



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HC MISC CIVIL APPL. NO. 61 OF 2018

**PAULINE NDUNGE PHILIP (Suing as the legal representative of the estate of
ALFRED KIOKO MUTHOKA (Deceased))..... PLAINTIFF**

-VERSUS-

FRANCIS MUTINDA PHILIP.....1ST DEFENDANT

STEVE MUTUKU PETER..... 2ND DEFENDANT

EQUITY BANK KENYA LTD.....3RD DEFENDANT

OBADIAH NGUYO KAMWALO.....4TH DEFENDANT

RULING

1. In the instant matter the 3rd Defendant/Applicant seek to be removed from the matter as it is the financier and the case of action arose in a traffic accident where the beneficial owner and/or agent drove motor vehicle at the material time.
2. The Respondent/Plaintiff is estate of Kioko Muthoka who was a passenger.
3. The Application by way of a Notice of Motion dated 21/06/2018 is supported by Affidavit of Peter Kariuki, credit manager of 3rd Defendant/Applicant sworn on 21/06/2018.
4. The Application is opposed via Replying Affidavit of Pauline Ndunge Philip sworn on 21/09/2018.
5. The parties agreed to canvass same via submissions but only the Applicant has filed and served the same.

APPLICANT'S SUBMISSIONS

6. The Applicant submits that, it was just a mere financier for the purpose of a loan for the purchase of motor vehicle KBW 256U that was advanced to the 1st and 2nd Defendants who are/were the beneficial owners and also the registered owners of the same M/V. The Applicant has annexed documents to show that the Applicant/3rd Defendant was/is only the financier.
7. The Applicant contends that, it was neither driving nor was it in possession/control and/or management of motor vehicle KBW 256U.
8. It argues that the loans were paid, and the 3rd Defendant's name was removed from the logbook. The 1st and 2nd Defendants are the registered owners of motor vehicle KBW 256U hence they are vicarious liable.
9. The 4th Defendant who was in control/management of the said motor vehicle is solely to blame for occurrence of the said accident.
10. Thus the Applicant submits that, the 3rd Defendant/Applicant is wrongly and/or improperly enjoined on this suit and should therefore be expunged and/or removed from the pleadings since it was just a mere financier and was neither in possession nor control of the said motor vehicle at the time of the accident.

11. The Applicant cites **Order 2 Rule 15**, which states that, at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

- a) **It discloses no reasonable cause of action or defense in law or**
- b) **It scandalous, frivolous or vexatious or**
- c) **It may be prejudice, embarrass or delay the fair trial of the action or**
- d) **It is otherwise an abuse of the process of the court.**

12. The 3rd Defendant/Applicant cites and relies on the following cases, **Civil Appeal No. 417 of 2008 Investments and Mortgages Bank Ltd –Vs- Nancy Thumari and Others eKLR**, where the court held that the Appellants name be struck out from the proceedings since it was improperly enjoined in the suit.

13. It also relies on, **Anyanzwa & 2 Others –Vs- Luigi De Casper and Anor (1981) eKLR**, the court held that the doctrine of vicarious liability depends not on the legal title ownership of the motor vehicle, but on the declaration of the task or duty.

RESPONDENT AFFIDAVIT

14. The Respondent avers that, the Applicant was enjoined, in the suit as a Defendant after the search of the ownership of the motor vehicle revealed that the Applicant was one of the owners of the Motor Vehicle registration number KBW 256U which was involved in a road traffic accident resulting in the death of Alfred Kioko (deceased), and attached copy of the of the record of the search PNP 1.

15. The Respondent further states that, she was not a party to the chattels mortgage agreement which was purely between the Defendants. That the search at the Registrar of motor vehicles did not show the Applicant as financiers but as registered owners of the motor vehicle.

16. The Respondent further states that, if the orders sought by the Applicant in its application dated 21/06/2018 are granted, the Plaintiff and the estate of the deceased will suffer prejudice since the conclusive determination of all the issues and prayers sought in the Plaint dated 11/07/2017 will not be realised.

ISSUES, ANALYSIS AND DETERMINATION

17. After going through the Affidavits, Application and Submissions, the court finds the only issues are;

- a. *Whether Equity Bank Ltd is properly enjoined as a Defendant?*
- b. *What is the order as to costs?*

18. Under Order 2 Rule 15, the court at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

- **It discloses no reasonable cause of action or defense in law or**
- **It scandalous, frivolous or vexatious or**
- **It may be prejudice, embarrass or delay the fair trial of the action or**
- **It is otherwise an abuse of the process of the court.**

19. In **Civil Appeal No. 417 of 2008 Investments and Mortgages Bank Ltd –Vs- Nancy Thumari and Others eKLR**, the court held that the Appellants name be struck out from the proceedings since it was improperly enjoined in the suit.

20. In **Anyanzwa & 2 Others –Vs- Luigi De Casper and Anor (1981) eKLR**, the court held that the doctrine of vicarious liability depends not on the legal title ownership of the motor vehicle, but on the declaration of the task or duty.

21. The Respondent contend that, the Applicant was enjoined, in the suit as a Defendant after the search of the ownership of the motor vehicle revealed that the Applicant was one of the owners of the Motor Vehicle registration number KBW 256U which was involved in a road traffic accident resulting in the death of Alfred Kioko (deceased).

22. The Applicant has averred that it was just a mere financier for the purpose of a loan for the purchase of motor vehicle KBW 256U that was advanced to the 1st and 2nd Defendants who are/were the beneficial owners.

23. The loans were repaid, and the Applicant/3rd Defendant's name was removed from the logbook. The Applicant avers as much and it is not rebutted.

24. It has not been rebutted that, the 1st and 2nd Defendants/Respondents are the registered owners of motor vehicle KBW 256U hence they are vicarious liable. The 4th Defendant who was in control/management of the said motor vehicle is averred to be solely to blame for

occurrence of the said accident. 4th Respondent was not claimed to be Applicant Agent/driver.

25. Therefore the court finds that, the Applicant was just a mere financier and was neither in possession nor control of the said motor vehicle at the time of the accident.

26. The court finds that the application has merit and makes the following orders;

a. Applicant is wrongly and/or improperly enjoined on this suit and is hereby expunged and/or removed from the pleadings.

b. Costs to the Applicant.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE