



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 61 of 2008

SAMUEL MAINA MUNUHE.....APPELLANT

Versus

JAMES KIBUTHU MUBEA.....1ST RESPONDENT

DUNCAN GUAMA.....2ND RESPONDENT

JUDGMENT

on the 11th day of October 1990, Duncan Guama (plaintiff), the 2nd respondent herein, was hit by motor vehicle registration No. KZK 203 while he was lawfully walking along Othaya-Nyeri road. The 2nd Respondent filed a compensatory suit vide Nyeri H.C.C.C. 107 of 1992 against Samuel Maina Munuhe, (defendant) the appellant herein. On 29th September 1995, the suit was transferred to the Senior Principal Magistrate's court for hearing and determination. The suit was allocated a new number i.e. Nyeri S.P.M.C.C.C. No. 704 of 1995. It would appear the plaint and the summons were served upon m/s Stallion Insurance Co. Ltd., the insurer of the motor vehicle. Stallion Insurance Co. Ltd appointed the law firm of M/s Kagia & Ngatia Advocates to defend the suit on behalf of its insured. The aforesaid firm of Advocates ceased to act for the defendant with effect from 30th October 2002. Consequently the appellant was served personally. On 5th March 2003, he informed the trial court that he was kept in the dark of what was happening in the case. On 13th March 2003, the appellant successfully applied for leave to file a defence out of time. By an application dated 14th May 2003, the defendant applied for leave to issue a third party notice upon one James Kibuthu Mubea (1st Respondent herein) on the basis that at the time of the accident the 1st Respondent was the owner of motor vehicle registration number KZK 203 whereas the appellant was the authorized driver of the aforesaid motor vehicle. The appellant was granted the order enjoining the 1st Respondent as a third party on 16th July 2003.

Upon receiving the notice enjoining him as a third party, James Kibuthu Mubea (1st Respondent) filed a notice of preliminary objection dated 6th November 2006 in which he applied for the third party proceedings to be struck out because they were time-barred. The preliminary objection was heard by M/S Gitari, learned Chief Magistrate. The learned Chief Magistrate in the end agreed with the 1st Respondent whereupon she upheld the preliminary objection. Being dissatisfied with that decision, the appellant preferred this appeal.

On appeal the appellant put forward the following grounds in his memorandum of appeal:

1. *The learned Ag. Chief Magistrate erred in law in failing to appreciate that the issue of Third Party Notice does not amount to a cause of action against the Third party and the question of limitation did not arise.*

2. *The learned trial magistrate erred in law in failing to appreciate that the defendant was claiming indemnity against the Third Party which is not a tortious action.*

3. *The learned trial magistrate erred in law when she held that Section 4(2) of the Limitation of Actions Act applied to a claim against the 3rd party*

4. *The learned trial Magistrate erred in law in failing to appreciate that the 3 year period stated in Section 4(2) of the Limitation of Actions Act had not elapsed from the time the appellant learnt of the suit up to the time he applied for the Third Party to be enjoined in the suit.*

5. *The learned trial magistrate erred in law when she held that the Defendant ought to have applied for leave to issue a 3rd party Notice out of time.*

6. *The learned trial magistrate erred in law in failing to make a finding that as leave to joint the third party in the suit had been granted, the issue of limitation as against the Third Party did not arise.*

7. *the learned trial magistrate erred in law when she held that time for Third Party proceedings begins to run from the time the cause of action in the original suit accrues*

8. *The learned trial magistrate erred in law when she held that a Third Party Notice must be filed within the time limited for filing a defence.*

When the appeal came up for hearing learned advocates appearing in this appeal recorded a consent order to have the appeal determined by written submissions. The main issue in dispute is whether or not the third party proceedings were time-barred. The 2nd Respondent was in agreement with the appellant that the learned chief Magistrate erred when she upheld the preliminary objection. The 1st Respondent was of the view that the learned Chief Magistrate arrived at the correct decision when she found that the third party notice was time-barred by dint of section 4(2) of the Limitation of Actions Act.

I have carefully considered the written submissions filed by learned counsels from both sides. I have perused the provisions of order 1 rule 14 of the Civil Procedure rules. It is clear that there is not time limit as to when a defendant should take out third party proceedings. In such a case I am of the view that the defendant can take out third party proceedings at any time before the suit is heard so long as the suit between the plaintiff and the defendant was filed within time. In a nutshell the provisions of S. 4(2) of the Limitation of Actions Act does not apply to third party proceedings. Third party proceeding is dependent on the suit between the plaintiff and the defendant.

For the above reasons the appeal must succeed. The appeal is allowed with a consequential order that the order striking out the suit against the third party issued on 23rd July 2008 is set aside and is substituted with an order dismissing the preliminary objection dated 6th

November 2006. The end result is that the 1st Respondent is reinstated as a third party. Costs of the appeal and the preliminary objection to be met by the 1st Respondent.

Dated and delivered this 5TH day of February 2010

J.K. SERGON

JUDGE

In open court in the presence of

Mr. Njuguna for appellant, Muchiri f

or 1st Respodnent and K. Wachira

for 2nd respodnent.

J.K. SERGON

JUDGE