



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO.242 OF 2013**

**THIOMI LIMITED .....APPELLANT**

**- V E R S U S -**

**KYAKA INVESTMENTS LIMITED.....1<sup>ST</sup>RESPONDENT**

**CMC MOTORS GROUP LTD ..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the ruling and order of Hon. Wasike P. W. (Mr) Resident Magistrate delivered on 12<sup>th</sup> April, 2013 in Milimani Civil Suit no. 8339 of 2005)***

**JUDGEMENT**

1) Thiomi Limited, the appellant herein filed a suit by way of plaint dated 29/7/05 and amended on 17/03/06 against Kyaka Investment Limited, the 1<sup>st</sup> respondent herein, for recovery of damages occasioned to the appellant for repairs to his damaged car. It is alleged by the appellant that on or about 30<sup>th</sup> September 2004, his motor vehicle registration no. KAK 070R was being driven along ArgwingsKodhek road, when the 1<sup>st</sup>respondents car registration no. KAP 533K, rammed into the appellants car causing it extensive damage. The cost of repairs incurred by the appellant amounted to kshs.156,513/=, the amount which the appellant sought as compensation from the 1<sup>st</sup>respondent. The 1<sup>st</sup>respondent filed its defence dated 3/07/2006 to deny the allegations.

2) The 1<sup>st</sup>respondent by way of chamber summons dated 16<sup>th</sup> October 2006 sought leave to issue third party notice against CMC motors Group Ltd as the alleged repossessioners/owners of motor vehicle registration no. KAP 533K, one of the suit subject vehicle. The third party leave was granted on and CMC Motors Group Ltd was enjoined in the suit as the 2<sup>nd</sup> respondent herein. The 2<sup>nd</sup> respondent filed its defence dated 27<sup>th</sup> June 2007. The 1<sup>st</sup> respondent thereafter took out a notice of motion dated 19/11/2012 which motion substantively sought for orders that the suit against it be dismissed with costs for failure to disclose any cause of action against it and as it is an abuse of the court process. Upon service of the 1<sup>st</sup> respondent's application, the 2<sup>nd</sup> respondent did not oppose the application, while the appellant filed a replying affidavit in opposition of the 1<sup>st</sup> respondent motion dated 4/2/2013.

3) Hon. P. W. Wasike, learned Resident Magistrate, on 12/4/2013 delivered a ruling on the 1<sup>st</sup> respondents application by striking out the appellants/plaintiff's suit as against the 1<sup>st</sup> respondent/defendant for failure to disclose any cause of action. Being aggrieved the appellant preferred this appeal. The appellant put forward the following 6 grounds in its memorandum of appeal.

***1. The learned trial magistrate erred in law and in fact by striking out the appellants case against***

*the 1<sup>st</sup> respondent.*

*2. The learned trial magistrate erred in law and in fact by failing to find that the matters arising from the pleadings could only be determined after a full hearing.*

*3. The learned trial magistrate erred in law and in fact by striking out the plaint when evidence placed before the court was not sufficient enough to persuade the court to strike out the suit.*

*4. The learned trial magistrate erred in law and in fact in failing to appreciate that the issue of ownership as between the defendant and third party could only be resolved on a trial upon evidence being adduced.*

*5. The learned trial magistrate erred in law and in fact by applying the wrong principles in interpreting the provision of the Traffic Act.*

*6. The learned trial magistrate erred in law and in fact by failing to find that the plaintiff raised triable issues as between the plaintiff, the defendant and the 3<sup>rd</sup> party.*

4) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the 2<sup>nd</sup> respondent's written submissions. The appellant and the 1<sup>st</sup> respondent did not file their submissions.

5) Though the appellant put forward a total of 6 grounds, the issues raised revolve around the question as to whether or not the trial magistrate was justified in striking out the suit herein for failure to disclose any cause of action. It is the 2<sup>nd</sup> respondent's submission that the learned magistrate based his informed decision on the pleadings and documents on record that clearly established that the appellant/plaintiff suit did not disclose any cause of action as against the 1<sup>st</sup> respondent/defendant. The 2<sup>nd</sup> respondent cited Order 2 rule 15(a) of the Civil procedure Rules that states

**“at any stage of the proceedings, the court may order to be struck and or amend any pleading on the grounds that it discloses no reasonable cause of action or defence in law.”**

6) The 2<sup>nd</sup> respondent further cited the case of **Kenya Commercial Bank –vs- Suntra Investment Bank Ltd (2015) e KLR**, where it was held inter alia that:

**“The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant, and cannot be a bonafide issue between the defendant and the plaintiff.”**

7) It is the 2<sup>nd</sup> respondent's submission that the learned magistrate analysed pleadings and documents on record and applied sound legal principles in making the finding that the motor vehicle was repossessed by the 2<sup>nd</sup> respondent/3<sup>rd</sup> party and sold to another party who is not a party to the suit.

8) The power to strike out pleadings has been held in many decided cases to deprive a party of the opportunity to present its case, which ought to be employed only as a last resort and even then only in the clearest of cases. The power of striking out pleadings or suit should only be exercised after the court has considered all facts and not the merits of the case.

9) The substantive law governing striking out of pleadings is founded in the provisions of Order 2 rule 15 of the Civil Procedure Rules sub-rule 15(1) of the aforementioned order, enacts that:

**At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that:**

- a) It discloses no reasonable cause of action or defence 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. The above provision gives the court power to strike out pleadings

In **Dev Surinder Kumar Bij –v- Agility Logistics Limited** Nairobi civil suit no. 311 of 2013 (2014) eKLR it was held inter alia that

**“For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1) it should be made clear that the issues raised by the plaintiff can neither be substantiated nor disclose any unreasonable or justifiable an action as against the defendant.**

10) In this case, the appellant instituted a suit as against a party who appeared as the registered owner of motor vehicle KAP 533K as per the records at the registry of motor vehicles, pursuant to the provisions of the Traffic Act Section 8 that states “the person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle.”

11) However upon the filing of the defence and subsequent 3<sup>rd</sup> party defence, as a result of the 1<sup>st</sup> respondent intention to make the 2<sup>nd</sup> respondent liable to the appellant, it means a proper suit can still be sustained as against the appellant and the 2<sup>nd</sup> respondent(the 3<sup>rd</sup> party)

12) The court has jurisdiction to strike out pleadings only in clear cases and this has to be exercised with extreme caution. In the circumstances of this case, no reasonable cause of action can be sustained against the 1<sup>st</sup> respondent in respect of the accident herein due to the 3<sup>rd</sup> party defence on basis that the 1<sup>st</sup> respondent was not in actual/physical or legal possession of the motor vehicle registration no. KAP 533K at the time of the accident.

13) As such, the appellant can institute a suit against a party that is the rightful owner of the motor vehicle registration no. KAP 533K, the 1<sup>st</sup> respondent herein having denied ownership of the said motor vehicle.

14) In light of the foregoing reasons, I find merit in the appeal and it is hereby allowed. The order striking out the suit is set aside and is consequently substituted with an order dismissing the motion date 19/11/2012. Costs shall abide the outcome of the suit.

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of December, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent