



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 17 OF 2014

(From the Original Ruling in Civil Case No. 110 of 2013 of the Chief Magistrate's Court at Malindi –
Y.A. Shikanda, SRM)

MUCHIRI JAMES 1ST APPELLANT

DAVIS & SHIRTLIFF CO. LTD 2ND APPELLANT

PATRICK KAI HARO 3RD APPELLANT

VERSUS

KANENO KATANA NZAI also known as

KAREMBO KATANA RESPONDENT

JUDGEMENT

This appeal emanates from the Ruling of Hon. Y.A. SHIKANDA delivered on 28th May, 2014. A summary of the grounds of appeal is that the trial court did not apply Article 159 of the Constitution, that the delay in filing the third party proceedings could not be a good reason for the dismissal of the application and that no prejudice could have been caused to the respondents.

Parties agreed to determine the appeal by way of written submissions. I was able to see submissions by the appellant's counsel only. Counsel contends that after perusing police investigation report, the defendant noted that motor vehicle registration Number KBB 761L had two flat tyres. This confirms that the vehicle had a tyre burst and veered off the road. Counsel reiterates that the appellant is seeking indemnity from the owner of motor vehicle registration Number KBB 761L. Counsel relies on the case of **GODFREY GITHINJI KAMIRI V A.G. [2012] eKLR** and the Canadian case of **DILCON CONSTRUCTOR S LTD V ANC DEVELOPMENTS [1994] ABCA 245**:

The dispute herein relates to a road traffic accident which occurred on 19th December, 2012 along the Mombasa-Malindi road at Kizingo area. The accident involved motor vehicles registration numbers KBB 761L owned by the intended third party and KBN 647Y owned by the 2nd appellant and driven by the 3rd appellant. The record of the trial court shows that several victims of the accident filed cases before the Malindi Chief Magistrate's Court. These include case Numbers 102-109 of 2013, 111, 112, 113 and 172 of 2013. The cases were consolidated. There was a pre-trial conference and the cases were fixed for hearing. By the time the application for leave to issue 3rd party notice was filed on 6th May, 2014, ten witnesses had testified.

The main issue for determination is whether the court was wrong by not allowing the appellant to enjoin the third party. I have read the ruling of the trial court delivered on 28th May 2014. The ruling refers to all the issues involving enjoinder of a third party. The trial court was of the view that the application was filed quite late. The appellants in their defence attributed negligence to the third party but did not follow up the matter. The cases were consolidated but once again the appellants did not raise the issue of 3rd party notice. Further, the counsel for the appellant participated in the hearing and cross-examined all the ten (10) witnesses. An application of that nature ought to have been filed within fourteen (14) days after the close of pleadings as provided under Order 1 rule 15 of the Civil Procedure Rules. The driver of the intended third party is one of the plaintiffs and has already testified. The trial court felt that it would be absurd to enjoin the owner of motor vehicle number KBB 761L – Nissan Matatu yet his driver is one of the plaintiffs. The trial court also considered the fact that since witnesses had already testified, it would be difficult to issue the 3rd party notice as the 3rd party has to file his defence and participate in the case.

It is clear from the record that the 3rd party notice was filed quite late. The plaint was filed on in April, 2013. The defence was filed on 2nd July, 2013. A reply to the defence was filed on 3rd July, 2013. The application was to be filed 14 days after the reply to the defence was filed. Counsel for the appellants maintain that Section 3A of the Civil procedure Act was applicable as the court has inherent powers to grant the orders in the interest of justice. The application annexed the several third party notices as well as the police abstract. Ordinarily, the police abstract could be easily obtained by the appellants having been involved in the accident.

It is established that the plaintiffs' claims arise from a road traffic accident involving two vehicles. The plaintiffs were traveling as passenger in motor vehicle registration number KBB 761L but blame the 3rd appellant who was the driver of motor vehicle registration number KBN 6477, a Toyota Probox: It is quite clear that should the trial court find in favour of the plaintiffs, the appellants will be called upon to satisfy the judgement. These are several cases and the amount payable will be quite sizable. The appellants feel that the 3rd party was to blame for the occurrence of the accident. The accident occurred on 19th December, 2012. The appellants can still file fresh suits against the intended 3rd party as the three year period has not elapsed. This will lead to multiplicity of suits and is unnecessary. The issue of liability needs to be determined once and for all so that the parties can know who was to blame for the occurrence of the accident.

The overriding objective is to administer justice without undue regard to technicalities. I do agree with the considerations considered by the trial court with regard to time and the inconvenience caused if the application was to be granted. However, should the same court have allowed the application later found that indeed the third party's driver was to come extent liable, that finding is more strong than the inconvenience and time element. Even if the trial court were to find the 3rd party not to blame, still that would resolve the defendants' opinion that the 3rd party is to blame. By allowing the application and bringing the 3rd party into the case, the court would have dealt with the positions taken by all those involved in the dispute at once. The 3rd party can still enter appearance and file his defence. He can decide to have the witnesses who have already testified recalled for cross-examination, if need be. The fact that the intended 3rd party's driver is one of the plaintiffs and has already testified cannot be a good reason to deny the defendants from seeking indemnity from the 3rd party. Once liability is apportioned, that is to say if the trial court finds that the 3rd party is party to blame, then the 3rd party's driver will only be paid damages to the extent of the defendants' liability while the other plaintiffs will recover 100% from the defendants and the 3rd party according to the portioned rate of liability.

For the sake of justice, it was prudent for the trial court to have allowed the application. The case need not start de novo. The plaintiffs who have testified seek compensation and are therefore available should they be required for further testimony. The trial court ought to have exercised its discretion and allow the application.

In the end, I do find that the appeal is merited and is hereby allowed. The ruling of the trial court of 28th May, 2014 is hereby set aside. The appellants to issue 3rd party notices against Thomas Wanje Nyale within twenty one (21) days after the delivery of this judgement. Costs shall follow the outcome of the main suit.

Dated and delivered in Malindi this 24th day of March, 2016.

S. CHITEMBWE

JUDGE