



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL CASE NO. 33 OF 2017

NAFTALY MUIRURI MACHARIA.....RESPONDENT/PLAINTIFF

-VERSUS-

SAMUEL MAINA.....1ST DEFENDANT/RESPONDENT

FRANCIS KANINI MWANGI.....2ND DEFENDANT/RESPONDENT

-AND-

GEORGE KANGARAGITHIGIA.....INTENDED INTERESTED PARTY/APPLICANT

RULING

1. By notice of motion dated 30/12/2020 Applicant seek the reliefs that he be joined as interested party and court to review, vary or set aside judgment delivered on 28th September, 2018 inter alia.

2. The application is supported by grounds:

i. That the intended Interested Party was the 2nd Defendant in Nyahururu Chief Magistrate's Court where he had been sued together with the 1st Defendant herein in Nyahururu SPMC Civil Case No. 84 of 2012.

ii. That the intended Interested Party at the time of institution of the said suit was the registered owner of motor vehicle Registration Number KAZ 462C Toyota Matatu though he had sold his interests to the 2nd Defendant herein who had not effected transfer into his names.

iii. That the said motor vehicle was insured under policy No. 035/0841/1/000187/2010/2006 by Invesco Insurance and/or Assurance Ltd.

iv. That the said motor vehicle was involved in a road traffic accident on or about the 3rd September, 2010 where passengers on board were injured.

v. That the legal representatives of one of the passengers that was fatally injured moved the lower court vide Nyahururu SPMCCC No. 84 of 2012 against the intended Interested Party and the 1st Defendant herein for recovery of damages.

vi. Judgment was entered against the Interested Party and the 1st Defendant herein on the 25th November, 2015 for the payment of damages amounting to Kshs.4,165,656/-.

vii. That the intended Interested Party upon delivery of the said judgment moved the lower court vide Nyahururu CMCCS No. 22 of 2019 for a declaratory judgment against Invesco Insurance Ltd that was the insurer of the said motor vehicle.

viii. Indeed a declaratory judgment was entered against the said insurance company and an order to that effect was issued on the 14th December, 2020.

ix. That the 2nd Defendant at the time had his movable assets proclaimed for sale by public auction in satisfaction of the decree herein.

x. *That as a result, if the decree herein is executed during the existence of a declaratory judgment against the insurance company in respect of the same motor vehicle, same accident and same insurance policy number that are the subject of the instant case and the damages payable herein, then justice will not have been served.*

3. Same application is anchored on supporting affidavit of George Kangara Githigia sworn on 30th December, 2020 which reiterates the grounds aforesaid.

4. The Plaintiff/Respondent oppose application via affidavit of Charles Onkoba Omariba advocate for Applicant sworn on 14th January, 2021.

i. *That in Nyahururu SPMCC Number 10 of 2012 where we represented Douglas Wambugu Ndegwa Plaintiff suing as administrator of the estate and on behalf of the other Defendants of John Maina Ndegwa (Deceased), the 2nd Defendant herein was the Defendant in the suit of which the same was negotiated with Invesco Assurance Company and was settled out of court.*

ii. *That the Applicant herein has already indicated in his supporting affidavit that he has sold the said motor vehicle to the 2nd Defendant herein and to the ends the 2nd Defendant herein was the owner of the said motor vehicle at the time of the accident.*

iii. *That Applicant herein has not attached any documentary evidence to proof that he was the owner of the said motor vehicle registration number KAZ 462C at the time of the accident.*

iv. *That a declaratory judgment in lower court suit should not be subjected in the case herein heard and determined by the High Court.*

5. The Applicant also filed a supplementary affidavit responding to replying affidavit sworn on 23/09/2021 where it is deponed to as follows;

i. *In both Nyahururu CMC Civil Suit No. 22 of 2019 and in CMC Civil Suit No. 84 of 2012 found him to have been the owner of the subject motor vehicle as at the time of the road traffic accident and the orders therein have never been set aside.*

ii. *That from the onset, his intention is not to stifle the Plaintiff's right to enjoy the fruits of his judgment rather it is to ensure that there is harmony between the decision and proceedings. Matters relate to one and the same subject matter being the road traffic accident involving motor vehicle Registration No. KAZ 462C Toyota Hiace (Matatu) under the same policy of Insurance No. 035/0841/1/000187/2010/2006 by Invesco Assurance Co. Ltd.*

iii. *That it was after the judgment in the said Nyahururu CMC Case No. 84 of 2012 that he filed a declaratory suit against Invesco Assurance Co. Ltd in Nyahururu CMC Case No. 22 of 2019 George Kang'ara Githigia v Invesco Assurance Ltd for a declaration that the insurance company.*

iv. *That the instant matter was instituted when the 2nd Defendant had effected the transfer of the motor vehicle into his names since he had purchased the subject motor vehicle already.*

v. *That the real issue in this matter is motor vehicle Reg. No. KAZ 462C was involved in an accident along Rumuruti – Nyahururu road and which occurred on the 3rd September, 2010 and at the time of the said road accident, it was insured vide insurance Policy No. 035/1/000187/2010/06 by Invesco Assurance Co. Ltd and several persons were injured.*

6. The parties were directed to canvas the application via written submissions but only the Applicant – Interested Party filed written submissions:

INTENDED INTERESTED PARTY'S SUBMISSIONS:

7. **Order 1 Rule 10 of the Civil Procedure Rules 2010** provides a framework for removal and addition of parties to a suit.

8. **Order 1 Rule 10 (2)** therefore provides thus:

“The court may at any stage of 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..... Or whose presence before the court may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to be added. (emphasis ours)

9. The Court of Appeal in Meme v Republic [2004] KLR 637 set out circumstances which would warrant grant of leave to join a party to wit:

i. *Whether the presence of the party will result in the complete settlement of all questions involved in the proceedings.*

ii. *Whether the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law.*

iii. *Whether the joinder will prevent a likely course of proliferated litigation.*

10. The joinder of the Applicant will provide protection for the rights of the Defendants herein, who would otherwise be adversely affected in law, in that the application brings to this Honorable Court evidence that is sufficient to avert execution of decree being levied against the Defendants herein on an accident involving a motor vehicle that was insured by an insurance company that has been ordered to settle all claims emanating from the said accident involving the said motor vehicle under the said policy of insurance.

11. Finally, on joinder, the involvement of the Applicant herein will prevent a likely court of proliferated litigation in that the Defendants herein after the said joinder will not be forced to pursue another declaratory suit against the said insurer of the said motor vehicle under the said policy of insurance.

12. In *Central Kenya Ltd v Trust Bank Ltd & 5 Others [2000] eKLR*.

13. *On the replying affidavit sworn by Counsel for the Plaintiff/Respondent:*

Through and through the said replying affidavit, it is very clear that the counsel for the Plaintiff/Respondent deponed to contested matters of fact and said that the same are true and within his knowledge, information and belief.

14. Now, the High Court in *Kisya Investment Ltd & Others v Kenya Finance Corporation Ltd* as cited with approval in *Simon Isaac Ngui v Overseas Courier Services (K) Limited [1998] eKLR*, held thus:

“By deponing to such matters, the advocate Courts an adversarial invitation to step from his privileged position at the bar into the witness box. His is liable to be cross examined on his disposition it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.”

15. ***Order 45 Rule 1(1) of the Civil Procedure Rules 2010 as well as Section 80 of the Civil Procedure Act Cap. 21*** address the question of review and from the foretasted provisions of law, the following are the principle grounds upon which an order for review can be granted:

a) The discovery of new and important matter or evidence, or

b) Some mistake or error apparent on the face of the record, or

c) Any other sufficient reason.

16. That the Applicant in bringing the instant application vides on the ground of discovery of a new and important matter and/or evidence that was and would not have been available at the time the instant suit was heard and determined.

17. Clearly the judgment against the said insurer was obtained on the 10th day of April, 2019 whereas the judgment in the instant matter was delivered on the 28th day of September, 2018.

18. Meaning that the judgment in the instant matter was delivered before the judgment in the declaratory suit was delivered.

19. The outcome of the declaratory suit would therefore not have been available at the time of hearing of the instant suit even after employing all possible efforts to obtain it.

20. The same therefore marks a new and important matter and/or evidence enough to cause this Honorable Court to review, vary and/or set aside its judgment herein.

21. The Applicant does not however intend to have the judgment of this Honorable Court set aside per se, but would want to have the same varied to the effect only that the award of damages in favour of the Plaintiff as it is recovered from the insurer of the subject motor vehicle, under the policy of insurance No. 035/0841/1/0001/87/2010/2006 for the period covering the 3rd of September, 2010.

ISSUES, ANALYSIS AND DETERMINATION

22. The issues herein are whether the applicant has merit and what is the order as to costs?

23. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR*, Mativo, J. explained when an interested party ought to be enjoined in a proceeding. He stated: -

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.

24. In the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR* the

Supreme Court of Kenya held that:

“[22] In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

“[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...”

25. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) joinder to prevent a likely course of proliferated litigation.”

26. The aforesaid cited cases and civils proceedings on joinder contemplate a live pending suit. The applicant states that The he does not however intend to have the judgment of this Honorable Court set aside per se, but would want to have the same varied to the effect only that the award of damages in favour of the Plaintiff as it is be recovered from the insurer of the subject motor vehicle, under the policy of insurance No. 035/0841/1/0001/87/2010/2006 for the period covering the 3rd of September, 2010.

27. However, to the extent he seeks to vary the judgement of a concluded case, it means the matter will remain concluded and not for hearing the interested party/ applicant nor the insurance who is supposed to satisfy the conclude judgement.

28. That of course is not in tandem with the essence of joinder of a party to champion his interest.

29. In the case of Methodist Church in Kenya v Mohammed Fugicha & 3 others [2019] eKLR where it held, citing the Murautetu case;

“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court.”

30. the case of Habiba W. Ramadhan & 7 others v Mary Njeri Gitiba (2017) eKLR; Nairobi High Court ELC Case No. 119 of 2014 the Court stated as follows;

“As already observed by the Court, under Order 1 Rule 10(2) the Court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute....”

31. The applicant has not rebutted the respondent advocates’ averment that, in Nyahururu SPMCC Number 10 of 2012 where the Plaintiff suing as administrator of the estate and on behalf of the other Defendants of John Maina Ndegwa (Deceased), the 2nd Defendant herein was the Defendant in the suit of which the same was negotiated with Invesco Assurance Company and was settled out of court.

32. That the Applicant herein has already indicated in his supporting affidavit that he has sold the said motor vehicle to the 2nd Defendant herein and to that ends the 2nd Defendant herein was the owner of the said motor vehicle at the time of the accident.

33. That Applicant herein has not attached any documentary evidence to proof that he was the owner of the said motor vehicle registration number KAZ 462C at the time of the accident.

34. That a declaratory judgment in lower court suit should not be subjected in the case herein heard and determined by the High Court.

35. In view of my aforesaid findings, in sum I find no merit in application and same **is dismissed with no orders as to costs.**

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021.

.....
CHARLES KARIUKI

JUDGE