



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 54 OF 2016

NAOMI MAGHEMA MWASHIGADI,

JOSEPH Mwangi NJOROGE

(BOTH SUING AS THE ADMINISTRATORS OF THE ESTATE OF

SAMUEL KAMAU NJOROGE.....PLAINTIFF

VERSUS

MASENGELI HERBERT.....1ST DEFENDANT

EDWARD GITHAE WANJAU.....2ND DEFENDANT

AND

THE KENYA RAILWAYS CORPORATION.....1ST THIRD PARTY

RIFT VALLEY RAILWAYS CORPORATION.....2ND THIRD PARTY

THE ATTORNEY GENERAL.....3RD THIRD PARTY

THE KENYA NATIONAL HIGHWAY AUTHORITY.....4TH THIRD PARTY

KENYA URBAN ROADS AUTHORITY.....5TH THIRD PARTY

RULING

1. The Defendants herein took out the motion dated 12th September 2019 in which they sought for the following orders inter alia:

i) THAT pending the hearing and determination of the application there be a stay of all steps in;

a) CMCC NO 5204 OF 2014; PURITY MBINYA MULWA VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU.

b) CMCC NO 4918 OF 2016; GEORGE MACHARIA MUTITU VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

c) CMCC NO 7441 OF 2016; GIBSON MUNGAI KIMANI VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

d) CMCC NO 4815 OF 2015; SARAH WANJA MBAKA VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

e) CMCC NO 2213 OF 2014; ALFRED OUKO JAGONGO VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

f) CMCC NO 3015 OF 2014; PATRICK MUTUA KAMOLO VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

ii) CMCC NO 54 of 2016; NAOMI MAGHEMA MWASHIGADI, JOSEPH MWANGI NJOROGE (Both suing as the administrators of the Estate of **SAMUEL KAMAU NJOROGE VS MASENGELI HERBERT AND EDWARD GITHAE WANJAU** be tried as a test case on liability in respect of the suit arising out of an accident involving motor vehicle No KBQ 474C and the train KOA Locomotive NNo. 9312 and vehicle KBL 789E on 30th October, 2013 at Mutindwa Level crossing off outerring road.

iii) THAT all steps in other suits namely;

a) CMCC NO 5204 OF 2014; PURITY MBINYA MULWA VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU.

b) CMCC NO 4918 OF 2016; GEORGE MACHARIA MUTITU VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

c) CMCC NO 7441 OF 2016; GIBSON MUNGAI KIMANI VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

d) CMCC NO 4815 OF 2015; SARAH WANJA MBAKA VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

e) CMCC NO 2213 OF 2014; ALFRED OUKO JAGONGO VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU

f) CMCC NO 3015 OF 2014; PATRICK MUTUA KAMOLO VERSUS HERBERT MASENGELI AND EDWARD GITHAE WANJAU arising out of the aforementioned accident on 30th October 2013 at Mutindwa level crossing outerring road involving Motor vehicle KBL 789E be stayed until **CMCC No. 54 of 2016; NAOMI MAGHEMA MWASHIGADI, JOSEPH MWANGI NJOROGE** (Both suing as the administrators of the estate of **SAMUEL KAMAU NJOROGE VS MASENGELI HERBERT AND EDWARD GITHAE WANJAU** herein is finally heard and determined.

2. The motion is supported by the affidavit of Eva Kahiti, learned advocate for the Defendants. When served, the Plaintiffs filed grounds of objection to oppose the application. The 1st Third party filed the replying affidavit of Wycliffe Omwenga, learned advocate for the 1st Third party to oppose the motion. The 3rd and 5th Third parties filed grounds of opposition to resist the motion.

3. When the motion came up for inter parties hearing, learned counsels recorded a consent order to have the application disposed of by written submissions. However, the 1st Third party was the only party which filed written submissions while the others relied on their responses.

