



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 217 OF 2002

ELIUD RIMO I KIARIE.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL

NAHID MOOSA

MASUD MUSA

BWANAHERI.....RESPONDENTS

RULING

Introduction

1. I am called upon by the defendants in their application dated 11.3.2008 to strike out the plaint for reasons that the High Court has completely absolved the 2nd, 3rd & 4th defendants from culpability for alleged shooting which forms the basis of the entire suit, in the basis of the plaintiffs suit against the 1st defendant in vicarious liability for alleged negligence of the 2nd, 3rd & 4th defendant, and therefore the suit is scandalous, frivolous and vexatious and otherwise an abuse of the process of the court therefore a candidate for dismissal with costs.

2. In opposition to the application, the plaintiff filed a replying affidavit sworn on the 28/3/2008 in which it is deponed that the deponent of the affidavit in support of the application, one MARTIN MUTUNGI, is not competent to swear the affidavit by virtue of being such counsel in this suit; that the plaintiff sues on his own behalf and accord and not as a representative of the estate of the deceased ISAAC H ASHIM whose death was the subject of the inquest; that the suit cannot be defeated on account of misjoinder and that the application was a calculated more to confuse the court and delay the fair trial of the suit.

The pleadings:

3. The plaint dated the 2/5/2002 and filed on 27/5/2002 pleads that on the 16/11/2001 the plaintiff was on his duty as a taxi driver ferrying a passenger to Reef Hotel in Nyalı when the two were sprayed with bullets as a consequence of which his passenger died but he survived.

He therefore pleads negligence against the defendants jointly and severally and prays for General as well as Special damages for the resultant injuries.

4. The defendant filed three sets of statements of defences namely:

- Defence dated 24/7/2002 by Taib A. Taib for the 3rd & 4th defendants.
- Defence dated 5/7/2002 by Taib A. Taib for the 3rd & 4th defendants.
- Defence dated 5/7/2002 by Taib A. Taib for the 2nd defendant.

5. The two statements of defence on behalf of 2nd, 3rd & 4th defendant generally traverse the pleadings in the plaint, deny the connection with the shooting and pleads in the alternative on behalf of the 3rd & 4th defendant, that they acted in pursuit of averting a crime and with a view to arresting the plaintiff as a suspect.

6. The defendant here, as said before, filed the application dated 11/3/2008 in which they seek orders that:-

- i. THAT the Plaint filed herein by the Plaintiff/Respondent (“the Respondent”) be struck out.
- ii. THAT in the result the suit against the Applicant be dismissed with costs to the Applicant.
- iii. THAT in the alternative the name of the 2nd, 3rd and 4th Defendants herein namely NAHID MOOSA, MASUD MUSA and SALMIN BWANAHERI be struck out from this suit.
- iv. THAT costs of this Application be awarded to the Applicant.

Submissions by the parties

7. The defendants/applicants filed written submissions on the 30/7/2010 in which they reiterated the position that the review by the High Court on the inquest proceedings exonerated them from the shooting. It is to be noted from the beginning that the inquest was about and concerned an inquiry into the death of one Isaq K. Hashim. It had totally nothing to do with the plaintiff, whose claim as summarised above is grounded on the bodily injuries allegedly inflicted upon him by the defendant and to which the 4th & 3rd have filed a defence which alleges Justification.

8. On his part the plaintiff filed submissions essentially asserting that the decision in the inquest in so far as he was a witness was about the death of the deceased and not about his injuries subject matter of the suit. The plaintiff cites three decisions which I have read and taken note of concerning when a court may strike out a pleading.

Determination

9. Having read the application, the Replying Affidavit, the pleadings filed by both sides and the submissions offered; the only issue that emerge for my determination is whether or not the plaint in this matter is liable for being struck out under Order VI Rule 13 b, c & D as read with Order Rule 10(2 and 22 of the repeal Civil Procedure Rules.

Former Order VI Rule 13 b, c & d (now Order 2 Rule 15(1) b, c & d) provides as follows:-

Striking out pleadings [Order 2, Rule 15]

“ (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:

(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.”

10. For the court to accede to an application under that provision the court must be persuaded that the pleading is offending for being scandalous, frivolous or vexatious or that it may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the court process.

11. There is indeed commonality of what is scandalous, frivolous, vexatious prejudicial and embarrassing. The base line in my view is that it is a pleading that fails *bona fides*, is ingenuine, indecent, improper, offensive feeble and hopeless. Such cannot be said to present genuine or true grievances for determination by the court and whose sole intention would be to unduly and unfairly utilise and consume courts time.

12. Therefore a pleading that is capable of description as frivolous, vexatious and scandalous can only be said to be bent on embarrassing and prejudicing the opposite party and ultimately, for it seeks not to address a genuine dispute, abuse to court process.

13. I have keenly read the pleadings filed and the submissions as well as the affidavit by the defendant and observe no attempt is made to prove the impropriety or lack of the *bona fides* of the plaint. The only allegation made is that Judge Maraga exonerated the 2nd, 3rd & 4th defendants from the blame leading to the death of the deceased. No justification is attempted at relating that decision with the plaintiffs suit.

14. I am in no doubt that the application before me fails the threshold. It is most misconceived and on my part, rather than the plaint, it is the application which is calculated to embarrass and delay the fair and just determination of the suit.

15. It is now trite that courts of law should be cautious and very careful in consideration of all facts before striking out a suit.

With our newly entrenched right to access to justice and courts obligation to do substantial justice, a court would only entertain an application and strike out a suit on the clear of the clearest cases. In this case, I am convinced the plaintiffs case does not border on the accusation level against it. The application lacks merit and is therefore dismissed with costs to enable the claim be heard on the merits.

16. I direct that the parties comply with the pretrial requirements under order II as follows:-

- i. The Plaintiff shall within 14 days from today file and serve documents as well as witness statements.
- ii. Upon service the defendant shall file and serve documents and witness statements within 14 days from the date of service.
- iii. Parties shall thereafter settle and file a statement of agreed issues within 2 days from the date of service by the plaintiff.
- iv. If for any reason the defendant shall fail to comply or if there shall be no agreement on issues for determination each party shall file separate issues not later than 60 days from today.
- v. A party who shall have failed to file documents and witness statement shall be deemed not to rely on any documents and shall not rely on any at trial neither shall it be at liberty to call any witness.
- vi. A hearing date shall be fixed at the registry within 30 days after the issues shall have been filed.

Dated, signed and delivered at Mombasa this 4th day of December 2015.

P.J.O.OTIENO

JUDGE