



REPUBLIC OF KENYA



KENYA LAW
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**Mayfair Insurance Company Limited v Fredblack Insurance Brokers Limited; Insurance
Regulatory Agency (Proposed Interested Party) (Commercial Case E749 of 2021)
[2023] KEHC 2324 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E749 OF 2021
DAS MAJANJA, J
MARCH 17, 2023**

BETWEEN

MAYFAIR INSURANCE COMPANY LIMITED PLAINTIFF

AND

FREDBLACK INSURANCE BROKERS LIMITED DEFENDANT

AND

INSURANCE REGULATORY AGENCY PROPOSED INTERESTED PARTY

RULING

Introduction and Background

1. The Defendant has filed the Notice of Motion dated September 30, 2022 made under sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act* as read with Orders 8, 40 and 51 of the *Civil Procedure Rules, 2010* and Article 50(1) and 159 of the *Constitution*. It seeks orders to join the Proposed Interested Party, Insurance Regulatory Authority (“the IRA”) in the suit as an interested party, to file and amend its Statement of Defence and Counterclaim and to restrain the IRA from continuing with the contemporaneous enquiry proceedings as against the Defendant in respect of Cover Note No FB/200015/AVN/220220 dated February 22, 2020 and ancillary matters, as expressed in its letter dated August 25, 2022 and referenced CFN/IRA/06/449/04A pending inter parties hearing of this suit.
2. The application is supported by the grounds on its face and the supporting affidavit, supplementary affidavit and further supplementary affidavit sworn on September 30, 2022, November 11, 2022 and January 10, 2023 respectively by the Defendant’s Principal Officer, Morris Mugo. It is opposed by the Plaintiff through the Grounds of Objection dated November 7, 2022 and the replying affidavit sworn



on November 25, 2022 by Emma Mwangi, the Plaintiff's Legal Manager. The IRA also opposes the application through the Grounds of Opposition dated November 29, 2022.

3. The facts leading up to the filing of the suit and the present application can be gleaned from the parties' pleadings on record. The Plaintiff is an Insurance Company regulated by the IRA. It is licensed to cover risks; including aviation risks whereas the Defendant is an insurance intermediary authorised to transact insurance business as an Insurance Broker in Kenya.
4. The Plaintiff claims that on diverse dates in the year 2020, the Defendant instructed it to issue Ventura Aviation Limited with Certificate(s) of Aircraft Insurance to cover its aviation related risks for the period February 2020 to February 2021. It acceded to the Defendant's request issued a cover under the Aviation Hull, Spares, Hull War and Liability Insurance, Policy No 01/01/010/0076/2020 for the period between February 22, 2020 to February 21, 2021 for the sum assured of USD 9,400,000.00. The Plaintiff avers that it agreed that the Defendant would pay premiums to the Plaintiff in the cumulative sum of USD 379,340.00 and that Ventura Aviation Limited would pay USD 379,340.00 to the Defendant who would then pay it to the Plaintiff. The Plaintiff now claims that the Defendant has failed to pay the USD 379,340.00 and this is what forms the basis of its suit against the Defendant.
5. In its defence, the Defendant denies owing the Plaintiff the said USD 379,340.00 in premiums and avers that the premiums received by the Defendant were duly remitted to London in the London and Lloyds Market through the Defendant's representatives, Ed Broking LLP and that the Plaintiff merely acted as a frontier and did not assume the risks covered as the cover was 100% overseas, with no local retention. The Defendant has also filed a counterclaim accusing the Plaintiff of tortious interference of business as well as breach of the fronting agreement between the parties and seeks, inter alia, general damages amounting to Kshs 60,000,000.00 for the same.

The Application

6. Turning to the instant application, the Defendant avers that the IRA has commenced adverse legal proceedings as against it in respect of Cover Note No FB/200015/AVN/220220 dated February 22, 2020 ("the Cover Note") and ancillary matters, as expressed in the Notice to Show Cause letter dated August 25, 2022 and referenced CFN/IRA/06/449/04A ("the Notice to Show Cause"), which issues are already pending determination before the Court. It contends that as a result of its action, IRA is a necessary party to these proceedings especially because the Defendant is now constrained to seek orders as against it as its joinder is necessary to resolve the contestation before the Court.
7. The Defendant submits that the issues under enquiry by the IRA and before the court are materially similar as they both centre on the placement of Cover Note and the duties and obligations accruing therefrom. That the interests of justice necessitate that the matter be determined in single proceedings in order to avoid duplicity and possible conflict in the processes. The Defendant accuses the IRA of acting in bad faith and violating the sub judice rule by proceeding with its inquiry yet its attention has been drawn to this suit and proceedings.
8. The Defendant submits that unless IRA is joined to this suit, its position will be prejudiced and the ends of justice defeated.

The Plaintiff's Reply

9. The Plaintiff opposes the application. The Plaintiff contends that as an insurance intermediary, the Defendant may only place the insurance business with the Plaintiff, as the Plaintiff covered the risk of Ventura Aviation, the Policy holder and that the said Re-insurance cover could only be obtained by the Plaintiff upon seeking an approval from the IRA if the Plaintiff wished to procure the same



from the London Market. It states that section 20 of the *Insurance Act* (Chapter 487 of the Laws of Kenya) prohibits insurers, brokers or any other person from directly or indirectly placing any insurance business with an insurer not registered in Kenya without the IRA's prior approval and a person who does so is guilty of an offence under section 156 of the *Insurance Act*.

