



REPUBLIC OF KENYA



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Dong Yi (Suing on his own behalf and as the Administrators of the Estate of the Late Luo Jinli) v Sun Africa Hotels Limited t/a Keekorok Lodge Masai Mara; First Assurance Company Limited (Intended Third Party) (Civil Suit 12 of 2019) [2023] KEHC 1666 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL SUIT 12 OF 2019
F GIKONYO, J
MARCH 13, 2023**

BETWEEN

DONG YI (SUING ON HIS OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE LUO JINLI) PLAINTIFF

AND

SUN AFRICA HOTELS LIMITED T/A KEEKOROK LODGE MASAI MARA DEFENDANT

AND

FIRST ASSURANCE COMPANY LIMITED INTENDED THIRD PARTY

RULING

1. The significant orders sought in the application dated September 15, 2022 by the defendant/applicant are;
 - i. Leave to file this application out of time.
 - ii. Leave to the defendant to issue a third-party notice to First Assurance Company Limited To be enjoined as a third party to this suit.
 - iii. Costs of this application be in the cause.
2. The application is expressed to be brought pursuant to article 159(2) of the Constitution, section 1A, 1B and 3A of the Civil Procedure Act and order 1 rule 15 of the Civil Procedure Rules.
3. It is premised upon grounds that by policy no. 11/60/003263/07 dated July 1, 2016, the First Assurance Company Limited undertook to cover and /or indemnify the defendant against all sums



that the defendant would become legally liable to pay in respect of inter alia, accidental death or bodily injury occurring at the defendant's premises during the period of the said policy cover. That on August 8, 2016, the plaintiff's wife, Luo Jinli (deceased) died while in the defendant's premises following a fatal injury arising from physical assault by one of the tourists namely Lee Chungpin. The death of the plaintiff's wife occurred during the subsistence of the policy provided by the intended third party to the defendant and was within the scope of the policy. Upon occurrence of the said accidental death, the defendant exercised due diligence and immediately reported it to the First Assurance Company Limited.

4. Further, the plaintiff instituted the instant suit on August 6, 2019 against the defendant under the Fatal Accidents Act and law reform (miscellaneous provisions act) claiming damages for the alleged death of his wife. The plaintiff's case is that it is due to the alleged defendant's negligence that resulted in his wife's death. Immediately upon formal service of the summons to enter appearance and the accompanying suit papers by the plaintiff's advocate, the defendant immediately thereafter notified the intended third party through its agent as was stipulated under condition one of the said policy. That in utter disregard of its contractual obligation as per the said policy cover, the first assurance company limited refused, failed and /or neglected to cover and /or indemnify the defendant against the said risk thereby exposing the defendant to this suit. That instructions to act for and on behalf of the defendant was obtained through its previous management. On September 5, 2022 during case preparations with the current management it came to their attention that the defendant was at all material times material to this suit insured by the first assurance company limited. Further that the said First Assurance Company Limited refused to cover the defendant upon occurrence of the accident as stated above. That the plaintiff will not be prejudiced if the first assurance company limited is joined to this suit. That to join the First Assurance Company Limited to this suit is beneficial to this suit in the following manner.
 - a. To avoid a multiplicity of actions
 - b. To avoid the possibility that there might otherwise be contrary or inconsistent findings in two different actions on the same facts.
 - c. To allow the third party to defend the plaintiff's claim against the defendant
 - d. To save costs and
 - e. To enable the defendant to have the issue against the third party decided as such as possible, in order that the plaintiff cannot enforce a judgment against him before the third-party issue is determined.
5. That in the best interest of justice, the prayers sought in this application be allowed.
6. The application is supported by the affidavit of James Pere sworn on September 15, 2022. The affidavit has reiterated the contents of the grounds set out on the face of the chamber summons.
7. The application herein has been opposed by both the plaintiff and the intended third party vide the replying affidavit sworn by Sophie Omolo which is undated and Doreen Wamanga on 8th September respectively.
8. The plaintiff filed a replying affidavit sworn by Doreen Wamanga on October 17, 2022. She averred that she is an advocate of the High Court of Kenya practicing in the firm of Conrad Maloba & Associate Advocates who have conduct of this suit on behalf of the plaintiff. She opposed the application in totality. That the application dated September 15, 2022 is majorly for leave to issue a third party notice to first assurance company limited to be joined as a third party to the suit. That under order 1 rule



