



**REPUBLIC OF KENYA**

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

**H. C. C NO. 43 OF 2013**

**FIDELITY SHIELD INSURANCE COMPANY LIMITED.....PLAINTIFF**

**V E R S U S**

**JOSEPH IHA WANJE.....DEFENDANT**

**RULING**

1. The applicant Margaret Magiri Njuguna filed a Notice of Motion under **Article 50 of the Constitution, Section 10(4) of the Insurance (Motor Vehicle 3<sup>rd</sup> Party Risks), Cap 405 Laws of Kenya, Order 1 Rule 10(2), Order 51 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking an order that the court be pleased to grant her leave to be enjoined in this suit as an interested party. The application is based on the following grounds:

- (a) That the interested party sued the Defendant herein in Baricho PMCC No. 41 of 2013 (Margaret Magiri Njuguna –vs- Patrick Kamau Kihuhi & Another), claiming damages arising from a road accident that occurred on 28/11/2012, involving motor vehicles registration numbers KBD 358G and KAS 066F;
- (b) That at the material time of the accident, motor vehicle registration number KBD 358G was owned by the Defendant and insured by the Plaintiff;
- (c) That the Plaintiff has filed the instant suit, seeking to repudiate liability for the accident, and if the orders sought are granted, they will adversely affect the Interested party, and
- (d) That the interested party is entitled under section 10(4) of the Insurance (Motor Vehicle Third Party Risk) Act to be made a party in the instant suit.

The application is supported by the affidavit of the applicant sworn on 10/12/15. She claims that on 28/11/2012 she was travelling as a fare paying passenger in a motor vehicle registration number KAS 066F when it was involved in a road traffic accident with motor vehicle KBD 358G which was owned by the defendant in this case. She sustained injuries and instructed her advocate to file a civil suit claiming damages. A civil suit PMCC 41/2013 was filed at Baricho Law Courts, **Margaret Magiri Njuguna –v- Patrick Kamau Kihuhi & Another**, Joseph Iha Wanje was the owner and the insured of the said motor vehicle KBD 358G. The said vehicle was insured by the plaintiff against 3<sup>rd</sup> party risks at the time of the accident, policy of Insurance No. MC03312887 and Certificate No. A5678294 commencing on 22/08/2012 and expiring on 21/08/2013. The applicant filed a declaratory suit PMCC 93/2015 against the plaintiff herein Fidelity Shield Insurance Co. Ltd. Her advocate then served with the instant suit where the plaintiff is seeking to repudiate the liability for the claims arising from the accident. She contends that under **Section 10(4) Insurance (Motor vehicle 3<sup>rd</sup> Party Risks) Act** upon service of a suit repudiating liability the person so notified is entitled to be enjoined in the suit. That the outcome of the suit will have a direct effect in her suit No. 93/2015 at Margaret Magiri Njuguna –v- Fidelity Shield Insurance Company at Baricho Law Court. That it is in the interest of Justice that she be enjoined in this suit.

2. The respondent filed a replying affidavit sworn on 26/2/16 by Caren Jaguga the Legal Officer of the plaintiff. Her contention is that the suit involves the plaintiff and the defendant and there is no issue related to the interested party. That the suit involves the defendant's breach of the terms of the policy of Insurance of the plaintiff and the plaintiff cannot make any good decree from any judgment in relation to the said accident (sic). She objects to the applicant being enjoined as an interested party since the claim for breach of Policy involving the defendant and the plaintiff does not relate to the applicant. She further depones that section 10(4) of the Insurance (Motor vehicle 3<sup>rd</sup> Party Risks) does not apply as it stipulates that an insurer cannot pay a claim in respect of a policy that has been breached.

3. The application was disposed of by way of written submissions. The applicant submits that she should be made a party to this suit because the outcome would affect her and thus she has an interest. That her application is premised on the **Insurance Act** and the principles of natural justice. That the applicant has legal and factual basis for making her a party to this suit. The factual basis are:

- i) an accident occurred on the 28/11/2012, involving the Interested Party and motor vehicle registration number KBD 358G;

- ii) the said motor vehicle was at the time of the accident insured in the name of the Defendant.
- iii) the Plaintiff/Respondent had insured the said motor vehicle against third party risks, among other risks;
- iv) the Interested Party filed suit against the insured and notified the Plaintiff/Respondent; and
- v) the Plaintiff/Respondent seeks to repudiate liability for that accident in the instant suit.

That it is obvious that the rights of the Interested Party will be affected by the outcome of this instant suit and her presence will assist the court to effectively adjudicate the matter in controversy which the criteria for determining whether a party can be joined in the suit as an interested party. She relies on *Departed Asians Property Custodian Board –V- Jaffer Brothers Ltd Supreme Court of Uganda (1999) I.E.A 55.*

***“ A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit ..... A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.”***

Further, the above undisputed facts are within the definition of an interested party, which entitles the Interested Party/Applicant to be joined in the suit. The Supreme Court of Kenya in *TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE –VS- MUMO MATEMO & 5 OTHERS (2014) eKLR* held as follows with regard to an interested party:

Suffice it so say that while *an interested party has a ‘stake/interest’ directly in the case*, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

*Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.* (emphasis added).

4. On legal basis he relies on Order 1 rule 10(2) Civil Procedure Rules which provides:

*The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.* (emphasis provided).

*He further relies on Section 10(4) Insurance (Motor Vehicle 3<sup>rd</sup> Party Risk) Act* which provides:

*(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:*

*Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto* (emphasis added).

The contention is that the provision makes it mandatory for a plaintiff in a primary suit to be made a party in a declaratory suit between the insurer and the insured. He relies on the case of *Gateway Insurance Co. Ltd –v- Moses Jaika Luvai(2008) eKLR*, Justice Ibrahim, as he then was where he stated :

*The aforesaid provision is clear and speaks for itself. The plaintiffs in the suits which the insurer seeks to avoid liability under Section 10(1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit.*

*The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.* (Emphasis included).

5. For the Plaintiff it was submitted that *Rule 2 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules* 2013 defines an interested party thus,

**“ A person or entry that has an identifiable stake or legal interested or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the proceedings”**

The respondent further relies on section -7- of the Civil Procedure Act and states that there is an appeal in the High court which is being pursued by both parties which is not related to the present suit. That the applicant has not demonstrated sufficient reason to be enjoined herein as an interested party. They rely on **Brek Sulum Hemed –v- Constituency Development Fund Board and Kenya Rural Roads Authority**. C.A 18/13 where it was stated that the issue is whether it is in the interest of Justice for the applicant to be joined whether as necessary parties or as interested parties – whether it is on own motion of the court or on their application. That under **Order -1- rule 10 civil Procedure Rules** the party has to demonstrate that their involvement is necessary to, **“effectually and completely adjudicate upon and settle all questions involved in the suit.”** This they submit the applicant has not demonstrated.

6. The issue which arise is the joining of an interested party in a suit. An interested party is the one who has a stake in the proceedings though he was not a party in the cause ab intio. This is in line with the definition quoted above. The party must demonstrate that it is necessary for him to be joined as a party to enable the court to settle all the questions involved in the suit. It is not sufficient for a party to state he has an interest he must convince the court that his being enjoined in the suit is crucial and will be necessary to assist the court in the determination of the questions involved in the suit. The applicant has stated the factual basis for this application which she has indicated is not in dispute and the facts are pleaded in the plaint. The pleading by the plaintiff is alleging a breach of the policy. Simply stated the plaintiff is seeking to avoid liability to pay the interested parties. It is based on a claim that the defendant was not using the motor vehicle on that particular day for the insured purpose. The plaintiff seeks a declaration that he is not bound to settle decree in Baricho R. M. C.C. 36, 37, 38, 39, 40 & 41 of 2013 or any other suit that maybe filed in future on account of suits having arisen inbreach of the express provisions of the own goods master comprehensive policy No. MC 03312 887.

7. There is no doubt that the decision of this court will affect the rights and interests of the interested party. The interested party has a stake and or interest in the case. This was well stated in the Supreme Court in **Trusted Society of Human Rights Alliance –v- Mumo Materu & Others**, (Supra). The applicant will be affected by the decision and has a stake in the proceedings. The interest of Justice demands he be party in the proceedings.

8. This matter is brought under section 10 of the Insurance **Motor Vehicle 3<sup>rd</sup> Party Risk** Act. The provision makes it mandatory for the Insurer to settle the Judgment(s) in respect of persons it has insured against claims by 3<sup>rd</sup> parties. Such claims are where death or bodily injuries has resulted from an accident involving the vehicles insure under the **Act. Section 10(4)** is mandatory that a person who has been given notice of the proceedings to repudiate liability shall be entitled if he thinks fit to be made a party thereto. It means that if such a party wishes to be enjoined in the suit, the court has no discretion, it has to allow such a party to be enjoined in this suit. I am in agreement with the decision of Justice Ibrahim as he then was in the case of **Gateway Insurance Co. Ltd –V- Moses Jaika Luvai**, (Supra) that if the party applies to be joined in the suit the court is without discretion, it must allow him. Where a party has been given a right by a statutory provision to be enjoined in a suit, the plaintiff or the party cannot take away the right. I am in agreement with the counsel for the interested parties that the interested party has the legal basis in **Section 10(4) of Insurance Act** to be enjoined in this suit.

9. In conclusion, I find that this application has merits and I allow it. The applicant will be enjoined in the suit as an interested party. Since she has been served with plaint, she will file a defence to the plaintiff’s suit within 21 days from today. This ruling to apply in the applications by the interested parties who have applied to be enjoined in the suit.

Costs to the applicant.

**Dated at Kerugoya this 12<sup>th</sup> day of July 2018.**

**L. W. GITARI**

**JUDGE**