REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 571 OF 2009

KENYA BUS SERVICE

MANAGEMENT LTD ……..…….. APPELLANT

VERSUS

RICHARD OCHIENG OLEWE..... 1ST RESPONDENT

JOHN MWANGI MACHARIA ..... 2ND RESPONDENT

(Being an appeal from the Ruling of the Honourable Resident Magistrate, A. Ireri on 18th September 2009 in Milimani Commercial Courts in Civil Suit No. 8739 of 2004)

J U D G M E N T

This appeal arises from the ruling and order of Hon. A. Ireri, Resident Magistrate delivered/issued on 18th September 2009 in Milimani Chief Magistrate's Court Civil Suit No. 8739 of 2004,

The appellant, Kenya Bus Service Management Limited was the defendant in the said suit whereas the 1st respondent Richard Ochieng Olewe was the plaintiff in the said lower court suit. The 2nd respondent herein John Mwangi Macharia was the 2nd defendant jointly sued with the appellant herein.

By a further amended plaint filed on 14th November 2008, Richard Ochieng Olewe sued the appellant herein Kenya Bus Service Management Limited and John Mwangi Macharia claiming for general and special damages arising from an alleged road traffic accident which occurred on or about 18th August 2003 involving motor vehicle registration No. KAN 821Z belonging to the appellant herein and then being driven by John Mwangi Macharia along Nairobi – Limuru Road at Muguga. The 1st respondent is alleged to have been travelling in the said motor vehicle when it was involved in an accident and he sustained serious injuries.

The appellant herein entered an appearance on 21st January 2009 vide a memorandum of appearance dated 19th January 2009 filed by Mulondo, Oundo, Muriuki & Co Advocates. It also filed defence on 27th January 2009 denying the plaintiff/1st respondent's claim as presented.

In paragraph 3 of the defence, the appellant herein denied being the registered owner of the accident motor vehicle and or ever being the successor in title or otherwise of the Kenya Bus Service Limited, alleging that it is an independently incorporated limited liability company without any association

whatsoever with Kenya Bus Service Limited and put the plaintiff/1st respondent to strict proof thereof. It also denied ever employing the 2nd respondent herein as its driver, servant or agent or in any other capacity in its existence.

It further denied the knowledge of the alleged accident.

The 1st respondent's advocates Muturi Kamande & Co Advocates filed reply to defence on 5th February 2009 reiterating the contents of the plaint as pleaded.

By a chamber summons brought under the provisions of Order VI Rule 13 (1) of the old Civil Procedure Rules, the appellant herein filed on 29th April 2009, sought orders for dismissal of the 1st respondent's suit against the appellant on the grounds that:

a. The suit disclosed no cause of action against the 1st defendant.
b. That the 1st defendant was not registered and had never been registered as owner of motor vehicle registration No. KAN 821Z.
c. That the 1st defendant was an independent limited liability company and had never been and is not a successor in title of Kenya Bus Service Limited.
d. That the suit therein was misconceived and a non-starter as the 1st defendant had never taken over the assets or liabilities of Kenya Bus Service Limited; and
e. That the 1st defendant had never in its existence employed the 2nd defendant as a driver for any of its buses whatsoever.

The 1st respondent filed grounds of opposition contending that his suit raised issues that could only be determined at a full hearing that included among others:-

1. Whether the Kenya Bus Service Management Limited is a successor in title of Kenya Bus Services Ltd and therefore liable in damages as a result of the alleged accident;
2. Whether the 2nd defendant was an employee of Kenya Bus Service Limited at the time of accident thus making KBSM Ltd vicariously liable?
3. Whether the Kenya Bus Service Management Limited was the owner of motor vehicle registration No. KAN 821Z at the time of the accident by virtue of the succession of title of Kenya Bus Services Limited by Kenya Bus Service Limited.
4. That sufficient cause had not been shown to warrant the granting of the orders sought.
5. The application was mischevious and not brought in good faith.
6. The application was hopeless in that it did not raise any arguable ground,
7. The application amounted to gross abuse of court process only intended to frustrate the plaintiff in having the matter heard and finalized.

The said application was heard on 23rd June 2009 with both parties reiterating the contents of their rival positions as per the application and grounds of opposition filed and reiterated above. By a ruling delivered on 18th September 2009, the Resident Magistrate A. Ireri (Ms) dismissed the appellant's application, thereby provoking this appeal.

The memorandum of appeal dated 16th October 2009 sets out seven grounds of appeal challenging the ruling of the Resident Magistrate namely:

1. That the trial magistrate erred in law and fact in finding that there was triable issues raised in the defence.
2. The trial magistrate erred in law and fact in not finding that there was no cause of action disclosed against the appellant.
3. The learned trial magistrate erred in law and fact in finding in favour of the respondent when there was no material and or documentary evidence produced to disclose any cause of action against the appellant.

4. The learned trial magistrate erred in law and fact in not stating in her ruling what triable issues she had discerned in the defence in dismissing the appellant's application.
5. The learned trial magistrate erred in law in disregarding the grounds adduced by the appellant in dismissing the application.
6. The learned trial magistrate erred in law in misinterpreting the provisions of the law under which the appellant had moved the court thus transferring the burden of proof from the respondent to the appellant.
7. That the trial magistrate erred in law and in fact in arriving at a decision that is not in consonance with available evidence.

The appellant prayed for the appeal herein to be allowed and the ruling of 18th September 2009 by the subordinate court set aside, substituting it with an order allowing the application dated 27th April 2009 in the subordinate court.

Directions were given on 12th October 2010 by **Hon. R. N. Sitati J** and the parties hereto agreed to dispose of this appeal by way of written submissions.

The appeal came up for hearing before **Hon. Khaminwa J** (as she then was) on 21st February 2001 and she reserved if for judgment on 18th May 2011, having confirmed that all parties had filed their submissions.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence before it and arrive at its own conclusion. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lesterig** stated that,

"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."

And in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**,the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."

The appellant's application which was dismissed was brought under Order 6 Rule 13 of the Civil Procedure Rules and Section3A of the Civil Procedure Act.

The said rule as repealed was replaced with Order 2 Rule 15 of the Civil Procedure rules, 2010 which in parimateria provided,

"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; 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.

2) No evidence shall be admissible on an application under subrule 1 (a) but the application shall state concisely the grounds on which it is made."

The trial magistrate in her ruling at page 28 of the record of appeal set out the grounds relied on by the applicant found that:

"The application was not supported by any affidavit but that notwithstanding, I am of the considered view that the defence on record does raise some serious triable issues and as such the court may need to hear both parties at a full hearing so as to conclusively come up with a decision."

She held that the application was therefore somewhat premature, the issues raised by the defence being triable, the same must go to full hearing in order for justice to be equitably spread and dismissed it with costs.

SUBMISSIONS

In their submissions in support of this appeal and the grounds set out in the memorandum of appeal dated 16th October 2009, the appellant's counsel's submissions dated 27th October 2010 and filed on 28th October 2010 submits that the appellant not being the registered owner of the motor vehicle registration No. KAN 821Z prompted them to file the chamber summons to have the 1st respondent's suit against it struck out.

Ground 1:

They fault the trial magistrate for failing to appreciate that under Order VI Rule 13 (1) (a) and (20 of the Civil Procedure Rules, no affidavit was required to be filed with the application but only grounds relied on which they had done and therefore she erred in finding that no affidavit supported the application.

They further fault the trial magistrate for finding that the defence raised serious issues capable of being tried and that the court thus needed to hear both parties to the suit. They submit that the trial magistrate ought to have scrutinized both the plaint and defence and having found that the defence raised serious issues, proceeded to strike out the plaintiff's suit against the 1st defendant. Instead it is averred that she looked at the defence in a vacuum and came to a decision that it raised serious issues.

Grounds 2 & 3

In the second and third grounds the appellant faults the trial magistrate for failing to find that there was no cause of action disclosed against the 1st defendant as the plaintiff/respondent did not place any material before the court to prove that there was indeed disclosed a cause of action against the 1st defendant. It is submitted that no documentary or other evidence was given in court to prove any allegations contained in the plaint, such as copy of records of the motor vehicle from the Registrar or a copy of the log book or evidence of any relationship between the 1st defendant and the Kenya Bus Service Management Limited. In their view, the grounds of opposition were mere statement of issues for determination as opposed to grounds of opposition, maintaining that the 1st defendant had been unnecessarily dragged into the proceedings and citing the Mombasa HCC 97/1997.

