



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 193 of 2001

**MILLICENT ACHIENG
ODHIAMBO Suing as next
of kin and widow of**

**JOSEPH OLIVER
ODHIAMBO MULUARE
(Deceased)**

.....
.....**PLAINTIFF**

VERSUS

**AKAMBA PUBLIC ROAD
SERVICES
LTD.....
.....**1ST**
DEFENDANT**

**BERNARD G. KAMAU T/A
SHAGGY BUS
SERVICE.....
.....**2ND**
DEFENDANT**

RULING

On 22nd December 2004 the first defendant filed an application by way of chamber summons brought under **Order I rule 10(2)** and **13** of the **Civil Procedure Rules** and **Section 3A** of the **Civil procedure Act**. The application seeks the following substantive orders:-

1. That this honourable court be pleased to strike out the name of the first defendant from the suit.
2. In the alternative the suit as against the first defendant be struck out.

The application was supported by an affidavit sworn by Joseph Oloo, the Traffic Manager of the first defendant company. He deponed that the suit herein arose out of an accident that occurred on the 29th March 2000 involving the first defendant's motor vehicle registration number KAE 283D and the second defendant's motor vehicle registration number KAG 779R. As a result, multiple suits were instituted against the defendants in various courts and pursuant to an application that was made by the first

defendant in **HCCC No. 63 of 2001, CONSOLATA AKINYI VS AKAMBA PUBLIC ROAD SERVICES LTD & ANOTHER** the Honourable the Chief Justice, B. Chunga (as he then was) made an order staying all proceedings in all the suit pending determination of the issue of liability in the aforesaid case. A copy of the above ruling was annexed to the affidavit of Mr. Joseph Oloo. Thereafter, the test suit came up for hearing and on 30th September 2004 a judgment was delivered and the first defendant was wholly absolved from any negligence in the occurrence of the accident and the court found that the second defendant was 100% liable for its occurrence. Copies of the judgment and the decree were annexed to the said affidavit sworn by Mr. Oloo. Mr. Oloo therefore deponed that proceedings as against the first defendant should be discontinued.

The plaintiff's advocates opposed the said application and filed grounds of opposition. They stated that an appeal had been filed against the judgment in HCCC NO. 63 of 2001 aforesaid and that the deceased in this case was a passenger in the first defendant's vehicle and therefore the first defendant had properly been sued. They further stated that striking out of the suit against the first defendant would defeat the test suit as liability was tested between the two defendants and the finding on liability was as between the two and that for the order in the test suit to apply in this suit, the first defendant must still be a party in this suit.

Mr. Nyaribo for the applicant pointed out that although an appeal had been filed against the determination of the test suit, there was no order of stay of execution that had been issued. He further pointed out that the first defendant/applicant was not seeking any costs as against the plaintiff in respect of this matter and therefore urged the court to allow the application for reasons as stated in the affidavit of Mr. Oloo.

Miss Mwangi for the respondent/plaintiff submitted that an appeal had been filed against the judgment that was delivered in the test suit and that striking out the first defendant's case before the said appeal was determined, was prejudicial to the plaintiff's case. She further submitted that the appeal may be rendered nugatory if the first defendant is removed from the case at this stage.

Having considered the affidavits sworn by Mr. Joseph Oloo in support of the first defendant's application and the submissions made by both counsel herein, I note that the order made on 22nd November 2002 stayed all the cases that were pending in court as a result of the said accident pending final conclusion of the test case on the issue of negligence. It was further ordered that the issue of quantum would be dealt with and decided in the individual cases after determination of the issue of negligence. It is not in dispute that the case herein that is, HCCC No. 193 of 2001, was filed on 4th June 2001 and was therefore subject to the orders aforesaid. It was not disputed by the first defendant's advocate that an appeal had been filed against the decision of Angawa J which was delivered on 30th September 2004, wherein the second defendant was found to have been wholly liable in the occurrence of the accident already referred to. It was not disclosed whether the said appeal has been given any hearing date or not.

In deciding this application, I have to bear in mind that the Court of Appeal may decide the appeal in any of the following ways: It may wholly agree with the findings of the trial court or it may apportion liability as between the two defendants or it may hold that the first defendant was wholly liable. If the plaintiff's suit as against the first defendant is struck out at this stage and it so happens that the Court of Appeal fails to uphold the findings of the trial court in their entirety, the plaintiff's suit will be prejudiced. It has to be borne in mind that the plaintiff was a passenger in the first defendant's motor vehicle and until the appeal is determined it cannot conclusively be said that the first defendant was not to blame at all for the occurrence of the accident.

On the other hand, it would be improper for the plaintiff to continue prosecuting this case before the appeal is heard and determined. I am of the considered view that the proceedings herein should be stayed to await the final determination of the appeal now pending before the Court of Appeal and it is so ordered. The costs of the first defendant's application shall be in the cause.

DATED, SIGNED and DELIVERED at Nakuru this 12th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Miss Njoroge holding brief for Mrs Odede for the plaintiff and Mr. Nyaribo for the 1st defendant.

D. MUSINGA

JUDGE