



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 979 OF 2006

JOHN KENNETH WROE.....PLAINTIFF

V E R S U S

AAR HEALTH SERVICES LIMITED.....DEFENDANT

RULING

This is an application (by Notice of Motion dated 9th June 2015) by the Defendant for leave to enjoin a third party Nimrod Africa as a third party to this suit. It is brought under Order 1, rule 15 (1)(b); Order 8 rule 3(1) and Order 51 rule 1 of the Civil Procedure Rules, 2010 (the Rules). Under Order 1 rule 5 (1)(b), where a defendant claims as against any other person not already a party to the suit in the circumstances set out in the rule, he may, with the leave of the court, issue a third party notice to that effect to such other person.

In the present case, the defendant seeks to enjoin Nimrod African Limited because after conducting an analysis of the payments made by itself through its officers, in respect of the Plaintiff's treatment established that the Plaintiff was indebted to the Defendant to the tune of Kshs. 1,455,509/-. That in view of that, it is only just and fair that the Defendant be granted leave to enjoin the proposed third party to enable full determination of the issues in the matter.

The Plaintiff has opposed the application by grounds of opposition filed on 22nd June 2015 to the effect that –

1. That the application offends the provisions of Order 1 rule 15 of the Civil Procedure Rules 2010.
2. That the application is bad in law as it seeks to introduce a counterclaim that is statute barred by virtue of section 4(1) of the Limitation of Actions Act.
3. It is an abuse of the process of the court and only aimed at delaying the hearing and disposal of the suit.
4. It is an afterthought as it has been brought after parties fully comply with pre-trial directions.
5. It is frivolous, vexatious and a gross abuse of the process of the Court and should be dismissed with costs.

The application was argued by way of written submissions. On behalf of the Defendants it was submitted

that the primary contract for provision of medical cover was between the Defendant and the proposed third party where the Defendant was to provide medical cover for the Directors and employees of the third Party. That the money owing from the Defendant to the Plaintiff is actually money owed by the proposed third Party under the contract.

The Defendant contends that failure to resolve the matter as among the three parties would only result in failure of justice. It is argued that the law relating to leave to issue third Party proceedings at the time of filing this suit was Order 1 rule 14 of the old civil procedure rules which did not prescribe a limited period within which to seek such leave. It was also the position under those rules that the Plaintiff was not entitled to give a response as the proceedings were to be brought ex parte.

On their part the plaintiff submitted that the application is an abuse of the process of the court and is filed to delay the hearing of the suit. The plaintiff further submitted that there has been unreasonable delaying bringing the application, is frivolous and mischievous and is time barred by Limitation of Actions Act and that the delay erases any cause of action which the intended amendment may introduce.

I have carefully considered the submissions of both parties.

The court will grant leave to a defendant to issue a third party notice where the defendant claims:-

“(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”

See sub-rule (1) of rule 14 aforesaid.

I am persuaded that the Defendant’s claims against the proposed third party falls under the categories listed above. The Defendant is claiming indemnity in that the primary contract to provide medical cover was between it and the third party. Its claim is therefore related to the original subject-matter of the suit, and are substantially the same as the relief claimed by the Plaintiff. It is also apparent that the questions of fact and law arising out of the Defendants’ claims against the proposed third party relate to the same contract for provision of medical services.

The **Civil Procedure Rules 2010, Order 1, Rule 10 (2)** provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined . . . and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit be added.”

The court in the case of **Eastern Bakery – Vs – Castelino [1958] EA 461** summarised the principles which would act as beacons to guide the court when granting or refusing amendment of pleadings as follows –

“It will be sufficient . . . to say that amendments of pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs. The court will not refuse to allow an

amendment simply because it introduces a new case. But there is no power to enable one distinct cause of action to be substituted for another. The court will refuse to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment. The main Principle is that an amendment should not be allowed if it causes injustice to the other side.”

In the 12th Edition of **Precedents of Pleadings** at page 130, an overview of the primary considerations to be taken into account in determining whether to allow or disallow amendments –

“The circumstances, in which amendment of pleadings may be sought are infinitely various . . . each case must be decided having regard to all the surrounding circumstances of the particular case . . . The first and in a way the paramount consideration is whether the application for leave is made in good faith. For this purpose, good faith means that the amendment is sought for the purposes of raising real question in controversy between the parties, and is not dishonest or intended to over reach the opposing party, or made for any ulterior motive and relies on facts which are substantively true and germane to the matters in controversy between the parties.”

Therefore, this court has wide discretion when faced with an application for leave to amend proceedings which discretion must be exercised judiciously. It is true that there has been considerable delay in bringing this application. However, the merits of the application is that if it is granted the court will have the chance to hear all parties on merit and on the evidence available. The court cannot wholly ignore the allegation by the Applicant that the party who could be responsible for the Defendant’s claim, if at all, may be presently out of these proceedings. It is best in the interest of justice that all necessary parties to this suit be joined in order that the court can determine where the liability if any, lies, and a more informed decision is made. The application is therefore allowed.

However, the Court is alive to the allegations by the plaintiff that this application is intended to delay the finalization of the suit as it has been brought many years after the original claim was made. With this in mind, I direct the Applicant to file and serve its amended defence within the next 10 days. The defendant shall serve the third party with its pleadings within 14 days thereafter, and the Third Party shall enter appearance and file a defence within 14 days of such service.

This being an old matter, and both the plaintiff and defendant having complied with the pretrial procedure, after the third party complies with the directions given, the suit may be set down for hearing.

The plaintiff shall have the costs occasioned by this application.

Orders accordingly.

Dated and delivered at Nairobi this 6th Day of November, 2015.

A.MBOGHOLI MSAGHA

JUDGE