It was submitted that the plaintiff ought to have availed documentary evidence to an affidavit in reply and or offered an amendment which nonetheless could not breath any life into the plaint.

Grounds 4 & 5

On the 4th and 5th grounds of appeal, it is submitted that the trial magistrate grossly erred in failing to state in her ruling what those triable issues were that she had discerned in the defence that made her dismiss the 1st defendant's application and that she must have misapprehended the application and mistook it for an application seeking to strike out the defence hence, she disregarded the grounds for striking out the plaint thereby arriving at a wrong decision not backed by any cogent reasons.

Ground 6

On the sixth ground of appeal, it is submitted that the trial magistrate transferred the burden of proof to the appellant by stating that there was no supporting affidavit contrary to what the law provided.

Ground 7

Finally on ground seven it was submitted that the decision was not in consonance with the available evidence.

It was further submitted that the resemblance of names between the original plaintiff and appellant did not mean that the latter had or was the successor in title of the former.

They further cited the case of **Peter Kamonye – Vs – Barclays Bank of Kenya NRB HCC 403/2004** that there were no particulars of such taking over of the Kenya Bus Services Limited by the appellant and two decisions to show that where no cause of action is disclosed on the point, the court ought to strike out the claim. These are **NRB HCC 74/2004 Jackson Njuki Kagendo – Vs – Mantu Were Opi & 3 Others** and **NRB HCC 59/2004 Joseph Okumu Simiyu – Vs – East African Building Society & Another**.

The 1st respondent opposes the appeal by his advocate's written submissions dated 9th November 2010 and filed in court the same day, supporting the ruling by the trial magistrate in the lower court. He maintains that there were triable issues that could only be proved or disprove upon a trial and that the trial magistrate was therefore correct in determining that the defence having controverted the contents of the amended plaint in whole had raised issues which could only be determined upon a full trial.

Relying on the **D.T. Dobie & Co. Ltd – Vs – Joseph Mbaria Muchina & Another CA 37/1978** he urged this court to dismiss the appeal herein with costs to the 1st respondent.

I restate that application by the appellant before the trial court was brought under Order 1 rule 13 (1) (a) and Section 3A of the Civil Procedure Rules. That provision states:-

13 (1) (a) 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;***
b. **...**
c. **...**
d. **...**

And may order the suit to be stayed or dismissed and judgment to be entered accordingly, as the case may be.

2) 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 have carefully considered the appeal herein and I find one central issue for determination to dispose of the appeal:-

Issue 1

Whether the plaintiff's suit as presented disclosed no reasonable cause of action or defence in law.

The power to strike out a suit is discretionary and there are laid down principles that must be applied. Striking out of a suit is a summary remedy that courts have held, must be granted in the clearest cases only, and with extreme caution since a court of justice should aim at sustaining a suit rather than terminating it by summarily dismissing it. See **HCC 483 of 2012 Jane Wairimu Turanta – Vs – Githae John Vickey & Equity Bank Ltd & Munene Don**.

In **Francis Kamande – Vs – Vanguard Electrical Services Ltd 1996**, the Court of Appeal held that:

"The summary procedure can only be adopted when it can be clearly seen that a claim or answer on the face of it is 'obviously unsustainable'".

In another Court of Appeal decision of **Olympic Escort International Co. Ltd & 2 Others – Vs – Parminda Singh Sandhu & Another (2009) eKLR** the court held that,

"***It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."***

In the application under Order 1 Rule 13 (1) (a), (2) the applicant is not required to swear an affidavit of evidence, but state concisely the grounds on which it is made.

The reason, I opine, is that the grounds upon which such an application is made must be purely points of law and not factual in nature. That being the case, then it is not expected that the party responding to the application must swear an affidavit of evidence to prove anything, as to do so would be in contravention of Order 6 rule 13 (2).

