



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 205 OF 2016

J J (a minor suing through J K G

And J M J

His father and mother as next friends).....1st PLAINTIFF

F J (a minor suing through J K G

and J M J her father and mother as next friends).....2ND PLAINTIFF

VERSUS

GENERAL ACCIDENT INSURANCE COMPANY LTD.....DEFENDANT

RULING

The plaintiffs herein hold a judgment in their favour against the defendant's insured in High Court Civil Case No. 236 of 2010. After the said judgment, they moved to execute the decree therein leading to this declaratory suit.

Following the filing of this suit by the plaintiffs, the defendant filed a defence in which it denied liability on the basis that, the motor vehicle registration No. Kxxx 2xxC was covered under a cover issued by the National Bureau of Tanzania under COMESA Yellow Card cover. For that reason, it is pleaded the defendant is not liable under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act for the claim set out in the plaint. The accident took place in Tanzania.

The plaintiffs have now filed an application by way of Notice of Motion under Order 2 Rule 15 1 (d), Order 5 rule 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1 A, 1B and 3A of the Civil Procedure Act for the substantive order that the defendant's defence herein be struck out and judgment be entered in terms of the plaint.

The reasons for seeking that order are set out on the face of the application alongside a supporting affidavit sworn by the father of the two plaintiffs. The application is opposed and a replying affidavit has been sworn by the defendant's Legal Manager. Both parties have filed written submissions.

The plaintiff's case in this application is that it is too late in the day for the defendant to deny liability in that, in the earlier trial, the defendant retained an advocate during the proceedings. There is also an averment that there were attempts to settle the matter yet nothing has been stated in that regard by the

defendant.

Whereas it may be true that the motor vehicle in question was covered under reinsurance pool, under the yellow card cover, this was not raised during the earlier trial. In any case, if that were the case, it was incumbent upon the defendant herein to bring that to the attention of the court.

It is also instructive to note that in the proceedings relating to High Court Civil Case No. 236 of 2010, the parties at some stage agreed on liability which was later withdrawn due to non-co-operation of the defendants. In that other case, after observing that the defendant did not call any evidence and that the plaintiffs were passengers in the said motor vehicle, the defendants therein were held to be 100% liable jointly and severally. The record would also show that an interlocutory judgment on liability was entered at 100% against the defendants on 19th July, 2010. It would appear that the defendants herein are merely postponing an obvious eventuality. That notwithstanding, striking out of a pleading would drive the defendant out of the judgment seat without a hearing.

The cited cases by both parties point to the fact that, however weak the defendant's case may be, it should be retained so that they have their day in court. Therefore, whereas I consider the defence extremely weak, the defendant should have its day in court, and therefore I decline strike out the application. The same is therefore dismissed. Each party shall bear their own costs.

Considering the nature of this case, and the anxiety that has been expressed in the material before me, this suit shall be fast tracked so that the parties know their position as soon as possible.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th Day of July, 2017

A. MBOGHOLI MSAGHA

JUDGE