



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 584 OF 2001

JANE KANAGA KADUYU & GLADYS KADUYU AGOI

Suing on behalf of JANE KANAGA KADUYU and on behalf of the Estate of

CHRISTINE JAHENDA KADUYU(Deceased).....PLAINTIFFS/APPLICANTS

-VERSUS-

WYCLIFFE YIDA.....1ST DEFENDANT/RESPONDENT

GEORGE ODONGO.....2ND DEFENDANT/RESPONDENT

GEORGE KAGWE GACHINGU.....3RD DEFENDANT/RESPONDENT

UNITED INSURANCE CO. LTD. (under receivership).....RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 24th February 2016 taken out by the plaintiffs/applicants in which they sought the following orders *inter alia*:

i. THAT this application be certified urgent and be heard ex parte at the first instance.

ii. THAT leave be granted to sue UNITED INSURANCE CO. LTD (Under receivership).

iii. THAT a declaration that UNITED INSURANCE CO. LTD (Under receivership) is both liable and bound by the judgment of this honourable court delivered on the 14th November against the 1st, 2nd and 3rd defendants jointly and severally.

iv. THAT a declaration that UNITED INSURANCE CO. LTD (Under receivership as at the time the judgment was entered against the 1st, 2nd and 3rd defendants in this suit on the 14th November 2014) be and is hereby together with the said 1st, 2nd and 3rd defendants jointly and severally liable to the plaintiffs herein in the sum of kshs.3,137,320/= together with interest at court rates from the date of judgment until payment in full plus costs of this suit.

v. THAT any other or further order or declaration the honourable court may deem just, fit and convenient to grant.

vi. THAT costs of this application be provided for.

2) The applicants filed the supporting and further affidavit of Gladys Kadugu Agoi to buttress the motion. When served with the motion, United Insurance Co. Ltd (under receivership) filed the replying affidavit of Christopher Onyango to oppose the application.

3) When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the application disposed of by written submissions. At the time of writing this ruling, the applicants were the only parties

who had filed their submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the applicants written submissions.

5) It is the submission of the applicants that on 14.11.2014 they successfully obtained a judgment against one George Kagwe Gachingu, the insured of United Insurance Co. Ltd (Under receivership) and two others vide Nairobi H.C.C.C no. 584 of 2001.

6) It is stated that the suit which gave rise to the aforesaid judgment arose out of a fatal motor vehicle accident involving the insured's motor vehicle registration no. KAG 387Y Nissan Matatu.

7) The applicants aver that having obtained judgment they are now before this court seeking of a declaratory judgment to declare that the respondent is bound to settle the decree by virtue of the insurance contract between it and its insured.

8) The respondent on the other hand strenuously opposed the motion arguing that the application is fatally defective. **First**, it is argued that the applicants did not seek for prior leave from court before commencing the current motion against the respondent.

9) **Secondly**, that the applicants failed to present credible evidence to prove that the respondent was the insurer of motor vehicle registration no. KAG 387Y.

10) **Thirdly**, that there is an existing moratorium hence suit filed against the respondent were stayed by operation of law.

11) **Fourthly**, that a suit for declaratory judgement can only be filed as a suit on its own and not within a subsisting suit as against the insured.

12) The background of this matter is clearly set out in the supporting affidavit of Gladys Kadugu Agoi and by the applicants' written submissions. It is stated that the late Christine Jahenda Kaduyu was a fatally injured in a road traffic accident on 9th day of April 1998 involving motor vehicle registration no. KAG 387Y Nissan Matatu registered in the name of George Kagwe Gachingo, the 3rd defendant herein.

13) The aforesaid motor vehicle is alleged to have been insured by United Insurance Co. Ltd (Under receivership), the respondent herein.

14) The applicants herein filed this suit in which they sought for both general and special damages under both the Law Reform Act and the Fatal Accidents Act. The suit was heard and judgment in the sum of kshs.3,137,320/= was pronounced in favour of the plaintiffs(Applicants herein) on 14.11.2014.

15) The applicants have now taken out the motion dated 24th February 2016 seeking for inter alia that united Insurance Co. Ltd (Under receivership) is liable to the plaintiffs herein in the sum of ksh.3,137,320/= plus costs and interest.

16) In the replying affidavit, the respondent raised three preliminary points of law. **First**, it is argued that the motion is incompetently before this court in that the applicants were required to file a separate declaratory suit and not an application without the primary suit.

17) The plaintiffs/applicants are of the argument that there is no need to file a new suit seeking for leave to sue the insurer yet the Insurer was a party to this suit before the same was withdrawn.

18) I have perused the defence filed by the respondent to deny the plaintiffs/applicants claim. The respondent has been enjoined as the 4th defendant. The respondent stated that it was wrongly sued since there was no privity of contract between them and the plaintiffs. The respondent also stated that the plaintiffs had not sought for leave to sue it since it was under statutory management. The record shows that the plaintiffs proceeded to withdraw the suit as against the respondent.

19) A careful reading of the provisions of Section 10 of the **Insurance (Motor Vehicle Third Party Risks) Act** will reveal that the law envisaged the filing of a declaratory suit as a fresh action separate from the primary suit. With respect, I agree with the submissions of the respondent that the plaintiffs'/ applicants' motion is incompetently before this court since it lacks a foundation.

20) The **second** preliminary issue raised by the respondent is that **no** prior leave was sought before the filing of the current motion. It is apparent that on the face of the motion, that the plaintiffs'/ applicants have included one of the prayers to be for leave to sue the respondent.

21) In my view, though the plaintiffs/applicants sought for leave to sue to be granted together with other substantive prayers, it is always the best practice to first obtain prior leave to sue before commencing the filing of the substantive suit.

22) In their written submissions the plaintiffs/applicants appear to suggest that leave had been sought and obtained earlier.

23) When the respondent came on aboard as the 4th defendant, it would appear that the plaintiffs are indirectly arguing that there is no need to seek for leave. That is an erroneous argument. The law makes it mandatory for leave to be sought first.

24) In the end, I find the motion to be incompetently before this court. The same is ordered struck out. In the circumstances of this case, a fair decision on costs is to order which I do, that each party meets its own costs.

Dated, Signed and Delivered at Nairobi this 31st day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the Defendants/Respondents