



**Ng'ati & another (Suing as the legal representatives of the Estate of
Kelvin Ng'ati Mutua - Deceased) v Gitonga & 2 others (Civil Suit
E001 of 2023) [2024] KEHC 14634 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT E001 OF 2023
EM MURIITHI, J
NOVEMBER 14, 2024**

BETWEEN

**BENJAMIN MUTUA NG'ATI 1ST PLAINTIFF
LINDA MWIKALI MBALUKA 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KELVIN
NG'ATI MUTUA - DECEASED**

AND

**TIMOTHY GITONGA 1ST DEFENDANT
TITUS GUANTAI KINYUA 2ND DEFENDANT
SMEP MICROFINANCE BANK PUBLIC LIMITED COMPANY 3RD
DEFENDANT**

RULING

1. By a Notice of Motion dated 18/3/2024 pursuant to Order 1 Rules 3, 9 & 10 (2), Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A & 1B of the [Civil Procedure Act](#), Articles 48 and 50 of [the Constitution](#) and all other enabling provisions of the law, the 3rd Defendant/Applicant seeks that:
 1. This Honourable Court be pleased to order that the name of the 3rd Defendant/Applicant be struck out of the suit.
 2. Costs be provided for.
2. The application is premised on the grounds on the face of it and supporting affidavit of Ruth Njuguna, its legal officer sworn on even date. She avers that the Plaintiff sued the Defendants over a claim for damages arising out of an accident that occurred on 9/2/2020 along Chuka-Meru Road involving



motor vehicle registration No. KCT 156 F (hereinafter referred to as the accident vehicle). The Plaintiff alleged that the 3rd Defendant is the registered owner of the accident vehicle. The name of the 3rd Defendant was added onto the registration of the accident vehicle merely to protect its interests as a financier for a loan facility granted to the 2nd Defendant around September,

2020 for the purposes of business expansion and used the motor vehicle as security. The 2nd Defendant has fully repaid the loan and they are waiting for him to initiate the re-transfer process to have their name removed from the registration records. The 3rd Defendant cannot be held vicariously liable as it was neither the principal nor the insured of the vehicle as alleged by the Plaintiff. The application is absolutely necessary to ensure the determination of the questions in controversy between the parties herein, because it would be improper and unjust to involve the 3rd Defendant in a matter where there is no reasonable cause of action against it. The 3rd Defendant has already incurred costs in defending the suit, and unless the application is allowed, it stands to suffer substantial loss, hardship and grave injustice.

3. In her supplementary affidavit sworn on 11/9/2024, Ruth Njuguna, the 3rd Defendant's legal officer contends that the 3rd Defendant only became a joint owner of the accident vehicle long after the accident and for the sole purpose of protecting its interests as a frantic. While the accident occurred on 9/2/2020, the 3rd Defendant became a joint owner of the accident vehicle in August 2020 after it was offered by the 2nd Defendant as collateral for a loan facility.
4. The Plaintiff has opposed the application vide a replying affidavit sworn by Benjamin Mutua Ng'ati on 25/3/2024. He avers that at the time of the accident, the accident vehicle was jointly registered in the names of the 2nd and 3rd Defendants. The 3rd Defendant, as the registered owner of the accident vehicle at the time of the accident, is therefore a rightful party to the suit.

Submissions

5. The 3rd Defendant urges that even after the addition of its name as a joint owner of the accident vehicle, it remained as a nominal owner with no custody or control of the vehicle. It invites the court to be persuaded by the holdings in *Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 Others* (2017) eKLR and *Ali Abdi Dere v Hash Hauliers Limited & another* (2018) eKLR, and allow the application as prayed.
6. The Plaintiff cites *D.T Dobie and company v Joseph Mbaria Muchina & Another* (1982) KLR 1, *Kepha Marita Okemwa suing as the personal representative of the estate of Johnson Okemwa Nyakundi v Mega Choice Limited & another* (2021) eKLR and *Humphrey Mbaka Nandi t/a Nyati Distillers Limited v Equity Bank (K) Ltd & 2 others* (2018) eKLR on the need to exercise caution before exercising the power to strike out a case. He urges that there is need for a trial hearing to effectively determine the ownership of the accident vehicle at the time of the accident and to get justice for the deceased.
7. The 1st and 2nd Defendants did not file any submissions.

