



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 283 OF 2006

MUNIRA ABDUL PLAINTIFF

V E R S U S

SCANDINAVIA EXPRESS KENYA LTD 1ST DEFENDANT

CMC MOTORS GROUP 2ND DEFENDANT

CLEANWELL PRODUCTS (K) LTD 3RD DEFENDANT

SYNERGY IND. CREDIT 4TH DEFENDANT

RULING

1. The Plaintiff Munira Abdul filed this case seeking to recover from the Defendants general and special damages which resulted from an accident that occurred between trailer KAV 457F/ZC 3825 and motor vehicle KAU 132J Nissan Bus. The accident was caused by the collision between the bus and the trailer. The Plaintiff was travelling in the bus. The accident resulted in many deaths which included the drivers of the bus and the trailer. It also resulted in the injuries to many. As a consequence various suits were filed in different Courts.
2. It is important to note that the 2nd Defendant's name was struck out from this suit by this Court's order of 4th September 2007.
3. By a Notice of Motion dated 22nd October 2008 the 3rd and 4th Defendants sought the following prayers-

“1. THAT this Honourable Court be pleased to direct

that Mombasa High Court Civil Suit No. 283 of 2006 (Munira Abdul –Vs- Scandivania Express Kenya Limited, CMC Motors Group, Cleanwell Products (K) Limited, CMC Motors Group, Cleanwell Products (K) Limited & Synergy Ind. Credit be selected and tried as a test case on liability in respect of all the suits arising out of the accident involving Motor Vehicles Registration Nos. KAU 132J (a Nissan Omnibus) Motor Trailer Registration Number ZC 3825 which occurred at Voi along Nairobi-Mombasa road on 30th May 2006.

2. **THAT all the other suits arising out of the**

aforestated accident namely Malindi SPMCC 228 of 2007 – Said Mahfoudh Awadh (Administrator of the Estate of Asiya Suleiman Ali deceased) –V- Scandinavia Express Limited and Cleanwell Products Ltd, Voi Express Limited and Cleanwell Products Ltd, Voi SRMCC 79 of 2007 – Emmanuel Kombo Ngala –v- Scandinavia Express Limited and Cleanwell Products Ltd, Voi RMCC 141 of 2007 – Masumbuko Charo Ngari –v- Cleanwell Products Ltd, Voi SRMCC 41 of 2007 – Chimwaga Ndungo Katembo –v- Scandinavia Express Limited and Cleanwell Products Ltd, Mombasa CMCC 984 of 2008 – Nicholas Kioko Mutua –v- Scandinavia Express Limited and Cleanwell Products Ltd, SRMCC No. 7764 of 2007 – Gladys Wacheke Mwangi –v- Scandinavia Express Kenya Ltd & Cleanwell Products Ltd be stayed pending the determination of this suit.”

4. The Court on 3rd November 2008 after hearing arguments of the parties involved in those various matters granted the two prayers as prayed. The effect of that order was to make this case to be the test suit among those pending suits.
5. Parties have never undertaken pretrial directions nor fixed this case for hearing since that order was granted.
6. The 3rd and 4th Defendants with their Notice of Motion dated 21st August 2012 now seek the following orders-

“THAT this Honourable Court adopt the judgment on liability delivered in Machakos High Court Civil Suit No. 62 of 2007 (Henry Njuguna Muroki and Anor suing as Administrators of the Estate of The Late Jane Kabara Mwangi (Deceased) –vs- Scandinavia Express Kenya Ltd) on the 23rd April 2009 in respect of this suit and all other suits arising out of the accident involving Motor Vehicle Registration Nos. KAU 132J (a Nissan Omnibus) and Motor Trailer Registration Number KAV 457F/ZC 3825 which occurred at Voi along the Nairobi – Mombasa Road on 30th May 2006.”