15(1) (c) of the Civil Procedural Rules for a defendant to apply for leave to issue third party notice. It is important to show that any questions or issue relating to or connected with the said subject matter is substantially the same questions or issue arising between the plaintiff and 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. That further indeed the subject matter between the third party and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same. That it is clear the plaintiff's claim is for negligence against the defendant while the claim between the defendant and the intended third party is purely contractual where the defendant is claiming that the intended third party is in utter disregard of its contractual obligations as per the said policy cover. That indeed the plaintiff is not privy to the contract in respect of the defendant's dealings with the intended third party. That it is not true that the intended third party will defend the plaintiff's claim against the defendant since the issues arising between the parties are totally different and the intended third party has already denied liability as per the documents annexed to the defendant's application. That in any case based on the documents annexed to the defendant's application, in particular exhibit jp 3(a) in a letter dated January 22, 2020 the intended third party has denied liability and claims that the defendant is in breach of a policy conditions as a result of not reporting the incident that had occurred at its premises on time and further claims breach of a public liability policy. These are delay tactics being employed by the defendant. That the above issues are entirely between the defendant and the intended third party and are not in any way familiar to the plaintiff's negligence claim. That the applicant has failed to demonstrate the liability of the proposed third party to it in the application or to lay any basis for its claim of indemnity to contribution by the third party. That it is not in dispute that the defendant owed a duty of care to its guest and the defendant's application to join a third party to the suit is another delay tactic. That further to the above the court should take notice of the defendant's pattern who filed a notice to produce and interrogatories dated April 12, 2022 which the plaintiff responded however the defendant did not concede to the same and proceeded to file an application dated November 15, 2021 to strike out the plaintiff's suit. The said application was unsuccessful and dismissed with costs the court proceeded to fix the matter for hearing on priority basis and to our dismay the defendant has again filed this application for leave to join a third party. That the contractual issues between the intended third party and the defendant are only triable between the intended third party and the defendant and cannot be bona fide issues triable between the defendant and plaintiff. That indeed this application is an afterthought since the defendant's former general manager it was not even part of the defendant's witnesses and illustrated in their list of witnesses. Further the issues raised were never raised in the defendant's defence and the time of drafting their pleadings while the company was still under its former general manager. That the application dated September 15, 2022 lacks merit incompetent premature and a waste of the court's precious judicial time and the same should be struck out with costs to the plaintiff

9. The intended third party filed a replying affidavit sworn by Sophie Omollo and filed in court on October 21, 2022. She averred that she is the assistant legal manager of the intended third party. That the intended third party by policy no. 11/60/003263/07 undertook to cover and/or indemnify the defendant against all sums that the defendant would become legally liable to pay in respect of inter alia accidental death or bodily injury occurring at the defendant's premises during the period of the said policy cover. That on August 8, 2016 it is alleged that the plaintiff's wife namely Luo Jinli (deceased) died while in the defendant's premises following fatal injuries that resulted from a tourist namely lee Chungpin. That vide the application dated September 15, 2022 the defendant sought among other orders inter alia to be granted leave to issue a third party notice to first assurance company limited to be joined as a third party to this suit. The application to join their company as a third party is unmerited and premature and should be dismissed for the following reasons; firstly, the



relationship between the defendant and the intended third party is contractual in nature as a result of the insurance contract dated July 1, 2016. In an insurance contract the insurer's liability is secondary and only attaches and /or crystallizes upon the insured incurring primary liability however in the present applications secondary liability is yet to crystallize as the dispute between the plaintiff and the defendant has not been conclusively determined to establish primary liability and therefore joinder at this stage is premature. Secondly the spirit of joinder of parties to a suit as espoused by order 1 (parties to a suit) is that parties should only be joined in proceedings if there are common questions of law and fact arising amongst them and if trying such issues would be convenient and not delay trial. That in the present suit the cause of action between the plaintiff and the defendant is tortious in nature (negligence) while the dispute between the defendant and the intended third party is based on breach of contract which are clearly separate questions of law that should be tried separately. That the proper procedure to be adopted in determining the dispute between the defendant and the third party is through filing of a suit for breach of contract wherein the defendant would seek appropriate remedies under the law of contract. Thirdly in so far as the dispute between the defendant and the 3rd party is concerned the insurance policy cover is clear on the procedure for resolution of disputes and therefore this court is not the proper forum for adjudication of the said disputes. That the insurance policy condition no. 8 on the claims procedure requires that for any disputes arising from the policy the parties involved shall endeavor to resolve the matter first by negotiation if the negotiations fall within 30 days or such a period as may be determined by the parties a sole mediator jointly appointed by the parties in writing shall help resolve the disputes however if the two mechanisms above fail within 60 days, the chairperson of the chartered institute of arbitration will appoint a mediator upon request by parties to help resolve the dispute before heading to court as a last resort mechanism. That therefore joining of the 3rd party in these proceedings will be in breach of the dispute resolution clause and will amount to an arrogation of jurisdiction by this court contrary to the express wishes of the defendant and the intended third party under clause 8 of the insurance policy cover on dispute resolution.

10. That additionally the joinder of their company in these proceedings will only result in a undue delay of the plaintiff's suit against the defendant in the following ways.
 - i. Once joined the intended third party will file an application under section 6(1 of the [arbitration act](#) for the referral of the dispute between the defendant and the third party to arbitration as appointed by the chairperson of the institute of chartered arbitration of Kenya.
 - ii. That if this court will grant that application then the court will equally have to stay the entire case pending the outcome of the arbitration
 - iii. That the net effect of this stay would be delay of the plaintiff's suit yet the plaintiff has no interest in the arbitration process between the defendant and the third party as he is not privy to the insurance contract.
 - iv. That such a delay would be in violation of the plaintiff's right to a fair and expeditious hearing as espoused under article 50 of the [constitution](#) and further buttressed under section 1A and 1B of the [Civil Procedure Act](#).
11. That the joinder of the intended third party is wholly incompatible with the overriding objective of expeditious disposal of disputes. That article 159(20 9c) of the [constitution of Kenya](#) encourage this honourable court to promote arbitration as an alternative form of dispute resolution especially where parties have expressly incorporated the arbitration agreement in their contract. That this application is a non-starter and should be dismissed with costs for lack of merit. That the defendant would not be prejudiced as its recourse lies in another forum that is institution of a separate suit. That therefore they strongly oppose the application dated September 15, 2022.



Directions of the court

12. The application was canvassed by way of written submission. The defendants have filed. The intended third party have filed. The plaintiff has also filed.

Defendant's submissions

13. The defendant submitted that plaintiff's counsel is conflicted. That her replying affidavit is tantamount to being a witness from the bar. Therefore, the replying affidavit sworn by Doreen Wamanga advocate for the plaintiff should be struck out.
14. The defendant submitted that the replying affidavit offends order 19 rule 3(1),
15. The defendant submitted that the replying sworn by the plaintiff's advocates offends section 4(1) of the *Oaths And Statutory Declarations Act*. that the commissioner of oaths one Mr. Cain Mingo, who commissioned the document practices in the firm of Conrad Maloba & associates, the advocates on record for the plaintiff.
16. The defendant submitted that it was necessary for the defendant to make the application for first assurance company limited since they are entitled to being indemnified by the intended third party.
17. The defendant submitted that there exists a basis of liability of the third party to the defendant. Therefore, this application is well founded
18. The defendant/applicant has relied on the following authorities;
 - i. Simon Isaac Ngui Vs Overseas Courier Services Ltd [1998] eKLR
 - ii. HCCC NO. 3504 Of 1993 Kisya Investment Limited & Others V Kenya Finance Corporation Ltd.
 - iii. Caltex Oil (Kenya) Limited V New Stadium Services Station Ltd & Another [2002] eKLR
 - iv. Ocean Freight (EA) Limited Versus Technomatic Limited & Another [2010] eKLR

Intended Third Party's Submissions.

