



**REPUBLIC OF KENYA**

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

**CORAM: A.K NDUNG’U J**

**CIVIL APPEAL NO 632 OF 2017**

NELLY KALIA KILONZO.....1<sup>ST</sup> APPELLANT  
HARRIZON MATIVO.....2<sup>ND</sup> APPELLANT  
CECILIA NDUNG’E .....3<sup>RD</sup> APPELLANT  
FELIX MAUTA .....4<sup>TH</sup> APPELLANT

**(T/A THREE GEE COSMETICS)**

**VERSUS**

CIC GENERAL INSURANCE LIMITED.....1<sup>ST</sup> RESPONDENT  
EQUITY INSURANCE AGENCY LIMITED.....2<sup>ND</sup> RESPONDENT

*(Appeal from the Ruling of Hon. D.A Ocharo – SRM dated 17<sup>th</sup> October, 2017 in Chief Magistrate’s Court at Milimani Commercial Courts, Nairobi in Civil Case No. 1992 of 2016)*

**JUDGEMENT**

1. In this appeal, the appellants have challenged the ruling of Senior Resident Magistrate D.A. Ocharo. The trial court found that the 2<sup>nd</sup> defendant was improperly enjoined in the suit. The appellants were the plaintiffs before the subordinate court while the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. I shall refer to the parties in their capacities before the trial court for ease of reference unless the context otherwise admits.

**Background**

2. The plaintiffs are mobile money transfer agents on behalf of Equity Bank Limited and Co-operative Bank of Kenya Limited, trading in the business name and style Three Gee Cosmetics. The plaintiffs got an insurance cover from CIC General Insurance Limited, the 1<sup>st</sup> Defendant, through the 1<sup>st</sup> Defendant’s agent, Equity Insurance Agency Limited, the 2<sup>nd</sup> Defendant. The plaintiffs claim that they took a policy with the 1<sup>st</sup> Defendant and paid the premiums through the 2<sup>nd</sup> Defendants. While they had the policy with the 1<sup>st</sup> Defendant their business suffered loss of Kshs 2,987,937/= as a result of armed robberies that took place on diverse dates between 2014 and 2015. The plaintiffs claimed for compensation from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the sum of Kshs 2,987,937/=. In the alternative the plaintiffs pleaded that the 2<sup>nd</sup> Defendant represented to the Plaintiffs that it was authorized by the 1<sup>st</sup> Defendant to make insurance sales as the 1<sup>st</sup> Defendant’s agent. They further pleaded that in the event the 2<sup>nd</sup> Defendant had no authority to transact Insurance Agency Business on behalf of the 1<sup>st</sup> Defendant, then the 2<sup>nd</sup> Defendant would be in breach of its warranty of authority.

3. The 1<sup>st</sup> Defendant filed its Statement of Defence on 25<sup>th</sup> May 2016 denying the Plaintiff’s claims. The 1<sup>st</sup> Defendant pleaded that there was no valid contract of insurance between itself and the Plaintiff. In the alternative it pleaded that if there existed any insurance policy cover between the Plaintiff and the 1<sup>st</sup> Defendant then the same would be unenforceable for reasons that the Plaintiff was in breach of the terms and warranties thereof and guilty of non-disclosure of material facts thereby entitling the 1<sup>st</sup> Defendant to repudiate the same.

4. The 2<sup>nd</sup> Defendant filed its statement of Defence and claimed that there was an insurance policy cover entered between the Plaintiff and the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant. They pleaded that it fulfilled all its duties as agent of the 1<sup>st</sup> Defendant and transmitted all

relevant documents concerning the policy to the 1<sup>st</sup> Defendant and the Plaintiff took up insurance policy cover with the 1<sup>st</sup> Defendant.

5. In due course the 2<sup>nd</sup> Defendant filed a notice of motion seeking that it be struck out as a party to the suit. In the application the 2<sup>nd</sup> Defendant contends that it disclosed that it was acting for the 1<sup>st</sup> Defendant and cannot therefore assume responsibility. In addition it advanced that it was not privy to the contract between the Plaintiff and the 1<sup>st</sup> Defendant.

