



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 2 OF 2020**

**DENNIS MURITHI & JACOB THURANIRA**

**(Suing as the legal representative of the estate of FKM-DECEASED).....1<sup>ST</sup> APPELLANT**

**VERONICA GAICHUGI**

**(Suing as the legal representative of the estate of JMM-DECEASED).....2<sup>ND</sup> APPELLANT**

**VERSUS**

**INVESCO ASSUARANCE CO. LIMITED.....1<sup>ST</sup> RESPONDENT**

**MARTIN KOOME.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal against the Ruling of Hon. T.M Mwangi SPM**

**in Meru CMCC No. 104 of 2019 delivered on 21/11/ 2019)**

**JUDGMENT**

1. The appellants herein filed an application in the lower court dated 24/6/2019 seeking to be enjoined as co-plaintiffs in the suit and for leave to file their pleadings in the suit. The trial court in its ruling dismissed the application with no orders as to costs. That decision aggrieved the appellants, thereby necessitating the filing of their memorandum of appeal on 10/01/2020 raising five (5) grounds, which I have collapsed into 3 as follows; -

- i. The learned magistrate erred in law and fact in failing to appreciate that the appellants' intended joinder in the suit was necessary and founded on Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act.
- ii. The learned magistrate erred in law and fact in failing to find that there were decrees obtained in favor of the appellants in CMCC NO 189/2013 and CMCC 333/2013 respectively and the same could not be satisfied in their absence as they are the direct beneficiaries thereof.
- iii. The learned magistrate erred in law and fact in dismissing the appellants' application without giving reasons for so doing, thus contravened the provisions of law.

2. The appeal was canvassed by way of written submissions, which were respectively filed on 29/7/2020 and 18/5/2021. The appellants submitted that they are interested parties as defined in the Constitution, as they have a stake in the instant suit, taking into account their decrees against the 2<sup>nd</sup> respondent was stayed pending the hearing of this suit. It was imperative they be enjoined so that they could follow up on the progress of the suit, and the respondents did not oppose their application to be enjoined as interested parties. The two stressed the statutory duty placed on the insurer to satisfy judgments against persons insured, adding that even although they could have instituted a declaratory suit themselves against the 1<sup>st</sup> respondent, in order to satisfy their respective decrees, they elected to save the courts valuable resources and time by filing the application to be enjoined as interested parties. According to them, their application was merited as the outcome in the suit would either establish or curtail their legal rights. They relied on **Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi [2019] eKLR** in support of their submissions.

3. For the respondent, it was submitted that the trial magistrate was able to distinguish the possible causes of action and that the appellants sought to be enjoined as plaintiffs and not as interested parties. They faulted the appellants for not having exhausted the available avenues

provided under Order 22 of the Civil Procedure Rules and cited to court the decision in **Alfred Mutinda Mutua v CFC Stanbic Bank (K) Ltd [2019]eKLR, Mumo Matemu v trusted Society of Human Rights Alliance & 5 Others[2013]eKLR**, respectively, in support of the proposition of the law that one needs to establish his cause of action in a suit before joinder can be ordered and on who qualifies as an interested party

#### **Analysis and determination**

4. As the first appellate court, this court is duty bound to re-evaluate, re-assess and re-analyze the evidence on record and make its own independent determination, having in mind that it did not have the advantage of hearing witnesses testify. See: **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR**.

5. In executing that mandate, I have considered the impugned decision, memorandum of appeal, the rival submissions made by the parties as well as the authorities cited. The main issue for determination is whether the appellants ought to have been enjoined in the suit. In coming to the conclusion to dismiss the application, the trial court was evidently concerned with the question whether the appellants claim was founded on tort or contract and asserted very affirmatively that the defendant had no direct duty of care towards the appellants. That the court did without invitation as the respondent did not oppose the application for joinder. At the onset, the application as presented for joinder was clear that it was hinged upon the provisions of section 10, cap 405. The cause of action was thus statutory and not contractual nor grounded upon tort. In coming to the conclusion that the cause was grounded on tort, the trial court made a glaring error of law and invites this court interference by being reversed.

6. Under the provisions of Order 1 of the Civil Procedure Rules, a party may seek joinder either as a plaintiff or defendant. Order 1 Rule 10 (2) provides as follows:

**“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, whether as plaintiff or defendant, be struck out, 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 effectually and completely adjudicate upon and settle all questions involved in the suit, be added.”**

7. In their application dated 24/06/2019, the appellants sought to be enjoined in the suit as the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, as they had a judgment against the 1<sup>st</sup> respondent but now they contend that they sought to be enjoined as interested parties and not plaintiffs, the question still remains whether they are necessary parties to the suit. If necessary, it was within the power of the court to fashion an order on joinder that would serve the interests of justice and avoid an injustice

8. It is common place that the applicants hold decrees against an insurer of the respondent. Those decrees are the very foundation of the suit in which the joinder was sought. In that set of admitted facts, it is difficult to fail to see how the appellants stood to be affected by any decree the trial court would issue. It is obvious that either way, the appellants would be affected. I consider it a basic and straight forward question of the right to be heard before a right to determined. In declining joinder, the trial court was driving away the appellants from their right to be present and be heard when a matter concerning their property in the decree was set to be heard. That was plainly erroneous as the interests of the appellant was not merely cursory but very substantial.

9. In **Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR** the court stated;

**“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation.”**

10. In my considered view, it was necessary to enjoin the appellants at any stage of the suit because they were the persons to be effected by an order whether or not the respondent was obligated to settle the decree in their favour. Their participation would present a very valuable assistance to the court. Accordingly, I find the appeal merited and allow it with the consequence that the order of dismissal is set aside and in its place substituted an order allowing the joinder as interested parties to the suit. I do award the costs of the appeal to the appellants.

**DATED SIGNED AND DELIVERED VIRTUALLY BY MICROSOFT TEAMS THIS 27TH DAY OF OCTOBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

**MUKHAMA FOR THE RESPONDENT**

**NO APPEARANCE FOR THE APPELLANT**

**PATRICK J.O OTIENO**

**JUDGE**