

TANZANIA / JUDGMENT

sophia iddi hassanali vs adeola phabian iraqu and two others

2023 tzhc 16897 25 april 2023

COURT
TZHCDECIDED
25 April 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA CIVIL CASE NO. 18 OF 2022 SOPHIA IDDI HASSANALI (Suing as administratrix of the estate of the late Hassana/i Shabani Akoonay)..... PLAINTIFF Vs ADEOLA PHABIAN IRQA..... 1stDEFENDANT OCTAVIAN EVARIST..... 2ndDEFENDANT BRITAM INSURANCE CO. LTD..... 3rdDEFENDANT

RULING

Date of last order: 21-3-2023 Date of ruling: 25-4-2023 The plaintiff herein is a widow of the late Hassanal Shaban Akonaay (hereinafter to be referred to as "the deceased") who passed away on 23rd August 2019 in a road accident. He was hit by the car belonging to the 1st defendant which was being driven by 2nd defendant. The plaintiff filed this case in her capacity as the administratrix of the deceased estate. In this case the plaintiff prays for the judgment and decree against the defendants jointly and severally as follows;

- i) Payment of Tshs 263,000,000/= by the defendants as special and general damages, and disturbance and costs at a tune of Tshs 303,000,000/= ii) Costs of the suit iii) Any other relief(s) the Honourable court deems fit and just to grant. 1 | Page Upon being served with the plaint, the 3rd defendant through his advocate filed his written statement of defence together with three points of preliminary objections, to wit;
- i) That, the plaint does not disclose any cause of action against the 3d defendant. ii) That, the 3d defendant is wrongly, un-procedurally and improperly joined in this suit. iii) That, the plaintiff's plaint violates the mandatory provision of order VII Rule 1 (i) of the Civil Procedure Code (Cap 33 R.E2019). Plaintiff appeared in person, unrepresented whereas Mr. Abdallah Issa, Ali learned advocate appeared for the 3rd respondent. The 1st and 2nd respondents did not enter appearance in court despite being notified on the existence of the case. The preliminary objection was disposed of by way of written submission. In his submission Mr. Ali argued that according to Mulla's Code of Civil Procedure, 13th Edition at

page 44 the phrase "cause of action" is defined as follows; "...every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It is not limited to the actual infringement of the right to sue on but includes every piece of evidence which is necessary to be proved to entitle the plaintiff to a decree..". He contended that the same definition was adopted by this court in the case of Musanga Ngandwa vs Chief Japhet Wanzangi and 8 others, (2006) TLR 351. He went on submitting that in paragraph 9 2 | Page of the plaint the plaintiff pleaded existence of insurance contract between the 1st defendant and the 3rd defendant for third party insurance cover which means that the plaintiff is a stranger to the insurance contract between 1st and 3rd defendants. Therefore, she has no right to sue on the aforesaid insurance contract. It was Mr. Alli's contention that under the principle of privity of contract as far as the insurance contract in question is concerned, it is only parties who are privy to that contract have obligation to fulfil the conditions stated therein and can sue on that contract. Any person not a party thereto, legally have no right to enforced the terms of the contract or demand performance of the same. He cited the case of Attorney General Vs Hassan Abdirahaman Mohamed and Phoenix Tanzania Assurance Company Limited, Civil Case No. 121 of 2007 and Austack Alphonse Mushi Vs Bank of Afrika Tanzania Ltd and another, Civil Appeal No. 373 of 2020,(both unreported) to bolster his arguments. With regard to the 2nd point of preliminary objection Alli submitted that under insurance claims an insurer has always been treated as a third party whose liability is based on the principle of contribution to the liability of insured (in this case 1st defendant) as regulated provided in Order 1 Rule 14 (1) (2) and (3) of Civil Procedure Code (Henceforth "the CPC"). He was of the view that a 3rd party cannot be treated or joined as defendant in a suit of this nature since his/her liability is only limited to contribution on the liability of the defendant, in this case the 1st defendant. To bolster his arguments, he cited the case of Metropolitan Tanzania Insurance Co. Ltd Vs Frank Hamadi Pilla, 3 | Page Civil Appeal No.191of 2018 (unreported) in which the court held as follows; .the third-party procedure is based on the principle of contribution and/ indemnity upon the defendant being found liable to the plaintiff, We also agree with him that what is material is not the plaintiff, but the right to indemnity from the third party. We further agree that such circumstance, the third party is not supposed to be treated as a defendant in the suit, but essentially as a third party and non-party to the suit He added that the 1st defendant is the who can sue the 3rd defendant on the contract of insurance or to join him in this case as a third party upon obtaining leave of this court under third party procedure since he has a right of indemnity from the insurer (3rd defendant herein).Thereafter the court would have proceeded in term of Order 1 rule 18 of the CPC. He maintained that claim against 3rd defendant is misconceived. On the 3rd point of preliminary objection Mr. Alli submitted that the statement of the value of the subject matter in the plaint is a mandatory requirement as the same assists the court in ascertaining the pecuniary jurisdiction of the court as well as court fees. To bolster his argument, he cited Order VII Rule (i) of the CPC. He contended that the aforesaid provision of the law has been coached in mandatory terms since the word used is "shall" which means the requirement stipulated in the law must be done. He cited the case of Jamal Said and others

