



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 417 OF 2008

INVESTMENTS AND MORTGAGES

BANK LIMITED.....APPELLANT

VERSUS

NANCY THUMARI1ST RESPONDENT

MARSAM AND COMPANY LIMITED.....2ND RESPONDENT

NYORO CONSTRUCTION

COMPANY LIMITED.....3RD RESPONDENT

MUTINDA MUTUNGA.....4TH RESPONDENT

JUDGMENT

This appeal arises from the ruling and order of Honourable Kimingi (Mrs) Senior Principal Magistrate in Milimani CM CC NO.720 of 2006 delivered/made on 10th July 2008.

The Memorandum of Appeal dated 11th August 2008 and filed in this court on the same day by the appellant Investments & Mortgages Bank Ltd sets out 3 grounds of appeal challenging the aforesaid ruling and order for reasons that:-

- 1) The magistrate erred in law and in fact in finding that the claim against the appellant could be sustained;
- 2) The magistrate erred in law and in fact by failing to find that the suit ought to have been struck out;
- 3) The magistrate erred in law and fact in failing to appreciate that the evidence supporting the application before her was not controverted.

The appellant prayed to this court to set aside the order of the Senior Principal Magistrate and substitute it with an order striking out the suit in the subordinate court with costs to the appellant.

The background to the appeal herein is that by an amended plaint dated 13th February 2006 and filed in court on 17th March 2006, the plaintiff in the lower court Nancy Wangechi Thumari (suing as the personal representative of the estate of the late Sammy Ndegwa sued Marsman Investments & Mortgages Bank Ltd, Nyoro Construction Company Ltd and Mutinda Mutunga, claiming for general and special damages arising from an alleged road traffic accident which occurred on 8th October 2003 along Outering road, Nairobi involving the deceased Sammy Ndegwa and motor vehicle registration No.KAH 042 E. Paragraph 5 of the said amended plaint alleges that the aforesaid motor vehicle was jointly owned by the 1st and 2nd defendants while the 3rd defendant was their authorized driver or agent and or servant.

The 1st defendant, now appellant entered an appearance and filed defence on 15th March 2006 denying at paragraph 2 that it ever or at all owned motor vehicle registration No. KAH 02 E at the time of the alleged accident and contended that it had prior to the filing of the suit notified the plaintiff/1st respondent's advocate on 15th June 2005 of that position. It averred that it had been wrongly sued as a party to the suit. At paragraph 4 of the defence, the appellant disclosed that by an agreement for sale dated 12th March 2001 motor vehicle registration No. KAH 042 E which was jointly owned by Marsman & co. Ltd and Investment & Mortgages Bank Ltd, by virtue of a hire purchase agreement, was sold to the 2nd defendant Nyoro Construction Company and that therefore no cause of action had been disclosed against the 1st defendant/appellant herein.

By an amended defence of 17th January 2007, the appellant pleaded that the action was time barred. On 29th August 2006, by a chamber summon dated 28th August 2006, the 1st defendant/appellant herein filed an application under Order 6 Rule 13(1) (a) (b) (d) and 16 of the Civil Procedure rules, seeking from the court orders:-

1. That the further amended plaint as against the 1st defendant struck out with costs on an advocate client basis.
2. That the 1st defendant's costs be assessed in the sum of shs 1,500,000 and all further proceedings in the suit be stayed until the 1st defendant's taxed costs are paid in full.
3. That costs of the application be awarded to the 1st defendant in any event.

The application was premised on the grounds that:-

- a) There is no reasonable cause of action against the 1st defendant as there is no legal entity by that name.
- b) That the 1st defendant was never registered as the owner of the vehicle.
- c) The plaintiff was informed in writing on or about 15th June 2005 that the vehicle that caused the accident was never owned by the bank.
- d) The suit in addition to being an abuse of the court process is scandalous, frivolous and vexatious and a wrong party was used. Unnecessary costs have been incurred by virtue of the 1st defendant having to defend itself.
- e) The plaintiff should be condemned to pay costs on an advocate/client basis for filing a frivolous suit.
- f) The costs should be assessed in the sum of kshs 1,500,000 being the amount the vehicle KAH 042E was sold to the 2nd defendant.

The application in the lower court was supported by an affidavit sworn by Paul Kinyanjui Ndungu on 28th August 2006 to the effect that the 1st defendant/appellant only provided the finances for the purchase of the truck /Mv in question vide a hire purchase agreement dated 14th August 1996 with Marsmans Co. Ltd.

