



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

Civil Case 82 of 2002

JORAM WERE & ARNEST MBATI SUING

Thro'

- 1. PAMELA KANAKA WERE 1ST APPLICANT**
- 2. DAVID ABISAI MABINDA 2ND APPLICANT**

VERSUS

- TRANSPARES (K) LTD 1ST DEFENDANT**
- WILSON KOSKEI KIPKAMOI 2ND DEFENDANT**
- AUTO SUAR PARTS LTD 3RD DEFENDANT**
- MOHAN SINGH DHILION 4TH DEFENEDANT**

RULING

In the Chamber Summons dated 28th September, 2005 under Order VI Rule 13 (1) (b) and (d) of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act. The application seeks that:

- 1. The third party notices against the 1st and 2nd third parties/applicants and subsequent third party proceedings against the said 1st and 2nd parties be struck out.**

It is the contention of the applicants that the third party notices are scandalous, frivolous and vexations. Secondly the 3rd party notices are otherwise an abuse of the process of the Court.

Thirdly the suit against the 2nd and 4th defendant who are now being joined as third parties was long dismissed with costs. That the 3rd party notices are only a back door tactic to reinstate the already dismissed suit against the 3rd and 4th defendants. It is alleged that the whole process is meant to harass the applicant.

There is no dispute that the presents two applicants were defendants in the suit as 2nd and 4th defendants. And that on 8.10.2002 the suit against them was dismissed. The suit that was dismissed was between the plaintiffs and all the defendants including the applicants. The suit was for compensation as a result of the accident which is the subject matter of this suit. The other two defendants were aggrieved by the

dismissal of the suit against the 2nd and 4th defendants. It is the contention of the 1st and 3rd defendants that the applicants are wholly to blame for the accident. The first defendants then sought third party proceeding and on 10.5.2005 it obtained leave to investigate third party proceedings against the applicants. The order was granted and the 2nd and 4th defendants were made third parties for purpose of indemnity or contribution. The order joining the applicants as third parties was made on 10.5.2005 and since the applicants have no contested that order, then its present application is misconceived.

It is also clear that the 2nd third party is the owner of the bus in which the plaintiff was travelling, when the accident occurred. The 1st third party was the driver of the said bus. In my understanding the 2nd third party is a common courier and it is incumbent upon to show that the accident was not due to the negligence of its driver is that the probable cause of the accident does not connote negligence on their part. Secondly, the driver of a P.S.V is undoubtedly expected to exercise due care for he has greater responsibility to the passenger on board the vehicle. The inference of negligence has not been displaced and in order to determine the dispute fairly, I think the applicants are necessary parties to this litigation. There is no prejudice that would be visited on the applicants by their participation in the suit. The case between them and the plaintiffs may have been dismissed but that cannot in way opinion be a reason to say the third party proceeding are an abuse of the Court process. The defendants are seeking and is entitled to an indemnity and/or contribution from parties who may have caused or contributed to the cause of the accident under determination. The issue for my consideration is who is to blame for the accident which is the subject matter in this case and the degree of responsibility of each party. Prima facie a common carrier has a greater responsibility to passengers injured under its car therefore it is essential to determine the matter on merit. In the end the applicants may be blameless but as matter stand, their presence before Court is extremely necessary. The applicants in my view are required in the proceedings so that the issue of liability can be properly and effectively be addressed. I am satisfied that the respondents are entitled to an indemnity and/or contribution from the applicants and there is no reason to warrant the removal of the applicants from participating in this suit. In any case the applicants have not applied for the setting aside the order which brought them in as third parties their failure to contest that decision means that the present application is incompetent.

The issue of compensation was between the plaintiff and all the defendants, however the issue of contribution or compensation was never an issue earlier and was never comprehensively and conclusively determined. There is no demonstration by the applicants that the third party proceedings is frivolous or vexations. I have not been shown of any paragraph or pleadings by the respondent which is indecent or offensive or made abusing anybody. The legitimate cause of action of the respondents cannot in my humble view be branded an abuse of the Court process, when their desire is to ventilate their grievances.

In the circumstances it is my decision that it is the applicant's application which is frivolous vexatious and an abuse of the judicial process. The same is dismissed with costs.

Dated and Delivered this 1.12.2005.

M. Warsame

JUDGE

1.12.2005

Coram Warsame Judge.

Mr. Okero holding brief for Onyikwa for the respondent.

Mr. Odeny for the applicants.

Court Clerk Collins.

Court: Ruling read in chambers in the presence of both advoctes.