7. The judgment of the Machakos High Court case found Scandinavia Express (K) Ltd 100% liable for the accident. As it will be seen from the prayers reproduced above the judgment of the Machakos High Court which the 3rd and 4th Defendants seek that it be adopted in this suit and in all the other suits arising out of the accident was not one of the suits which was the subject of the order of this Court of 3rd November 2008 which it will be recalled made this suit to be the test suit. The judgment of the High Court in Machakos was delivered on 23rd April 2009 after the order in this matter was delivered on 3rd November 2008.
8. The application was opposed by the Plaintiff in **VOI SRMCC No. 79 of 2007 GACHENGO MURIU MATINDI -VS- SCANDINAVIA EXPRESS (K) LTD & ANOTHER.** Gachengo did not participate in the suit before the Machakos High Court. In that regard she deponed in her replying affidavit as follows-

“8. That as the court will notice the test suit was supposed

to be the current suit ie HCCC No. 283 of 2006 Munira Abdul Vs. Scandinavia Express Kenya Ltd & Anor at the High Court Mombasa in which both vehicles the bus and the truck had been sued.

9. That as an interested party I have been waiting to be

served with a hearing notice in the said test suit so that I could participate in the determination of the issue of liability but todote I have never been informed of the

hearing.

10. That the accident was a serious accident in which both

the driver of the bus and the truck perished plus 14 other people and it was therefore paramount that we the survivors of the accident testify as to the causation.

13. That we do not understand why the defendant counsel

now wants to utilize the judgment from the High Court Machakos being HCCC No. 62 of 2007 as the judgment on liability when they can clearly see that only one of the vehicles ie the bus was sued at Machakos and also noting that none of the other interested parties were involved in the hearing.

14. That we question the good faith of the defendant

counsel, in their current application for the following

four reasons-

- a. ***no explanation has been made as to why the test suit at Mombasa where both the tort feasons were sued has never been heard.***
- b. ***no reasons have been advanced as to why I and other claimants who either lost loved ones or sustained injuries were not involved in the hearing of the suit at Machakos.***
- c. ***that although a third party notice was issued upon M/s Cleanwell Products Ltd in the matter at Machakos see page 4 of the judgment, the third party did not participate in the proceedings.***
- d. ***the defendant in the matter at Machakos did not adduce any evidence:- page 4 of the judgment.***

15. That in light of the above the judgment in the Machakos

case is hardly the best judgment to be applied in all matters emanating from the accident.”

9. The 3rd and 4th Defendants submitted that they seek for the judgment

of the Machakos High Court to be adopted in this matter and that other suits because of the ***'interest of uniformity and protecting the integrity and sanctity of this Court that potentially conflicting decisions are not issued in matters arising out of the same cause of action.'***

10. The learned Counsel for the 3rd and 4th Defendants submitted that the

judgment was of a Court of concurrent jurisdiction with this Court and having delivered judgment of that accident it was in the interest of justice to adopt that judgment in this matter.

11. The order of 31st November 2008 ordering that this suit be a test suit

of various suits named therein was made first in time compared to the judgment of the Machakos High Court. When the High Court at Machakos entertained the suit before it, it did not address the Order in this Court of 3rd November 2008. That order of 3rd November 2008 continues to subsist to date. It has not been set aside and this Court unless moved to setting aside cannot ignore it.

12. Over and above that to allow the Machakos High Court judgment to

be adopted in this case would lead to deny the Plaintiff and all the other Plaintiffs in the various suits which were stayed by the order of 3rd November 2008 their right to a fair trial as guaranteed

by Article 25 of the Constitution of Kenya 2010.

13.I have noted with concern that the 3rd and 4th Defendants failed to

serve the Plaintiffs in this case with their Notice of Motion dated 21st August 2012 even though the orders sought would have ultimately adversely affected him.

14.The Court therefore for the reasons set out above hereby dismisses the

Notice of Motion dated 21st August, 2012 with costs to Gachengo Muriu Matindi.

15.This being an accident case, and because the Chief Magistrate's Court

jurisdiction has been enhanced to Kshs. 7 million I do hereby transfer this case to the Chief Magistrate's Court, Mombasa for trial. The Deputy Registrar shall ensure to communicate with all the parties concerned informing them of the new case number allocated to this matter before the Chief Magistrate's Court.

Dated and delivered at Mombasa this 31st day of October, 2013.

MARY KASANGO

JUDGE