



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 925 OF 2003

MARY WANJIKU (SUING AS ADMINISTRATIX OF THE ESTATE OF

RICHARD NDIRANGU.....PLAINTIFF/RESPONDENT

EVERALD STEPHEN KONGO.....DEFENDANT

TELKOM KENYA LIMITED.....2ND DEFENDANT /APPLICANT

RULING

1. The application before this court is the chamber summons dated 22nd may 2013. The same is brought under section 3A of the civil procedure Act, order 1 rule 14, order 1 rule 2 15(1) of the Civil Procedure Rules. The applicant seeks for orders that; the suit against the 2nd defendant Telkom Kenya limited be struck out with costs.

2. The application is based on grounds that; the plaintiff has no cause of action against the 2nd defendant; the 2nd defendant is not the registered owner of motor vehicle number KAJ 612S that is alleged to have been involved in the accident; the 2nd defendant cannot be held vicarious liable for the alleged acts of negligence of the motor vehicle's driver as he was not its employee, servant or agent; the suit against the 2nd defendant is misconceived bad in law, frivolous and vexatious.

3. The application is supported by the affidavit of Lawrence Karanja sworn on 22nd May 2013; he deponed that the plaintiff instituted the suit against the defendants in 2003 for being negligent and vicariously liable for the acts of its servants in a motor vehicle registration number KAJ 612S allegedly owned by the 2nd defendant; that at the time of the alleged accident the motor vehicle was registered in the names of the Postal Corporation of Kenya, a fact that the plaintiffs admit to in their replying affidavit sworn by her advocate Munyalo R. Nthuli ; the 2nd defendant denies having owned or been in control of the subject motor vehicle and is a stranger to the proceedings and had no beneficial interest in the said motor vehicle and it would be just and expedient to strike out the said suit.

4. The application was opposed and the plaintiff filed a replying affidavit sworn by Munyalo R. Nthuli on 14th October 2013. He deponed that the applicant's application is fundamentally flawed as the mandatory provisions of Order 12 rule 15(2) of the Civil Procedure Rules exclude affidavit evidence where a party seeks to strike out a suit on grounds of failure to disclose a reasonable cause of action; that the application is flawed in that the applicant seeks to rely on affidavit evidence outside the amended plaint filed on 5th August 2008 and that the law places a very high threshold for an argument of failure to disclose a reasonable cause of action to succeed and excluding

affidavit evidence such a claim must be asserted on the assumption that the facts as pleaded in an amended plaintiff must be asserted on the assumption that the facts as pleaded in the amended plaintiff on 5th August 2008 are correct. That a cursory consideration of the facts pleaded in the plaintiff aptly demonstrate that the plaintiff, prima facie case has more than a reasonable cause of action; that at the time of the accident the motor vehicle was registered to the Kenya Post and Telecommunication before it split to Postal Corporation and Telkom Kenya and the two parties are yet to give information on who between the two has ownership of the said motor vehicle and that provides information on the enjoinder of the 2nd defendant.; that the plaintiff discloses a merited cause of action and the same is not scandalous, frivolous and vexatious and the plaintiff is the administratrix of the estate of the late Richard Ndirangu deceased who was in a road accident involving the car he was driving KAJ 612C and the 1st defendant's lorry KZC 584. The plaintiff urged the court to dismiss the applicant's application with costs.

5. The plaintiff/respondent filed a further replying affidavit and reiterated the contents of the replying affidavit and deponed that the Postal Communication filed their defence on 6th November 2009 disputing ownership of the said motor vehicle and that they had since established that as at 7th September 2000 the said motor vehicle belonged to the defunct Kenya Post and Telecommunication and not Postal Corporation of Kenya and the two parties have failed to provide verifiable evidence on who between the two took over the ownership and liability of the vehicle.

6. The respondent further filed a supplementary affidavit sworn by Caroline Ndindi on 14th May 2014, the legal manager of the 2nd defendant. She deponed that the motor vehicle KAJ 612S was not vested in Telkom Kenya Limited and further added that the assets of KPTC were vested in three entities Communication Authority of Kenya CAK formerly CCK, Postal Corporation of Kenya (PCK) and Telkom Kenya and noted that the gazette notice containing motor vehicle vested in Telkom Kenya Ltd, the application should be allowed. As the motor vehicle KAJ 612S which allegedly caused the accident is not among them.

7. Parties filed written submissions. The applicant/2nd defendant reiterated the grounds on the face of the application; that nothing had been brought before court to show that the motor vehicle belonged to the applicant; that the said motor vehicle was not in the list of the assets of vested in either the applicant Corporation of Kenya and without such evidence the applicant cannot be held vicariously liable of the acts of the 1st defendant; that the application was brought under Order 2 rule 15 (2) that excludes affidavit evidence and not Order 2 rule 15(1)(a). The applicant urged the Court to look at the merit of the application and not technicalities as section 1A (2) which gives effect to the overriding objective of this Court while 1B gives the court duty for its just application and efficient determination.

