



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 327 OF 2014

FRANCIS MUNUVE & GEORGE MWENDWA

(The administrators of the estate of

KIVWANA MUNUVA.....PLAINTIFFS/RESPONDENTS

- V E R S U S -

MANUFACTURERS AND SUPPLIERS LIMITED..... 1ST DEFENDANT

JUBILEE INSURANCE COMPANY LIMITED..... 2ND DEFENDANT

RULING

1) Jubilee Insurance Co. Ltd Co. Ltd, the 2nd defendant herein, took out the motion dated 7th September 2015 whereof it sought for the following orders:

1. THAT the suit filed herein against the 2nd defendant/ applicant be struck out.

2. THAT the plaintiff/respondent do pay the costs of this application and the suit to the 2nd defendant/applicant.

2) The motion is supported by the affidavit of Collin Nyaema. When the motion was served upon the plaintiffs, they filed the replying and a further affidavit of Francis Munuve to oppose the application. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the application disposed of by written submissions. At the time of writing this ruling, the plaintiffs were the only parties who had filed their submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting, further and the replying affidavits. I have also taken into account the submissions filed by the plaintiffs. It is the submission of the 2nd defendant that the manufacturers and suppliers Ltd, the 1st defendant herein, did not have a valid Employer's Liability cover as at the date of the loss. The 2nd defendant further argued that the suit as against it discloses no reasonable cause of action. This court was asked to find that there is a misjoinder of parties with respect to the 2nd defendant. There is an averment in the affidavit of Collin Nyaema that the 1st defendant was insured by the 2nd defendant between 24th April 2007 and 23rd April 2008 under the Employer's Liability class and thereafter there was no renewal of the policy after the same lapsed. The 2nd defendant averred that it was surprised when it was served with summons to enter appearance with the plaint in this matter over an accident which allegedly took place on 16th February 2012. The 2nd defendant felt that there was no privity of contract between itself and the 1st

defendant. It also submitted that there is no declaratory judgment against it hence this suit discloses no cause of action.

4) The 2nd defendant also argued that there was absolutely no basis to enjoin it to this suit.

5) I have already stated that the plaintiff's filed two affidavits sworn by Francis Munuve to oppose the motion. The plaintiffs too filed written submissions. The plaintiffs stated that they wrote a demand notice to the 1st defendant demanding payment of damages for the wrongful death of the late Kivwana Munuve vide the letter dated 12th February 2014. It said that the 1st defendant forwarded the plaintiff's demand letter to the 2nd defendant who in turn responded to it vide its letter dated 25.2.2014 in which it referred to the 1st defendant as its insured.

6) The plaintiffs also pointed out that the 2nd defendant successfully applied for the defence to be amended in which the 2nd defendant applied for set off claiming that the deceased had been adequately compensated to the tune of ksh.5,953,056/=. The plaintiffs further showed this court a letter written to it by the 2nd defendant informing them that the 2nd defendant had taken over the matter in place of its insured. The plaintiffs argued that pursuant to the 2nd defendant's correspondences they were prompted to sue the 2nd defendant. The plaintiffs further annexed to the affidavit of Francis Munuve a copy of the claim credit note showing that there was an insurance policy no. P/NRB.2567/2008 between the 1st and 2nd defendants covering the period between 24th April 2011 and 23rd April 2012.

7) After a careful consideration of the material placed before this court, it is now apparent that the gist of the 2nd defendant's motion is that it has no privity of contract between it and the 1st defendant. In this saga, the 1st defendant has been deaf silent and yet it is suppose to shed light over the issue at hand. I have critically examined the documents attached to the affidavit of Francis Munuve and it is clear to me that there was an insurance cover between the 1st defendant and the 2nd defendant covering the period between 24th April 2011 and 23rd April 2012. The insured risk is alleged to have attached on 16th February 2012. It cannot therefore be true to say that there was no privity of contract between the 1st defendant and 2nd defendant. The 2nd defendant has attempted to challenge the credibility of the insurance cover. In my view, that is a matter which can only be determined in the substantive hearing of this suit. In my view the 2nd defendant is a necessary party to this suit. It is difficult to conclude that there is misjoinder of parties in the circumstances of this dispute. In any case the provisions of Order 1 rule 9 of the Civil Procedure Rules, 2010 expressly states that a suit cannot be defeat for misjoinder.

8) In the end, I find no merit in the motion. The same is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 10th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant