IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 40 OF 2009

DHARMAGMA PATEL..1ST APPELLANT

AKSHAR AUTOSPARES LTD..2ND APPELLANT

AND

T A (a minor suing through the

mother and next friend H H).. RESPONDENT

RULING

By chamber summons dated 24/6/2008, the appellant sought leave to file and issue a third party notice against H H, the mother of the minor (plaintiff) herein (T A). In that application, the appellant contended that the accident, the subject of the proceedings, was solely caused and/or contributed to by the negligence of the the plaintiff's parents.

In reply, the respondent filed a preliminary objection contending that the third party was already a party to the suit as next friend and mother of the plaintiff; that the third party notice and proceedings were a nullity in law; that the proceedings were brought in bad faith and are an abuse of the court process.

In a ruling delivered on 4/2/2009, the trial magistrate held:-

> **"...the issue at the centre of the preliminary objection is whether a party in a case can handle it in two different capacities. The issue covers a deeper question of whether in a way a dependant can counter-claim against a next friend within the plaintiff's suit or go out to seek judgment against the plaintiff's next friend, in which case if such next friend were adjudged the finding would impact directly on the finding for the plaintiff.**
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> **At best the defendant would have counter claimed but in the instant case he cannot counter-claim against T A's case. It is clear that if the minor were to succeed in the case, the next friend will still be the person to persue the execution process. If the plaintiff loses the case and is condemned to pay costs the next friend will carry the responsibility. Can one then envisage a situation where the same next friend is a party to the case and is personally adjudged?**
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> **The defendant's idea is good, they want to share responsibility or pass it on to another party but in this case the person who is already part of the case in a different capacity can in no way fit in as a third party."**

It is that ruling which aggrieved the appellants and led to the filing of the appeal which is based on four

(4) grounds; that can be summarized in one ground, the learned trial magistrate erred by dismissing the third party notice and proceedings.

When the appeal was called for hearing, on 27/5/2014, Mr. Mahida, for the appellants, submitted that the proposed third party has different capacities in the suit. The first capacity is that of next friend of the plaintiff, while the 2nd capacity is that of mother to the plaintiff. Reiterating that the third party notice and proceedings are necessary for determination of the following questions:-

1.Was the plaintiff's mother negligent; if yes

2. Did that negligence cause or contribute to the cause of the accident herein?

Mr. Mahida also faulted the decision of the trial magistrate on the grounds that she set aside the third party notice when there was no prayer to that effect. Contending that, by the time the notice of preliminary objection was filed, the appellants had already obtained a judgment against the plaintiff, Mr. Mahida submitted that it was wrong to entertain the notice of preliminary objection without first setting aside the judgment. For the foregoing reasons, the appellants urged the court to set aside the order of the lower court and reinstate the third party as a party to the suit before the lower court.

Counsel for the respondent, Mr. Kilach, contended that the appeal herein was filed without leave of the court, yet there was no automatic right of appeal.

In a rejoinder, Mr. Mahida submitted that the ruling of the trial court was substantive and as such, gave the appellants an automatic right of appeal.

I have read and considered the rival arguments raised in this appeal. The questions for determination are:-

1. Should the appeal be dismissed for want of procedure?
2. Did the trial magistrate err by dismissing the appellant's third party notice and proceedings?
3. What order(s) should the court make?

<u>Should the appeal be dismissed for want of procedure?</u>

As pointed above, the appeal herein is challenged on the ground that it was filed without the leave of the court. In this regard, reference was made to Order 43 of the Civil Procedure Rules which lists orders and rules in respect of which an appeal shall lie as of right under Section 75(h) of the Civil Procedure Act.

Although Ms. Kilach did not clarify whether the order in respect of which the appeal herein was preffered is governed by Order 43(2), from her contention, I gather that her case is that the impugned ruling is covered by Order 43 rule (1) subrule (2). That rule provides as follows:-

“An appeal shall lie with leave of the court from any other order made under these Rules.”