6. The application was opposed by the Plaintiffs, and on 19<sup>th</sup> May 2017 Nelly Kalia Kilonzo filed a Replying Affidavit on behalf of the plaintiffs. It pointed out that the 1<sup>st</sup> Defendant have denied the existence of an agency relationship between themselves and the 2<sup>nd</sup> Defendant yet the plaintiffs remitted premiums to the 2<sup>nd</sup> Defendant for onward transmission to the 1<sup>st</sup> Defendant. She further pleaded that in the event the 2<sup>nd</sup> Defendant had no authority to act as agent on behalf of the 1<sup>st</sup> Defendant then they would be liable to the plaintiff's for the loss suffered. She also averred that the 2<sup>nd</sup> Defendant also failed to acknowledge in their defence that it received premiums from the plaintiffs and therefore the striking out of the 2<sup>nd</sup> Defendant as a party in the suit will sabotage the plaintiff's case.

7. The trial court in its ruling dated 17<sup>th</sup> October 2017 allowed the 2<sup>nd</sup> Defendant's application dated 20<sup>th</sup> March 2017 and held as follows;

***“...it is not contested that the 2<sup>nd</sup> Defendant was merely an agent of the first defendant whose business was to receive the premiums from the plaintiff and transmit them to the 1<sup>st</sup> Defendant. There is no contractual relationship which existed between the plaintiff and the 2<sup>nd</sup> Defendant. The presence of the 2<sup>nd</sup> defendant in this case is not necessary for the effectual and complete adjudication of the issue in controversy.*”**

...

***So, in this case too, there is no privity of contract between the 2<sup>nd</sup> Defendant and the plaintiff and the plaintiff cannot therefore seek to enforce a contract between himself and the 1<sup>st</sup> defendant against the 2<sup>nd</sup> defendant.”***

8. The plaintiff being dissatisfied with the ruling of the trial court has lodged this instant appeal raising the following grounds;

1. *That the learned Magistrate erred in law and in fact by allowing the 2<sup>nd</sup> Respondent's application thereby occasioning the plaintiff's great injustice.*
2. *That the learned Magistrate in total disregard of the law and facts in the case erred by failing to appreciate the law thereby occasioning the plaintiffs injustice.*
3. *That the learned Magistrate erred in fact and law by failing to uphold the principles of justice and equity in determining the 2<sup>nd</sup> respondents application in its favour case.*
4. *That the learned Magistrate erred in fact and in law by failing to acknowledge that the 2<sup>nd</sup> Respondent is a fundamental party to this suit so as to effectively and completely adjudicate upon this suit and settle all questions involved in the suit thereby acting contrary to Order 1 Rule 10 (2) of the civil procedure Rules 2010.*
5. *That the learned Magistrate erred in fact and in law by striking out the 2<sup>nd</sup> Respondent from this suit as a party in this suit (sic) as the suit will not remain intact as the presence of the 2<sup>nd</sup> Defendant is necessary so as to enable the trial court to effectually and completely to adjudicate upon and settle all questions involved in the suit.*

9. It is prayed that the appeal be allowed and the ruling in regard to the 2<sup>nd</sup> respondent's application dated 20/3/2017 be set aside and substituted by an order dismissing the 2<sup>nd</sup> respondent's application to strike out the 2<sup>nd</sup> respondent from the subordinate court suit. The appellant seeks costs.

10. The appeal was disposed off by way of written submissions. I have had regard to the pleadings in the primary suit, record of appeal and submissions on record. Of determination is whether the 2<sup>nd</sup> respondent (2<sup>nd</sup> plaintiff) was improperly joined in the primary suit as a defendant. Based on the answer to this, this court is invited to determine whether the joinder of the 2<sup>nd</sup> respondent as a defendant in the primary suit should be sustained.

11. **Order 1 Rule 10 (2) of the Civil Procedure Rules** provide;

***“The Court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added.”***

12. Having had regard to the record and specifically the pleadings in the primary suit, I entirely agree with counsel for the appellant who has submitted that many questions for determination arise which require adjudication. Those questions touch on the appellant, the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent.

It is worth noting that the appellant's claim in the primary suit as seen at para 5 and 6 of the plaint is as follows;

**Para 5: The Plaintiffs aver that given the nature of business that they engage in it was necessary to obtain an Insurance Policy that covers and protects them from all manner of risks which they eventually did with the First defendant through the Second Defendant being the First Defendant's appointed and disclosed Insurance Agents.**

**Para 6: By a policy of Insurance entered into between the Plaintiffs and the First defendant, the First Defendant in consideration of the premiums then paid to them by the Plaintiffs through the second Defendant, agreed during the validity period of the Insurance Policy to insure and indemnify the Plaintiffs against loss by burglary of the Plaintiffs' cash at the Plaintiffs' business premises at Embakasi within Nairobi.**

13. Among the issues that would arise for determination would naturally be;

- 1) Whether there was a contract of insurance between the appellants and the 1<sup>st</sup> respondent
- 2) Whether the 2<sup>nd</sup> respondent had authority to act as 1<sup>st</sup> respondent's agents.
- 3) Whether 2<sup>nd</sup> respondent breached that warranty of authority to act as agents of the 1<sup>st</sup> respondents
- 4) Whether indeed the appellants have been paying insurance premiums.
- 5) Whether the 2<sup>nd</sup> respondent has been remitting the same to the 1<sup>st</sup> respondents.

