



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 917 OF 2006

1. BEATRICE ADHIAMBO NGIELA

2. BARRACK AMOLLO (Legal representatives of the estate of

CAREY FRANCIS MANGA ODHIAMBO.....PLAINTIFFS

VERSUS

1. MEHUL KISHORCHAND SHAH

2. N.I.C BANK LIMITED.....DEFENDANTS

R U L I N G

1. The 2nd Defendant has applied by **chamber summons dated 9th October, 2007** essentially for an order to strike its name from these proceedings. The application has been brought pursuant to **Order I, rules 10 & 13, Order VI, rule 13 (1) (c) & (d)** of the **Civil Procedure Rules** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** is also cited.

2. The grounds for the application are -

(a) That the suit against the 2nd Defendant will prejudice, embarrass or delay the fair trial of this suit and is otherwise an abuse of the court process.

(b) That the 2nd Defendant was not in control, possession or the owner of the suit motor vehicle at the time of the alleged accident or at all.

(c) That under the **Chattel Transfer Act** and the **Hire Purchase Act** the 2nd Defendant should not be joined in a suit on negligence of a mortgagor.

2. By a hire purchase agreement made on 23rd March, 2004 between the 1st and 2nd Defendants, the 2nd Defendant let to the 1st Defendant motor vehicle registration number KAR 643 N (hereinafter referred to as the **suit motor vehicle**) at a purchase price of KShs. 486,704/00 payable in 23 monthly instalments of KShs. 12,404/00. The final instalment was to be paid on 23.3.06. The suit accident occurred on 25th August, 2005, but by the time the suit herein was filed, the 1st Defendant had finished payment.

3. The 2nd Defendant now seeks to be struck off this suit on the ground that it had no interest at all in the suit motor vehicle, nor did it or its agents have control over its management, use or otherwise at the time of the accident, and that therefore it did not owe the Deceased any duty of care.

4. During the hearing of the application, Mr. Kimondo, counsel acting for the 2nd Defendant, submitted that the mere fact that the name of the 2nd Defendant is still reflected in the records of the Registrar of Motor Vehicles as a joint owner is not a basis for liability since the 2nd Defendant was purely a financier who was at the time of the accident neither in possession nor control for its benefit of the said vehicle.

5. Mr. Wambua, counsel for the Plaintiffs on his part submitted that the aforesaid records indicate that the 2nd Defendant was a joint registered owner of the suit motor vehicle and not a financier and therefore had interest in the suit motor vehicle. He also referred to **clause 2.11** of the hire purchase agreement saying that the 2nd Defendant's relief is to claim indemnity from the 1st Defendant. Mr Wambua also submitted that the provisions of Order VI rule 13 (1) (c) and (d) of the Rules are not applicable since the 2nd Defendant is not seeking to strike any pleading in this suit.

5. Having considered all matters placed before the court, it appears to me that the main issue for determination in this application is the ownership of the suit motor vehicle as between the 1st and 2nd Defendants. The registration certificate obtained from the Registrar of Motor Vehicles is prima facie evidence of ownership of the vehicle as it will show the name of the registered owner of the vehicle. But this will not necessarily be final proof that the sole or absolute owner is the person whose name is shown.

6. **Section 8 of the Traffic Act, Cap 403** is fully cognizant of the fact that a different person, or different other persons, may be the *de facto* owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: **actual ownership; beneficial ownership; possessory ownership**. A person who enjoys any such other category of ownership may for practical purposes be much more relevant than the person whose name appears in the certificate of registration; and in the instant case, there was such alternative kind of ownership.

7. It is clear from annexure 'HMI' that the 2nd Defendant was a mere financier of the 1st Defendant for purposes of acquisition of the suit motor vehicle by the 1st Defendant, and the 2nd Defendant's interest in the said motor vehicle was merely recorded in the registration book or in the records held by the Registrar of Motor Vehicles for the purpose of securing its interest under the hire-purchase agreement. That interest is the balance of the loan or advances to the 1st Defendant. At the time of the accident the 1st Defendant was in possession of the said vehicle operating it for his own benefit, not the 2nd Defendant's benefit.

8. Indeed, the available evidence shows on balance that the 1st Defendant was the actual, beneficial, or possessory owner of the motor vehicle in question. Therefore, there is no legal basis for extending ownership to the 2nd Defendant.

9. I therefore find that the 2nd Defendant is not a necessary party in these proceedings and is hereby struck out of this suit pursuant to Order 1, rule 10 of the Rules. The 2nd Defendant will have its costs, but against the 1st Defendant, not against the Plaintiffs. It is so ordered.

10. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

DATED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED THIS 21ST DAY OF SEPTEMBER 2012