



Peter & another (Suing as the personal representatives of the Estate of the Late Geraldine Mwendu Peter alias Peter Geraldine -Deceased) v Bere & 2 others (Civil Suit 136 of 2016) [2024] KEHC 13070 (KLR) (Civ) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13070 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 136 OF 2016
CW MEOLI, J
OCTOBER 31, 2024

BETWEEN

AGNES MWIKALI PETER AND VALENCIA KYALO PETER (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE GERALDINE MWENDE PETER ALIAS PETER GERALDINE -DECEASED) APPLICANT

AND

ABDULLAHI SEGO BERE RESPONDENT

AND

TSUSHO CAPITAL KENYA LIMITED 1ST DEFENDANT

BLUE NILE EAST AFRICA LIMITED 2ND DEFENDANT

RULING

1. Agnes Mwikali Peter and Valencia Kyalo Peter (hereafter the 1st and 2nd Plaintiff/Respondents respectively)) in their respective capacities as the personal representatives of the estate of Geraldine Mwendu Peter alias Peter Geraldine (the deceased), via the plaint dated 9.05.2016 instituted the present suit in which Abdullahi Segu Bere (hereafter the 1st Defendant), Tsusho Capital Kenya Limited (hereafter the 2nd Defendant/Applicant) and Blue Nile East Africa Limited (hereafter the 3rd Defendant) were named as defendants. The suit arose from a fatal accident involving motor vehicle registration number KCF 702P (the subject motor vehicle), and the Plaintiffs sought inter alia general and special damages.
2. Following pre-trial directions, the suit proceeded to hearing between the Plaintiff/Respondents and the 1st and 3rd Defendants. Before the matter could be concluded, the 2nd Defendant/Applicant



appeared through its advocate and filed an application dated 1.03.2023 seeking primarily, leave of the court to enable it file and serve its statement of defence and notice of claim as against the 3rd Defendant, out of time. When the parties attended this court on 8.05.2023 the said application was allowed. The 2nd Defendant's/Applicant's statement of defence dated 27.02.2023 and notice of claim of like date are on record.

3. Subsequently, the 2nd Defendant/Applicant moved the court by way of the Notice of Motion dated 16.05.2024 (the Motion) seeking to have its name struck out from the suit. The Motion is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 1, Rules 10(2), Order 2, Rule 15(1)(a)(b)(c) and (d) and Order 4, Rules 1(1)(f) and 5 of the Civil Procedure Rules (CPR). The said Motion is the subject of this ruling.
4. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the 2nd Defendant's/Applicant's advocate Sophie Akello. Who swore, firstly, that the 2nd Defendant/Applicant changed its name in the year 2019 and is now referred to as 'Loxea Limited.' The advocate then proceeded to depose that the 2nd Defendant/Applicant financed the purchase of the subject vehicle by the 3rd Defendant vide the Master Instalment Sale Agreement dated 23.11.2015 (the sale agreement) and addendum of like date, following which the said vehicle was registered in the joint names of the two Defendants, solely for the purpose of securing the 2nd Defendant's/Applicant's financial interest in the vehicle.
5. The deponent further asserted that upon due delivery of the subject vehicle on 23.11.2015, the 3rd Defendant executed a delivery note and took possession of the subject motor vehicle and was therefore henceforth in control thereof, at all material times, including at the time when it was allegedly involved in the material accident herein, on 2.12.2015. And consequently, the 2nd Defendant/Applicant is a stranger in the proceedings having had no role whatsoever in the events leading to the accident and should therefore not bear any liability arising therefrom. The advocate contended that the 2nd Defendant/Applicant was previously exonerated on similar grounds of being a financier, in a related suit involving the subject motor vehicle, namely Naivasha Civil Suit No. 81 of 2019 (Margaret Nelima Odhiambo v Tsusho Capital Kenya Ltd & Global Sustainable Ltd) and thus urged the court to arrive at a similar finding. Finally, the advocate stated that the 2nd Defendant/Applicant stands to suffer irreparable loss if the order sought is denied.
6. The 1st Plaintiff/Respondent swore a replying affidavit on 8.06.2024 to oppose the Motion. Therein, she deposed that the issue of misjoinder ought to have been raised at the earliest opportune time and not at this late stage in the proceedings. The 1st Plaintiff/Respondent contending further that the Motion is not only bad in law but also brought in bad faith and with the sole aim of delaying the conclusion of the suit. In urging the court to disallow the Motion, she stated that the 2nd Defendant/Applicant is a proper party to the suit by virtue of its joint ownership with the 3rd Defendant, in respect of the subject motor vehicle. That no viable reasons have been given to warrant the order sought or to explain the delay in bringing the Motion.
7. On their part, the 1st and 3rd Defendants indicated that they would not be participating in the proceedings relating to the Motion.
8. Directions were given for the Motion to be canvassed through written submissions. Counsel for the 2nd Defendant/Applicant submitted that it is not in dispute that at the time of filing the present suit, his client and the 3rd Defendant were the registered owners of the subject motor vehicle. However, counsel proceeded to reiterate the depositions in the supporting affidavit that at the time of the accident, the subject motor vehicle was solely in the possession of the 3rd Defendant pursuant to the sale



agreement and addendum thereto. That in view of the fact that the 2nd Defendant/Applicant neither had possession nor control of the subject motor vehicle at the material time, it ought to be struck out from the suit.

