



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 87 OF 2010**

**PETER NGONDE GITAU.....APPELLANT**

**VERSUS**

**THOMAS MOGENI OSEKO.....RESPONDENT**

*(An appeal from the judgment and decree of Hon. V.W. WANDERA (Senior Principal Magistrate) dated and delivered on the 31<sup>st</sup> day of March, 2010 in the Original KISII CMCC No. 519 of 2008.)*

**JUDGMENT**

1. The appeal herein originated from the lower court's ruling in Kisii CMCC 519 of 2008 in respect to the appellants application dated 9<sup>th</sup> September 2009 wherein he (appellant) had sought orders inter alia, to enjoin John Waithuka Nyanga and Tranzas Company Ltd as Co-defendants in the suit. The said application was based on the grounds that the road traffic accident, which was the subject matter of the main suit, involved two motor vehicles, one of which was owned by the proposed defendants that the appellant had sought leave to enjoin to the suit and therefore that it was necessary to include them in the suit for the effectual and final determination of the case.

2. The trial court heard the said application and dismissed it in its ruling delivered on 31<sup>st</sup> March 2010 thereby giving rise to the instant appeal in which the appellant has listed the following grounds of appeal in his memorandum of appeal.

**1. The learned trial Magistrate erred in law and fact in failing to grant leave to enjoin the owners of motor vehicle registration number KAU 796N Nissan matatu whose presence in the lower court's proceedings as co defendants to the appellant was crucial for ease determination of the issues of liability.**

**2. The Learned trial Magistrate erred in law in failing to find that the presence of owners of motor vehicle KAU 796N Nissan matatu as necessary parties in action brought by the plaintiff/respondent herein to enable effectual and complete determination of issues arising out of the said suit.**

**3. The Learned trial Magistrate erred in law and fact in failing to hold that any party to the suit could enjoin another defendant as the law permits.**

**4. The Learned trial Magistrate thus in coming for his ruling misled himself on the appropriate law hence occasioning great loss and injustice to the appellant.**

**5. The ruling entered by the learned trial Magistrate was contrary to the prayers in the**

**application before the learned magistrate and the law that it was brought in.**

3. At the hearing of the appeal, parties agreed to canvass their arguments by way of written submissions which I have perused and I discern the main issue for determination to be whether the trial court was justified in dismissing the appellant's application for leave to enjoin the proposed co-defendants to the suit.

4. Order 1 Rules 3 of the Civil Procedure Rules stipulate as follows:

**“Order 1 Rule 3 who may be joined as defendants.**

**3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”**

5. A perusal of the record of appeal in respect to this case reveals that the respondent's suit against the appellant arose out of a road accident involving a collision between motor vehicle registration NO. KAV 273S alleged to belong to the appellant and motor vehicle registration No. KAU 796N belonging to the proposed co-defendant. At paragraph 4 of the respondent's plaint filed on 4<sup>th</sup> August 2008, the respondent stated as follows:

**“On or about the 11<sup>th</sup> day August 2007, the plaintiff was lawfully traveling in motor vehicle Reg. No. KAU 796N Nissan Matatu along KISII-MIGORI road at Awendo or thereabout when the defendant, his driver, servant or agent so negligently drove, managed and controlled the defendant's motor vehicle registration No. KAV 273S Isuzu Lorry that he caused/permitted the same to collide with the oncoming motor vehicle Reg. No. KAU 796N Nissan Matatu head on consequently the plaintiff suffered pain and damage.”**

6. From the above paragraph of the respondent's plaint, it is crystal clear that he claims that he was a lawful passenger in motor vehicle No. KAU 796N which allegedly collided with the appellant's motor vehicle Reg. No. KAV 273S. To my mind therefore, in terms of liability, the owner of motor vehicle Reg. No. KAU 796N wherein the respondent was a passenger, owes him more direct liability than the appellant whose vehicle allegedly collided with motor vehicle no. KAU 796N.

7. In the application before the trial court, whose outcome is the subject of this appeal, the appellant reiterated that he had conducted a search that revealed that the owners of he said motor vehicle KAU 796N were one JOHN WAITHAKA and TRANZAS CO. LTD whom he had sought leave to enjoin in the suit.

8. It is therefore not disputed that the accident that is the subject matter of the suit before the trial court involved 2 motor vehicles even though the respondent chose to sue the owner of one of the vehicles.