19. The intended third party submitted that in an insurance contract, the insurer's liability is secondary and only attaches and / or crystallizes upon the insured incurring primary liability. That there is a pending suit between the plaintiff and the defendant in which liability and quantum has not been determined. The secondary liability is yet to crystallize. Therefore, the application is premature and incompetent.
20. The intended third party submitted that the question of law and fact differs between the plaintiff, the defendant and the intended third party. That the claim between the plaintiff and the defendant is one of negligence. The claim between the defendant and the intended third party is on contract.
21. The intended third party submitted that the joinder of the intended third party in the proceedings is likely to give rise to practical problems in handling the proposed cause of action. That the contract of insurance has an arbitration clause. Therefore, the third party should not be joined before exhaustion of the arbitration remedy espoused by the contract. That even if the third party is joined in the



- proceedings it will seek stay of proceedings to exhaust the arbitration process and in the process drag the case.
22. The intended third party submitted that the intended third party is not a necessary party whose presence will id the court in determining the dispute between the plaintiff and the defendant.
 23. The intended third party submitted that clause 8 of the policy which is the contract between the defendant and the intended third party clearly stipulates that in case of any dispute arising the parties shall endeavor to implore alternative dispute resolution before heading to court which is a last resort. The court should not rewrite the terms and conditions of the contract.
 24. The intended third party submitted that the application herein fails to satisfy the three pillars of joinder of parties. They therefore pray the same should be dismissed with cots to the intended third party.
 25. The intended third party has relied on the following authorities;
 - i. Laichard Shah & Another Vs Kenindia Insurance Company Limited [2005] eKLR
 - ii. Lucy Nungari Ngigi & 128 Others V National Bank of Kenya Limited & Another [2015] eKLR
 - iii. Zephyr Holdings Ltd Vs Mimosa Plantations Ltd, Jeremiah Maztagaro And Ezekiel Misango Mutisya [2014] eKLR
 - iv. Kingori Vs Chege & 3 Others [2002] 2 KLR 243
 - v. Departed Asians Property Custodian Board Vs Jaffer Brothers Ltd [1999] 1 EA 55
 - vi. Article 159(2) of *the Constitution*.
 - vii. Geoffrey Muthinja & Another
 - viii. Okiya Omtatah Okoiti 7 Another V Kenya Power & Lighting Company Limited (KPLC) 7 4 Others [2020] eKLR
 - ix. John Shantilal Maide & 9 Others V Transmara Investment Limited & 2 Others (2018) eKLR
 - x. National Bank of Kenya Vs Pipeline Samkolit (K) Ltd & Another [2001] eKLR

Plaintiff's submissions

26. The plaintiff submitted that no substantial explanation has been given for the defendant's delay in lodging the present application. The defendant has therefore not fulfilled the criteria for grant of leave.
27. The plaintiff submitted that it is not privy to the contract between the defendant and the intended third party and has no claim against the intended third party.
28. The plaintiff submitted that on 17th October 2021, Ms. Wamanga swore a replying affidavit. The same was commissioned by advocate Cain Mingo. The plaintiff argued that the affidavit was erroneously filed on 18th October 2022 by one of their clerks. However, on the same day they refiled the same replying affidavit dated 17th October 2022 commissioned by advocate Albert Kuloba. That they filed the same before the defendant raised any complaints. Therefore, their replying affidavit is properly on record.
29. The plaintiff submitted that this court should strike out the defendant's application in its entirety with costs to the plaintiff.



30. The plaintiff has relied on the following authorities;
- i. Order 1 Rule 5, Order 1 Rule 15(1) And Order 2 Rule 13 Of The Civil Procedure Rules.
 - ii. Muhoroni Sugar Company Limited V Fredrick Jonam Okech [2022] eKLR
 - iii. First American Bank of Kenya Ltd Vs Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 Of 2000 [2002] 1 EA 65
 - iv. Yafesi Walusumbi V the Attorney General of Uganda [1959] EA 223
 - v. Josphat Njuguna Kariuki Vs Simon Karichu Irungu [2004] eKLR
 - vi. Article 159(2)(d) of *the Constitution* of Kenya
 - vii. Section 4(1) of the *Oaths and Statutory Declarations Act*
 - viii. Kaiser Investments Limited V Hug Run Company Limited & 3 Others [2021] eKLR

Analysis And Determination

Issue

31. The nature of the application is for leave to issue third party notice to the intended third party. Is it merited?

Nature Of Third Party Procedure

32. 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...”

