



**Gateway Insurance Company Limited now Sanlam General Insurance Limited  
v Joseph; Ngethe & another (Intended Defendant) (Suing as the administrators  
of the Estate of the Late Peter Kagwima Kimani) (Civil Suit 432 of 2013)  
[2024] KEHC 61 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 61 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 432 OF 2013  
JWW MONG'ARE, J  
JANUARY 11, 2024**

**BETWEEN**

**GATEWAY INSURANCE COMPANY LIMITED NOW SANLAM GENERAL  
INSURANCE LIMITED ..... PLAINTIFF**

**AND**

**GATHOGA JOSEPH ..... RESPONDENT**

**AND**

**GRACE WANJIRU NGETHE ..... INTENDED DEFENDANT**

**GEORGE GATHUA MATHU ..... INTENDED DEFENDANT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE PETER  
KAGWIMA KIMANI**

**RULING**

1. The Applicants through a Notice of Motion Application dated, 20<sup>th</sup> November 2020 have moved this Honourable Court seeking the following orders:-
  - i. An order that Grace Wanjiru Ngethe and George Gathua Mathu be enjoined in the suit as defendants and be granted unconditional leave to defend the suit.
  - ii. An order directed to the Plaintiff to amend the plaint and include the Applicants as 2<sup>nd</sup> Defendants.



- iii. An order that the Plaintiff's case be reopened and recall Pw1 for Examination in chief and cross-examination.
  - iv. That costs be provided for.
2. The Notice of Motion is supported on the following grounds as per the affidavit of Grace Wanjiru Ngethe, in which she stated that they had filed a suit on behalf of the estate of the late Peter Kagwima Kimani against the Plaintiff's insured Joseph Muiruri Gathoga and the National Police Service Commission, the Inspector General of police and the Attorney General in Limuru Civil suit no. 318 of 2015 for special damages, as a result of a road traffic accident that claimed the life of Peter Kagwima. She went further to state that by its judgment delivered on 28<sup>th</sup> February, 2019 the court awarded the intended Defendants Kshs.7,647.686/- plus interest and costs against Defendant Joseph Gathoga, the court also apportioned liability in the ratio of 10% for Joseph Muiruri Gathoga and 90% for the National Police Service. The Intended 2<sup>nd</sup> Defendant claims the settlement of the 10% due and owing from the plaintiff with no avail, which prompted the filing of a declaratory suit under the doctrine of subrogation on 11<sup>th</sup> June 2019 in Limuru Cmcc no. 141 of 2019 where the judgment was entered in favour of the Plaintiff vide the ruling dated 24<sup>th</sup> July 2020.
  3. She argued that the Intended 2<sup>nd</sup> Defendant ought to be enjoined in the proceedings as the Plaintiff is entitled to repay the Intended 2<sup>nd</sup> Defendant the amount of Kshs.764, 768.60/= and that therefore, the joinder will enable the court to effectively and judiciously determine the issue in dispute as the outcome of the case will affect the claim against the Plaintiff.
  4. In her further Affidavit sworn on 18<sup>th</sup> March 2021, Grace Wanjiru Ngethe contends that the doctrine of privity of contract has exceptions and that the court ought to grant third parties the right to enforce a contract made for their benefit since the claim before this court relates to a breach of a third-party risk insurance policy. That the Applicants further stand to suffer irreparable loss and damage which cannot be compensated by an award of damages as the Applicants will be unable to execute the judgment and the decree dated 24<sup>th</sup> July 2020 if not enjoined in the present suit and in any event the Plaintiff will suffer no prejudice if the application is allowed.
  5. In opposing the application Joan Oburu, the legal officer of the Plaintiff, filed a Replying Affidavit sworn on 12<sup>th</sup> February, 2021 in which she deponed the Defendant took out a third-party risk insurance policy cover against the Motor Vehicle KAN 476A, and a Certificate of Insurance No. 5677769 and Policy No. 030/084/1/033565/2012/11 was issued, and that the Intended 2<sup>nd</sup> Defendants were not parties to the Policy of Insurance No. 030/084/1/033565/2012/11 and therefore ought not to be enjoined as parties to the present suit. That the Applicants will add no value to the suit if enjoined and that the Defendant breached the policy of insurance in respect to Motor Vehicle KAN 476A which resulted to the filing of the instant suit, which is against the Defendant and the prayers or the reliefs sought can only be responded to by the Defendant/insured and not the intended parties as they played no role in the cause of action leading to the filing of the present suit. She further stated that the defendant failed to enter a defence and an interlocutory judgment having been entered, the matter proceeded for formal proof with only one witness remaining to testify, the matter had progressed too far to enjoin new parties.
  6. She depones the Applicants have failed to demonstrate the basis for them to be enjoined as parties to the suit and that no justification has been advanced to warrant the re-opening of the case. She urges the court to find that the application is frivolous, vexatious and an abuse of the court process and ought to be dismissed.