4. I have considered the responses filed by the parties. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion together with the grounds of opposition/ objection. I have also considered the 1st Third party's written submissions plus the authorities cited. The main issues which was ably argued before this court is whether this suit should be made a test suit.

5. The background of this matter is simple and straightforward. On 30/10/16 an accident involving motor vehicle registration no KBQ 474C, Train No. KOA Locomotive No. 9312 and motor vehicle registration No KBL 789E whereof several people were injured. Various compensatory suits listed hereinabove were filed against the Defendants.

6. It is the submission of the Defendants that the determination of this suit as a test suit will save time spent on entertaining determination of similar issues on liability in other matters where several persons sustained injuries out of the accident. It is also argued by the Defendants that this test suit shall ensure just and timely determination of the proceedings.

7. The 1st, 3rd and 5th Third parties opposed the application stating that liability has already been conclusively determined in the case of **Doricus Rael Oyatsi Vs Masengeli Herbert & Another [2018] eKLR** and no appeal has been preferred hence there is no need to entertain the current application. It was proposed that the aforesaid case should instead be used as a test case.

8. The 1st Third Party was quite emphatic that as much as the suits herein arise from a similar cause of action, they have different circumstances in relation to the 1st Third party and as such cannot be said to be precisely similar. It was pointed out that in some cases the 1st Third party has been struck out as a party. It was also argued that the various suits mentioned herein were filed at different times and therefore the issues involved as far as limitation of time is concerned are different.

9. The Plaintiff on their part are of the submission that the Defendants have not disclosed that they have made similar applications for test suits in other cases and the same have been heard and dismissed on various reasons.

10. Having considered the divergent averments and submissions, it is not in dispute that the Chief Magistrate 's Court , Nairobi has already determined the question touching on liability vide Nairobi Chief Magistrate's court Milimani , Civil Case No 5543 of 2014.

11. In the aforesaid suit Hon. A.M Obura (Mrs), Learned Senior Principal Magistrate, found Masengeli Herbert and Edward Githae Wanjau, the 1st and 2nd Defendants wholly liable for the accident vide her Judgment delivered on 22nd February 2017.

12. There is no evidence that the aforesaid decision on liability has been challenged on appeal. With respect, I am persuaded by the arguments put forward by the 1st Third Party that liability having been conclusively determined in the aforesaid matter the same issue cannot be relitigated and determined again. It is no longer an issue pending for determination unless the decision alluded hereinabove has been impugned on appeal.

13. Under Order 38 rule 1 of the Civil Procedure Rules the guiding principles in determining a test suit are set out as follows:

“Where two or more persons have instituted suits against the same Defendant and such persons could have been joined as co-plaintiffs in one suit, upon application of any of the parties with notice to all the affected parties that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in other suits until the selected suit shall have failed to be a real trial of the issues.”

14. It is therefore apparent that under order 38 rule 1 of the Civil Procedure Rules that the current motion cannot be entertained.

15. The Plaintiffs have already stated that the Defendants have filed applications similar to the instant motion but have failed to disclose the same. The Plaintiffs did not disclose the suits where applications similar to the one before this court were filed. The Defendants too did not dispute the Plaintiffs assertions meaning that those applications actually exist.

16. The Defendants did not also dispute the Plaintiffs’ averment that some of those applications were heard and dismissed. In my humble view, since the Defendants did not discount the Plaintiffs averments, this court is entitled to infer that the Defendant had filed similar applications which were heard and dismissed thus rendering the instant application resijudicata.

17. In the end, I am persuaded by the submission of the Plaintiffs and the 1st, 3rd and 5th Third parties that the Defendants motion lacks merit. The same is hereby dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered at Nairobi this 28th day of February, 2020.

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J.K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....For The1st Defendant

.....for the 2nd Defendant

.....for the 1st Third Party

.....for the 2nd Third Party

.....for the 3rd Third Party

.....for the 4th Third Party

.....for the 5th Third Party