



Jubilee General Insurance Limited v Levites Internation Reinsurance Brokers Limited (Civil Case E184 of 2021) [2023] KEHC 1208 (KLR) (Commercial and Tax) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E184 OF 2021
A MSHILA, J
FEBRUARY 10, 2023**

BETWEEN

JUBILEE GENERAL INSURANCE LIMITED PLAINTIFF

AND

**LEVITES INTERNATION REINSURANCE BROKERS
LIMITED RESPONDENT**

RULING

1. The Notice of Motion dated December 3, 2021 was brought under Order 8 Rules 1 and 5, Order 51 Rule 1, Order 1 Rule 15 of the Civil Procedure Rules, Section 3A and 100 of the Civil Procedure Act and Article 159 of the Constitution for the following orders;
 - a. The Court to grant leave to the defendant/Applicant to amend its defence.
 - b. The annexed draft Amended defence be deemed as duly filed upon payment of the requisite fees.
 - c. Leave be granted to the defendant to issue a 3rd party notice to the following entities;
 - i. Waica Reinsurance Corporation PLC
 - ii. Aveni-Re Africa
 - iii. First Mutual Reinsurance
 - iv. Baobab Reinsurance Company



- v. La Nouvelle Compagnie Africaine De Reassurance (NCA Re)
 - d. The Third Party Notice be issued to the intended third parties herein to be enjoined.
 - e. Upon hearing and determination of this application, Third Party Notice be served upon the third parties herein and they be deemed admitted as third parties and be allowed to file their responses.
 - f. The costs be provided for.
2. The Application was supported by the sworn Affidavit of Esther Muhindi who stated that this Application should be allowed to assist the court to determine the real issues in controversy and the true substantive merits of the case.
3. The defendant had an opportunity to peruse her defence and realized that there were some misrepresentations made by the previous advocate and that the defendant now wishes to amend her defence to reflect the real and actual position in the transaction. The same was a mistake of an advocate that should not be visited upon an innocent litigant.
4. The application for amendment herein does not seek to introduce new facts; the amendment sought to be made arises from the already existing facts.
5. The Respondent/Plaintiff filed Grounds of Opposition dated February 11, 2022 in opposition to the Applicant's Application on the following grounds;
 - a. The court record reflects that on June 8, 2021 the Defendant/ Applicant filed an unconditional Memorandum of Appearance of even date. Having submitted to the jurisdiction of the Court, the Defendant/Applicant is estopped from pleading that the suit herein be referred to arbitration as pleaded at paragraph 15 of the draft Amended Statement of Defence annexed to the Application.
 - b. The amendment at paragraph 15 of the draft Amended Statement of Defence annexed to the Application offends paragraph 6 of the *Arbitration Act*, 1995.
 - c. For the reasons set out in grounds (1) and (2) above, the amendment at paragraph 15 of the draft Amended Statement of Defence annexed to the Application is insubstantial and unsupported.
 - d. The leave sought by the Defendant/Applicant to amend its Statement of Defence therefore ought to be disallowed by the Court to the extent that it pleads to the suit herein being referred to arbitration.

Applicant's Case

6. The Applicant submitted that the law allows parties to amend their pleadings at any stage of the proceedings and that the amendment sought herein by the applicant does not have the effect of creating a new cause of action. The amendment sought at paragraph 8 is to correct a misrepresentation that was made by the previous Advocate on record and also include the issue of Arbitration at paragraph 15 that was also not included and or raised by the previous Advocate.



7. The Defendant filed its defence dated July 23, 2021 and in the said Statement of Defence at paragraphs 14 the Previous Advocate on record stated that the jurisdiction of the court was contested but failed to raise the issue of Arbitration then. The filing of the Notice of Appointment of Advocates was only to bring advocates on record and should not in any be construed as an acceptance of jurisdiction.
8. The circumstances in this case clearly shows that the previous Advocate on record omitted and/or failed to raise this issue at the earliest opportunity, however a mistake of an Advocate should not be visited upon an innocent litigant. The Applicant pointed out that there is an arbitration clause at page 44 of the Application clearly shows at the 2nd last paragraph that all disputes arising out of the said contract shall be submitted to Arbitration
9. Further, the Arbitration issue was not pleaded then and that the document that the applicant seeks to rely on did not also form part of the record then however it's unjust and unfair for the litigant herein to be locked out of an Alternative Dispute Resolution forum due to the mistake of an Advocate. For the given reasons the draft Amended statement of defence inclusive of paragraph 15 should be allowed.
10. The Applicant further submitted that there will be no prejudice suffered or an injustice occasioned to the respondent if the paragraph 15 is included in the statement of defence because then the same cannot be raised unless its pleaded as the applicant will then proceed and or have an opportunity to make the relevant application for stay of proceedings.
11. The amendment also sought is not made in bad faith and that there is no irreparable loss to be occasioned and that the court has an opportunity to exercise its discretion in view of the circumstances given. The fact came to the realization of the Applicant and the Advocates now on record who filed the Notice of Change dated November 17, 2021.
12. On the third prayer of the Application, where the applicant sought for leave to issue third party notices; the said prayer was not opposed by the respondent as the grounds of opposition filed do not raise any objection to the said prayer. The Applicant acted as an intermediary between the Respondent and Applicant in Facultative Reinsurance Agreements and that the parties the applicants seeks to issue third party Notices to are key participants in the said Facultative Reinsurance Agreement.

Respondent's Case

13. In response the Respondent submitted that Section 6 of the *Arbitration Act* makes it clear that a party seeking a stay of court proceedings and referral of a matter to arbitration pursuant to an agreement to arbitrate is required to make its application no later than at the time of filing its appearance. This was pronounced in the case of *Trishcon Construction Co Ltd v Leo Investments Ltd* [2013] eKLR, where the court cited with approval the Court of Appeal decision in *Lofty v Bedouin Enterprises Ltd* (2005) eKLR.
14. The Defendant took a step in the proceedings by filing an unconditional Memorandum of Appearance on June 8, 2021 and thereafter its Defence on July 23, 2021, it cannot thereof introduce an amendment to its Defence, the effect of which would be to seek a referral of the suit herein to arbitration. The Plaintiff submitted that the referral to arbitration which the Defendant is seeking in the Proposed Amendment can only be made under the provisions of Section 6 of the *Act* and the Defendant has waived its right to seek such referral by filing an unconditional Memorandum of Appearance and a Defence.
15. The Respondent added that by filing the Application herein to amend its Defence as opposed to immediately filing the requisite stay application under Section 6 of the Act, the Defendant has taken an additional step in these proceedings which would further preclude it from seeking referral of the



suit herein to arbitration under the said provision. The steps undertaken by the Defendant in these proceedings are therefore completely out of kilter with the Proposed Amendment and the same is therefore unsupportable and insubstantial.

16. Further to the above, it was the Respondent's submission that the Defendant has argued in its Written Submissions that the failure by its erstwhile Advocate to raise the issue of a stay under Section 6 of the Act was a mistake and that a mistake of an Advocate ought not to be visited upon his client.
17. The Respondent argued that the Defendant's assertion that the failure to raise the issue of referral to arbitration was a mistake on the part of the Defendant's erstwhile Advocate is an afterthought since there was no deposition to this effect in Ms Muhindi's Affidavit.
18. Additionally, even if the failure to raise the issue of arbitration was a mistake on the part of the Defendant's erstwhile Advocate, the same ought to be raised in the requisite application under Section 6 of the Act and cannot be sneaked into the Amended Defence. The Defendant's current Advocate, upon realizing the alleged mistake, ought to have immediately filed the requisite application under Section 6 of the Act. Conversely, the Defendant's current Advocate has sought amendment of the Defence and issuance of Third-Party Notices, which in of itself is a clear and unequivocal submission to the jurisdiction of this Court.

Issues For Determination

19. After considering the Application, Grounds of Opposition and the written submissions; the court has framed the following issues for determination:
 - a. Whether the amendments to the Statement of Defence should be allowed?
 - b. Whether leave should be granted to the Defendant to enjoin 3rd parties?

Analysis

Whether the amendments to the Statement of Defence should be allowed?

