



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 595 OF 2016

IDRIS FARIDI.....APPELLANT

FARYD SHADIA.....APPELLANT

JUBILEE INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

KARITHI PETER MURUNGI.....RESPONDENT

(Appeal from the Ruling of Honourable G.A. M'Masi (Mrs.) Senor Principal Magistrate at Nairobi delivered on 2nd December, 2016 in CMCC No. 5026 of 2016)

JUDGMENT

The Respondent was the plaintiff in the Chief Magistrate's Civil Suit No. 5026/2015. In the said suit, he sued the Appellants claiming special and general damages arising from an accident that occurred on the 13th day of June 2015 while he was cycling along Ngong Road when he was hit by the Appellants motor vehicle registration number KAV 786W.

He contended that the said accident was caused by negligence on the part of the driver of the aforesaid motor vehicle. In this Appeal, the first Appellant was driving the vehicle as the 2nd Appellant's authorized agent and/or servant. The particulars of negligence are set out in paragraph 5 of the plaint.

The Respondent averred that as a result of the accident, he sustained injuries and suffered loss and damage which are particularized in paragraph 6 of the plaint.

The Appellants filed a defence on the 9th day of December 2015 in which they denied the claim. In the defence the 2nd Appellant denied being the registered owner of the subject motor vehicle. He also denied any principal/agent relationship between himself and the 1st Appellant. He denied that the first Appellant was driving the vehicle as his agent/authorized driver. The occurrence of the accident was also denied.

The Appellants further averred that, if the accident occurred, but which was denied, the same was not caused by negligence on the part of 1st Appellant as alleged but the same was caused by sole or significant and/or contributory negligence on the part of the Respondent. The particulars of negligence, loss and damage as pleaded in the plaint are denied and the Respondent is put to strict proof.

Before the matter could be heard, the Respondent brought an application dated 30th March 2016 in which he sought to enjoin Jubilee Insurance Company (the 3rd Appellants) as a party to the suit. The application was made on the ground that the said insurance company had insured the subject vehicle at the time of the accident, that the said company is a necessary party to the proceedings and that the joinder would not prejudice the interest of the Appellant.

The application was heard and a ruling delivered on 18th August, 2016 allowing the same. In allowing the application, the learned magistrate found that the application to join the 3rd Appellant was not premature and that it was not viable for the respondent to wait until judgment was entered so as to enjoin the insurance company.

The Appellant being aggrieved by the ruling appealed to this court and has listed eight grounds of Appeal in their Memorandum of Appeal dated the 19th day of September 2016 which I would collapse into one broad ground thus;

- (a) The learned magistrate erred in fact and in law by holding that the chamber Application dated 30th March, 2016 had merits and by failing to find that the application to enjoin the Appellant was premature.

The Appeal proceeded by way of written submissions which the court has duly considered.

In their submissions, the Appellants relied on section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act and cited several authorities to wit **Kenindia Assurance Co. Ltd. Vs. James Otiende (1989) 2KAR 162** and that of **Josephat Njuguna Kariuki Vs Simon Karichu Irungu (2004) eKLR**, in which the courts held that the insurance would only be liable after judgment has been entered against the insured.

The Respondent on his part submitted that the application dated the 18th day of March 2018 sought amendment of the plaint and the trial court determined the prayers sought in the application. It was contended that the Appellants only contested and/or challenged the issue of joinder whereas in their Memorandum of Appeal, they are seeking to set aside the whole ruling and the orders made on the 18th day of August 2016.

On joinder of the 3rd Appellant, it was contended that Section 10(1) of the Insurance (motor vehicle Third Party Risks Act does not expressly bar a party from joining the insurer in proceedings and when so joined, the insurance can still make a counter-claim against the 1st and 2nd Appellants.

In considering this Appeal, the main issue that the court has to determine is whether the application and subsequent order on joinder of Jubilee Insurance Company was pre-mature. The answer lies in section 10 of the Insurance (Motor Vehicle Third Party Risks) Act which provides;

If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (Being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability; including any amount payable in respect of costs and any sum payable in respect of interest or that sum by virtue of any enactment relating to interest on judgments”

The issue has been considered by the courts in various decisions. In the case of **Laichard Shah & another Vs. Kenindia Insurance Company Limited (2005) eKLR** Ang’awa J. when dealing with a similar situation held;

“The insurance company according to Law are never enjoined as a party in a tort suit. This is because the cause of action against an insurance company arises after liability and quantum has been determined by a court of law. All the party suing requires to do before trial is to issue a statutory notice to the insurance company to notify them that a suit will be filed against their insured where the tort case is finalized and there is no pending appeals, review application and any issues. The insurance company on behalf of its insured would be obliged to pay. If it fails to do so, the plaintiffs are to file a declaratory suit in the High Court seeking for the court to pronounce that they are owed the award”

Similarly, in the cases of **Kenindia Insurance Co. Ltd. Vs. James Otieno (supra)** the courts reached the same decision. I wholly concur with that finding. The court is not persuaded by the Respondent’s argument that the 3rd Appellant can make a counter-claim against the 1st and 2nd Appellants. It should be noted that insurance contract is usually between the insured and the insurer and the only way a third party (in this case the Respondent) can benefit from the contract is by first obtaining a judgment against the insured and not before them. Such a cause of action crystallizes after a judgment is delivered against the insured.

The Respondent in his submissions has argued that the Appellants only challenged the issue of joinder of Jubilee Insurance Company Ltd (the 3rd Appellant) and not amendment of the plaint.

The court has carefully perused the application dated 30th March 2016 and the orders sought therein are for joinder of Jubilee Insurance Company Limited as a 3rd defendant and upon granting that order, the Respondent be granted leave of the court to amend the plaint.

With tremendous respect to the counsel for the Respondent, that argument does not hold any water. The only purpose for which the application was made was to enjoin Jubilee Insurance as a party to the suit. That is the only amendment that the Respondent sought to introduce to the plaint and therefore, if that prayer was disallowed it follows that the other prayer to amend the plaint also failed. The two prayers are joined at the hip and you cannot allow one without the other. In my view, the Appellants were right in opposing joinder of Jubilee Insurance and they did not have to specifically oppose the prayer for leave to amend.

The Appellants opposed the application by way of Grounds of opposition dated the 14th day of April 2016. They averred that the application is premature as the Respondent reserves the right to seek indemnity from the 3rd Appellant after judgment. That the pleadings do not disclose any cause of action against the third Appellant and that by joinder, the 3rd Appellant would be robbed off his right to invoke the arbitration cause in the contract document to which the plaintiff is not a party. I fully concur with the Appellant.

In the premises foregoing, I find that the Appeal has merits and it is allowed with costs to the Appellant. For avoidance of doubt, the ruling and orders of the trial court made on 18th August, 2016 allowing the application dated 18th March, 2016 are hereby set aside and replaced with the order dismissing the application. The Respondent shall bear the costs of the Appeal

Dated, Signed and Delivered at Nairobi this 4th day of **October, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:

..... **For the Appellants**

..... **For the Respondent**