From the record filed in this appeal, It is clear that the trial magistrate did not grant the appellants leave to appeal against her ruling. Proceedings relating to that ruling and the decree obtained in respect thereof is covered by Order 21 of the Civil Procedure Rules (Judgment and Decrees). That order is not one of the orders and rules for which an appeal lies as a matter of right under 43 rule 1.

While I agree with the respondent's counsel that leave of the trial magistrate was required before the appellant could appeal from that court’s decision, the respondent having taken so long to raise that issue, I invoke the powers donated to this court under Section 3A of the Civil Procedure Act, and declare the procedural defect herein incapable of overriding the objective and duty of this court under Section 1A and 1B of the Civil Procedure Act.

The upshot of the foregoing is that, despite the appeal having been filed without the leave of the court as required under Order 43 (2) above, for purposes of the just determination of the proceedings I shall

consider the appeal on its merits.

As concerns the contention that the trial magistrate ought to have allowed the third party notice on the ground that the proposed party is capable of having more than one capacity in the suit, I propose to resolve that question by reviewing the law and practice as concerns the issues raised in the appeal herein.

Law regarding third party proceedings

The law on third party proceedings is found in Order 1 Rule 15 of the Civil Procedure Rules. The rule provides as follows:-

> **"15. (1) Where a defendant claims as against any other 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 and 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 and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the 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."**

Although the proposed third party is already a party to the suit in the lower court, the appellant contends that the issues they want to raise in the third party proceeding are incapable of being raised against the proposed third party in her current capacity to wit, as the next friend of the plaintiff. The case for the appellants is that they can only raise the issue of negligence against the plaintiff's next of kin if and if only the plaintiff's next of kin is sued in her capacity as the plaintiff's mother.

While I agree with counsel for the appellants that the proposed third party is not a party to the suit in her individual capacity, I am unable to agree with the proposition that joining the plaintiff's mother, who is already a party to the suit, but in another capacity, as a third party, will avail the appellants a remedy they cannot be able to obtain from the suit without so doing. In the circumstances of this case, the appellants can still escape liability by proving that they were not negligent as alleged and/or proving that a third party, in this case the minor's parents were to blame for the occurrence of the accident. All what is required to achieve that result are pleadings capturing those allegations. I do not think a court of law can refuse to take cognisance and consider evidence of that nature if it features in the pleadings.

I also take note of the fact that in our legal system, there is no liability without fault. In this regard see **Kiema Mutuku** v. **Kenya Cargo Hauling Services Ltd** (1991) 2 KAR 258 where the Court of Appeal held:-

> **"There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."**

The fault has to be pleaded and proved by evidence at the hearing.

Did the trial magistrate err in dismissing the appellants' third party notice and proceedings?

The appellants have faulted the trial magistrate's decision both on issues of procedure and substance. As concerns the procedural aspects of the decision, it is submitted that the trial magistrate erred by setting aside the appellants' third party notice and third party proceedings when there was prayer in the

respondent's notice of preliminary objection.

As regards this contention, I find as a fact that by the time the impugned notice of preliminary objection was filed, an interlocutory judgment had already been entered against the respondent (3rd party). I also note that there was no prayer for setting aside the said judgment.

Under Order 10 rule 9, the court has discretion to set aside or vary such judgment.

Although the trial court has been faulted for setting aside the judgment, it had entered in favour of the respondent, I note that under order 10 rule 11 it is not a requirement of law that there must be an application before the court exercises its discretion. The only rider in the exercise of that discretion is that it has to be exercised on such terms as are just.

While I appreciate the need for this court to limit itself to the orders sought by the parties, in the circumstances of this case, it was reasonable for the trial magistrate to presume that the reason for taking up the objection proceedings was to set aside the judgment obtained by the appellants. That being the case, I find and hold that the appeal cannot succeed on the basis of that procedural defect. In any event this court having found that the 3rd party notice and proceedings were unnecessary becuase the mother of the minor plaintiff is already a party to these proceedings, then the court would not allow the appeal on the basis of the trial court making a procedural error.

The upshot of the foregoing is that the appeal has no merit and is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 27th day of August, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Nyambane holding brief for Mr. Mahida for the appellants

N/A for the respondent

Mr. Juma – Court Assistant