REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 95 OF 2014

ROCKY DRIVING SCHOOL LIMITED.....APPELLANT

-VERSUS-

PAUL GABRIEL KIGAMBA.....RESPONDENT

(Formerly CMCC Civil Case 4204 of 2013 Milimani Commercial Courts, Nairobi)

JUDGEMENT

BACKGROUND

1. This Appeal arose from the Ruling of **Hon. Ms. I. N. Gichobi, R.M,** delivered on 28th February, 2014 in **Nairobi CMCC No. 4204 of 2013**. The Plaintiff in that suit, who is the Appellant herein, had instituted proceedings against the Respondent herein seeking Kshs.91, 704/= plus interest and costs of the suit.

2. A brief summary of the facts giving rise to the suit in the Lower Court is that on or about 15th July, 2010, the Appellant's agent and/or driver was lawfully driving motor vehicle registration number KBC 030R along Kenyatta Avenue, Nairobi, when the Respondent's agent and/or Driver so negligently drove the Respondent's motor vehicle registration number KAU 978W that he caused it to ram into the Appellant's motor vehicle.

3. As a result of the accident, the Appellant's motor vehicle was extensively damaged.

4. In the Lower Court, the Respondent entered appearance and filed a statement of defense. He denied any occurrence of an accident involving his motor vehicle KAU 978W. He also averred that the Plaintiff's suit does not disclose any reasonable cause of action against him.

5. On 9th September, 2013, the Respondent filed a Notice of Motion application of even date in the Lower Court. He sought an order to strike out the Appellant's suit for being scandalous, frivolous, vexatious and an abuse of the court process.

6. A copy of the application is at page 48-49 of the Record of Appeal. On 5th December, 2013, in response to the Application, the Appellant filed a replying affidavit sworn on even date. The Replying Affidavit is at page 72-75 of the Record of Appeal.

7. They invite the court's attention to the last paragraph on page 129, line 15 to 20, of the Record of Appeal. The Learned Magistrate noted that the Respondent had admitted being the registered owner of motor vehicle registration number KAU 978W. However, he denied ever being involved in an accident with the Appellant's motor vehicle registration number KBC 030R on the material date.

8. It is solely on that basis that the Learned Magistrate allowed the Respondent's application dated 9th September, 2013 and struck out the Appellant's suit with costs.

9. Bing aggrieved by the above decision, the Appellant lodged instant appeal setting out 4 grounds namely:-

> ***1) The Learned Magistrate erred in law and fact by ignoring weighty and triable issues raised in the Plaintiff's pleadings and summarily dismissing the Plaintiff's suit.***
>
> ***2) The Learned Magistrate misapprehended the law and fact into finding that the Plaintiff's suit did not disclose any cause of action against the defendant.***
>
> ***3) The Learned Magistrate showed extreme prejudice by totally ignoring the Appellant's Replying Affidavit and the documents***

already on record and thereby arrived at an erroneous conclusion.

4) The Learned Magistrate showed extreme prejudice by totally ignoring the Appellant's counsel's submissions on issues of law and fact and thereby arrived at an erroneous conclusion.

10. On 06/09/2018, the parties agreed to canvass appeal by way of submissions which were to be filed and exchanged within 30 days.

11. At the lapse of the timeline set, only Appellant had filed submissions.

APPELLANT SUBMISSIONS

12. The Appellant submitted that Order 2 Rule 15 (1) (a) of the Civil Procedure Rules gives the Court power to strike out or order amendment of any pleading that discloses no reasonable cause of action or defense in Law. Order 2 Rule 15 (2) states as follows:-

"No evidence shall be admissible on as application under Sub Rule (1) (a) but the application shall state concisely the grounds on which it is made."

13. It is submitted that for a court to strike out a pleading for not disclosing any reasonable cause of action, it should only consider the pleading and the grounds in support of the application.

14. Under Order 2 Rule 15 (2), no evidence is admissible in an application to strike out a pleading for disclosing no reasonable cause of action. Page 129 line 18 of the Record of appeal the Learned Magistrate in arriving at her decision that the Appellant has no cause of action against the Respondent, took into account the Respondent's supporting affidavit and its annexures.

