



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 80 OF 2015

EMMANUEL KOMBE NZAI.....PLAINTIFF

BASARI COMPANY LIMITED.....1ST DEFENDANT

VERSUS

HORIZON COMPANY LIMITED.....2ND DEFENDANT

RULING

1. On 17th February, 2017, the Counsel of the defendants (applicants) through a Chamber Summons dated 11th February, 2017 brought under the provisions of Order 1 rule 15 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of law sought the following orders:-

- i. That the Honorable court be pleased to enlarge time within which to file and serve Third Party Notices to the intended Third Parties herein for the purposes of being enjoined in this suit;
- ii. That Third Party Notices be issued to Ngige Munyoki P.O Box 12593 - 00100 Nairobi one of the registered owners of motor vehicle registration Number KBV 225X together with Tshusho Capital Kenya Limited of P.O Box 4705 - 00506 and Kyalo Gregory P.O Box 44599 - 00100 as per the annexed draft Third Party Notice;
- iii. That HCC No. 80 of 2015 be selected as a test suit and all other matters filed in Mombasa court, that arose from the said accident including CMCC No. 883 of 2015, Mombasa be stayed pending the hearing and determination of this suit; and
- iv. That the costs of the application be provided for.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Maurine Adeje sworn on 11th February, 2017. On 23rd February, 2017, the plaintiff's (respondent's) Advocate filed a replying affidavit in opposition to the present application. Parties thereafter filed their written submissions which they highlighted.

APPLICANTS' SUBMISSIONS

3. Mr. Asena Learned Counsel for the Applicants informed the court that a suit was filed on 19th June, 2015 in which the respondent prays for damages for an accident that occurred on 24th December, 2013, involving two vehicles, namely KBV 225X in which the respondent was traveling as a passenger and motor vehicle registration No. KBM 688J. The accident happened at 2.00 a.m. along the Mombasa – Nairobi highway.

4. Counsel submitted that in their defence, they stated that motor vehicle registration No. KBV 225X contributed to the accident. They therefore wish to enjoin the owners of the said motor vehicle as Third Parties. He indicated that they were unable to enjoin the Third Parties as he obtained their particulars a week to the hearing of the defence case. To fortify his case, he relied on the provisions of Order 1 rule 15 and Order 10 rule 2 of the Civil Procedure Rules which state that the court may at any stage of the proceedings enjoin a party that it deems fit on terms that are just and that a party can be enjoined at defence stage. He explained that delay in bringing the present application was caused by factors beyond his control.

5. He further submitted that although he took cognizance of the fact that the respondent was paralyzed and in dire need of medical and financial assistance, it was important to determine the rights of the parties. He wound up his submissions by underscoring the need for liability being apportioned. To that end, he relied on the case of **John Kenneth Wroe vs AAR Health Services**, HCC No. 979 of 2006. He prayed for his application to be allowed.

RESPONDENT'S SUBMISSIONS

6. Mr Kilonzo, Learned Counsel for the respondent submitted that the application herein is incompetent as leave to enlarge time has not been granted, as such, the 2nd prayer in the Chamber Summons cannot stand.

7. On the 3rd prayer for this suit to be selected as a test suit, Counsel indicated that it was not stated who the Advocates in Mombasa CMCC No. 883 of 2015 and the other cases are and they may not be agreeable to the suit herein being selected as a test suit.

8. Counsel further stated that there was a collision between 2 buses whose owners are known and that the respondent places blame on the applicants' vehicle. In addition to the foregoing, 3 witnesses testified and the respondent closed his case, yet the enjoinder of Third Parties did not arise during the hearing of the respondent's case. Counsel submitted that the applicants ambushed the respondent at the defence hearing with the present application. In Mr. Kilonzo's view, if the application is allowed great prejudice will be occasioned to the respondent. He further submitted that Third Party proceedings can only be commenced 14 days after pleadings have closed. He stated that the defence was filed on 28th July, 2015, pleadings therefore closed 14 days thereafter.

