REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 5 OF 2017

(Coram: Odunga, J)

ANGELINA KANYI MUINDE (Suing as the wife/widow and legal representative/administrator of the Estate of Joseph Muinde Mutinda (Deceased))..... PLAINTIFF/RESPONDENT

VERSUS

AMBUTU DORRIS KINYA..... 1ST DEFENDANT/APPLICANT

ALBERT MWANGI MATHANGI..... 2ND DEFENDANT/RESPONDENT

EDWARD GIKANDI MWANGI..... 3RD DEFENDANT/RESPONDENT

RULING

1. What triggered these proceedings, according to the Plaintiff herein, was an accident which occurred on 22nd February, 2014. According to the Plaintiff, on that day the deceased was travelling as a passenger aboard motor vehicle registration number KBQ 485R along Nairobi-Mombasa Road when due to the negligence of the 3rd Defendant in controlling motor vehicle registration number KAZ 241, owned by the 1st Defendant, the same collided with motor vehicle registration number KBQ 485R as a consequence whereof the deceased sustained fatal injuries. It was pleaded that the 3rd Defendant was the driver, employee, servant and/or agent of the 1st and/or 2nd Defendants and was then in the normal course of his employment hence the 1st and 2nd Defendants are vicariously liable for the negligence of the 3rd Defendant.

2. By a Chamber Summons expressed to be brought under Order 1 rule 10(2) and 25 of the ***Civil Procedure Rules, 2010***, Sections 1A, 1B and 3A of the ***Civil Procedure Act***, the 1st Defendant herein seeks that her name be struck out from this suit.

3. According to the said applicant, she entered into an agreement with the 2nd Defendant on 26th October, 2011 for sale and purchase of motor vehicle registration Number KAZ 241R Tata Tipper Model 2516 (the subject Motor Vehicle) whose sale was to be effected upon full payment of the purchase price. According to her upon payment to her of the said purchase price by the 2nd Defendant, she released the said vehicle to the 2nd Defendant as per the provisions of the Sale Agreement.

4. The applicant therefore averred that since 26th October, 2011 she has not been an owner of the said vehicle nor has she had any interests or rights therein which rights and interests were relinquished to the 2nd Defendant. She therefore averred that she did not and could not owe any duty of care to the Deceased so as to give rise to any liability in respect of the accident the subject of this suit.

5. The Applicant therefore sought that her name be struck out from these proceedings as she is not a necessary party to these proceedings.

6. The application was opposed by the Plaintiff who attached a copy of the official search for said motor vehicle depicting the same as being jointly registered in the names of the 1st Defendant and Equity Bank (Kenya) Limited as at 11th April, 2016. According to her, she was not privy to the details of the sale of the said vehicle and cannot vouch for the authenticity of the alleged sale agreement which, based on legal advice, she believed was not admissible in evidence for want of stamping.

7. It was therefore the Plaintiff's case that since she was in doubt as to the ownership of the said vehicle as between the 1st and 2nd Defendants she was entitled to seek relief against both of them. According to her, in the absence of a defence by the 2nd Defendant absolving the 1st Defendant from liability, the application is premature and misconceived and ought to be dismissed with costs.

8. The application was similarly opposed by the 2nd Defendant. According to him, the application was premature as the question of liability can only be determined when the matter goes to full hearing where evidence is produced and weighed on the scales of justice. It was his case that the ownership of the said vehicle was denied *in toto* by him, an allegation which can only be ventilated at the hearing of the suit.

9. It was therefore his position that this suit should proceed to full hearing in order for the court to determine all the issues raised herein. He therefore prayed that the application be dismissed with costs.

Determination

10. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions on record. Order 1 rule 10(2)of the ***Civil Procedure Rules*** provides as follows:

> ***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.***

11. The question then is whether the 1st Defendant herein has been improperly joined as a party to this suit. According to the Plaintiff, a search at the office of the registrar of motor vehicles revealed that the 1st Defendant was at the material time the registered owner of the said vehicle. This position is not denied. The 1st Defendant however avers that she sold the said vehicle to the 2nd Defendant vide a sale agreement. She does not say that the said sale was perfected by way of change of registration. The Court of Appeal in **Francis Nzioka Ngao vs. Silas Thiani Nkunga Civil Appeal No. 92 of 1998** held that:

> **"In terms of section 8 of the Traffic Act, Cap. 403, Laws of Kenya, the registered owner of a motor vehicle is deemed to be its owner unless the contrary is proved on a balance of probabilities…Whether the property in a chattel being sold has or has not passed to the buyer is a question of fact to be determined on the facts of each individual case…A judge is perfectly entitled to draw an inference that by dint of section 9 of the Traffic Act, a purchaser of a motor vehicle is not supposed to use on the road for more than 14 days the said motor vehicle after the transfer unless he is registered as the owner thereof and therefore after the said period the original owner remained the registered owner…If a person is the registered owner of a motor vehicle and he transfers that ownership he must inform the Registrar of motor vehicles within seven days of the change of ownership in the prescribed form."**

12. It follows that unless the contrary is proved, the 1st Defendant herein who is the registered owner of the subject motor vehicle is deemed to be its owner. It is not conceded by the 2nd Defendant that he purchased the said motor vehicle from the 1st Defendant.

13. Order 1 rule 7 of the ***Civil Procedure Rules*** provides that:

> ***Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.***

14. In light of the denial by the 2nd Defendant of ownership of the subject motor vehicle, the Plaintiff cannot be faulted, based on the said provision for joining both the 1st and 2nd Defendants to this suit. In other words it cannot be said at this stage that the 1st Defendant herein has been improperly joined as a party to this suit. She is *prima facie* the owner of the said vehicle until proved otherwise. That proof is required to be on a balance of probabilities. In light of the averments by the 2nd Defendant denying ownership, what this Court has is the 1st Defendant's word against the 2nd Defendant's and as was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001**, in those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in section 3 of the ***Evidence Act*** Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved. Proof on a balance of probabilities was described by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred. That is not the case in election petitions."**

15. Can this Court on the basis of the cold-print affidavits filed herein by the parties, one of whom is alleged to be the purchaser of the said vehicle and who does not admit the said sale agreement, find that there was in fact an agreement between the 1st and 2nd Defendant for the purchase of the said vehicle and that the property in that vehicle did pass to the 2nd Defendant? I think not. My position is founded in the Court of Appeal's decision in **Joseph Kahugu Wakari vs. Barclays Bank of Kenya Limited & Another Civil Appeal No. 17 of 1995** where it held that if one party says, "I supplied the goods" and the other denies receipt, the issue becomes one for a trial court to decide on and cannot be established by cold-print affidavits.

16. I associate myself with the position taken in **Daphine Parry vs. Murray Alexander Carson [1962] EA 515** where it was held that:

> **"The court cannot order that the defendant be 'dismissed from the suit' without holding that the plaint discloses no cause**

of action against him, or that on the face of the pleadings as a whole the plaintiff has no chances of success. But to so hold would be to pre-judge the pending case itself, one of the issues in which, raised in the written statement of defence, is that the plaint discloses no cause of action. Although no counter-affidavit has been filed challenging the facts alleged in the applicant's supporting affidavit, the court cannot decide the application on the basis of truth of any of those allegations which are or may be in issue in the pending suit."

17. In **Marwaha vs. Pandit Dwarka Nath [1952] 25 LRK 45** it was held that:

"This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27."

18. It is similarly my view that the 1st Defendant ought to raise the issues being raised herein in her defence which defence will be considered by the Court in the usual manner.

19. In the premises this application fails and is dismissed with costs to the Respondents.

20. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 7th day of November, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyimi for Mr Mwanthe for the Plaintiff

Mr Mburu for Mr Mugun for the 1st Defendant/Applicant.

CA Geoffrey