8. The plaintiff respondent in her submissions submitted that the application to strike out pleadings as against the 2nd defendant is flawed and fatally defective as it states that the plaintiff has no cause of action as against the 2nd defendant. She relied on the case of ***DT. Dobie & Company Ltd. vs Muchina [1982] KLR***, where it was held that, *“in the instant case before us, the 2nd defendant's application stated that the plaintiff discloses no cause of action against the 2nd defendant while the rule provides that a pleading might be struck out, not on ground that it discloses no cause of action. The 2nd defendant's application was therefore incompetent.”*

9. Further that Order 2 rule 15 excludes affidavit evidence. That the affidavits of Lawrence Karanja and Caroline Ndindi could only be sworn to support the ground that the plaintiff's frivolous and vexatious which it fails to do as the same supports the ground that the suit discloses no reasonable cause of action against the 2nd defendant and further goes to prove that the motor vehicle does not belong to them and this seeks to dispute facts which gave the plaintiff the right to redress being sought by the plaintiff. She relied on the case of ***Mavuno Industries Ltd and 2 Others -vs- Keroche Industries Ltd [2012] eKLR***, a frivolous suit/action, *“is a suit that has no substance that has no substance, trifles the court, is fanciful, where to put up a defence would be wasting the court's time or is not capable of reasoned judgment.”* Vexatious proceeding, *as one that has no foundation, has no chance of succeeding or where it can really lead to no possible good.*

It was submitted that the two affidavits having failed to prove that the application is frivolous and vexatious and are only filed to introduce evidence in support of the ground that the suit discloses no reasonable cause of action. Counsel relied on the case of **George Muiruri Njenga & Anor –vs- Paul Kagunda Njenga & 3 Others [2014] eKLR**, “it is also provided under Order 2 rule 15(2) of the Civil Procedure Rules that a fact of a plaint disclosing no cause of action must be clear on its face and no evidence shall be admissible in this regard.”

10. It was further submitted that the applicant has failed to meet the threshold required to strike out pleadings. He relied on the case of **George Muiruri Njenga & anor –vs- Paul Kagunda & 3 Others**, where it was held that “the overriding principle to be considered in an application for striking out of a pleading is whether it raises triable issues...” also in the case of **Water –vs.- Sunday Pictorial Newspaper Limited**, where it was held that, “it is well established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed, it has been conceded before us that the rule is only applicable in plain and obvious cases.”

11. It was submitted that Order 1 rule 7 enables the plaintiff to join all persons in order that a question as to which of the defendants is liable and to what extent. Order 1 rule 7 provides, “where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.”

As such misjoinder of parties cannot be a ground for striking out pleadings as against such parties where the plaintiff is in doubt as to whom such redress can be sought and urged the Court to dismiss the application with costs.

The Issues for determination are;

- i. Whether the applicant’s affidavits should be expunged for offending Order 2 rule 15?
- ii. Whether the applicant has met the threshold to have the suit struck out for lack of cause of action or misjoinder of parties?

12. I have read and considered the parties affidavits and submissions made and find as follows. It is trite law that the striking out of pleadings must only be resorted to only in the clearest of cases. See the case of **DT. Dobie & Company Ltd. vs. Muchina (supra)**. The affidavits in support of the application sworn by Lawrence Karanja and Caroline Ndindi on 22nd May 2013 and 14th May 2014 respectively seeks to prove that the motor vehicle allegedly involved in the accident. In my view these are matters that can only be determined at full trial. On this am guided by the case of **HURRY NJUBI NDEKEI V RUTH WANJIKU KAMAU [2005] eKLR**, where it was held that; “pleadings are assertions of broad factual positions as perceived by the party. They are in character, allegations and are by no means, self-proving. Proof of such allegations is not the business of interlocutory applications, but that of full trial with evidence adduced through examination in chief, cross examination and re-examination. Interlocutory application rest on a prima facie position and evidence to support them is primarily by affidavits. Generally, interlocutory applications do not aim to prejudice the course of full trial, but they sometimes pre-empt the trial when it is perceived that the pleadings have no foundation in law, cannot be sustained, or merely scandalous or an abuse of the Court process.”

A plain reading of Order 2 rule 15. (1) provides 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 defence in law;further Order 2 rule 15a (2) provides that, “No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.”

I find therefore that the applicant’s affidavit offend the above section as they intend to adduce evidence

towards the argument advanced that the plaintiff's suit has no cause of action and expunge them from the Court's record.

13. On the ground on misjoinder. Order 1 rule 9 provides that, "*No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*" Thus I find is not reason enough to strike out the plaintiff's suit. I therefore find that the applicant's application lacks merit and dismiss the same with costs.

Orders accordingly.

Dated, signed and delivered this **25th** day of **November** 2014.

R.E. OUGO

JUDGE

In the presence of:-

.....**For the Plaintiff/Respondent**

.....**For the 2nd Defendant/ Applicant**

.....**Court Clerk**