9. In supporting her submissions, counsel cited the decisions rendered in P N M & J K M (the legal personal Representative of estate of L M M v Telkom Kenya Limited, Samuel Ndirangu & Godgrey Gateri Ngure [2015] KEHC 1324 (KLR) and Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] KECA 348 (KLR) on the principle of presumption of ownership of a motor vehicle. Counsel further urged the court to consider the decisions in Anthony Kuria Wangari v Guardian Bank Limited [2021] KEHC 2981 (KLR) and Consolidated Bank of Kenya Limited v Mwangi & another [2022] KEHC 3104 (KLR) where the respective courts struck out financiers who were not the beneficial owners of the motor vehicles that were the subject of the respective suits. On those grounds, the court was urged to allow the Motion as prayed.
10. On the part of the Plaintiff/Respondents, their counsel in urging the dismissal of the Motion, asserted that the 2nd Defendant/Applicant is a proper party to the suit by virtue of its joint ownership of the subject motor vehicle at the time of the material accident. Counsel further argued that the 2nd Defendant/Applicant is a necessary party in the proceedings and will assist the court in adjudicating the dispute, regardless of the outcome as relates to the said Defendant. The case of Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] KEHC 1192 (KLR) was cited in this respect. Counsel also cited the decision in D.T Dobie and Company (K) Ltd v Joseph Mbaria Muchina & Another (1982) KLR 1 where the court held that the power to strike out pleadings ought to be exercised only after the court has considered all the facts but without delving into the merits of the case before it.
11. Counsel further contending that the instant Motion is insincere and an attempt to defeat justice, coming over six (6) years since the inception of the suit. Counsel maintains that prior to enjoining the 2nd Defendant/Applicant and the 3rd Defendant to the suit, in their respective capacities as joint owners of the subject motor vehicle, the Plaintiffs'/Respondents' advocates had exercised due diligence.
12. Moreover asserting that the Plaintiff/Respondents were not privy to the purported agreement between the said Defendants if the order sought is granted, the Plaintiff/Respondents will suffer grave prejudice since the outcome of the suit will be pre-empted. Counsel here citing the decision in Kepha Marita Okemwa suing as the personal representative of the estate of Johnsom Okemwa Nyakundi v Mega Choice Limited & I&M Bank Ltd [2021] KEELC 2279 (KLR) where the court dismissed a similar application by the defendant therein on grounds that the defendant was thereby seeking to have the merits of the matter prematurely determined. Counsel therefore urged the court to exercise its discretion accordingly.
13. The Court has considered the rival affidavit material and the submissions on record together with the authorities cited. It is clear that the same fundamentally seeks to have the 2nd Defendant/Applicant struck out from the suit.
14. A pertinent question in the consideration of the Motion is whether the Motion was timeously filed. This suit was commenced by the Plaintiffs/Respondents on 18.05.2016. The record shows that subsequently, the Defendants herein were served with summons to enter appearance and the plaint. However, the 2nd Defendant/Applicant formally appeared on the record for the first time through a notice of change of advocates dated 20.10.2022 followed by the application dated 1.03.2023 seeking leave to file a defence statement and notice of claim against the 3rd Defendant. Pursuant to the leave granted on 8.05.2023, the 2nd Defendant/Applicant filed its statement of defence and notice of claim against the 3rd Defendant, but a year later, on 16.05.2024 brought the present Motion.



15. Thus, the 2nd Defendant/Applicant was at all material times aware of the existence of the suit, a position was acknowledged in its application seeking leave. No credible or reasonable explanation has been given for the delay of over one (1) year since leave was granted, in filing the instant Motion. This delay is inordinate, and unexplained and the Plaintiff/Respondents' complaint in that regard is merited.

16. That said, the relevant portion of Order 1, Rule 10 of the CPR invoked in the Motion provides that:

1. Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.....

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3)

(4)"

17. The above provision was considered in the case of *Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 EA 55, the court observing as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown.

Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

18. Further in *Civicon Limited v Kivuwatt Limited & 2 Others* [2015] eKLR the Court stated regarding the provision and discretion of the court therein that:

“Again, the power given under the Rules is discretionary, which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their



presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings.

Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

19. The argument by the 2nd Defendant/Applicant is primarily that, despite having been registered as a joint owner of the subject motor vehicle, it had no role whatsoever in the events leading up to the material accident and hence no liability, vicarious or otherwise could be apportioned to it. The Plaintiff/Respondents’ response being that the said Defendant/Applicant is a proper and necessary party to the suit by virtue of its association by way of co-ownership of the subject motor vehicle.
20. Without going into the merits of the suit at this juncture, the court notes that it is not in dispute that the 2nd Defendant/Applicant together with the 3rd Defendant are the registered owners of the subject motor vehicle, which vehicle is alleged to have been involved in the material accident. It is apparent from averments in the plaint that this admitted fact was the basis for joinder of both Defendants in the suit.
21. In the premises, the court is of the view that the issue relating to the kind of ownership or control exercised by the 2nd Defendant/Applicant over the subject motor vehicle at the material time, and hence liability ought to be ventilated at the trial and determined at the end of the trial. While the 2nd Defendant/Applicant may be inconvenienced by being retained as a defendant in the suit, its presence appears necessary for the determination of all the issues arising in this suit. In any event, if the court is to ultimately find that the 2nd Defendant/Applicant was improperly enjoined in the proceedings, an award of costs to the said Defendant/Applicant would be adequate compensation.
22. Consequently, the Notice of Motion dated May 16, 2024 fails and is hereby dismissed. The costs of the Motion will abide the outcome of the suit.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31st DAY OF OCTOBER 2024.

C. MEOLI

JUDGE

In the presence of

N/A for the Plaintiffs/Respondent

Mr. Gekonge for 2nd Respondent/Applicant

N/A for 1st Respondent

C/A: Erick

