



Ekanyariat Atoo Enterprises Limited v Kenya Commercial Bank Kenya Limited; County Government of Turkana (Intended Third Party) (Civil Case E002 of 2022) [2023] KEHC 18511 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL CASE E002 OF 2022
JRA WANANDA, J
JUNE 16, 2023**

BETWEEN

EKANYARIAT ATOO ENTERPRISES LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK KENYA LIMITED DEFENDANT

AND

COUNTY GOVERNMENT OF TURKANA INTENDED THIRD PARTY

RULING

1. The Application before Court seeks leave to join the intended third party to this suit.
2. The background of the matter is that by the Plaintiff filed on May 11, 2022 through Messrs Bashir Noor & Co Advocates, in summary, the Plaintiff pleaded that it was a customer of the Defendant bank where it held a bank account, the Plaintiff entered into a contract with the intended third party for the construction of Lodwar-Moi stadium for a consideration of Kshs 34 Million, the Plaintiff submitted the said bank account as the account where the contractual payments were to be made, the Plaintiff successfully completed the contract, the intended third party made two payments thereto, the Plaintiff accessed and utilized the funds without any hitches, the intended third party later made a third payment of Kshs 5,564,275/-, subsequently a conflict arose between the Plaintiff's Director and an official of the intended third party, later the said official communicated an intention to reverse the payments on the premise that the documents presented by the Plaintiff were "forged", the real reason for the intended reversal was because the official corruptly wanted a percentage of the payments as commission which corrupt practice the Plaintiff declined, the intended third party then authored a letter to the Defendant bank requesting reversal of the third payment, in response the Plaintiff issued a letter to the Defendant warning it against reversing the payments, the Plaintiff later filed a suit in Court against



the intended third party, the Plaintiff obtained a temporary injunction order barring the reversal and an order that the status quo be maintained, the Court ordered that the status quo be maintained, the order was served upon the Defendant, the Plaintiff confirmed that as at that time the account had a credit balance of Kshs 9,878,583/- an amount that was over and above the figure in contention of Kshs 5,564,275, later when the Plaintiff sought to withdraw an amount of Kshs 2,000,000/- the Defendant declined to effect the withdrawal, later the Defendant reversed the amount of Kshs 5,564,275.85 from the Plaintiff's said account. On the said grounds, the Plaintiff pleaded that the Defendant breached its duty of care, fiduciary duty and duty of confidentiality to the Plaintiff. As a result, the Plaintiff prayed for Judgment against the Defendant for general damages under several heads, special damages, aggravated damages and costs.

3. The Defendant filed its Statement of Defence on July 4, 2022 through Messrs G&A Advocates. It denied most of the allegations made by the Plaintiff terming itself a stranger to the contracts and dealings between the Plaintiff and the intended third party. The Defendant however admitted that it made the reversal alleged in the Plaintiff but basically averred that the reversal was made lawfully.
4. The Defendant has now approached this Court vide the ex parte present Chamber Summons dated March 21, 2023 seeking the following orders;
 - i. The Honourable Court be pleased to grant leave to the Defendant/Applicant (hereinafter referred to as the 'Applicant' to file this Application out of time.
 - ii. This Honourable Court be pleased to grant leave to the Applicant to take out a 3rd party notice against the intended third party, that is, County Government of Turkana.
 - iii. The third-party notice, as attached, be issued against the intended 3rd party herein to be joined in this matter.
 - iv. Costs of this Application be in the cause.
5. The Application is brought under "Sections 1A, 3 and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 1 Rules 15 and 16 of the Civil Procedure Rules 2010 and all enabling provisions of law". It is premised on the grounds set out therein and the contents of the supporting Affidavit sworn by one Lilian Sogo.
6. In the Affidavit, it is deponed that the Plaintiff held an account with the Defendant at its Lodwar branch being Account No, 1107126975 opened in the year 2003, on May 20, 2019 the Plaintiff's account was credited with Kshs 5,564,275.85 vide an inward SWIFT remittance from the intended third party, on 28/05/2019 the Defendant received a letter dated May 27, 2019 from the intended third party informing the Defendant that the documents that facilitated the transfer to the Plaintiff's account with the bank were forged, the Plaintiff was further informed that if he does not present a case to prove otherwise the transaction would be reversed, the intended third party then wrote to the Defendant informing it that the Plaintiff had failed to prove that the documents used to process the payment were not fraudulently obtained and the bank was asked to initiate the reverse process which it did and the same took effect June 13, 2019, the reversal constitutes the subject matter between the Plaintiff and the Defendant as well as the subject matter between the Defendant and the intended third party hence the intended third party should be joined to the suit.
7. It was further deponed that the intended third party will be in a good position to demonstrate to the Court why it was suspicious that the documents that were presented to facilitate the deposit were fraudulent or forged, the Plaintiff and the intended third party are the authors of the circumstances that have led to this litigation and should participate in the instant proceedings, the enjoining of the intended third party will promote the expeditious disposal of the suit and avoid multiplicity of suits.



8. When the matter came before on May 11, 2023, Mr Noor, Advocate for the Plaintiff, while appreciating that under Order 1 Rule 15 (1)© of the Civil Procedure Rules, the Application is ex parte in nature, nevertheless, orally sought to be allowed to participate in the Application. I declined the request.

Analysis & Determination

9. Upon considering the Pleadings filed, the Application and the Supporting Affidavit, I find that the issue that arises for determination to be “whether the intended third party should be joined in the suit”
10. The provision that governs the issue of notice and joinder of third parties is Order 1 Rule 15 (1) of the Civil Procedure Rules which provides as follows:

- “(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...”

11. The main issue for consideration in joining a party as a third party is whether there exists a basis of liability of the third party to the Defendant. In Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR, F. Gikonyo J held as follows;

“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.

12. The cause of action in the present suit arises from the Defendant’s action of reversing payments made by the intended third party into the Plaintiff’s bank account held at the Defendant bank. In the circumstances, I am satisfied that the Defendant has demonstrated that in order to assist in the conclusive determination of the issues arising in this suit, it is necessary to join the intended third party in the suit.
13. It is true that under Order 1 Rule 15 (1) of the Civil Procedure Rules, a third party notice is to be issued within 14 days of close of pleadings. From the record placed before me, the last pleading was



the Statement of Defence filed on 4/07/2022. It is not quite clear when the present Application was filed but it appears to have been filed sometime in March 2023. The Defendant is therefore obviously long of out of time in filing the Application. However, since the Defendant has made an express and specific prayer for leave to file the Application and issue the notice of time and since the trial is yet to commence, I do not find any serious prejudice that will be caused to the Plaintiff that cannot be compensated by an award of costs. In the interest of justice therefore, I allow the Application.

Conclusion

14. I hereby order as follows;

- i. Leave is hereby deemed to have been granted to the Defendant to file the Application dated March 21, 2023 out of time.
- ii. The Defendant's said Application dated March 21, 2023 is accordingly hereby allowed.
- iii. Leave is hereby granted to the Defendant to take out and/or issue a third party notice to join the intended third party, namely, County Government of Turkana, to this suit and such service to be effected within the timelines stipulated under the *Civil Procedure Rules*.
- iv. As its penalty for filing the said Application out of time, the Defendant shall bear the costs of the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

WANANDA J.R. ANURO

JUDGE

