



**KCB Bank Kenya Limited v Claytown Valuers Limited (Commercial Case E692 of 2021)
[2023] KEHC 24660 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 24660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E692 OF 2021**

MN MWANGI, J

JUNE 16, 2023

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

CLAYTOWN VALUERS LIMITED DEFENDANT

RULING

1. Before me is a Chamber Summons application dated 22nd March, 2023 brought under the provisions of Order 1 Rule 15 & Order 40 Rule 6 of the Civil Procedure Rules, 2010 and Sections 1A, 1B & 3A of the *Civil Procedure Act*. The defendant/applicant seeks the following orders -
 - i. That leave be granted and/or time be extended for filing of an application under Order 1 Rule 15 of the Civil Procedure Rules;
 - ii. That leave be granted to the defendant to issue Third Party Notices upon M/s Monwalk Investment Limited and M/s Sanlam General Insurance Limited; and
 - iii. That costs be in the cause.

2. The application is premised on the grounds on the face of it and is supported by an affidavit sworn on the same day by Frank Nzomo Nzioka, the Managing Director of the defendant. In opposition thereto, the plaintiff filed grounds of opposition dated 20th April, 2023 raising the following grounds—
 - i. That the application and the prayers sought is (sic) an abuse of the process of this Honourable Court as the same has failed to meet the threshold under Order 1 Rule 15 of the Civil Procedure Rules, 2010.



- ii. That the application is time barred in view of the express provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010.
3. When the instant application came up for hearing on 24th April, 2023, Ms. Wangio, the plaintiff's learned Counsel indicated that the plaintiff had filed grounds of opposition and it wished to file written submissions. Mr. Mutua, Senior Counsel, for the defendant stated that the instant application was served on the plaintiff out of courtesy, since the nature of the application is *exparte*. He stated that it was up to the Court to decide if there was need for the plaintiff to be heard.
4. Directions were given by this Court that it would consider the application herein and determine if leave should be granted for the defendant to join the two third parties to the suit in issue, and whether the plaintiff has a right to respond to the instant application, and if so, if its grounds of opposition would be considered.
5. As a preliminary issue, I will first determine whether the plaintiff has a right to respond to the application herein. The application has been brought under the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010, which states as hereunder –
 - “(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.” (emphasis added).
6. From a reading of Order 1 Rule 15 of the Civil Procedure Rules, 2010, it is clear that an application for leave to issue a third-party notice is made *exparte* and is supported by an affidavit. In civil procedure, *exparte* is a legal proceeding brought by one party in the absence of, and without representation of, or



notification to the other party. The word/expression *exparte* is defined in the Black's Law dictionary, 11th Edition, 2019 at page 722 as follows –

“Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest; of, relating to or involving Court action taken or received by one party without notice to the other...”

7. My finding is that pursuant to the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010, the plaintiff had no right to respond to the application herein in regard to the joinder of third parties. This Court however notes that the defendant is also seeking extension of time to file the application herein, since it was filed outside the prescribed timelines. Due to the said fact, the plaintiff had the right to respond to the issue of whether or not the defendant should be granted leave to file the instant application out of time. This means that the plaintiff's grounds of opposition dated 20th April, 2023 shall be considered only to that extent.

Analysis And Determination.

8. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiff, in so far as the issue of the defendant being granted leave to file the present application out of time is concerned. The issues that arise for determination are –
 - i. Whether the defendant should be granted leave to file the instant application out of time; and
 - ii. Whether leave should be granted for the defendant to join M/s Monwalk Investment Limited and M/s Sanlam General Insurance Limited as third parties to this suit.
9. In the affidavit filed by the defendant, its deponent deposed that by a letter dated 7th August, 2017, the plaintiff instructed the defendant to value a total of twelve properties. That the defendant's deponent personally visited all the locations where the twelve properties are situated and investigated values of comparable properties. He averred that by applying his academic and professional qualifications, as well as experience, they arrived at market values for each of the twelve properties and thereafter prepared valuation reports.
10. He averred that the plaintiff's case is that it relied on the valuation reports by the defendant in order to advance to M/s Monwalk Investments Limited (the intended 1st third party), banking facilities amounting to a sum of Kshs. 980,000,000/=. That as a result of breach of contract and/or duty by the defendant, the plaintiff has suffered loss and damages equivalent to Kshs. 980,000,000/=.
11. It was stated by the defendant that from the plaint, the plaintiff has not disclosed whether or not it took any steps towards recovery of the loan amount advanced to the intended 1st third party and if it has, whether it has recovered any money. The defendant further stated that even if it were to be held liable, it cannot be held liable for the entire sum advanced to the intended 1st third party, since if the Court were to make such a determination without interrogating whether or not the plaintiff has recovered any monies, then the plaintiff or the intended 1st third party would be unjustly enriched.
12. The defendant's case is that the intended 1st third party ought to participate in the proceedings herein so that the Court may determine the extent of its liability in this matter, and in the event the Court finds that the defendant is liable, then the question of indemnity and contribution by the intended



1st third party may arise. The defendant averred that as at the time of the alleged negligence or breach of contract, it had a valid professional indemnity cover policy No. 010/051/1/038094/2017/07 for an insured sum of Kshs. 200,000,000/= issued by M/s Sanlam General Insurance Ltd (the intended 2nd third party).