Vs Karmal Aziz Msuya, Land Case No. 42 of 2017 and Daniel Beatus Makanga Vs Mathew Shamba Model, Land Case No.1 of 2016 HC at Arusha (both unreported) to cement his arguments. 4 | Page In rebuttal, with regard to the 1st point of preliminary objection the plaintiff submitted that paragraph 9 of the plaint establishes the existence of a contract between 1st defendant and 3rd defendant in a manner showing that there is an implied contractual relationship between the plaintiff and the 3rd respondent as per the insurance policy third party risk and motor vehicles insurance Act, Cap 169. She contended that the facts stated in the plaint have disclosed a cause of action against the 3rd defendant who has already filed his written statement in court. Relying on the landmark case of Mukisa Biscuit Manufacturing Company Limited Vs West and Distributors Limited (1969) EA 696. She further added that this point of preliminary objection is not a pure point of law since it needs evidence for the court to satisfy itself on whether or not the pleadings disclose cause of action against the 3rd defendant. On the 2nd point of preliminary objection the plaintiff submitted that according to the nature of the contract between 1st defendant and 3rd defendant, under the provisions of sections 78, 79 and 80 of the Law of the Contract Act, the plaintiff is entitled to claim direct compensation from 3rd defendant. He added that insurance policy requires any owner of the motor vehicle to have third party insurance cover to cover the third party in case of death or loss that can be caused in the course use of the motor vehicle. She maintained that the laws gives the insurance companies responsibility of paying compensation for losses occasioned by the use of motor vehicles insured by the those companies against a third party liabilities. To cement his arguments he referred this court to section 4 and 5(b) of the Motor Vehicle Insurance Act, Cap 169 RE 2002. Expounding on the obligation of the Insurer in case of an 5 | P a g e accident involving a motor it insured, the plaintiff contended that the insurer has duty to pay a third party any amount of money he /she is entitled as per a judgment of the court. She was of the view that the 3rd defendant (insurer) has been joined in this case as a necessary party since this court cannot pass an effective judgement in the absence of the 3rd defendant. He insisted that in this case all necessary parties who share the responsibility, to wit, the owner of the motor vehicle (1st defendant), the driver (2nd defendant) and the Insurance Company (the 3rd defendant) have been joined. He was emphatic that whether or not the 3rd defendant has been wrongly joined in this case is a pure factual point which can be established in the course of hearing of the case. She referred this court to the case of Karata Ernest and others vs The Attorney General, Civil Revision No. 10 of 2010 (unreported) to fortify her arguments. In addition to the above, relying on the provisions of Order 1 Rule 9 and 10 (2) of the CPC the plaintiff argued that even if this court finds that the 3rd defendant has been mistakenly joined in this case, the remedy is not to struck out the whole case but to remove the 3rd defendant from the case. She was of the view that even if this court finds out that 3rd defendant was mistakenly joined in this case or was un-procedurally sued the remedy available is not to struck out the case as if it is incompetent. The proper remedy is to struck out the name of the 3rd defendant. To bolster her argument, she cited Order 1 Rule 9 and 10 (2) of the Civil Procedure Code. On the 3rd point of preliminary objection, the plaintiff submitted that she pleaded under paragraph 15 of the plaint that the amount of the 6 | P a g e

