**Onama v National Insurance Corporation**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 30 January 1974

**Case Number:** 1166/1973 (70/74)

**Before:** Kakooza Ag J

**Sourced by:** LawAfrica

*[1] Insurance – Motor Insurance – Nominal defendant – May be sued only when vehicle uninsured and*

*neither owner nor driver identified – Traffic and Road Safety Act* 1970, *s.* 44 (*U*)*.*

**Judgment**

**Kakooza Ag J:** In the substantive suit which came before me, the plaintiff, having been granted letters

of administration on 10 May 1973, brought action, as the administrator of the estate of the late Lt. Martin Kenyi, against the defendant for the benefit of the members of the family of the deceased under ss. 7 and 8 of the Law Reform (Miscellaneous Provisions) Act (Cap. 14). The cause of action arises out of a collision between the deceased’s car and a Land Rover, Reg. No. E.2692, which was being driven by one Leonard Bugonga, now dead, along Kampala/Entebbe Road, on 17 February 1973. At the opening of the hearing, Mr. Bamuturaki, for the defendant, made a preliminary objection. He submitted that the suit was bad in law and misconceived in that it is brought against the defendant as a nominal defendant when the driver of the vehicle is known. He referred to s. 44 (1) (*b*) of the Traffic and Road Safety Act 1970 which says: “44. (1) Where the death of or bodily injury to any person is caused by or through or in connection with the use of a motor vehicle, trailer or engineering plant, and, (*a*) ........................................; or (*b*) the vehicle is an uninsured motor vehicle, trailer or engineering plant and the identity of the owner or driver cannot be established after reasonable inquiries have been made, any person who could have obtained a judgment against the owner or driver of the motor vehicle, trailer or engineering plant in respect of that death or bodily injury may obtain against the nominal defendant the judgment which in the circumstances he could have obtained against the owner or driver of the motor-vehicle, trailer or engineering plant.” On the strength of these provisions, counsel submitted that the nominal defendant can be sued only when the vehicle is uninsured and when the owner or driver thereof is not found. In this suit, the driver was known to the plaintiff, accordingly, the plaintiff had no option to sue the nominal defendant; even if the driver was dead, as here, the plaintiff could sue the driver’s estate. Counsel further referred to s. 45 (1) (*b*) of the Traffic and Road Safety Act, which says: “45. (1) Where .................................................... (*a*) ......................................; and (*b*) the death or bodily injury is one against liability for which the owner or driver or other person would have been indemnified if there had been in force in respect of that motor vehicle, trailer or engineering plant a contract of insurance under this Part of this Act, then, subject to the provisions of this section, the amount of any judgment obtained by any person against the owner or driver or other person in respect of the death or bodily injury shall be paid to that person by the nominal defendant.” Counsel put emphasis on the phrase “. . . the amount of any judgment” in s. 45 (1) (*b*) (*supra*) and submitted that s.44 (1) (*b*), read together with s. 45 (1) (*b*), has the inescapable meaning that the nominal defendant can be sued only if the vehicle is uninsured and the driver is not known. On this first point of law, Mr. Bamuturaki submitted, the suit was misconceived under s. 44 (1) (*b*) and premature under s. 45 (1) (*b*), premature because the driver being known, the plaintiff should go against him first. In passing, counsel pointed out that s. 45 speaks of s. 35 of the same Act. Mr. Kulubya, for the plaintiff, contended that counsel for the defendant had deviated from his pleadings in his defence by pleading s. 45 (1) (*b*) and that as he had no notice of these pleadings, they should be struck out. Regarding s. 44 (1) (*b*), counsel put emphasis on the “or” between ss. 44 (1) (*a*) and 44 (1) (*b*) and the “or” between “owner” and “driver” and the phrase “. . . identity of owner or driver cannot be established”. He argued that the “or” should be interpretated to mean “and” in the sense that one did not have to fail to identify both owner and driver but failure to identify one of them would qualify one to go against the nominal defendant. Referring to the plaint, paragraph 7, counsel pointed out that the motor vehicle driven by the driver was uninsured and that the plaintiff had taken all reasonable steps to trace the owner of the motor-vehicle but in vain. Counsel added that he was putting emphasis on lack of insurance and owner