9. It was submitted for the respondent that during pre-trial directions, the applicants did not indicate that they wanted to enjoin Third Parties therefore, the court should infer that they had abandoned the desire for enjoining Third Parties. He added that the applicants' witness one Musyoka Makau stated in his statement that one bus belonged to Horizon Company and the other one to Spring company. In addition, the respondent adduced his evidence and addressed the defence by the applicants but not the Third Parties who had not been enjoined.

10. Mr. Kilonzo submitted that PW2 blamed the applicants wholly for causing the accident and that they had a recourse to filing a fresh case against the proposed Third Parties. Counsel pointed out that the applicants failed to explain why they failed to file Third Party proceedings on time. He relied on the case of **Kaneno Katana Nzai also known as Kaneno Katana vs Muchiri James and 2 others** Civil Appeal No. 28 of 2016, where the court stated that it has to exercise its powers judiciously and upon reason rather than capriciously or whimsically.....”

11. He concluded by submitting that in the present application, one is left to speculate on the reasons why action was not taken to bring in the Third Parties even at the time of hearing of the respondent's case.

APPLICANTS' REJOINDER

12. Mr Asena informed the court that they had not abandoned their desire to bring in Third Parties. He stated that paragraph 6 of the defence does not indicate the name of the bus and that the name Spring bus is an *alias* name.

ANALYSIS AND DETERMINATION

The issues for determination are:

- i. If a Third Party can be enjoined in this case at the defence hearing;
- ii. If the present suit should be used as a test case for other matters that arose from the accident in this case.

13. Order 1 rule 15 (1) of the Civil Procedure Rules makes provision for Third party proceedings in the following terms:-

“Where a defendant claims as against any person not already a party to the suit (hereinafter called the third party)-

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 or 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 but as between the plaintiff and the defendant and the third party or between any or either of them, he shall apply to the court within fourteen days after close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect and such leave shall be applied for by summons in chambers ex parte supported by affidavit.”

14. The applicants did not apply for leave of the court to issue Third Party notices within 14 days after the close of the pleadings. They now seek enlargement of time to do so for the reasons stated in the supporting affidavit of Maurine Adeje sworn on 11th February, 2017. In paragraph 3 of the said affidavit, she states that she has been advised by the conductor of motor vehicle KBM 688J as well as an eye witness that the accident was solely or substantially contributed to by the driver of the motor vehicle registration number KBV 225 (sic) bus.

15. She deposes in paragraph 4 of the said affidavit that at all material times Ngige Munyoki was one of the registered owners of the motor vehicle registration number KBV 225X bus and Tshusho Capital Kenya Limited and Kyalo Gregory were the beneficial owners and in control of the said bus. For the said reason, it is in the interest of justice for the said parties to be enjoined as Third Parties. The said affidavit is however deafeningly silent on the reason behind the late filing of the present application. No reason or explanation has been given to the court as to why the present application was not made within 14 days after close of pleadings.

16. The plaint was filed on 19th June, 2015 and in paragraphs 4 and 5 thereof, the respondent avers that he was lawfully travelling as a passenger in motor vehicle registration number KBX 225X, when motor vehicle registration No. KBM 688J collided with the motor vehicle he was in as a result of which he sustained severe injuries. It is clear from the foregoing averments that the respondent squarely places blame on the Driver of motor vehicle registration No. KBM 688J. In the defence filed on 28th July, 2015, the applicants lay blame on the plaintiff and/ or the Driver of motor vehicle registration Number KBV 225X.

17. Order 2 rule 13 of the Civil Procedure Rules provides thus:-

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counter claim, or, if neither is served, fourteen days after service of the defence notwithstanding that any order or request for particulars has been made but not complied with.”

18. The reply to the defence was filed on 31st July, 2015, thus the pleadings in this case closed on 15th August, 2015. The applicants should have sought leave to issue Third Party notices by 29th August, 2015. The parties herein went through pre-trial directions and the hearing of the case commenced on 8th June, 2016 with Mr Asena representing the applicants. Previously parties had appeared before Judge P. J. Otieno on 12th November, 2015 wherein he gave the applicants 21 days to comply with Order 11 of the Civil Procedure Rules. At the said time, Counsel for the applicants did not seek leave to file Third Party proceedings out of time. The prayer was made before this court on 23rd February, 2017 after closure of the respondent's case on 13th December, 2016.

19. It is disconcerting to note that although the applicants had in their defence addressed the issue of a Third Party having contributed to the said accident, no follow up was made to establish who the owner/s of the said motor vehicle was/were. It has taken the applicants over one year and 6 months to apply for leave to enjoin Third parties. The applicants' Counsel in his written submissions endeavors to explain why there was delay in seeking leave to file Third Party proceedings. This court cannot give any regard to the said explanation as the same should have been put forth through affidavit evidence. This was not done.

20. In demonstrating that this court has a wide discretion to grant the orders sought, counsel for the applicants relied on the case of **John Kenneth Wroe vs AAR Health Services Limited** (supra) wherein the court granted orders for enjoinderment of a Third Party. He also cited the provisions of Order 1 rule 10 (2) of the Civil Procedure Rules that provide 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 court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

21. Mr Kilonzo relied on the case of **Kaneno Katana Nzai also known as Karemba Katana vs Muchiri James and others** (supra) a Court of Appeal decision to illustrate that when faced with an application such as the present one, the court exercises its discretionary powers after taking into consideration the time lines set by Order 1 rule 15 of the Civil procedure Rules; the time that an applicant takes to file such an application for leave, the explanation given for the delay, the stage the hearing of the suit has reached and the prejudice each party is likely to suffer.

22. The applicants filed a witness statement of one Munyoki Makau on 24th November, 2015. He blames the Driver of motor vehicle registration No. KBM 688J, belonging to Horizon bus company for the accident. The said statement was recorded on 30th December, 2013. It then follows that the applicants knew from the outset about the existence of the said bus and aptly captured the same information in paragraph 6 of the applicants' statement of defence and more particularly in the particulars of negligence.

22. It would appear that the applicants embarked on a cruise without properly charting their route very well as a result of which they have sailed into stormy waters. In my considered view, the application for enlargement of time to join Third Parties after close of the respondent's case is not meant to advance the cause of justice. It is not lost to this court that joinder of a Third Party at the defence hearing will lead to delay in the hearing and determination of this case and will prejudice the respondent who has already testified. It will lead to reopening the plaintiff's case and going back in time to fit the proposed Third Parties into the present proceedings. The said application appears to be an afterthought.

23. The affidavit filed on behalf of the applicants is silent on the efforts made to unearth the owners of motor vehicle registration No. KBV 225X. This court takes judicial notice of the fact that a motor vehicle search to ascertain the registered owner is an exercise that is undertaken online with results being availed instantaneously. If difficulties were encountered in the year 2013 when the accident occurred it would have not taken 3 years to unravel the mystery of who the owners of the said motor vehicle are.

24. I am therefore not persuaded by the reasons advanced by the applicants that I should exercise my discretion in their favour by granting the order sought for enlargement of time to file Third Party proceedings.

25. The applicants also seek orders for the primary suit to be selected as a test suit and for stay of all other matters filed in Mombasa arising from the same accident, including CMCC No. 883 of 2015 pending the hearing and determination of the suit herein. Counsel of the applicants did not disclose all the cases that are pending in the Mombasa Law Courts from the accident in issue and who their Advocates are. There are no affidavits filed to show that the parties in the other cases have agreed that the primary suit herein be used as a test case. This court cannot grant a blanket order for other matters that have not passed the test of full disclosure, for doing so will interfere with the rights of the parties in the said suits to have their cases proceed in the courts they were filed in. It is also not indicated at what stage of hearing the said cases have reached.

26. Counsel for the applicants did not place much emphasis on the foregoing prayer which was opposed by Counsel of the respondent. This court is not persuaded that it should grant the said prayer. The end result is that the application dated 11th February, 2017 is hereby dismissed. Costs are awarded to the respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Asena for the defendant/applicant

Mr. Wambua Kilonzo for the plaintiff/respondent

Mr. Oliver Musundi - Court Assistant