



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 50 OF 2011

DIAMOND TRUST BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK LIMITED.....DEFENDANT

AND

ORIENTAL COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK OF KENYA LIMITED.....1ST DEFENDANT

KENG SERVICES LIMITED.....2ND DEFENDANT

SUSAN KERUBO BIGINGI.....3RD DEFENDANT

GILBERT GICHANA NYAMWOCHA.....4TH DEFENDANT

NATIONAL TRANSPORT AND SAFETY AUTHORITY

(Sued as the successor of the Registrar of motor vehicles).....5TH DEFENDANT

RULING

1. The Chamber Summons of 3rd July 2018 raises the question whether National Transport and Safety Authority (NTSA) is a necessary party to these proceedings. In that summons, NTSA seeks the following orders:-

a) This Honourable Court be pleased to strike out the 5th Defendant/Applicant from the Amended Statement of Defence & Counterclaim dated 28th November 2013.

b) The Costs of this Application and the suit be awarded to the 5th Defendant/Applicant.

2. This suit which constitutes of a main claim and a counterclaim involves 6 parties namely Diamond Trust Bank of Kenya Limited (DTB), Oriental Commercial Bank Ltd (Oriental), Keng Services Limited, Susan Kerubo Bigingi, Gilbert Gichana Nyamwocha and NTSA.

3. It is the case of DTB that it was at all material times the actual and registered owner of motor vehicle Registration KBC 545S and trailer registration number ZC 9200 and that it hired out the said vehicles to Malison Transporters Company Limited (Malison) pursuant to a Hire Purchase agreement entered between DTB and Malison. DTB is aggrieved that Oriental repossessed the vehicles in the pretext that the vehicles were security in respect to a debt owed to it by one of its customers.

4. That customer is Keng Services Limited against whom Oriental avers that it advanced a sum of Kshs.3,000,000 and created a debenture

over motor vehicle KBC 545S. Oriental asserts that its charge over the said vehicle has priority over all other claims. In respect to NTSA, Oriental contends that the joint registration of the vehicle in the names of DTB and Keng (perhaps Malison) was procured by fraud and is null and void. In the end Oriental seeks the following prayers against all the five (5) parties:-

- a) A declaration that Keng Services Limited is the legal and registered owner of motor vehicle registration No. KBC 545S and that the Debenture created over the same motor vehicle in favour of the Defendant has first and paramount priority over all other claims over the said motor vehicle.
- b) A declaration that the purported transfer of motor vehicle registration number KBC 545S from Keng Services Limited to the joint names of the Plaintiff and Keng Services Limited was procured fraudulently and is null and void.
- c) The payment of the sum of Kshs.6,769,789.40 together with interest at 27.5% per annum or at such rate as the Plaintiff in the counterclaim may in its sole and absolute discretion from time to time determine from 30th October 2013 until payment in full against the 2nd, 3rd and 4th Defendants jointly and severally.
- d) Costs of this counterclaim.

5. In responding to the Application by DTB, Oriental Bank also referred this Court to the replying affidavit of Alphonso Victor Gambo sworn on 28th February 2011. Annexed to that affidavit is a copy of a Registration Book for motor vehicle registration KCB 545S issued pursuant to Section 6(5) of The Traffic Act. It shows that as at 16th July 2008, the vehicle was duly registered in the name of Keng Services Limited. There is also a debenture document dated 17th July 2009 from Keng Services Limited to Oriental for Kshs.3,000,000.00, a security said to operate as a first fixed charge over motor vehicle registration KCB 545S. What is curious however is the existence of another Registration Book over the same vehicle for the same date (16th July 2008) in which the registered owners are shown as Malison and DTB. There is also a copy of records dated 10th February 2011 which shows that as at 23rd July 2008 the said motor vehicle was registered in the names of DTB and Keng Services Limited and that as at 10th February 2011 was registered in the names of DTB and Malison as owners.

6. The case of Oriental is that the existence of this apparent double registration is a work of fraud and in paragraph 5 of its Amended Defence states that the fraud was perpetrated by DTB, the Directors of Keng Services and officials at the office of the Registrar of Motor Vehicles.

7. On its part NTSA argues that the Amended Statement of Defence and Counterclaim is scandalous, frivolous, vexatious and otherwise an abuse of court process and that no reliefs are sought against it. In a word, NTSA asserts that it has no role in these proceedings.

8. NTSA is established under Section 3 of The National Transport and Safety Authority Act (No. 33 of 2012, NTSA Act) and one of its functions is to administer The Traffic Act (see Section 4(1) (e) in conjunction with the First schedule of The NTSA Act). The mandate of keeping records of all motor vehicles and trailers registered in Kenya falls on NTSA (Section 5 of The Traffic Act). The responsibility of registering vehicles in Kenya again falls on NTSA (Section 6 of The Traffic Act).

9. It is of course true that as at 23rd July 2008 (one of the dates around which the controversy herein revolves), NTSA had not been established as The NTSA Act commenced with effect from 1st December 2012. However, by virtue of Section 62 of the NTSA Act, which is on transitional provisions, NTSA has taken over the role of the Registrar of Motor Vehicles and is really the successor in title. In that sense any claim against the Registrar would have to be a claim against NTSA.

10. One allegation in this matter is that the officials in the office of the Registrar of motor vehicles were party to the fraud that led to the double registration of motor vehicle KBC 545S. That double registration is at the heart of the dispute herein. In the counterclaim itself, the prayers sought are against all the Defendants, and the assertion by NTSA that no prayers are maintained against it is not entirely correct.

11. I would think that NTSA are a necessary party. Whether or not Oriental will in the end make out a case against it is of course another matter. Oriental contends that officials of the Registrar's office (a **forerunner to NTSA in certain respects**) are guilty of wrongdoing and has claimed against NTSA as the successor in title. This Court takes a view that given the allegation made against officials of the office of the Registrar, this controversy cannot be effectively resolved without the participation of NTSA.

12. I come to the answer that NTSA fits the description of a necessary party as envisaged in the decision Amon vs Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. 273;

13. The Chamber Summons of 3rd July 2018 is bereft of merit and is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 25th Day of October 2019.

F. TUIYOTT

JUDGE

PRESENT:

Mirei holding brief Shah for Defendant

Rop for Ochieng for 5th Defendant

Court Assistant: Nixon