compensation she is demanding from the defendants for the death of her husband is Tshs 263,000,000/=, thus the value of subject matter was pleaded. She added that this point of preliminary objection is not a purely point of law since it depends on factual issues which need to be proved by evidence. Evidence is needed in order for this court to satisfy itself on whether or not the plaintiff pleaded in any paragraph in the plaint on the value of subject matter. In conclusion of her submission the plaintiff beseeched this court dismiss all points of preliminary objection for lack of merit with costs. In rejoinder, Mr. Alli reiterated his submission in chief and added the following arguments; That plaintiff's contention that her cause of action against 3rd defendant is impliedly drawn from the insurance contract between the 1st and 3rd defendants is a misconceived as in insurance contracts it is only parties to the contract have rights over the contract and can sue on the same. The cause of action being a creature of statute as provided under Order VII Rule 1 of the CPC must arise from acts or a failure to perform a certain legal obligation by an individual leading to a breach of duty, or a violation or invasion of a right. To bolster his argument he cited the case of John Byombalirwa Vs Agency Martime Internationale (Tanzania) Ltd (1983) TLR 1. He further argued that in order for the plaintiff to be able to establish that there is cause of action between her and the 3rd defendant she was duty bound to demonstrate in her plaint two things one, that she has right to sue and two such right to sue attracts remedies upon proof by the plaintiff. 7 I P a ge Moreover, he contended that in paragraph 9 of the plaint the plaintiff stated that 1st defendant was insured by the 3rd defendant but she has not given any particulars as to account for the involvement of the 3rd defendant or her contribution on occurrence of the said motor vehicle accident as to entitle her to have a direct legal remedy against 3rd defendant. The 1st defendant is the one who was ought to file an application to join 3rd defendant. To support his position he cited the case of January Nshimba Vs The registered Trustees of Daughters of Marry Immaculata and Collaborators, Civil Appeal No. 127 of 2018, CAT at Dar es salaam (unreported). The plaintiff's plaint has to be in compliance with the requirements of the law provided in Order VII of the Civil Procedure Code. Having carefully considered the rival arguments made by Mr. Alli and the plaintiff, before delving into the merits of the points of preliminary objections, I am compelled determine the concern raised by the plaintiff that all points of preliminary objections are not pure points of law, thus they contravene the principle lied down in the famous case of Mukisa Biscuits (supra). Starting with the 1st point of preliminary objection, it is a trite law that a plaint has to disclose cause of action against the defendant(s). In the case of Msanga Ngandwa (supra) this court held that cause of action means every fact which would be necessary for the plaintiff to prove in order to support his title to a decree. In other words, a cause of action is the sum total of those allegations upon which the right to relief claimed is founded. And on how should the same be determined the court held that in determining a cause of action, only the plaint together 8 | Page with anything attached should be looked at. The plaintiff is under no obligation to anticipate any special defence which might be available to the defendant. From the foregoing, I am not inclined to agree with the plaintiff that establishing whether a plaint discloses cause of action against the 3rd defendant this court needs evidence. In making a determination on whether or not the plaintiff has a cause of action