20. Order 8 Rule 5 (1) of the Civil Procedure gives the court a wide discretion as far as amendment of pleadings is concerned. This section provides that for the purpose of determining the real question in controversy between the parties or correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such a manner as it directs as to costs or otherwise as are just. This discretion may be exercised at any stage of the proceedings.
21. In Institute For Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR the court held:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is



introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

22. One of the amendments sought by the Applicant is at par. 15 which seeks to have this matter referred to arbitration as per the cover note. Section 6(1) of the *Arbitration Act* is key. It provides: -

“(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds.....”

23. It is trite law that the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance. The Defendant herein had entered appearance and proceeded to file a statement of defence. In the present Application the Defendant is seeking to amend the statement of defence which amounts to taking any other step in the proceedings. The Applicant cannot argue that it was the Advocate’s mistake when clearly the Applicant’s new Advocate has equally proceeded with the said statement of defence by seeking its amendment. Filing this application seeking to enjoin third parties in itself amounts to taking a further step.

24. The Court in the case of; *Charles Njogu Lofty vs Bedouin Enterprises Ltd* (supra) concurred with the views of Githinji J; in Civil Case No. 1756 of 2000, *Bedouin Enterprises Ltd vs Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments*, where the Judge had rejected the argument that, an application for reference to arbitration can be made at three stages, namely: at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. The learned judge expressed himself as follows:

“In my view, section 6(1) of the *Arbitration Act*, 1995, which court is construing means that, any Application for stay of proceedings cannot be made after the Applicant has entered appearance or after the Applicant has filed pleadings or after the Applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the Applicant enters appearance. It seems that the object of section 6(1) of the *Arbitration Act* 1995 was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of proceedings..... We respectfully agree with these views so that even if the conditions set out in paragraph (a) and (b) of section 6(1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof for arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings”.

25. The Applicant having failed to file an Application invoking the arbitration clause promptly, did not comply with the provision of section 6(1) *Arbitration Act*. It would therefore serve no purpose to allow the said amendment. However, the amendment at par. 8 is allowed as it seeks to provide more information necessary in determining the real question in controversy between the parties.



Whether leave should be granted to the Defendant to enjoin 3rd parties?

26. The Applicant seeks leave to enjoin third parties and Order 1 Rule 15 (1) of the [Civil Procedure Rules](#) stipulates that:

- “(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
- (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...”

27. The Applicant avers that it entered into a Facultative Reinsurance Agreement with the Respondent and that it was a term of the said agreement that the Respondent would pay its premium in time to the Applicant for onward transmission to reinsurers and whenever a risk arose to be covered by the insurers the Respondent would promptly inform the Applicant of the claim in good time to enable the Applicant inform the insurers.

28. In [Kenya Commercial Bank vs Suntra Investment Bank Ltd](#) (2015) eKLR the Court held that;

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the [Civil Procedure Rules](#). And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the [Civil Procedure Rules](#).”

29. In the instant Application, the 3rd parties are part and parcel of this contract. It was the Applicant’s duty under the agreement to follow up on payments from the reinsurers and thus the subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and this case will be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party. On this ground the Application is allowed.

30. The upshot of the above is that the court is satisfied that the Application is partially successful to the extent that the amendments at paragraph 2 and 8 are allowed. Further, the Applicant is granted leave



to file third party notices. The suit shall proceed as the applicant has brought itself within this court's jurisdiction and no reference to arbitration is allowed.

Findings and Determination

31. In light of the above this court makes the following findings and determinations;
- a. The Court finds the application to be partially meritorious;
 - b. Leave is hereby granted leave to the defendant/Applicant to amend its defence only at para 2 and 8 as per the annexed draft Amended defence; and it be deemed as duly filed upon payment of the requisite fees.
 - c. The ground for amendment to refer the matter to arbitration is disallowed
 - d. Leave is hereby granted to the defendant/applicant to issue a 3rd party notice to the following entities to be enjoined;
 - i Waica Reinsurance Corporation Plc
 - ii Aveni-re Africa
 - iii First Mutual Reinsurance
 - iv Baobab Reinsurance Company
 - v La Nouvelle Compagnie Africaine De Reassurance (NCA Re)
 - e. The costs of the application shall be borne by the defendant/Applicant.
 - f. Mention on April 3, 2023 before the Deputy Registrar for case management.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

HON. A. MSHILA

JUDGE

