



REPUBLIC OF KENYA



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Sanlam Insurance Company Limited (Formerly Gateway Insurance Limited) v Itunga & another (Civil Appeal E058 of 2022) [2024] KEHC 14532 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E058 OF 2022
EM MURIITHI, J
NOVEMBER 14, 2024**

BETWEEN

SANLAM INSURANCE COMPANY LIMITED (FORMERLY GATEWAY INSURANCE LIMITED) APPELLANT

AND

GRACE MWARI ITUNGA RESPONDENT

AND

ESTHER WAWIRA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL GITANGA KIBATHI - DECEASED) PROPOSED DEFENDANT

(Being an appeal from the Ruling of Honourable M.A Odhiambo (RM) delivered on 31/4/2022 in Meru CMCC No. E079 of 2020)

RULING

1. The Respondent herein has filed a declaratory suit against the Appellant in the trial court. The Appellant filed an application dated 8/11/2021 seeking leave to amend its defence to join Esther Wawira (Suing as the legal representative of the estate of Samuel Gitanga Kibathi –Deceased) as a proposed 2nd Defendant.
2. In dismissing the said application, the trial court vide its impugned ruling of 31/4/2022 rendered thus;

“In this particular case the defendant (Sanlam Insurance Co Ltd formerly Gateway insurance co Ltd) seeks to enjoin Esther Wawira as a co-defendant in the suit. Their reasoning is that Esther Wawira is the legal representative of the estate of Samuel Gitangu who was their insured. It is further stated that Samuel Gatangu was in breach of the terms of the insurance policy No 052/081/1/205678/0012/12. That he failed to report the accident and



that further he also failed to pay the excess as required. I have considered the material placed before me. There is no dispute that the insurance policy contract was between the defendant and the deceased Samuel Gitangu. I also take note that the policy contract was not attached and as such the court is not in a position to tell whether or not the obligations extend to the legal representative of the estate of the deceased Samuel Gitangu. There is no Privity of contract between the defendant and the estate of the deceased Samuel Gitangu. As a rule of common law, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not privy to it. See Halsbury's Law of England 4th Edition. Vol. 9(1) Paragraph 748. The underlying principal is that only parties to a contract can sue and be sued under it...Accordingly, a contract cannot be enforced either by or against a third party. A policy document is a contract between the insured and the insurer. According to the pleadings by the defendant the deceased Samuel Gitangu was in breach of some clauses of the insurance policy. It is stated that he failed to report the accident and to pay excess as the contract stipulates. That it is for this reasons that the defendant cannot satisfy the decree in Cmcc 409 of 2013. Their prayed for the estate of the deceased Samuel Gitangu to satisfy the claim. I am of the view that it is only the deceased Samuel Gitangu who would have been better placed to prove or disprove the allegations of breach of insurance policy contract. A third party in my view is not in a position to prove or disprove the alleged breaches raised by the defendant. The proposed 2nd defendant not being a party to the agreement cannot therefore be called to answer to the alleged breach of policy agreement. There is no cause of action against the proposed 2nd Defendant and there was no justification for the defendant enjoining the said proposed 2nd Defendant. Accordingly, the court finds no merit in the application dated 8.11.2021. Application is dismissed with costs to the plaintiff."

3. Aggrieved by the said dismissal, the Appellant filed a memorandum of appeal in this court on 11/5/2022 raising 5 grounds as follows:
 1. That the learned trial magistrate erred in law and fact by dismissing with cost the Appellant's notice of motion application dated 8th November 2021, seeking to add Esther Wawira (Suing as the legal representative of the estate of Samuel Gitanga Kibathi –Deceased) as a 2nd Defendant.
 2. That the learned trial magistrate erred in law and fact by ignoring the importance of the proposed 2nd defendant as a party to the suit as per Appellant's amended defence annexed to the Appellant's notice of motion application dated 8th November 2021.
 3. That the learned trial magistrate erred in law and fact by summarily determining the suit without considering the importance of proposed 2nd Defendant as per Appellant's draft defence and hence, arriving at an erroneous decision.
 4. That the learned trial magistrate erred in law and fact by failing to consider the grounds in support of the Appellant's notice of motion application dated 8th November 2021 together with the grounds set out in the supporting affidavit of Sharon Mwasi sworn on 8th November 2021.
 5. That the learned trial magistrate's ruling as a whole is not supported by the evidence that was tendered in court by the parties.

Submissions

4. The Appellant cites the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR on the duty of a first appellate court. It



faults the trial court for erroneously equating the proposed 2nd Defendant, the legal representative of the estate of Samuel Gitanga Kibathi to a 3rd party, and cites Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Mainigi (Intended Plaintiff) (2022) eKLR. It urges the court to set aside the ruling of 31/4/2022 and allow the appeal with costs.