Basis For Application

33. The basis for seeking leave to issue a third party notice is that, the defendant is covered by the third party under a policy of insurance in which the intended third party undertook to pay any third party accidentally injured in his premises during the subsistence of the policy. According to the defendant, despite being duly notified of the claim herein, the intended third party has refused to compensate the family of the deceased. The defendant is of the view that, as this suit is for compensation, the



issue between them is the same as the one between the plaintiff and the defendant which should be determined together in these proceedings by way of third party proceedings. They therefore seek leave to issue a third party notice upon the intended third party.

Scope Of Third Party Procedure

34. The court is aware of the decision of the Court of Appeal in *Gachago v. Attorney-General* [1981] KLR 232, that third-party proceedings are not dependent on there being a contract binding upon the intended third party, nor on there not being a different case pending before the Court or before a Court of equal jurisdiction.
35. The decision in the *Gachago* case provides a liberal approach to third-party proceedings in order to give parties an opportunity to prove their claim. It also established that privity of contract is not the sole consideration in determining whether third-party proceedings may be filed and sustained. However, I doubt whether the third party procedure encompasses all situations where indemnity may be claimed by the defendant nor is a substitute for special procedures designed to suit particular types of claims.
36. Hence, the test provided in Order 1 Rule 15 (1) of the Civil Procedure Rules should be a good guide but after taking into account the nature of liability for which joinder as third party proceedings is sought.

Declaratory suits

37. The relationship between the insured and the insurer is contractual, and is governed by the contract of insurance between them. Liability between the defendant and the intended third party herein arises in accordance with the contract of insurance between them. And, if liability underwritten benefits a third party, the accepted procedure for determination of such liability is a declaratory suit which provides full remedy under the contract of insurance. I do not think the procedure of declaratory suits is guilty of duplication of suits- which third party procedure seeks to avert- but one specially designed for situations such as this one where liability or questions of indemnity in respect of injury to a third party should be determined between the insured and the insurer.
38. Not always the insurers willingly settle claims. Hence, necessity to file a declaratory suit to compel the insurer to settle a decree issued against the insured. Ordinarily, such dEclaratory Suits are filed by the insured- the Defendant and/or Judgment Debtor in the primary suit. But, where it is statutorily required, the insurer may also file a declaratory suit seeking to avoid the policy and liability that may arise from third party judgments.
39. In such special contractual relationship between the insured and the insurer, any question or issue relating to or connected with the policy or liability between the two, cannot be said to be substantially the same question or issue arising between the plaintiff and the defendant and which should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party.
40. Similarly, whereas the indemnity under the policy may be in respect of injury to a third party in the premises of the defendant, the dispute between the insured and the insurer seems to be alleged breach of policy, which makes it inconsistent with the subject and the cause of action between the plaintiff and the defendant (*Yafesi Walusimbi -vs- Attorney General of Uganda* (1959) EA 223).
41. In my view, liability between the defendant and the third party may not be or conveniently determined through third party procedure under Order 1 Rule 15 (1) of the Civil Procedure Rules. I have already stated that the accepted procedure for determining such liability is a declaratory suit which provides for full remedy between the parties.



42. In addition, trying such liability in a third party procedure is likely to become a source of prolonged delay of the plaintiff's case, which will offend the overriding objective of the law and the principle of expeditious disposal of cases enshrined in article 159(2)(b) of *the Constitution*.

Conclusion And Order

43. In sum, it is not necessarily that the dispute herein can only be resolved completely and effectually by resolving the dispute between the plaintiff and defendant and the intended 3rd Party.

44. In the upshot, I dismiss Defendant's Chamber Summons application dated September 15, 2022 seeking issuance of third party notice.

45. Given the nature of the application and the honest belief that liability between the defendant and the intended third party could be determined within third party procedure, I will not make any order as to costs. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
13TH DAY OF MARCH, 2023**

F. GIKONYO M.

JUDGE

In the presence of:

PARA 1.

Makora for Interested Party

PARA 2.

Mr. Kasaso – C/A

PARA 3.

Wamanya for Maloba for Plaintiff

PARA 4.

Olembo for Nyiha for Defendants

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