Judge alone. This had indeed been emphasised earlier in *Harman v. Crilly* [1943] K.B. 168, [1943] 1 All E.R. 140 but it is important to note that this case was one wherein the defendants were seeking to join their insurers as third parties under a contract of indemnity between the defendants and the insurers, so that there was privity of contract between them and it was thought convenient to try that at the same time as the action by the plaintiff against the defendants, as Goddard, L.J. indicated when he said at 173-143):

It seems to me that the deciding question whether or not there is a contract of indemnity should be tried in the same proceedings as the action in which the liability of the defendants will be determined. There is no ground for saying this third party notice is in any way embarrassing or would lead to anything but a fair trial of the action.”

The action was not begun there by the plaintiff suing the insurers.”

7. The respondent alternatively submitted that Order 1 Rule 15 of the Civil Procedure Rules 2010 allows a defendant to issue a third-party notice to any person not already a party to the suit requesting them for contribution or indemnity in the plaintiff’s matter in the event the court finds the defendant liable. The respondent argued that the issue between the appellant and the intended third party is that of breach of contract. Joining the intended third party to the primary suit would introduce a new cause of action from that of the respondent and should not be adjudicated in this matter as the respondent has nothing to do with it.
8. This being a first appeal the duty of the first appellate court is as follows:-

In *Selle -vs- Associated Motor Boat Co.* [1968] EA 123 where the Court held: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.



An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

9. The issues for determination in this appeal are as follows:-
 - i. Whether the enjoinder of the 3rd Party will introduce new issues.
 - ii. Whether the appeal should be allowed.
 - iii. Who pays the costs of the appeal.
10. On the issue as to whether the enjoinder of the Intended 3rd Party would introduce new issues, I find that the Defendant is seeking indemnity against the Intended 3rd Party who is its insurer.
11. Sections 5 and 10 of Cap 405 Laws of Kenya states as follows:-
 5. Requirements in respect of insurance policies.

In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

 - (a) is issued by a company which is required under the *Insurance Act* (Cap. 487) to carry on motor vehicle insurance business; and
 - (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

 - i. liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or
 - ii. except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or
 - iii. any contractual liability;
 - iv. liability of any sum in excess of three million shillings, arising out of a claim by one person.
 10. Duty of insurer to satisfy judgments against persons insured.



- (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.

12. I find that the issue of indemnity is not a new issue but one which ought to be determined separately but in the same suit.
13. I find that this appeal has merit and I allow it.
14. The Intended 3rd Party be and is hereby enjoined as a necessary party to this case. The Defendant/Appellant to serve the 3rd Party with the notice within 15 days of this date.
15. I further direct that the issues between the Intended 3rd Party and the Defendant be determined separately from the issues between the Plaintiff/Respondent and the Defendant/Applicant.
16. The costs of this appeal to abide the main cause.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina/Trizah