5. The Respondent urges that a declaratory suit by its own simple meaning is a suit filed against a Judgment Debtor's insurer in an already concluded suit, and the contract giving rise to the insurance policy in the primary suit was solely between the Appellant and the deceased Judgment Debtor. She urges that the presence of the proposed 2nd Defendant is not necessary and will not enable the court to effectually and completely adjudicate the issues in the case, and prays for the dismissal of the appeal with costs. Analysis and Determination
6. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).
7. The singular issue for determination is whether the trial court erred in disallowing the Appellant's quest for joinder of the proposed 2nd Defendant.
8. Joinder of all necessary parties to a suit was discussed at length by the Court of Appeal in *Civicon Limited v Kivu Watt Limited & 2 others* (2015) eKLR, as follows;

“The question is whether the right of a person may be affected if he is not added as a party. Generally in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided. Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.”

9. The facts of the case as recapitulated hereinbelow are that the Respondent herein, the Decree Holder in the primary suit being Meru CMCC No. 409/2013 instituted a declaratory suit against the Judgment Debtor's insurer, the Appellant herein, to settle the decretal sum of Ksh. 2,714,168. Ordinarily, such declaratory suits are filed by the Judgment Debtor in the primary suit. Interestingly in this case, the declaratory suit was commenced by the Respondent herein, the Decree Holder in the primary suit. To this court's mind, it was the duty of the Judgment Debtor, namely Samuel Gitanga Kibathi (deceased) now represented by the proposed 2nd defendant, to file the suit because he stood to suffer substantial loss if the suit were to be dismissed, because he would be obligated to settle the decree on his own. The Respondent on the other hand would still have a recourse, as she would be at liberty to execute.
10. This court allowed the joinder of a Judgment Debtor to a declaratory suit in *Francis Mwobobia v Invesco Insurance Co. Limited; Mwirigi Muguna Nkoroi* (Intended Interested Party/Applicant) [2021] eKLR as follows;

“The Court does not find that the Plaintiff/Respondent stands to be prejudiced in any manner by the joinder of the Applicant to the suit. In fact, in order to sustain the suit, as correctly pointed out by the Applicant, it is necessary to prove the existence of an insurance contract between him, the Judgment Debtor and the insurance company. The Court considers that the details of this contract, if any, are matters within the special knowledge of the Applicant. The Court further considers that the Plaintiff/Respondent is not privy to any such contract. It thus appears that in order to sustain his case against the Defendant/



Respondent, the Plaintiff/Respondent actually needs the Applicant to participate in the proceedings...16. The above is an indication that the participation of the Applicant in the suit is necessary for

the Court to effectively resolve all the issues in the suit...20. This Court finds that the justice of the case, requires the joinder of the Applicant to the suit as he is a proper and necessary party in these proceedings. The Court finds that it does not matter that the suit is part heard as upon conclusion of the Plaintiff's case, the Applicant will get opportunity to adduce his evidence and the matter will proceed appropriately."

11. This court respectfully notes the case of Britam General Insurance Company Ltd v Rentco East Africa Limited & another; Festus Mbithi Thomas & 36 others (Interested parties) [2022] eKLR, where the court (D. Chepkwony J) stated as follows; "30. On the other hand, the Plaintiff averred that it has sued both Defendants as co-insured with respect to policy covering Motor Vehicle Registration No.GKB 904T. The said policy contract forms part of the Plaintiff's documents. Having read through the said policy, it is evident that the respective insured are Rentco East Africa Limited (the 1st Defendant and Co-operative Bank of Kenya Ltd) while the Plaintiff on the other hand is the Insurer. The present case being a declaratory suit seeks to repudiate the said policy. I am persuaded to agree with the Plaintiff's submissions that the 1st Defendant being a party to the same policy has the obligation to step on its boots to answer the averments in the Plaint. 31. Given the definition of the term "reasonable cause of action" in the DT Dobie case (supra) and considering that an insurer may be entitled to avoid liability pursuant to Section 10(1) and (2) of the Insurance (Third Party Risks) Act, the insured is entitled to a chance to answer to those allegation. Therefore, the 1st Defendant is directly connected to the instant suit by virtue of being an insured in the subject policy and it is at liberty to enter appearance and answer to the claim. In view of the foregoing I find no merit to the prayer seeking to strike out the suit against the 1st Defendant."
12. This court, pursuant to Order 1 Rule 10 of the Civil Procedure Rules, finds that the presence of the proposed 2nd Defendant before the court is necessary in order to enable the trial court effectually and completely adjudicate upon and settle all issues in the declaratory suit.

Orders

13. Accordingly, for the reasons set out above, the Court finds that the Appellant's appeal has merit and it is allowed in the following terms:
 1. The trial court's ruling dated 31/4/2022 dismissing the Appellant's application dated 8/11/2021 is set aside.
 2. The Appellant shall have the cost of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER, 2024.

EDWARD M. MURIITHI JUDGE

Appearances:

Ms. Oteko for the Appellant. Mr. Ndubi for the Respondent.

