

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 209 OF 2019

Veronica Daniel Ngoji

(Administratrix of the Estate of Juma Mjelele)..... 1st Appellant

Versus

1. Yasin Mvumo1stRespondent

2. BUMACO INSURANCE CO. LTD2nd Respondent

JUDGEMENT

Date of Last order: 28.11.2019

Date of Ruling: 06.03.2020

Ebrahim, J.:

Veronica Daniel is the administratrix of the Estate of the late Juma Mahinya Mjelele. She filed Civil Case No. 16 of 2019 at Kinondoni District Court against the respondents herein. The 2nd respondent's counsel raised preliminary objections that there is no cause of action against the 2nd defendant; and that the suit was pre-maturely instituted and abuse of court process. In considering the submissions made by the rival parties, the trial magistrate dismissed the

suit on the basis that the plaintiff has no cause of action. Hence the present appeal.

The appellant raised two grounds of appeal that the District Court erred in holding that there was no cause of action and proceeded to dismiss the appeal. He also defaulted the trial Magistrate by holding that the suit was to be sent to ombudsman. When the matter was called for hearing Advocate Mafie appeared for the applicant and the 2nd defendant was represented by advocate Emmanuel Njama.

The court ordered the appeal to be disposed of by way of written submission and set a schedule thereto. Both parties adhered to the set schedule.

I shall not recapitulate in full the submissions made by both Counsel but shall refer to them in the course of discussing substantive issues.

I have carefully followed the discussions by parties and observed that the bone of contention is whether the appellant had no cause of action against the 2nd defendant therefore it was correct to dismiss the claim; and whether the matter had first to be referred to the ombudsman.

I must point out on the outset that I would not discuss the issue of Insurance Ombudsman as extensively addressed by the Counsel for the 2nd defendant on the basis that, firstly, the trial magistrate did not agree with the point of objection that the matter was prematurely filed. **Section 122(1) of the Insurance Act, 2009**, it establishes Ombudsman Services.

Counsel for the 2nd Defendant passionately submitted on the powers of the Ombudsman in resolving insurance disputes through mediation, reconciliation or arbitration. He has also stressed on the importance of utilizing the methodology into resolving insurance disputes expeditiously. I verily commend the submission and the suggestions thereof. However, the Counsel has not provided this Court the Regulation requiring requires parties to firstly exhaust the remedies available before resorting to legal mechanism. As it is, it is an option hence I would not agree it to be a point of objection to impede a party in bringing the matter to court. More – so according to **section 124(1) of the Act**, Ombudsman powers to grant an award is limited to fifteen millions only.

Now coming to the issue of third party procedure as referred by the Counsel for the 2nd defendant that the Plaintiff could not acquire

automatic right to sue without adhering to such procedure. First of all learned Counsel for the 2nd Defendant mis-construed the law. Accordingly, under **Order 1 Rule 14 of the Civil Procedure Code, Cap 33 RE 2002**, it is the defendant who initiates third party procedures where she feels that the claim against her is indemnified by a third party or that a relief claimed by the plaintiff is connected to the third party. It is unheard of his assertion in his submission that a Plaintiff cannot sue the 2nd defendant without first adhering to 3rd party procedure. For the purpose of clarity **Order 1 Rule 14(1) of CAP 33** reads:

*"14.-(1) Where in any suit **a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party")-***

(a) any contribution or indemnity; or

*(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff, **the defendant may apply to the court for leave to present to the court a third party notice**".*

From the above provision of the law, it is not the Plaintiff who initiates 3rd Party Procedure but the Defendant.

The Plaintiff in her submission in chief has referred to a number of cases explaining the cause of action. She cited the cases of **Stanbic Finance Tanzania Ltd Vs Giuseppe Trupia and Chira Malavasi**, Commercial

Case No. 42 of 2000 (HC); and **Antony Leonard Msanze and Another Vs Juliana Elias Msanze & Others**, Civil Appeal No. 76 of 2012 (CA) subscribe to the principles that cause action arise when there are facts occasioning a party to make a demand or seek redress; and that the claim is presented in the plaint and not as weighed against the defence statement. Most importantly as held by the Court of Appeal, if the plaint does not disclose cause of action, the remedy is to reject it and not dismiss.


In the instant cases, it is indisputable that the 1st defendant was insured by the 2nd defendant. The Plaintiff's claim against both defendants jointly and severally is for payment of Tshs. 85,000,000/- being compensation for specific and general damages. On the other hand the law i.e. **Order 1 Rule 6 and 7 of Cap 33** allows the Plaintiff to join parties jointly and severally and where in doubt as from whom he is entitled to obtain redress, she may join two or more defendants. It is not disputed that at the time of accident the 2nd respondent was insurer of the vehicle No. T478 DDL Toyota Coaster Bus. The said vehicle was involved in the accident while being driven by the 1st defendant. Therefore plainly, the 2nd defendant is a necessary party to this suit. The 2nd defendant may either join the 1st defendant in defending the suit or defend her position and liability in the case. Therefore, I would not completely rule out that there is no cause of

action against the 2nd defendant. After all as correctly submitted by the counsel for the plaintiff; if the court is of the views that there is no cause of action; the remedy was to struck out the plaint in terms of **Order 1 Rule 2 of Cap 33** and not dismiss it.

In dismissing the whole plaint, the trial magistrate did not even consider the claim of the plaintiff against the 1st defendant which means he was simply cleared from the plaintiff's claim.

All said and done, I find the appeal to be meritorious and I allow it with costs. The trial magistrate wrongly dismissed the plaint and I accordingly quash and set aside the dismissal order of 12.09.2019. I further remit the file to the District Court and order that Civil Case No. 16 of 2019 be heard and determined on merits by another magistrate.

Accordingly ordered


R.A. Ebrahim
Judge

Dar Es Salaam
06.03.2020