9. Nambuye J. (as she then was) in **Kingori vs Chege & 3 Others [2002] eKLR** stated the test for determining whether or not to enjoin a party to be as follows:

***“a) He must be a necessary party.***

***b) He must be a proper party***

***c) In the case of the defendant, there must be a relief flowing from the defendant to the plaintiff.***

***d) The ultimate order or decree cannot be enforced without his presence in the matter.***

***e) His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.”***

10. In the instant case, I find that the proposed new defendants are necessary and proper parties in this case by virtue of the fact that they are the owners of motor vehicle Reg. No. KAU 796N in which the appellant is alleged to have been a passenger. Moreover if the proposed defendants are found liable, there will automatically be a relief flowing from them to the respondent. It is my further finding that the presence of the proposed defendants to the main suit will enable the court effectively and completely adjudicate upon the all questions arising from the suit.

11. My humble view is that it will not only be in the interest of justice that the appellant be granted leave to enjoin the intended defendants to the case but also in the interest of the respondent that the liability of the owner of the motor vehicle, in which he was travelling, be determined in the same suit once and for all. I concur with the appellant's submissions that there was a nexus between the intended co-defendants and the respondent that make the said co-defendants necessary parties in the suit.

12. I have also perused the appellant's defence filed before the trial court and I note that he attributed the accident in question to the negligence of the owners and/or driver of motor vehicle Reg. No. KAU 796N in which the respondent was a passenger. Under those circumstances, I find that the intended co-defendants qualify to be enjoined as co-defendants as the appellant has shown that he cannot effectively put across his defence unless the co-defendants are enjoined in the suit.

13. In her ruling dismissing the appellant's application, the trial magistrate observed as follows:

**“The plaintiff having chosen to bring this claim against the defendant, the appropriate application the defendant ought to have made was to seek to enjoin the intended co-defendants as third parties as provided under Order 1 Rule 14 of the Civil Procedure Rules.”**

14. With due respect, I find that the position taken by the trial court is not consistent with the provisions of **Order 1 Rule 3 of the Civil Procedure Rules** which I have already highlighted at the beginning of this ruling. The said provision opens up space **for joinder of all persons** (emphasis mine) as defendants against whom a right or relief is alleged to exist.

15. A finding by the trial court that once the respondent had chosen to bring a case against the appellant meant that the only option left for the appellant in seeking to enjoin an intended defendant was through initiation of third party proceedings goes contrary to the clear provisions of Order 1 Rule 3, as such a position would amount to placing the legal defendant in a straight jacket of third party proceedings even where the circumstances of the case warrant the enjoining of a party as a co-defendant.

16. The distinction between third party proceedings and application to enjoin a proposed co-defendant was made in the case of **Commissioner for Transport vs FO Boero (1954) KLR**, it was held that:

***“Third Party procedure is a means for a trial of questions between the defendant and the third party on the liability of the third party to make a contribution or indemnity and not for the joining of the third party as a co defendant.”***

17. I have perused the appellant's defence filed before the trial court and I note that the appellant does not seek indemnity or contribution from the proposed co-defendants. The appellant's case is that it is the driver of the proposed co-defendants who caused the accident in question and under those circumstances I find that the trial court erred in finding that the appellant ought to have initiated third party proceedings.

18. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows:

**“[Order 1, rule 10.] Substitution and addition of parties.**

**(2) 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 to adjudicate upon and settle all questions involved in the suit, be added.”**

19. From the above provision, it is clear that the court has a discretion on whether or not to allow an application to enjoin the proposed co-defendants. The discretion of the court is however not absolute and must be exercised judiciously in which case, the court must be satisfied that the application is based on facts and legal principles. In exercising its discretion to allow or not allow such an application, the court must concern itself with establishing whether a party against whom an application has been made will suffer prejudice and if so, whether such a party would be adequately compensated by way costs.

20. In the instant case, I have already found in this judgment that the appellant established both the factual and legal basis for his application to enjoin the intended defendants. The respondent did not state in grounds of opposition, that he would suffer any prejudice if the application was allowed.

21. Having regard to the above findings and observations, I find that the instant appeal is merited and I allow it. Consequently, I order that the orders dismissing the appellant’s application before the trial court dated 9<sup>th</sup> September 2009 is hereby set aside with the result that the said application is allowed as prayed.

22. The costs of this appeal shall abide the outcome of the case pending before the lower court.

**Dated, signed and delivered in open court this 13<sup>th</sup> day of December, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Omotto for the Appellant

Miss Kerubo for the Respondent

Omwoyo court clerk