



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 311 OF 2011

JUBILEE INSURANCE COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

FRANCIS MURIITHI GITHINJI.....DEFENDANT

AND

ANN MUMBI KABIA &

ARTHUR GAKERI NJERI (Suing as the Administrators of the Estate of

BENSON NGUGI-deceased)INTENDED INTERESTED PARTIES/APPLICANTS

RULING

1. The Applicants herein are the Intended Interested Parties and have moved the court vide an application dated 20th September, 2019 seeking orders that they be enjoined in the suit herein as Interested Parties.

2. The application is premised on the grounds set out in the application that;

1. The Applicants have an identifiable and proximate interest in the outcome of the suit herein.

2. The Applicants stand to suffer prejudice should this honorable court make any orders or judgment without their participation in the matter.

3. The participation of the Applicants in the matter herein is paramount as they will make relevant submissions crucial for the just determination of the matter herein.

4. It is in the interest of justice that the orders sought herein be granted.

3. The application is further supported by the affidavit sworn by the Applicants. It is stated in the supporting affidavit that on or about October 10th 2009, the Defendant was involved in a road accident while using motor vehicle registration number KAY 458E killing Benson Ngigi (deceased) whose estate the Applicants sued on its behalf and who was the passenger in the suit motor vehicle. The Applicants filed a suit against the Defendant under Civil Suit Miscellaneous CMCC NO. 791 of 2010. That the Defendant did not enter appearance despite service, forcing the Applicants to apply for judgment in default which was granted. That at the time of the accident, the suit motor vehicle was insured by the Plaintiff/Respondent herein. It is further stated that the Plaintiff/Respondent instituted a suit seeking to be absolved of liability by avoiding the liability to indemnify the Defendant due to non-disclosure.

4. It is further stated that after the Applicants obtained the decree against the Defendant, the same was never settled which prompted the Applicants to move the court by way of a Declaratory Suit vide Machakos CMCC 641 OF 2016 against the Plaintiff/Respondent herein who sought stay of execution of Machakos CMCC 641 of 2016 vide Nairobi HCC Miscellaneous Application number 147 of 2018 pending the instant suit in which the Applicants wish to be enjoined as Interested Parties.

5. The Plaintiff/Respondent opposed the application on grounds that this court lacks the requisite jurisdiction to hear this application and that the Applicant is guilty of *laches*. Further, that the application is misconceived, bad in law and an afterthought and was filed with the sole purpose of delaying the determination of this matter. It is further argued that the Plaintiff stands to suffer prejudice as a witness who testified

on its behalf has since left the company.

6. The Plaintiff/Respondent further averred that the purpose of *grant ad litem* was for purposes of instituting a suit and as such the Applicants have no *locus standi* to institute the instant application.

7. It is the Plaintiff/Respondent's contention that the suit herein involves a contract between the Defendant/Respondent and the Plaintiff/Respondent which contract the Applicant is not privy to and cannot make any contribution to it.

8. The application was canvassed by way of written submissions which I have duly considered.

9. I will first address the issue of *locus standi* raised by the Plaintiff/Respondent. The issue of *locus standi* has the effect of nullifying a suit and therefore, it should be addressed at the preliminary stage before a court can make a step to determine any issue on merit. In that regard, I am in agreement with the decision in **Julian Adoyo Ongunga v Francis Kiberenge Abano CA No.119 of 2015**, while addressing the issue of *locus standi* where it was observed that;

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

10. Paragraph 14 of the 5th schedule to the Law of Succession Act Cap 160 Laws of Kenya, provides;

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution”

11. In the instant application, the Plaintiff/Respondent has stayed the Applicants' suit against it. The Applicants' primary suit has not been fully executed and the Plaintiff/Respondent's suit herein relates to the Applicants' primary suit as it involves the same Defendant and the Declaratory Suit that involves the Plaintiff/Respondent. The Plaintiff/Respondent's suit emanates from the Applicant's suit, consequently; the *grant ad litem* issued by court on 16th of April, 2010 is still in force as far as this suit is concerned. I, therefore, agree with the Applicant that they do have *locus standi*.

12. The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** at Rule 2 defines an interested party as;

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”

13. Similarly, the Supreme Court of Kenya in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** defined an interested party as;

“...Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

14. The Supreme Court of Kenya in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** relied upon by the Applicant set out the guiding principles for such applications as follows:

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

(ii) The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

15. The Intended Interested Parties posit that they are a beneficiary of the policy in question and, therefore, they do have an identifiable and proximate stake in the case. I do agree with the Intended Interested Parties in the sense that the Plaintiff/Respondents' case lies on the policy advanced to the Defendant/Respondent in which the Intended Interested Parties seek indemnity from.

16. It is the Applicants' position that should the court grant any of the orders in the suit without their participation, the same affects them directly as the Declaratory Suit stands stayed and the decree will be good only on paper. I am of the view that the Intended Interested Parties have demonstrated to the satisfaction of this court the prejudice they stand to suffer in the event that they are not enjoined in the suit.

17. The Intended Interested Parties have raised two pertinent issues they intend to submit on. The first issue is on the statutory timelines within which to bring a suit on avoidance of liability and the second being the fact that the policy in question was issued under Insurance (Motor vehicle Third Party Risk) Act Cap 405 Laws of Kenya which covers the Defendant/Respondent and any Third Party. The Applicants' further observed that this suit is undefended and the Applicants' submissions will be of great help to court since the Plaintiff/Respondent cannot submit against itself. The Applicants have satisfactorily presented an overview of their case and submissions they intend to make before this court and have shown their relevance to the suit.

18. To buttress the Plaintiff/Respondent's view that the Applicants are estopped from litigating on the policy as between itself and the Defendant by the doctrine of privity of contract, it is worth noting that there exists an exception to this general principle. The exception was well illustrated by the High Court in **David Njuguna Ngotho v Family Bank Limited & another [2018] eKLR** that;

“An exception to the Privity Rule suffices where the contracting clearly intended to benefit a third party from their agreement and the third party would be able to rely on and or enforce the agreement if it is not carried out properly.”

19. The policy in question was advanced by the contracting parties (*the Plaintiff/Respondent and the Defendant/Respondent herein*) with the sole intention of benefiting a Third Party (*the Applicants herein and any other Third Party*). The issue at hand is covered by the exception hence the issue of privity of contract does not arise. I am therefore, in agreement with the Intended Interested Parties/Applicants' submission.

20. The argument by the Plaintiff/Respondent that it will suffer prejudice if the witness who has so far testified is unavailable is not controverted by the Intended Interested Parties/Applicants. The intended interested Parties/Applicants' contention is that they wish to essentially rely on submissions. It is, therefore, not necessary to recall the said witness. The case will therefore proceed from where it has reached.

21. In the upshot, the application is merited and is hereby allowed with costs in cause.

Date, signed and delivered at Nairobi this 3rd day of June, 2021

B. THURANIRA JADEN

JUDGE