

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Civil Case 19 of 2003

**TALIB HAJI HAMIDI ALI (*Suing as legal representative and administrator
of the estate of Hassan Talib Hamid Ali*)PLAINTIFF**

VERSUS

AKAMBA PUBLIC ROAD SERVICES LTD.....DEFENDANT

RULING

By a chamber summons dated the 17th of December 2004 made under the provisions of **Order 1 Rule 10 (2) and 13 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act**, the defendant has sought the order of this court to strike out its name from the suit. The defendant alternatively prayed that the suit against it be struck out. It also prayed for costs to be awarded to it. The grounds in support of the application are that the defendant contends that it was wrongly or improperly joined as a defendant in the suit. It stated that it had been absolved from liability for the occurrence of the accident which was the subject matter of the suit. It stated that the continued pendency of the suit was prejudicial to the defendant because a decision had been rendered in a test suit, the subject matter of the present suit. The application is supported by the annexed affidavit of Joseph Oloo the Traffic manager of the defendant company.

The application is opposed. The plaintiff has filed grounds in opposition to the application. He states that the plaintiff was not a party to the test suit which rendered a decision at Nairobi. He states that the plaintiff properly sued the defendant in the suit. He further stated that the proceedings in respect of the test suit were stayed pending the hearing of an appeal to the Court of Appeal. He further stated that the plaintiff would be prejudiced if the name of the defendant is struck out as the defendant in the suit.

At the hearing of the application, I heard the submissions made in support of the application by Mr Ngechu on behalf of the defendant. Mr Motanya who had been instructed to hold brief for the plaintiff declined to make any submissions either supporting or opposing the application. I have carefully considered the said submissions made by the defendant. I have also read the pleadings that were filed by the parties to this application. The issue for determination by this court is whether the defendant has established a case to enable this court grant the application sought. Certain facts are not in dispute in this case. It is not disputed that motor vehicle registration No.KAE 283D wherein Hassan Talib Hamid Ali(deceased) was traveling as a fare paying passenger was involved in an accident with motor vehicle registration No. KAJ 779R. Motor vehicle registration No.KAE 283D is owned by the defendant. The said Hassan Talib Hamid Ali was fatally injured during the accident.

The plaintiff in this case sued the defendant on behalf of the estate of the deceased. The plaintiff did not however sue the owner of motor vehicle registration No.KAJ 779R. It is apparent from the affidavit sworn by the defendant that several suits were filed subsequent to the said accident. The suits were referred to the then Chief Justice Bernard Chunga who directed that one of the suits be heard as a test suit on the issue of liability. The suit which was appointed to be heard as test suit was **Nairobi HCCC No.63 of 2001 Consolata Akinyi vs Akamba Public Road Services Ltd & Anor**. After hearing the test suit, Angawa J, found that the owner of the motor vehicle registration No.KAJ 779R was solely liable for the accident involving the two motor vehicles. She however ordered that all the proceedings in respect of the claims filed arising out of the said accident be stayed pending the hearing of an appeal to the Court of Appeal.

A notice of appeal was filed. From the submission made before court it is apparent that the appeal has not

been heard and determined by the Court of Appeal. In my opinion therefore, the defendant prematurely filed the present application. This is because there is a possibility that the decision of Angawa J, may be overturned by the Court of Appeal. There is also a possibility that the decision would be affirmed. Due to that uncertainty this court cannot grant the application sought by the defendant. In any event, the defendant is a necessary party to the proceedings herein whether or not the defendant will ultimately be found to be liable. This is because the deceased on whose Estate this suit has been brought on behalf was a passenger in a motor vehicle owned by the defendant. Whatever the circumstances of the accident, the plaintiff was within his rights to sue the defendant as a necessary party.

I think the course of action that the defendant should have taken was to take third party proceedings against the owner of motor vehicle registration No.KAJ 779R. Such application for third party proceedings was made by the defendant but unfortunately the same has not been canvassed. Due to costs implications, it would only be right that the defendant remains as a party to this suit. The owner of the motor vehicle registration No.KAJ 779R should be joined as a third party to these proceedings. Notwithstanding the finding of the court which heard the test suit, I do hold that the defendant is a proper party to this suit.

In the premises therefore, I do hold that the application filed by the defendant and dated the 17th of December 2004 lacks merit and it is hereby dismissed with costs.

DATED at KERICHO this 2nd day of November, 2006

L. KIMARU

JUDGE