



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 162 of 2009

CATHERINE NDUTA NGARACHU *Suing as personal & Legal Representative of the estate of*

Nashon Kuria

Ngarachu (deceased)*.....**PLAINTIFF*

-VERSUS-

PETER GITAU NJONDE.....1ST****
DEFENDANT

SOUTHERN CREDIT BANKING CORPORATION LTD.....2ND****
DEFENDANT

RULING

The 2nd defendant has filed a Chamber Summons application dated 19th September, 2011 seeking orders that the 2nd defendant be struck out of this suit, and costs of the application. The Application is supported by grounds outlined therein and in the Supporting Affidavit sworn by one **Brian Asin** dated 25th October, 2011, the legal officer of the 2nd defendant. It is the contention of the 2nd defendant that it is wrongly joined in the suit since it is not an owner, beneficial owner or otherwise of Motor Vehicle Registration No. KAV 273S (“vehicle”) and that he is a mere financier by way of a loan advanced to the 1st defendant for purposes of the purchase of the said vehicle.

The deponent states that the 1st and 2nd defendant entered into a contract for the advancement of a term loan facility for the purchase of the vehicle; that it was part of the contract that a chattels mortgage to be created and joint registration over the vehicle; and that such registration was only to safeguard its interest in the loan facility advanced to the 1st defendant. Further that an owner according to Section 3 of Cap 405 Laws of Kenya, means the person in actual possession under the Hire Purchase Agreement. The 2nd defendant therefore prays that the suit against it be dismissed with costs.

In opposition to the application, the Plaintiff filed a Statement of Grounds of Opposition dated 28th November, 2011, wherein he contended that the application is premature, mischievous, misconceived and therefore bad in law. The Plaintiff averred that the application is at variance with the supporting affidavit and therefore the application is legally untenable. It is his contention that the 2nd defendant has confirmed that the vehicle is jointly registered in the names of the defendants, and therefore the extent of joint registration can only be investigated through a plenary hearing and not otherwise and that the application is calculated to attract a mini-trial on the basis of affidavit evidence and thereby pre-empt the defence hearing; and therefore the application is an abuse of the due process of the law. A final ground cited by the respondent is that the supporting affidavit violates the provision of Order 9 Rule 3 of the **Civil**

Procedure Rules, and the same ought to be expunged.

The application was argued orally before me on 12th June 2012. The issue for determination is whether the 2nd defendant has been wrongly joined in the suit herein. There are also technical issues raised by the respondent's counsel as stated above which merit my attention.

Firstly, Counsel has rightly pointed out that the application has been brought by way of chamber summons – a procedure not known in law, with the coming of the new **Civil Procedure Rules**. The repealed **Civil Procedure Rules**, provided procedure in the last rule of each order that an action would be brought before Court, for determination. In instances where no procedure was specified, parties were directed to bring an action by filing a notice of motion under order 51. The **Civil Procedure Rules**, 2010 does not specify procedure for bringing an action at the end of each order, but at Order 51, it makes provision for procedure that all applications to the court shall be made by motion and shall be heard in open court unless the rules expressly provide.

The application herein, despite being brought under chamber summons, was heard in open court, and more importantly, was brought under the correct provisions of the law, to wit, Order 1 Rule 9 and 10 (2) of the **Civil Procedure Rules**, which is in respect to mis-joinder and non-joinder and substitution and addition of parties, respectively. The mistake in filing of the application by way of chamber summons is glaring. However, the mistake is not fatal and cannot be the basis for dismissal of the application herein. The Court is guided by the provisions of Sections 1A and 1B of the **Civil Procedure Act**, which has also been cited by the 2nd Defendant, that the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

The second technical point raised by the Plaintiff's counsel is with respect to provision of Order 9 Rule 3 of the **Civil Procedure Rules**, and whether the Supporting Affidavit ought to be expunged. It is the respondent's contention and rightly so that where an application is brought in respect of a corporation, an officer of the corporation should be duly authorized under the corporate seal. In the instant suit, the 2nd Defendant is a corporation. The deponent, **Brian Asin**, has deponed at Paragraph 1 that he is the legal officer of the 2nd defendant and that he is duly authorized by the Board of Directors of the 2nd defendant to swear this affidavit. The deponent has however not attached the authority under seal in support thereto. The plaintiff prays that the affidavit be expunged for want of an authority under seal, with the resultant effect that the application shall collapse.

This Court finds that the lack of authority under seal is an omission. However, counsel has not shown that such an omission is prejudicial to the Plaintiff. I do not find this technicality fatal to the application. Even if the Court were to expunge the affidavit, resulting to the collapse of the application, the 2nd defendant would still be entitled to file the same application on the same issues to be determined. The Court is guided by the provisions of Article 159 (2) (d) of the Constitution which states that justice shall be administered without undue regard to procedural technicalities. The Court is also guided by Sections 1A and 1B of the **Civil Procedure Act**, referred to hereinabove. Section 1 B (d) provides for the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the parties.

In view of above, I decline to expunge the 2nd defendant's Supporting Affidavit, which therefore leads me to determine the application on merit.

The 2nd defendant avers that it has been wrongly enjoined in the suit, for it is not an owner, beneficial or otherwise, but a mere financier of the 1st defendant, and so as to safeguard its interest until the loan advanced is fully repaid, it is registered jointly with the 1st defendant. The plaintiff on the other hand avers that the nature, extent and tenor of such joint registration can only be investigated at the hearing.

Section 8 of the **Traffic Act**, provides;

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

It is an undisputed fact that the 2nd defendant is registered jointly with the 1st defendant as owners of the vehicle. However, the 2nd defendant has disputed that despite being registered, it is not an owner but its name appears in the registration instrument merely to protect its interest. It has acknowledged the fact of registration but endeavoured to demonstrate that such registration was only limited to protecting its interest over the loan advanced to the 1st defendant.

My view of the matter is that the extent of the applicant's interest in the subject motor vehicle is a matter to be determined by the trial court. The liability if any with respect to the matter under inquiry will flow from the determination of that court. For the moment I see no prejudice to either party being enjoined in the suit pending the determination of liability by the trial court. The second defendant will have opportunity during the trial to demonstrate its interest in the subject motor vehicle and prove that it is not an owner as per Section 8 of the **Traffic Act**.

In the result, I find the application dated 19th September 2011 not merited and dismiss it with no order as to costs. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for plaintiff

..... for 1st defendant

..... for 2nd defendant

..... court clerk

R. LAGAT-KORIR
JUDGE