The appellant in its proceedings/defence and submissions in court stated that it had denied being the registered owner of the motor vehicle registration No. KAN 821A. It had also denied ever having employed the 2nd defendant, and or being a successor in title to the previous defendant Kenya Bus Service Limited. In other words, it had denied liability, vicarious or otherwise attaching to it against the acts of negligence attributed to the 2nd defendant driver of the accident motor vehicle. What I gather the 1st defendant appellant saying is that the suit against it ought to be struck out *ex-debito justiciae* for misjoinder.

The respondent on the other hand maintains that he has a cause of action against both defendants in tort for negligence and that he sustained injuries for which she is entitled to special and general damages for negligence on the defendants. He does so by framing issues which he considers triable to show that he has a prima facie case against the defendant.

Section 8 of the Traffic Act Cap 403 Laws of Kenya provides that

"The person whose name a vehicle is registered shall unless the contrary is proved, be presumed to be the owner."

The appellant has vehemently denied that it was the registered owner of the accident motor vehicle registration No. KAN 821Z at the time of the accident and that neither is it the successor in title of the former Kenya Bus Services Limited. In my view, those allegations and denials are issues of fact that require proof. The issue of proof of ownership is not be taken to mean registration alone. The respondent is not precluded from adducing evidence at the hearing, to prove that the appellant was a beneficial owner of the motor vehicle in question. Issues of companies of limited liability cannot be determined on the face of it. There is more to it, which cannot be determined in an application seeking to strike out a suit. In any event, although the appellant complains that the trial magistrate shifted the burden of proof, to the contrary, it is he who alleges that the burden of proving what he alleges is cast and Section 107 of the

Evidence Act is clear.

In this case, it is the appellant who sought to summarily have the respondent's suit struck out for disclosing no reasonable cause of action. It therefore follows that the burden of proving that the said suit disclosed no cause of action in law lay on them, and not to the respondent to disprove or prove. This was not a full trial of the suit.

In **Osapil – Vs – Kaddy [2000] 1 EALA 187** the court held that,

"A registration card or log book was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle is registered was presumed to be the owner thereof unless proved otherwise."

Nothing prevents the respondent, during trial, to prove that not withstanding the fact that the appellant is not the registered owner of the accident motor vehicle, it is, nonetheless the beneficial owner.

The appellant did not prove on a balance of probabilities that it was not the owner of motor vehicle registration No. KAN 821Z whether by registration or otherwise, and the respondent must therefore be given an opportunity to prove otherwise.

On the question of vicarious liability for acts of the 2nd defendant, the case **Morgan – Vs – Launchbuy (1972) All ER 606** stated that,

"To establish agency relationship it is necessary to show that the driver was using the car at the owners request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

In **Anyanzwa & 2 Others – Vs – Lugi De Casper & Another (1981) KLR 10**. The court stated that;

"Vicarious liability depends not on ownership but on the delegation of task or duty."

In other words, the circumstances of this case in the court below as set out in the amended plaint would not warrant the same being struck out even against the 2nd defendant. The court would, during the trial, be able to establish whether indeed the 1st defendant was the successor in title to the Kenya Bus Services Ltd which evidence can only be obtained from the Registrar of Companies and or by an agreement between the parties. In addition, the court would establish whether the 2nd defendant was the driver of the accident motor vehicle in the course of his employment with the Kenya Bus Services Ltd, the alleged predecessor of the 1st defendant/appellant herein.

The trial magistrate found that the defence raised serious issues. The appellant complains that this was erroneous, because the application and submissions were against the amended plaint and not defence. It may be so, considering the ruling as it is. However, this court as an appellate court has the power to examine and interpret that ruling and come to its own conclusion.

In my estimation, the trial magistrate was referring to the amended plaint, having considered the application as a whole and in my view, such reference to the defence as opposed to the amended plaint did not make much difference or even occasion prejudice to the appellant.

It is in my view, a procedural technicality which is curable under Article 159 (2) (d) of the Constitution to the extent that justice shall be administered without undue regard to procedural technicalities.

Section 1A and 1B of the Civil Procedure Act also mandate this court to do justice to the parties applying the overriding objectives of the law.