15. Specifically, the Learned Magistrate took into account the Respondent's letter dated 14th August, 2013 and the letter from the Divisional Traffic Officer, Central Nairobi, dated 20th August 2013.

16. It is contended that the Learned Magistrate considered extraneous evidence in arriving at her decision. She was required by Order 2 Rule 15 (2) to consider only the pleadings and the grounds upon which the Respondent's application was made.

17. Appellant relies on **NAIROBI CIVIL APPEAL NO. 112 OF 2017; TAJ VILLAS MANAGEMENT LIMITED –VS- TAJ MALL LIMITED.**where court held;

"In our view, Order 2 Rule 15 (1) (a) as read with Rule 15 (2) is clear beyond peradventure and does not require more elaboration. The Learned Trial Magistrate was right in declining to look at the affidavit evidence placed on record by the parties. We note that the Learned Judge also made a correct statement of the law when she stated that she was not required to look at any evidence. However, immediately after that, she literally went off the rails and dove headlong into the lease agreement, which she irregularly used to reach the conclusion that the Appellant had no locus standi. With respect, that was a fundamental error because the Learned Judge was supposed to look only at the pleadings. The question of the lease agreement and its interpretation were matters for the trial. It was not the function of the court at that stage to examine evidence in detail to see whether the Appellant's case could succeed. Looking at the pleadings alone as was required by Order 2 Rule 15 (1) (a), the Appellant's plaint clearly disclosed a course of action."

"Accordingly, we are satisfied that the Learned Judge misdirected herself in striking out the Appellant's suit on the basis of evidence which she was not supposed to look at. We allow this appeal, set aside the judgment of the High court dated 10th December, 2017 and substitute therefore an order dismissing the Respondent's appeal. The Appellant shall have costs both in the High Court and in this Court. It is so ordered.

18. The definition of a cause of action was succinctly given in **NAIROBI CIVIL APPEAL NO. 37 OF 1978; DT DOBIE & COMPANY KENYA LTD –VS- MUCHINA**. The Court stated as follows at page 2 paragraph 1, line 1 and paragraph 2, line 5:

"The words "reasonable cause of action" in order VI Rule 13 (1) means an action with some chance of success, when the allegations in the Plaint only are considered.

A cause of Action will not be considered reasonable if it does not state such facts as to support the claim," "The words cause of action means an act on the part of the defendant which gives the Plaintiff his cause of complaint."

19. The Appellant's claim against the Respondent was for Kshs.91, 704/= in damages arising from an accident that occurred on 15th July, 2010.

20. The Police Abstract Report issued at the Central Police Station Nairobi on 20th July, 2010 indicates that motor vehicle registration number KAU 978W was to blame for the accident. A copy of records obtained by the Appellant's insurers established that the Respondent herein is the registered owner of motor vehicle registration number KAU 978W. A copy of the copy of records is at page 66 of the record of appeal.

21. The occurrence of the accident, which is confirmed by the police abstract, gave the Appellant his cause of complaint. Ownership of motor

vehicle registration number KAU 978W was duly confirmed through a copy of records.

22. The Appellant's plaint clearly disclosed a cause of action against the Respondent. The issues the Appellant raised in the Plaint were serious and had a high chance of success. These issues cannot be determined without careful consideration of evidence tendered during full trial.

23. Occurrence of the accident, having been alleged by the Appellant and specifically denied by the Respondent, is a central issue in contention in this suit. A conclusive finding on that specific fact can only be made after tendering evidence and cross-examination during trial.

24. They rely on the following exposition in the 2nd paragraph of page 3 in **NAIROBI ELC NO. 238 OF 2015; KIDBROOKE INVESTMENT LTD –VS- ISAAC MWANGI,** where the court held that:-

> ***"In an interlocutory application, the court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law".***

25. In **THIKA ELC NO. 111 OF 2017; ANTONY NDUNGU MAINA –VS- FAITH WANJIKU MAINA,** where the court held that:-

> ***"In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality."***

26. The Respondent contended that the plaint was scandalous, frivolous and vexatious. The definition of a scandalous, frivolous and vexatious pleading was succinctly given in **MPAKA ROAD DEVELOPMENT LIMITED –VS- KANA.** The court stated as follows at page 162, paragraph 3:-

> "***A matter would only be scandalous, frivolous and vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example imputation of character, where character is not an issue. A pleading is frivolous if it lacks seriousness. It would be vexatious if it annoys or tends to annoy. It would annoy if it contains scandalous matter irrelevant to the action or defense. A scandalous and/or vexatious pleading is ipso facto vexatious."***

27. There is no single paragraph or combination of paragraphs in the plaint which can be said to be scandalous within the definition rendered above.