13. He further averred that they advised the intended 2nd third party of the suit by a letter dated 22nd December, 2021 and that between the years 2022 and 2023, they have been engaging with the said insurance company so that it can take over the conduct of the matter or negotiate with the plaintiff, but all its efforts have been in vain. The defendant deposed that in view of the said professional insurance cover, the issue or the question of indemnity by the intended 2nd third party ought to be determined in this suit.

Whether the defendant should be granted leave to file the instant application out of time.

14. Order 1 Rule 15 of the Civil Procedure Rules, 2010 provides that an application to join third parties to proceedings ought to be filed within fourteen (14) days after the close of pleadings. From the record, it is evident that the pleadings herein closed on 10th December, 2022 when the Court certified the matter ready for hearing and slated it for hearing on 15th and 22nd March, 2023. That means that the instant application ought to have been filed on or before 23rd November, 2022.
15. The present application was filed on 30th March, 2023, which is approximately four (4) months after the close of pleadings. On a perusal of the defendant's affidavit in support of the application herein, I note that the defendant has not disclosed the reasons why it could not file the said application within the prescribed timelines. This Court as such has to consider if there has been inordinate delay in filing the instant application. The Court of Appeal in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR held that–

“It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

The general trend, following the enactment of Sections 1A and 1B of the *Civil Procedure Act*, Sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution*, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds...”

16. The application herein was filed before the case proceeded to hearing since as no witness had testified. Based on the foregoing, I find that the delay in filing the application herein is not inordinate. The plaintiff did not file an affidavit to demonstrate the prejudice it would suffer, if any, if the prayer for extension of time was granted. It filed grounds of opposition to oppose the instant application for having been filed outside the timelines provided for in Order 1 Rule 15 of the Civil Procedure Rules, 2010. In view of the foregoing, this Court holds that there has been no inordinate delay in filing the instant application. This Court also holds that no prejudice shall be occasioned to the plaintiff if extension of time is granted. As a result, I hereby extend the time for filing of the instant application.



Whether leave should be granted for the defendant to join M/s Monwalk Investment Limited and M/s Sanlam General Insurance Limited as third parties to this suit.

17. In the Ugandan case of Yafesi Walusumbi v The Attorney General of Uganda [1959] E.A. 223 cited in the case of Josphat Njuguna Kariuki v Simon Karichu Irungu [2004] eKLR the Court held that –

“...in order that a third party be lawfully joined, the subject matter between the third party and defendant must be the same as the subject matter between plaintiff and defendant and the original cause of action must be the same.”

18. On a perusal of the pleadings herein, it is evident that the subject matter between the plaintiff and the defendant is the valuation report that informed the plaintiff’s decision to advance to M/s Monwalk Investments Limited (the intended 1st third party), banking facilities amounting to a sum of Kshs.980,000,000/=. It is alleged that as a consequence thereof, the plaintiff has suffered loss and damage of Kshs.980,000,000/= due to breach of contract and/or duty by the defendant. For this reason, I agree with the defendant that a third-party notice ought to issue to the intended 1st third party so that the Court can ascertain to what extent it has repaid the sum of Kshs.980,000,000/= advanced to it by the plaintiff, and the extent of its liability in this matter.

19. Additionally, in the event that the Court finds the defendant is liable, then the question of indemnity and contribution by the intended 1st third party may arise. The defendant averred that as at the time of the alleged negligence or breach of contract, it had a valid professional indemnity cover policy No. 010/051/1/038094/2017/07 for an insured sum of Kshs. 200,000,000/= issued by M/s Sanlam General Insurance Ltd, the intended 2nd third party. The defendant contended that in view of the said professional indemnity insurance cover, the issue or question of indemnity by the intended 2nd third party ought to be determined in this suit.

20. The Court of Appeal in the case of Savji Harji Varsani v Kanjee Naranjee (Kenya) Ltd [1977] eKLR when upholding the decision by the High Court cited the case of Myers v. N. & J. Sherick Ltd & Others [1974] 1 All E.R. 81 and held that -

“In other words, the judge was satisfied that the landlord’s claim against the applicant as Third Party was connected with the original subject matter of the suit and that the was a question relating to, or connected with, the original subject matter which was substantially the same and should be properly determined not only between the tenant and the landlord but also between the landlord and the Third party. The cause of complaint is the same; damage to property by rain water. All the parties were, so to speak, at the scene. The relief sought is the same; damages. The causes of action are the same; negligence and nuisance. Mr. Khanna dealt on the issue of the contract; but we would say that it does not follow, in the circumstances of this case, that the absence, if any, of any contractual obligations as regards the works to be executed, would automatically exonerate the applicant from liability in negligence or nuisance as to the manner of execution of the agreed works...”

21. Based on the foregoing, my finding is that the subject matter between the plaintiff and the defendant is the same as the one between the defendant and the intended third parties. As such, the events and liability flow from the same cause of action, and the facts are so intertwined and interconnected that they should all be decided in one case. It is clear to me that the matters in controversy such as whether the defendant is liable, and to what extent it is if it will be found liable, and if it ought to be



indemnified by the third parties can be determined by joining the two (2) intended third parties to these proceedings.

22. I find that the application dated 22nd March, 2023 is merited. It is allowed as prayed. The defendant shall file and serve Third Party Notices within fourteen (14) days from today. There shall be no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE, 2023.

NJOKI MWANGI

JUDGE