7. By the Court's directions the application was canvassed by way of written submissions. The Plaintiff filed submissions dated 1<sup>st</sup> May, 2023 while the intended defendants filed submissions dated 13<sup>th</sup> April 2023.

### **Intended Defendants/Applicants Submissions**

8. Counsel submits, Order 1 Rule 10 (2) of the Civil Procedure Rules provides for joinder, and that the Applicants have met the threshold set for a party to be enjoined in a suit as Defendants. It was the submissions of the Applicants Counsel that the Applicants, as the Decree Holders in both Limuru SPMCC no 318 of 2015 and 141 of 2019, the Intended Defendants are proper/ necessary parties to the suit given that they have direct and substantive interest in the outcome of this present suit as execution in Limuru Civil Suit No. 141 of 2019 was stayed pending the determination of this suit.
9. Counsel argued that the inclusion of the Intended Defendants was crucial for the just determination of the suit and that their inclusion will enable the Intended Defendants to defend the suit to the full extent possible. Counsel urged the court to find that the principles upon which a party may be enjoined in a suit were settled in the case of *Meme vs Republic* (2004) KLR 637 where the court set out the following:-
- a. where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;
  - b. where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law and
  - c. where the joinder will prevent a likely course of proliferated litigation.
10. Counsel argued that the doctrine of privity of contract as relied on by the Plaintiff is not absolute as there are some exceptions, there are certain situations where the court ought to give third parties the right to enforce contracts made for their benefit. Further, it was premature for the Plaintiff to pre-empt the outcome of the suit. In addition, Counsel submitted that the contract between the Plaintiff and the Defendant imposed liability upon the Plaintiff to settle the claims by the third parties arising out of claims covered by the insurance contract under the doctrine of subrogation and that the contractual relationship with the Defendant extended to the Applicants by virtue of Section 10 (1) of the insurance motor Vehicles Third Party Risks. To support the argument on exclusions to the doctrine of privity of contract, counsel urged the Court to be guided by the decision in the case of *Vital Plantation Lease Company Ltd & Anor vs Agricultural Development Corporation* (2014) eKLR where the Court held:-
- “The only exception to the privity of contract rule is where the contract is made for the benefit of the third party, where the contract expressly states that the third party has a right of enforcement and where it was the intention of the parties to give a third party a right to rely on a term of a contract. “
11. Counsel argued that unless the Intended Defendants are enjoined into and allowed to defend the suit, they stood to suffer irreparable loss and damages that cannot be compensated by way of an award of damages as the Applicant's will be unable to execute the judgment and the resultant decree dated 24<sup>th</sup> July 2020 thereto.
12. Counsel argued that the Intended Applicants were entitled to be enjoined as parties to the suit and urged the court to allow the application with costs.



## Plaintiff's Submissions

13. Counsel for the Plaintiff submitted that the Intended Defendants had failed to meet the criteria to be enjoined as parties to the present suit since the same was instituted in the name of the rightful Defendant, Joseph Gathonga, who was the insured, the suit herein was not instituted through a bona fide mistake. The Applicants, Counsel argued are not necessary parties to the suit and that their inclusion into the suit will only cause unnecessary delay. That the Applicants had no right or relief in respect to insurance policy in question and therefore should not be brought into the suit as they had no value to the same. It was also submitted that the Applicants enjoyed no rights from the insurance and were strangers in the suit.
14. On the second issue on amendment to the plaint, counsel submitted that the same was not necessary as the plaint as drawn was proper as it has the proper parties necessary under the *Civil Procedure Act* for a claim to stand, being the insured and the insurer. That there was room for correction in the Plaint as the real issues in contention revolved around the Plaintiff and the Defendant. It was further argued by the Plaintiff/Respondent that the Amendment being sought by a non-party would prejudice it and visit an injustice against the Plaintiff since the Applicants had failed to meet the threshold for amendments of the Plaint, the proposed amendment will lead to further delay in the determination of the matter.
15. Counsel submits the prayer for re-opening the case lacks any basis and that Applicants had not introduced any relevant evidence with reference to the policy between the Plaintiff and the Defendant to warrant their inclusion or the suit being amended. That the Applicants did not annexed any new evidence that they intended to adduce in court in line with the Policy No. 030/084/1/033565/2012/11 and had therefore failed to meet the criteria necessary to have the Court order that witnesses who had already testified be recalled. That this was a declaratory suit which was a suit against the insured and the Applicant not being an insured part under the policy had no grounds to make the application before the Court. Counsel urged the court to dismiss the application with costs.

## Analysis and Determination

16. I have carefully considered the Application and the supporting affidavits and those filed in reply therein and the rival arguments by the parties. The only issue that emerge for is “whether the Intended Defendants ought have satisfied the requirements necessary to be enjoined as Defendants in the suit.”
17. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as 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.”
18. In the instant suit, the Applicants are the judgment holders in the primary suits Limuru SPMCC no 318 of 2015 and 141 of 2019, whose execution has been stayed awaiting the outcome of this suit. The Applicants seek to compel the Plaintiff (the insurer) to meet its obligation and compensate them under the obligations of the contract.
19. The relevant tests for determination of whether or not to enjoin a party to a suit were restated in the case of Joseph Njau Kingori v Robert Maina Chege & 3 Others [2002] eKLR it set out the guiding principles for a party to be enjoined as an interested party as follows:-



1. The Proposed Interested Party must be a necessary party and a proper party;
  2. In the case of a Defendant there must be a relief flowing from that Defendant to the Plaintiff.
  3. The ultimate order or decree cannot be enforced without his presence in the matter.
  4. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.
20. Further in *Civicon Limited vs. Kivuwatt Limited and 2 Others* [2015] eKLR the court observed as follows:-

“Again, the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the Plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

21. In this case, the Applicants seek to be enjoined as Defendants in the instant suit in order to proceed with the execution of the 10% award in a judgment issued by the courts in their favor as against the Defendant herein. The Defendant was insured by the Plaintiff, the insurance policy protected the insured from claims against third parties. As per the insurance policy, it would be the obligation of the Plaintiff to compensate the insured. Third parties have a responsibility to enforce insurance policies against the policyholders.
22. The *Civil Procedure Act* and Rules gives the court discretion to enjoin a party to the suit at any stage of the proceedings with or without an application by either party. Further Section 3A of the *Civil Procedure Act*, gives this Court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
23. The Supreme Court of Kenya in *Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 Others* (2014) eKLR held as follows with regard to an interested party:-

“Suffice it so say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.



24. Guided by the above decisions, this court finds and holds that the Intended Defendants are necessary parties to this proceeding, their interests in the suit will be affected by the outcome of the matter. I am satisfied that the Intended Defendants will add value and assist the court in determining the issue in dispute.
25. Accordingly, this court finds the Notice of Motion has merit. The same is hereby allowed in its entirety. Since the Intended Defendants are seeking execution of the judgment delivered on 28<sup>th</sup> February 2019 there shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF JANUARY, 2024.**

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. James Gakunga for the Plaintiff/Respondent.

Mr. Oguye holding brief for Mr. Kimani for the 2<sup>nd</sup> Intended Applicant/Defendant.

