



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 412 OF 2010

PHILIP ODHIAMBO MESO.....1ST PLAINTIFF

FRIDAH MUDIBO MESO(Suing as the

legal Representatives of

the Estate of Boaz Wafula Meso and

Monica Akinyi Barasa- Deceased).....2ND PLAINTIFF

-VERSUS-

CITI HOPPER LIMITED.....DEFENDANT

-AND-

GRAND BUS SERICES LIMITED.....THIRD PARTY

RULING

This ruling relates to an application dated 15th July, 2019 by the Third Party herein seeking for the following orders;

- a. THAT this Honourable Court be pleased to Strike out the Defendant's Third Party Notice and Statement of Claim against the Third Party**
- b. THAT the costs of this application be awarded to the Third Party**

The application is premised on the grounds on the face of the application and the supporting affidavit of **ROSE KOECH**, a Legal Officer of the third party sworn on 15th July, 2019. The basis for this application is that the third party was not in existence on the date the cause of action arose thus the suit against it is misconceived, scandalous and frivolous; that the suit against the third party is incompetent for the reason that the existence of a party to a suit goes to the substratum of the suit. As a consequence therefore, the third party notice and statement of claim are fatally defective, inadmissible and may prejudice, embarrass or delay the fair trial as between the Plaintiff and the defendant.

In support of the application, the Legal Officer of the third party reiterated the grounds of the application and deponed that the suit against the third party is a non-starter and a nullity hence should be struck out. She further deponed that the accident which gave rise to the present suit occurred on 28th August 2017 while the third party was incorporated and licenced to operate on 6th May 2008 which was more than Nine (9) months after the cause of action arose. The only issue raised by the third party was whether it should be struck out of the suit under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010. It is the third party submission that the suit does not disclose a reasonable cause of action as against it for the reason that it was not in existence at the time the cause of action arose, The third party cited the case of **Carol Alois Osoo & Another v Diane Quattlebaum Hamrick & Another [2018] eKLR** where Munyao J. emphasized the importance of establishing the legal capacity of the person issuing instruction before filing suits since this will determine the rights and obligations that accrue. Further, reliance was placed on the case of **Living Water Church International City Council of Nairobi [2008]eKLR** where **Nambuye J.A** highlighted the inherent jurisdiction of the court under Section 3A of the Civil Procedure Act to strike out suits for being a nullity.

The defendant in opposition filed grounds of opposition dated 3rd October 2019 stating that the issues of ownership raised in the application are triable issues which ought to be addressed in a full hearing and not by way of affidavit evidence. Further that the application being frivolous, scandalous and an abuse of the court process ought to be dismissed. The defendant neither filed a replying affidavit nor submissions although it alluded to an intention of doing the same.

Analysis/Determination:

The only issue for determination in the present application is whether the Third Party herein ought to be struck out of this suit for being improperly joined. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:-

“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.”

Further, Order 1 Rule 14 of the Civil Procedure Rules provides for the time and manner in which the application envisaged under Order 10 (2) of the Civil Procedure Rules is to be brought and states that;

“Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.”

The participation of a third party in a court proceeding is guided by the provisions of **Order 1 Rule 15 (1) of the Civil Procedure Rules** which stipulates that;

“(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...”

In the Ugandan Case of **Yafesi Walusumbi V. The Attorney General of Uganda [1959] E.A. 223** cited in the case of **Josphat Njuguna Kariuki Vs Simon Karichu Irungu[2004] eKLR** the court held that in order for a third party to be lawfully joined, the subject matter between the third party and defendant must be the same as the subject matter between plaintiff and defendant and the original cause of action must be the same. In the present case, the cause of action arose out of an accident that occurred on 28th August 2007 involving the defendant's motor vehicle registration No. KAS 394B and another motor vehicle registration No. 586 UAB 829F. The defendant in an application dated 22nd November, 2011 sought leave to issue 3rd Party Notice to the Third Party on the ground that it owns motor vehicle registration No. 586 UAB 829F and thus equally liable for the accident. The Third Party entered appearance on 1st August 2012 and filed its defence on 6th September, 2012 and witness statement in which it denied ownership of the said motor vehicle.

It is worth noting that from the court record, it is not clear whether directions were issued on how liability as between the defendant and the Third Party would be determined as provided for under Order 1 Rule 22. This court is however guided by **the decision of the Court of Appeal in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** where the court held that; **“where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...”**. I believe the presumption is that the issue of liability can be determined during the hearing.

In the present application, the third party argues that it was incorporated on 6th May, 2008 as per the Certificate of Incorporation attached, which was nine (9) months after the cause of action arose and therefore could not have been a registered owner of Motor Vehicle Registration No. 586 UAB 829F involved in the said accident. It is on this ground that the Third Party seeks to be struck out of this suit as the suit against it is a non-starter as it does not raise any cause of action against it. The Defendant in its grounds of opposition argued that the issue of ownership ought to be addressed in a full hearing. I do not agree with this proposition as the same would be unfair to a third party whose continued participation would not only be costly but time consuming.

I have perused the affidavit of A. Ndumu in support of the application for the third party notice. There is nothing exhibited to prove that the third party is the owner of Motor vehicle registration number 586 UDG/UAB829E. The plaintiff filed a list of documents dated 17th September, 2018. One of the documents is a Police Abstract which does not indicate who the owner of motor vehicle 586 UDG/UAB829E is. However, the Police Abstract indicates that the vehicle was insured by Jubilee Insurance Company under Policy Number P/RLA/251/2020/06/3333. The defendant must have been issued with a copy of that Police Abstract. Further, the defendant could have obtained ownership details either from the police or the insurance company. It is clear that the vehicle had not been registered in Kenya but the police must have released it to a known person or if it was a write off, someone must have been identified as the owner. The defendant does not state how it came to conclude that the third party is the owner of that vehicle.

In the end, I find that the Third Party herein is not properly joined and no cause of action arises as against it and allow the application dated 15th July, 2019. The Third Party Notice together with the Statement of Claim against the 3rd party are hereby struck out. Each party to bear

its own costs.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2021.

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S. CHITEMBWE

JUDGE