It is with such provisions in mind that this court must examine the application and ruling of the trial

magistrate as a whole rather than get embroiled with technicalities as raised by the appellant in the grounds of appeal and submissions which technicalities if applied seek to oust the respondent from the judgment seat instead of letting him ventilate his grievance in court. This court employs the principles espoused in the Constitution of fair hearing and fair trial under Article 50 (1) and access to justice under Article 48 thereof.

It was not for the trial court to seek to gather evidence to be adduced by the parties contrary to sub rule 2 of Order 2 Rule 15 of the Civil Procedure Rules which matter is subject of the full trial of the suit.

It was upon the appellant to satisfy the court that the pleadings they sought to have struck out disclosed no reasonable cause of action or defence in law and confine himself to the specific legal provisions.

By going beyond and requiring evidence to prove ownership of motor vehicle or succession in title, such matters can only be proved by evidence.

In this case, as the suit has been caught up by the new order 11 of the Civil Procedure Rules which requires full discovery of all documents and witnesses a party intends to rely on at the trial, the appellant is not prejudiced.

They can also seek for particulars if they feel the particulars of successor in title disclosed are insufficient.

As to what a cause of action is, **Pearson J** in **Drummond Jackson – Vs – Britain Medical Association (1970)2 WLR 688 at pg 616** defined it as:

"A cause of action is an act of the part of the defendant, which gives plaintiff his cause of complaint. Therefore, what the plaintiff needed to show was that he had a prima facie case against the defendants. The principles set down in D.T. Dobie & Co Ltd – Vs – Muchina & Another (1982) KLR 1 are clear that if a pleading does not disclose any reasonable cause of action or defence ... it ought to be dismissed."

The court however went on to hold that:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it."

In **Osodo – Vs – Barclays Bank international Ltd CA NRB 11/1980**, **Madan, Law JJA & Simpson Ag JA**, the Court of Appeal held that where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionally.

The High Court as far back as in the 1970 case of **Parklands Properties Ltd – Vs – Patel HCC 2/1970** held that:

"where a pleading has failed to comply with rules of pleading (such as where the pleading is evasive, vague and lacking particularity and the material facts are not pleaded, on an application to have the pleading or parts of it struck out on that ground, the hearing of the application may, in the discretion of the court, be adjourned and the party given leave to file an amended pleading within a time frame allowed for that purpose in order that a party may not be deprived of any possible claim or defence."

In **Eco Bank Kenya Ltd – Vs – Bobbin Ltd & 2 Others (2014) eKLR**, the court, in considering an application for striking out of a defendant's defence held that the policy consideration of the approach are that

1. On one hand, a plaintiff should not be kept away from his judgment by unscrupulous defendant

who has filed a defence which is a sham for the purpose only of tempering on the case as long as possible; and

2. On the other hand, a defendant who has a bona fide issue worth of trial should not be denied the opportunity to be heard on his defence on merit to enable the court determine the real issues in controversy completely; that is serving substantive justice on consideration of all facts of the case.

The above principles equally apply in cases where the plaint is the subject under review.

On the issue of who is to prove that the claim raises no reasonable cause of action, the case of **Carton Manufacturers Ltd – Vs – Prudential Printers Ltd [2013] eKLR** is relevant: **Havelock J** (as he then was) stated that:

"The plaintiff therefore, has to satisfy the court that the pleadings which it seeks to have struck out ... disclose no cause of reasonable cause of action or defence in law and that it may prejudice, embarrass or delay the fair trial of the suit. The plaintiff also was to show that pleadings or suit as in this case, is an abuse of the court process and as such, should be dismissed ..."

(Citing **D.T. Dobie & Co Ltd case (Supra)** with approval.)

Having found that the plaint as filed by the 1st respondent discloses reasonable cause of action, in the result, I find that the same should go for full trial so that an informed decision can be made regarding the defendant's claim that it did not own the accident motor vehicle and that it was not a successor in title to the Kenya Bus Services Ltd. The trial magistrate's ruling is therefore upheld with the necessary variations that both the plaint and defence do raise serious triable issues.

Costs of this appeal shall be to the 1st respondent.

Dated, signed and delivered at Nairobi this 9th day of December, 2014

R.E. ABURILI

JUDGE