Determination

8. The court has dispassionately considered the application, the responses thereto together with the authorities relied on and finds the sole issue for determination to be whether the 3rd Defendant is a necessary party to this suit.



9. Order 1 Rule 3 of the Civil Procedure Rules provides for joinder as defendants as follows;

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

10. Order 1 Rule 10 of the Civil Procedure Rules provides that;

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto. (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the

plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

11. The 3rd Defendant’s contention is that it was only registered as a joint owner of the accident vehicle to protect its interest in the repayment of the loan facility advanced to the 2nd Defendant. It has further contended that since the 2nd Defendant has repaid the loan in full, then the striking of its name from the registration records is long overdue.

12. In rejoinder, the Plaintiff insists that the 3rd Defendant is a rightful party to the suit by virtue of its registration as a joint owner of the accident vehicle at the time of the accident, and thus vicariously liable.

13. The 3rd Defendant has by documentary evidence, amply substantiated its claim that the occurrence of the accident on 9/2/2020 by far preceded its registration as a joint owner of the accident vehicle in August, 2020. The 3rd Defendant cannot therefore be properly said to have been a joint owner of the accident vehicle at the time of the accident.

14. This court in *Ali Abdi Dere v Hash Hauliers Limited & another* [2018] eKLR, cited by the 3rd Defendant espoused that;

“For my part, I take - and respectfully agree with the decisions cited above taking - the view that a person in the position only of a financier to the acquisition of a motor vehicle and who is registered as a joint owner of the motor vehicle for the purpose of protecting his interest in the full payment of the funds that he has invested in the financing arrangement, without any interest in the operation of the motor vehicle by the purchaser of the motor vehicle, and



therefore not vicariously liable for the use of the vehicle by the purchaser's agent/driver is not a necessary party to a suit for the recovery of damages in negligence arising from alleged negligent use of the motor vehicle...No duty of care and negligence is alleged against the 2nd Defendant. The driver of the motor vehicle is not shown to have been the agent of the 2nd Defendant as to give rise to vicarious liability. I find that there is no cause of action against the 2nd defendant, and the suit against it is struck out with costs to the 2nd defendant, the plaintiff having refused to withdraw the suit on invitation by the 2nd defendant."

15. The court finds that the 3rd Defendant's only interest in its registration as a joint owner of the accident vehicle was to secure the repayment of the loan advanced to the owner of the vehicle, the 2nd Defendant herein, and its subsequent entanglement in this suit is manifestly erroneous. It cannot therefore be held vicariously liable for the acts of the driver and/or owner of the accident vehicle at the material time.
16. The doctrine of vicarious liability was expounded in *Morgan v Launchbury* (1972) 2 ALL ER 606 where it was stated that;

"In order to fix vicarious liability upon the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty."
17. There is no doubt in this court's mind that no purpose will be served by unnecessarily dragging the 3rd Defendant through the entire trial, particularly when it has been shown that it had control over the accident vehicle at the material time and/or at all.
18. This court is enjoined by the provisions of Order 1 Rule 10 of the Civil Procedure Rules to strike out the name of a party who has been improperly joined to a suit. The cardinal tenets of the overriding objectives under Section 1A and B of the *Civil Procedure Act* entreat the court to efficiently and expeditiously dispose of disputes.
19. The court is alive to the fact that a life was lost as a result of the negligence of the driver and/or owner of the accident vehicle. Nonetheless, that driver and/or owner of the accident vehicle at the time of the accident was not the 3rd Defendant, and the court, in its zest to ensure justice is done to the Plaintiff must equally obviate any injustice which may be occasioned on the 3rd Defendant.

Orders

20. Accordingly, for the reasons set out above, the court finds merit in the 3rd Defendant/Applicant's application dated 18/3/2024, and it is hereby allowed as prayed.
21. The Plaintiff shall pay the costs of the application.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Misaro for the Plaintiff.

Ms. Masamba with Ms. Gitari for the 3rd Defendant.