but not on driver and that that was why he submitted that failure to find either owner or driver entitled one to go against the nominal defendant. Regarding s. 45, Mr. Kulubya submitted that this was a section which assumed that one had been able to identify the owner or driver. He again submitted that the “or” between “owner” and “driver” therein, should be interpreted to mean “and”. He added that as this section envisages a court action first, he could not see how it could be read together with s. 44 (1) (*b*) and if in conflict, which of the two would prevail. Counsel argued that s. 35 talks about settling, a stage that had not been reached. As the pleadings on ss. 45 and 35 had taken him unaware, counsel for the defendant should not be allowed to plead them. He should stand or fall by s. 44 (1) (*b*) already pleaded in his defence. On the submission of counsel for the plaintiff that the “or” should mean “and”, he submitted that as the plaintiff had no remedy under s. 44 (1) (*a*), the “or” between the two clauses did not affect clause (*b*). In (*b*) alone, the “or” could not mean “and”. The words should be given their natural meaning and the meaning attached by counsel for the plaintiff was not supportable. Counsel submitted that there are three categories of circumstances under which the nominal defendant may be sued: (*a*) where identity of the motor-vehicle cannot be found physically; (*b*) where the motor-vehicle is identified but is uninsured and, on top of that, the driver or owner cannot be traced; (*c*) where, under section 45 (1) (*b*), judgment is not satisfied. Accordingly, he submitted, where, as here the driver is known, it would be making s. 44 (1) (*b*) absurd, if the plaintiff left the driver alone and went against the nominal defendant. He could do this only if both the owner and driver were not there. From the submissions of both counsel, the following appear to me to be the issues: is the suit maintainable under s. 44 (1) (*b*)? First of all, of the three categories of circumstances, ably analysed by counsel for the defendant, under which action may be brought against the nominal defendant, only category two is relevant in this suit. The first issue will therefore be decided solely on that basis. Under this category, which is s. 44 (1) (*b*), judgment may be obtained against the nominal defendant on two conditions, namely, the motor-vehicle must be uninsured at the time of the cause of action and secondly, the identity of the owner or driver must not have been established after reasonable inquiries have been made by the plaintiff. Now, it is not disputed by either party, and it is clearly pleaded in the plaint, that the land rover was uninsured. The first condition is therefore satisfied. But the second condition must also be satisfied before judgment can be obtained against the nominal defendant. In relation to this second condition, counsel for the defendant submitted that once the plaintiff has established the identity of either the owner or driver, then, he cannot go against the nominal defendant but against that owner or driver as the case may be. That is to say, the nominal defendant can only be sued if both owner and driver are not identified. Plaintiff’s counsel, on the other hand, said that he was putting emphasis on lack of insurance and owner but not on driver. He further submitted that the “or” between “owner” and “driver” should be interpreted to mean “and” in the sense that one did not have to fail to identify both owner and driver in order to satisfy the second condition but failure to identify one of them would suffice. It seems to me that s. 44 (1) (*b*) covers two situations: first, where the vehicle is being driven by the owner himself and secondly, where the vehicle is being driven by a person other than the owner. In the first situation, the plaintiff, in order to be entitled to bring action against the nominal defendant, would have to have made reasonable inquiries regarding the identity of the owner in vain. In the second situation, the plaintiff would have to have made reasonable inquiries regarding the identity of both the owner and driver in vain in both cases. Once the plaintiff succeeds in identifying either the owner or the driver, then the second condition is not satisfied and accordingly no judgment, under s. 44 (1) (*b*), can be obtained against the nominal defendant. The present suit falls under the second situation above. I rule, therefore, that the suit, having failed to satisfy both conditions under s. 44 (1) (*b*), is not maintainable under that section. The suit is therefore dismissed with costs to defendant. *Order accordingly.* For the plaintiff:

*S Kulubya*

For the defendant:

*GW Bumuturaki* (instructed by *Kirenga & Gaffa*, Kampala)