



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 519 OF 2011

BEATRICE APIYO SHIKUKU & HESBON ANDITI OCHIENG (Both suing as

Legal Representative of the Estate of

BONIFACE ONG'INJO (Deceased).....PLAINTIFF

VERSUS

ROYAL HISHAM LIMITED.....DEFENDANT

RULING

1. For determination is the plaintiff's Notice of Motion dated 2.7.2018 seeking orders that Ms Direct Line Insurance Company Limited be joined to this suit and to be compelled to pay to the Applicant /decree-holder, the full award of general damages not limited to the sum of Kshs. 3,000,000 as capped by Section 3(a) of **Insurance ,(Motor Vehicle Third Party Risks), Amendment, Act 2013**

2. The application is premised on the grounds that after this court entered judgment for the plaintiff/appellant in the sum of Kshs. 9, 144,760 plus costs and interests the defendant/Respondent while relying on the said provision of Cap 405, opted to pay Kshs. Three million (Kshs. 3,000,000) and declined to pay the balance a position the Plaintiff/Appellant contends is unconstitutional and therefore the insurer should be joined to these proceedings and ordered to settle decree in full.

3. When the matter first came to court on the 16.7.2018 Mr. Osioma advocate, appeared for the Defendant Respondent and successfully sought an adjournment and time to file and serve a preliminary objection as an opposition to the application. Nothing was told to court whether the party proposed to be joined was ever served with the application. MR. osioma was granted 7 days to file and serve. However, when the matter came up on the date set for hearing, no opposition had been filed and not even attendance was made. The matter therefore proceeded without any opposition from the Respondent/ judgment-debtor.

4. Having read the record of the application together with the oral submissions and authorities cited, the the issues for determination are those as expressed in the application at prayer 2 but narrowed down to 2 issues as follows:

(i) Should Ms Directline Insurance Company Ltd be joined to these proceedings?

(ii) Should the insurer be compelled to pay the entire decretal sum or has it discharged its statutory obligation by payment of the capped sum?

Joinder

5. The court has the unfettered discretion and jurisdiction to order the joinder of a party at any time of proceedings in order that all issues in controversy between the parties are determined by a single decision. However the joinder can only be ordered where the relief to be sought against the proposed party and the person initially in the suit arise from the same act, transaction or a series of acts or transactions and where if a separate suit were brought against such several persons a common question of law or fact would arise^[1].

6. The suit filed against the current defendant was a case founded upon the tort of negligence. That cause of action cannot be alleged or maintained against the person sought to be joined now. From the affidavit and grounds of the application, the proposed party is demonstrated to be connected to the suit on the basis that it was the insurer of the defendant. As between the current defendant and the proposed party, the relationship disclosed is contractual. Any cause of action between them can only be grounded on statutory duty under Section 10 of Cap 405. There is essentially and in truth no common question of Law or fact to be determined in favour of the plaintiff between the defendant and the proposed party.

7. However an order to join a party to the proceedings is intended first and foremost to assist the court to determine all the issues in controversy between the parties. That opportunity for the court to determine all issues in controversy only exist in a pending proceedings but not post judgment as in this case.

8. For all practical purposes any joinder of a party after judgment merely for it to settle a decree cannot pass the test of a fair hearing because the party so joined will not have had the benefit of saying a word before it is bound to meet the decree. That is the basis upon which order 1 Rules 3, 8 and 10 have been interpreted by the superior court in this country to the effect that an order for joinder can only be made before judgment and not after.

9. In **JMK VS. MWN & MFS [2015] eKLR** Court of Appeal said :-

“We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. **Sarkar’s Code**, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in **TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448**, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014”.

10. There having been a final judgment in this suit, it would be against the principles of natural justice and the Constitutional dictates to a fair hearing to order the joinder of **Ms Directline Insurance Company Ltd** in this suit and at this stage. It would however be different had it been shown that the cause of action the plaintiff seeks to pursue against the current defendant and the proposed party were the same or common and that the plaintiff sought to set aside the entire judgment for the matter to start de novo.

11. The other reason I think the application cannot be granted is the fact that there was no evidence to verify that the proposed party was ever served with application. I do find that there is no jurisdiction on the court to grant the application for joinder on the facts disclosed.

12. Having so found the second issue becomes mute and a still-birth and no time need be employed in determining it. The upshot is that the application fails and is hereby dismissed with costs.

13. This is not to say that the plaintiff is rendered remediless on her request to interrogate the constitutionality of capping of the sums paid by an insurer upon a judgment of the court when the position of the law is interpreted and laid by the courts are found to favour her position. That endeavour must however be taken in an appropriate forum

Dated and delivered at Mombasa this 18th day of January 2019.

P.J. O. OTIENO

JUDGE.

[1] Order 1 Rules 3 and 10