14. It is totally inconceivable how the trial court would effectually and completely adjudicate upon and settle all the above questions and others in the suit without the participation as an active party of the 2<sup>nd</sup> respondent herein. Faced with a similar circumstance in the case of **Wilson Muriithi Kariuki t/s Wiskam Agencies –Vs- Surghipharm Ltd [2014]eKLR** the court held;

*“The issue as to whether the 2<sup>nd</sup> respondent is an agent was a contested fact and therefore the court cannot at this stage conclude that the defendant was an agent of 10N Exchange Ltd.”*

15. The 1<sup>st</sup> respondent has vehemently denied the existence of any agency relationship between it and the 2<sup>nd</sup> respondent. Yet that is the mainstay of the appellants' case. The removal of the 2<sup>nd</sup> respondent from the suit would in effect render the appellants' case rudderless and one destined for collapse. The decision in **Parry –Vs- Carson [1962]EA 515** succinctly sums up the applicable principle. The court stated;

*“An application to remove a party cannot be allowed unless it would leave the suit intact.”*

16. Thus counsel for the appellants is spot on when he states;

*“It is our humble opinion that, striking out the 2<sup>nd</sup> respondent from this suit will sabotage the appellants case as it will not remain intact as the evidence of the 2<sup>nd</sup> respondent will be required to address the issue of insurance premiums paid to them by the appellants as well as address the 1<sup>st</sup> respondent's assertion that no documents relating to the appellants' claim herein were forwarded to them by the 2<sup>nd</sup> respondent.”*

17. The 2<sup>nd</sup> defendant advanced that while determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party. (See **Wrerrot and Company Ltd & Others v Andrew Douglas Gregorry & Others (1998) LLR 2828 and Kizitto M Lubano v Kemri Board of Management and 8 Others p[2016] eKLR**. It is submitted that the plaintiffs have no cause of action against the 2<sup>nd</sup> defendant and neither is the presence of the 2<sup>nd</sup> defendant necessary for the settlement of the suit. It advanced that there was no privity of contract between 2<sup>nd</sup> defendant and the plaintiffs; therefore there were no rights enforceable against them as third parties and relied on the case of **Saving & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR**. They further cited the case of **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR** to explain that where a principal is disclosed the agent is not to be sued. It therefore urged court that no prejudice will be suffered by the plaintiffs if the appeal is denied.

18. That submission is legally sound but the authorities cited are distinguishable from our present suit for reasons found in the claim set out in the plaint by the plaintiff against the 2<sup>nd</sup> defendant at paragraphs 11, 12, and 13 of the plaint. That claim is specific to the 2<sup>nd</sup> defendant.

19. A plain reading of paragraph 13 together with paragraphs 11 and 12 reveal that the plaintiff is claiming that 2<sup>nd</sup> Defendant was in breach of its warranty of authority. Where there is breach of the warranty of authority then the insurer (the 1<sup>st</sup> defendant) is discharged from liability and the plaintiffs remedy would only be against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> defendant argued that there was no evidence that it was in breach of the warranty of authority. The issue of whether the 2<sup>nd</sup> defendant in breach of its warranty of authority is matter to be determined after a trial after the plaintiff has been given the opportunity to present its evidence. In any case **Order 1 Rule 3** of the **Civil Procedure Rules** provides that:

*“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same 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.”*

20. In line with the decision in ***Wrerrot and Company Ltd & Others v Andrew Douglas Gregorry & Others (1998) LLR 2828***, the 2<sup>nd</sup> defendant is a necessary party to the primary suit as;

i) There is a right to some relief against the 2<sup>nd</sup> defendant in the suit.

ii) It would not be possible to pass an effective decree in the absence of the 2<sup>nd</sup> defendant.

21. The upshot being that I am satisfied that the appeal herein is meritable and is allowed and I make the following orders;

1. The appeal herein is allowed.

2. The ruling of the trial court dated 17/10/2017 is hereby set aside and substituted thereof with an order dismissing the 2<sup>nd</sup> respondent's application dated 20/3/2017 with costs.

3. The appellant shall have the costs of this appeal.

**Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of January, 2020.**

**A. K. NDUNG'U**

**JUDGE**