28. There is nothing irrelevant to the Appellant's plaint that is sought to be advanced. There is nothing in the plaint that would tend to annoy. The issues raised in the plaint are serious. They urge the court to find that the plaint cannot be struck out for being scandalous, frivolous or vexatious.

29. The Respondent also claimed that the Appellant's suit may prejudice, embarrass or delay the fair trial of the action and that the Appellant's suit was an abuse of the court process.

30. The Respondent did not demonstrate how the suit would prejudice, embarrass or delay the fair trial of the matter. There is no averment in the plaint that would have delayed the fair trial of the suit, prejudiced or embarrassed the Respondent.

31. There is no averment in the plaint that would have delayed fair trial of the case. The Respondent's allegations had no basis. It is their humble submission that the Appellant's suit did no prejudice, embarrass or delay the trial of the action. The Appellant's suit was not an abuse of the court process.

32. Further it is argued that, Order 2 Rule 15 of the Civil Procedure Rules states as follows:-

> "*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 is scandalous,, frivolous or vexatious; or**
>
> **c) It may prejudice, embarrass or delay the fair trial of the action; or**
>
> **d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

33. Order 1 Rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. Order 1, Rule 10 provides for substitution and addition of parties. It states as follows:-

> 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."***

34. Where a defendant has been wrongly sued or improperly joined in a suit, striking out the suit is not the remedy stipulated by law. This is demonstrated by Order 1 Rule 9 above. If the suit is instituted through a bona fide mistake, the court can order addition or substitution of a party as stipulated under Order 1 Rule 10 above.

35. On 4th December, 2013, the Appellant filed a Chamber summons application dated 20th November, 2013. It is at page 59 of the Record of Appeal. Through the Application, the Appellant sought to substitute the name of the Respondent with that of Peter Odhiambo. It is also sought to amend the plaint accordingly.

36. The Respondent's application dated 9th September, 2013, was heard and a ruling delivered before the Appellant's application was heard. They humbly submit that the trial court should have considered the Appellant's application and allowed it instead of striking out the suit. They rely on the following exposition at page 2 paragraph 9, line 40 of the DT Dobie decision.

"The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

ISSUES, ANALYSIS AND DETERMINATION

37. After going through the pleadings, submissions and the record, I find the issues are;

1) Whether the trial court was justified in striking out Appellant suit?

2) If above in negative; what are the appropriate orders to make?

3) What are the orders as to costs?

38. The Appellant's claim against the Respondent was for Kshs.91, 704/= in damages arising from an accident that occurred on 15th July, 2010.

39. The Police Abstract Report issued at the Central Police Station Nairobi on 20th July, 2010 indicates that motor vehicle registration number KAU 978W was to blame for the accident. A copy of records obtained by the Appellant's insurers established that the Respondent herein is the registered owner of motor vehicle registration number KAU 978W. A copy of the records is at page 66 of the record of appeal.

40. The occurrence of the accident, which is confirmed by the police abstract, gave the Appellant his cause of complaint. Ownership of motor vehicle registration number KAU 978W was duly confirmed through a copy of records. The Appellant's plaint clearly disclosed a cause of action against the Respondent.

41. The issues the Appellant raised in the Plaint were serious and had a high chance of success. These issues cannot be determined without careful consideration of evidence tendered during full trial.

42. Occurrence of the accident, having been alleged by the Appellant and specifically denied by the Respondent, is a central issue in contention in this suit. A conclusive finding on that specific fact can only be made after tendering evidence and cross-examination during trial.

43. In the case of **DT Dobie** decision the court held;

"The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

44. The suit subject herein was not demonstrated to be so weak that it was beyond redemption and incurable by amendment.

45. Thus court makes the following orders;

a) The appeal is allowed.

b) The matter is to be heard in the magistrates court in Milimani Nairobi.

c) Parties to bear their costs.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE