



Kenya Commercial Bank Limited v Claytown Valuers Limited; Moonwalk Investments Limited & another (Third party) (Commercial Case E692 of 2021) [2024] KEHC 6428 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E692 OF 2021
MN MWANGI, J
MAY 15, 2024**

BETWEEN

KENYA COMMERCIAL BANK LIMITED PLAINTIFF

AND

CLAYTOWN VALUERS LIMITED DEFENDANT

AND

MOONWALK INVESTMENTS LIMITED THIRD PARTY

SANLAM GENERAL INSURANCE LIMITED THIRD PARTY

RULING

1. This ruling is in respect to a Preliminary Objection dated 26th June, 2023 raised by the 2nd Third Party in opposition to the said party being joined to these proceedings. The Preliminary Objection raises the following grounds-
 - i. That the said proceedings are ex facie premature, incompetent, mischievous and bad in law;
 - ii. That the dispute between the plaintiff and the defendant relate to alleged breaches of contract/negligence by the defendant - to which the 2nd Third Party is not privy to and clearly lacks the privity of contract to the said contract;
 - iii. That the 2nd Third Party's contract with the defendant, on the other hand, under the Professional Indemnity Cover that it issued the defendant, was a separate and distinct contract of insurance - to which only the defendant is privy to and has the privity of contract to it;



- iv. That as it were, being an insurer/insured relationship like any other, the 2nd defendant's statutory/contractual obligation to satisfy a judgment against an insured/or indemnify the insured against an exposure to a judgment debt, if at all, would only crystallize after the judgment - and not before/or in the course of the proceedings - and an insurer cannot tenably be dragged into disputation/s between an insured and a Third Party in anticipation of this potential obligation;
 - v. That it would indeed be prejudicial to the 2nd Third Party and any insurer at that and indeed an abuse of the process of the Court if the insurance company/ies were to be dragged to all proceedings involving its/their insured, as the case may be, and therefore exposing them to needless legal expenses;
 - vi. That even assuming there was a contractual dispute between the defendant and the 2nd Third Party, which would be presumptive at this stage, that ought to have been adjudicated separately and NOT intertwined with the cause herein - which is distinct and a stand alone chose in action. Otherwise, there could easily be an obfuscation of the real issues in the main cause herein to the great prejudice/detriment of the main owner of the main cause - the plaintiff (sic);
 - vii. That there is nothing at all to be tried in this cause as between the plaintiff and the 2nd Third Party/or the defendant and the 2nd Third Party, which is the essence of taking out Third Party proceedings; and
 - viii. That it would therefore be premature, incompetent and, mischievous even, for the defendant to attempt to sneak in a separate cause into these proceedings through the back door through the purported Third Party proceedings as it has tried to through the Third Party proceedings against its insurer. The same should be struck out ad limine.
2. The Preliminary Objection herein was canvassed by way of written submissions. The 2nd Third Party's submissions were filed on 18th October, 2023 by the law firm of M/s G & G Advocates LLP, and the defendant's submissions were filed by the law firm of E. K. Mutua & Company Advocates on 24th October, 2023.
 3. Mr. Karanja, learned Counsel for the 2nd Third Party submitted that it is not disputed that the cause of action by the plaintiff as against the defendant is separate and distinct from that raised in the Third Party Notice against the 2nd Third Party. That whereas the former is premised on a breach of professional duty giving rise to a claim in tort, the latter if any, would be contractual. He further submitted that the defendant is seeking indemnity to the tune of Kshs. 200,000,000/= in the event the plaintiff's claim against it succeeds, but the 2nd Third Party can only be called to satisfy any liability found against the defendant upon such a finding. Counsel stated that in this case, the Court is yet to determine whether the plaintiff's case as against the defendant is merited, thus the defendant's Third-Party proceedings against the 2nd Third Party are premature.
 4. Counsel relied on the cases of *Yafesi Walusimbi v The Attorney-General of Uganda* [1959] EA. 223 and *Myers v N. & J. Sherick Ltd & others* [1974] 1 All ER. 81 and contended that a Third Party can only be joined in proceedings where the cause of action by the plaintiff against the defendant is directly related to the defendant's claim against the 2nd Third Party. To buttress his submissions, Counsel referred to the decisions in *Laichard Shah & Another v Kenindia Insurance Company Limited* [2005] eKLR and *Martin Mwangi Nyutho (the Administrator of the Estate of the Late Benson Nyutho Mwangi) v Alkason Transporters Ltd & another; Metropolitan Cannon Insurance (Formerly Cannon Assurance (K) Limited (Third Party))* [2022] eKLR and asserted that Courts have held in claims premised on motor vehicle



insurance that an insurer would only be called upon to meet its obligation upon a judgment being secured against its insurer.

5. Mr. Mutua, learned Counsel for the defendant submitted that the suit against the defendant is for damages for breach of contract, duty of care and negligence, as the plaintiff contends that the defendant made inaccurate Valuation Reports in terms of the true market value of the properties, thus causing the plaintiff to suffer loss and damage in the sum of Kshs. 980,000,000/=. That subsequently, the defendant served on the 2nd Third Party with leave of Court, a Third Party Notice seeking *inter alia*, a determination of the question or issue of the defendant's liability to the plaintiff on one part, the 2nd Third Party's liability to the plaintiff on the other part, and the 2nd Third Party's liability to the defendant.
6. Mr. Mutua stated that on perusal of paragraphs 1 to 8 of the 2nd Third Party's Preliminary Objection, it is evident that it is grounded on disputed facts such as, whether the Third Party Notice to the 2nd Third Party has been filed prematurely, whether there is privity of contract between the 2nd Third Party and the contractual relationship between the plaintiff and the defendant, whether the 2nd Third Party's liability under the policy only crystalizes upon judgment as against the defendant, whether there is a contractual dispute between the defendant and the 2nd Third Party, and whether there is a cause of action against the 2nd Third Party, which issues require investigation by the Court.
7. Counsel cited the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors (Ltd)* [1969] EA 696 and stated that the moment the Court starts establishing the facts relating to the aforesaid issues, they become disputed facts and cease to be points of law. She asserted that the issues raised in the plaint and defence constitute issues relating to the contractual relationship between the defendant and the 2nd Third Party such as, whether the defendant was negligent and if yes, whether the defendant is entitled to be indemnified by the 2nd Third Party to the tune of Kshs.200,000,000/= by virtue of an insurance policy.
8. Mr. Mutua referred to the provisions of Order 1 Rule 15 of the *Civil Procedure Rules*, 2010 and the case of *Cheruiyot Edwin Mutai v Cyrus Ngaruiya* [2020] eKLR and argued that the authorities cited by the 2nd Third Party's Counsel are distinguishable since they relate to issues regulated under statute being the *Motor Vehicle Third Party Risks Act*. In addition, the other authorities are in respect to cases decided following substantive applications for review of orders granting leave to defendants to issue Third Party notices.

Analysis And Determination.

9. On consideration of the Preliminary Objection by the 2nd Third Party, as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether the instant Preliminary Objection is merited.
10. The Court in the case of *Oraro v Mbaja* [2005] 1KLR 141 expressed itself in regard to Preliminary Objections as hereunder -

“The principle is abundantly clear. A ‘preliminary objection’ correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary point... Anything that purports to



be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
(Emphasis added).

11. It is now well settled that a Preliminary Objection ought to raise a pure point of law, and to be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In this case, the defendant submitted that the Preliminary Objection herein contains disputed which call for this Court to interrogate evidence adduced by parties in order for it to make a determination, hence it does not qualify as a Preliminary Objection.
12. In determining whether the instant Preliminary Objection is merited, this Court has to determine whether a Third Party Notice ought to issue as against the 2nd Third Party by answering two questions, whether the cause of action by the plaintiff against the defendant is directly related to the defendant’s claim against the Third Party, and whether the 2nd Third Party’s statutory/contractual obligation to satisfy a judgment against the defendant can only crystallize after judgment against the defendant has been issued. I am of the considered view that in order to aptly answer and/or determine these questions, this Court will need to probe evidence. Therefore, this Court finds that the said issues can be argued in the normal manner since they are not strictly points of law but disputed facts. In the circumstances, this Court finds that the instant Preliminary Objection does not meet the requisite threshold as held in the case of *Oraro v Mbaja* (*supra*).
13. The above notwithstanding, the issues raised by the 2nd Third Party in the Preliminary Objection herein have already been determined by this Court in its ruling delivered on 16th June, 2023. In the said ruling this Court found that the issue or question of indemnity by the 2nd Third Party ought to be determined in this suit in view of the fact that as at the time of the alleged negligence or breach of contract, there existed a valid professional indemnity cover policy No. 010/051/1/038094/2017/07 for an insured sum of Kshs.200,000,000/= issued by the 2nd Third Party to the defendant.
14. Having made the said decision, this Court is *functus officio* in respect to the issue of whether the Third Party Notice issued to the 2nd Third Party is premature and/or whether a Third Party Notice ought to issue against the 2nd Third Party at all.
15. In the end, I find that the 2nd Third Party’s Preliminary Objection is not merited. It is hereby dismissed with costs to the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Leyla Ahmed h/b for Mr. Kiche for the plaintiff

No appearance for the defendant and the 1st Third Party

Mr. Karanja for the 2nd Third Party



Ms B. Wokabi – Court Assistant.