10. The Plaintiff does not deny that by a letter dated November 19, 2021, it addressed its concerns on the Defendant's conduct with the IRA, particularly enquiring whether the IRA has issued the Defendant an Exemption letter as required under the *Insurance Act*. It avers that, IRA as regulator of the Insurance industry, is entitled to act on any complaint and is empowered under section 7 of the *Insurance Act* to demand information relating to Defendant's insurance business and the Defendant is required to comply with such a demand failing which it shall be deemed to have failed to comply with the provisions of the *Insurance Act*. The Plaintiff avers that the Defendant failed to provide the IRA with the required information and was called upon to show cause why regulatory action should not be taken against it.
11. The Plaintiff takes the view that IRA's performance of its statutory obligations does not seek to determine the substratum this suit which concerns whether or not the Defendant should pay to the Plaintiff USD 379,340.00 being the premiums unlawfully received on behalf of the Plaintiff, and whether the Plaintiff is liable for general damages for breach of contract or for general damages for tortious interference of business. Thus, the Plaintiff submits that the regulatory proceedings before the IRA should proceed to enable the IRA to perform its statutory obligations. In any case, the Plaintiff states that it is not a party to the regulatory proceedings before the IRA.
12. The Plaintiff contends that the proposed joinder of the IRA will not assist the court reach a just determination of the claims before it. Further that IRA does not have an identifiable stake in the instant proceedings. For these reasons, the Plaintiff prays that the Defendant's application be dismissed with costs to the Plaintiff.

The IRA's Reply

13. The IRA opposes the application. It contends that the "parallel legal proceedings" said to be commenced by the IRA and the Notice to Show Cause are regulatory actions being carried in accordance with the *Insurance Act*. The IRA submits it is not privy to the dispute in this suit which is whether or not the Defendant is liable to pay premiums for issuance of alleged insurance contracts and whether the Plaintiff is liable for general damages for breach of contract. The IRA states that its involvement with the Defendant is limited to enforcement of the *Insurance Act* in relation to actions of the regulated entities and suspected breaches of the provisions of the *Insurance Act*. In the circumstances, IRA submits that it does not have an identifiable stake in these proceedings nor will it assist the Court to reach a just determination of the dispute before it.
14. The IRA also submits that the application offends section 9(2)(3) of the *Fair Administrative Action Act, 2015* which encapsulates the legal principles of exhaustion of alternative dispute resolution mechanisms as the first recourse available to the Defendant. In this case, it states that the Defendant has recourse to the Insurance Appeal Tribunal as provided for under section 173 and section 204A(3) of the *Insurance Act*. It further states that the Defendant should invoke judicial review procedures instead of applying for joinder and an interim injunction. It urges the court to dismiss the application and allow it proceed with its statutory obligations under the *Insurance Act*.



Analysis and Determination

15. The main issues for the court's determination are whether the IRA should be joined to this suit as an interested party and if so, whether the Defendant should be allowed to amend its defence and IRA be restrained from proceedings with the regulatory action against the Defendant.
16. The Court has discretion under Order 1 Rule 10(2) of the Civil Procedure Rules to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. In *Pravin Bowry v John Ward & another* NRB CA Civil Appeal No 70 of 2009 [2015] eKLR the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A 55 (SCU) where the Supreme Court of Uganda observed that:

A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

17. From the above, the question the court needs to answer is whether the suit can be determined in the absence of the IRA. The answer is an emphatic yes and I say so for a number of reasons. First, I agree with the Plaintiff and IRA that the substratum of this suit is about non-payment of premiums and breach of the Fronting Agreement between the parties. IRA is not privy to the Agreement and the suit does not concern regulatory action by IRA which is grounded on statutory authority.
18. Second, IRA does not have any identifiable stake in this suit. An 'interested party' is a "A party who has a recognizable stake (and therefore standing) in the matter" (See *Black's Law Dictionary*, 9th Ed. at pg. 1232). Therefore, an applicant who seeks to join an interested party must demonstrate the stake that party has in the suit. The issue of whether the Plaintiff was required to get an exemption from the IRA for the subject insurance covers is a matter of legal and factual interpretation and determination by the court, with or without the IRA.
19. Third and for the reasons I have outlined above, it must be clear that IRA's presence in this suit is not necessary for the court to effectually determine the issues between the parties concerning the agreement between them. Lastly, I do not detect any prejudice that will IRA will suffer if it is not joined to these proceedings. The Defendant has a right to defend itself before the IRA, answer to the allegations and also challenge the regulatory proceedings in any other forum provided by the law including appealing to the statutory tribunal or seeking relief by way of judicial review.



Disposition

20. For the reasons I have outlined above, I find that the Defendant's application dated September 30, 2022 lacks merit. It is dismissed with costs to the Plaintiff and the Proposed Interested Party. As the Proposed Interested Party has not been joined as a party I assessed its costs at Kshs 45,000.00.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Ongoma instructed by LJA Associates LLP Advocates for the Plaintiff.

Mr Lusi instructed by CM Advocates LLP for the Defendant.

Ms Ndirangu instructed by the Insurance Regulatory Authority.