against the defendant the court is required to only go through the facts pleaded in the plaint as they are. No evidence is required. Likewise, no evidence is required to establish whether or not the 3rd defendant has been wrongly and un- procedurally joined in this case because the procedure for joining a party to a case is a matter of law provided in the relevant laws depending on the matter in question. Similarly, no evidence is required to determine whether or not the plaintiff has complied with the requirements of Order VII Rule 1(i) of the CPC which requires the plaintiff to state the value of the subject matter, because the same can be determined by merely going through the contents of the plaint. In short, it is the finding of this court that all points of preliminary objection are pure points of law. The above being said, I will start dealing with the 3rd point of preliminary objection since the same is on the appropriateness of the plaint which is the basis of the existence of this case. If the plaint is defective then the 1st and 2nd points of preliminary objection will be rendered redundant. Let me point out on the onset that Upon perusing the plaint, I am inclined to agree with the plaintiff that the 3rd point of 9 | Page preliminary objection is void of merit as I will soon elaborate hereunder. In paragraph 17 of the plaint the plaintiff stated that the amount of money she is claiming against the defendants, to wit; Tshs 263,000,000/=) being compensation following the demise of her husband. In paragraph 19 of the plaint the plaintiff stated that this court has pecuniary and territory jurisdiction to determine this case. In my considered view the plaint is in compliance with the provisions of Order VII Rule 1(i) of the CPC. The case of Beatus Makanga (supra) relied upon by Mr. Alli in his submission is distinguishable from the case at hand because it has different set of facts. The claim in that case was on a landed property which required a valuation report to establish its value whereas the claim in the case at hand is on compensation following someone's death, thus valuation report required. From the foregoing it is the finding of this court that the 3rd point of preliminary objection is void of merit. The same is hereby dismissed and this paves away for me to dealt with the remaining points of preliminary objection. I will deal with them conjointly. As correctly submitted by Mr. Alli in paragraph 9 of the plaint the plaintiff stated that the 1st defendant's car which hit the deceased was insured by the 3rd defendant. Thus, the 1st defendant was the insured whereas the 3rd defendant was the insurer. The plaint reveals that the plaintiff's claims against the 3rd defendant are hinged on the third party insurance cover issued by the 3rd defendant to the 1st defendant. It is obvious that the plaintiff is not a party to the contract of 10 | Page insurance entered into by the 1st and 3rd defendants. It is also correct that the 3rd party insurance cover was issued to the 1st defendant to protect him against liabilities which he may incur from the third parties (victims). In this case the third party is the victim of the accident (deceased). The pertinent question here is; can the third party sue the insurer?. My answer to this question is in the affirmative. I am inclined to agree with the plaintiff that being the administratrix of the deceased estate she has a cause of action against the insurer which entitles her to sue the insurer because the victim is the beneficiary of the third party insurance cover which is specifically for taking care of the liabilities arising from damages /loss suffered by a third party. I entirely associate myself with the findings of this Court in the case of Dr.Loy Job Mbwilo (administrator of the late Amini Amani Mbaia) Vs Richard Mwera Matiku and Icea

Lion General Insurance Coy Limited , Civil Appeal No.7 Of 2018, (unreported) which have similar facts to the case in hand in which this Court (Hon Mongella, J) held as follows; "However, apart from what I have stated, it is my view that claims like the one in the case at hand are based on tort and not contract, thus the party suing (the victim) can as well join the insurance company in the parties to be sued considering the deep pocket rule. The insurance company does not necessarily have to be joined by the defendant through third party procedure as misconceived by the learned trial Magistrate. Therefore, from the observation I have made herein, it is my finding that the 2nd Respondent is jointly liable to compensate the Appellant". In addition to the above, I am alive that under the motor vehicle Insurance Act, Cap 196 (RE 2002), the insurer is duty bound to pay the victim any amount of money granted in a court judgment provided that 11 | P a g e there are no any justifiable reasons not to pay the same as provided in the law. (See section 10 of the Motor Vehicle Insurance Act, Cap 169). With due respect to Mr. Alli, the case of Metropolitan Tanzania Insurance Co. Ltd (supra) is distinguishable from this case because it has different set of facts. The same was in respect of insurance cover against fire for commodities/stocks. Likewise, the case of Autrack Alphonse Mushi (supra) , is distinguishable from the facts of this case because it was about a contract for a mortgage and loan agreement. From the foregoing, it is finding of this court that the 1st and 2nd points of preliminary objection have no merit. In the upshot, all points of preliminary objections are hereby dismissed with costs. Dated this day 5th April 2023 JUDGE 12 | P a g e

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