Further, that the physical possession of the truck was with the hirer as shown by copy of Hire Purchase agreement annexed as “PNJ” and that on 12th March 2001, Nyoro Construction Ltd purchased the said motor vehicle KAH 042 E as shown by exhibit “PN2’sale agreemen. That when the appellant received demand notice after the accident, it responded giving all those full facts. That when the accident took place on 8th October 2003 the bank was not the legal owner of the motor vehicle having relinquished its ownership to Nyoro Construction Company hence there was no reasonable cause of action against the bank. The rest of the depositions reiterate the grounds in support of the application.

The application by the appellant was opposed by the 1st respondent who was the plaintiff who swore an affidavit on 3rd November 2006 contending that the certificate of ownership issued for the vehicle in question is only prima facie evidence of ownership which is rebuttable by evidence to the contrary. Further, that the appellant was the beneficial owner of the accident motor vehicle hence a proper party to the suit as shown by copy of police abstract “NWTI” annexed to her supplementary affidavit sworn on 30th November 2007 hence the issue of ownership could only be determined during the hearing of the suit and not through the summary procedure. She urged the court below to strike out the application with costs.

The 3rd defendant Nyoro Construction too opposed the application by the 1st defendant appellant contending that as there was evidence and admission that the appellant was the registered owner of the accident motor vehicle, they were properly enjoined and that the issue of ownership of the motor vehicle could only be canvassed at the hearing of the suit. They relied on an affidavit sworn by Lydia Gutu Assistant Legal officer, Kenya Alliance Insurance Company Ltd, the 3rd defendant’s Insurers. The record also shows that the 3rd defendant Nyoro Construction Company Ltd did file an application dated 28th July 2006 under Order 1 Rules 10(2) and 22 of the Civil Procedure Rules seeking to be struck out from further proceedings in the matter. The grounds upon that application was predicated were that the plaintiff/1st respondent herein had not showed that it was the registered owner of the motor vehicle registration No. KAH 042E at the time of the material accident hence the claim was unsustainable against it, relying on the case of **Thuranira Karauri vs Agnes Ngeche Njeru C/A 192/2006** where the court held that a party cannot rely on what is stated in a police abstract as sufficient proof of ownership of motor vehicle.

In their submissions in support of the chamber summon dated 28th August 2006 in the lower court, the appellant herein maintained that the suit against it was unsustainable relying on the cases of **Mohammed & Another vs Haidara (1972) EALR 166** to advance the proposition that uncontroverted facts on oath must be taken to be admitted. It further relied on the **Halsbury’s Laws of England VOL. 37 Practice & Procedure Page 318 paragraph 430** that the court is invested with extensive powers to strike out pleadings and thereupon or for other good reason reasons arising from the making of the claim or defence, to dismiss actions by the plaintiffs or to enter judgment against the defendants. That those powers are both salutary and necessary not only to enforce the basic rules of pleadings but also to dispose of pleadings which are hopeless, baseless or without foundation in law or in equity or are otherwise an abuse of the court process. Further, that the powers are exercised by the court by summary process, speedily, and generally, at an early stage of the proceedings and they operate as a powerful, effective method of disposing of proceedings without a plenary trial.

Further reliance was placed on the case of **Samuel Mukunya Kamunge vs John Mwangi Karuri HCCA 34/2002 Nyeri** where the court held that the trial magistrate was in error when he held that only a certificate of search from the Registrar of Motor vehicles could prove ownership of the motor vehicle as such certificate was not conclusive proof of ownership of the motor vehicle, Section 8 of the Traffic Act providing that the contrary can be proved in recognition of the fact that often times,

vehicles change hands but the records are not amended.

The two applications – one by the 1st defendant/appellant and the other by the 3rd defendant/respondent herein were consolidated for hearing together and one ruling delivered on 10th July 2008 affecting both applications.

In her brief ruling, Hon R.N. Kimingi (Mrs) Senior Principal Magistrate dismissed both applications with costs in the cause.

In the trial magistrate's view, it would not have been in the interest of justice to consider each of the application in isolation as the issues raised in the application are issues that ought to be determined upon full hearing in the circumstances of the case. It is that order of 10th July 2008 by the trial court that provoked this appeal by the 1st defendant/appellant.

The appeal herein was admitted to hearing on 12th October 2012 and directions given on 1st July 2014.

All parties' advocates on record did agree on 31st July 2014 to have the appeal disposed of by way of written submissions. The appellant's submissions were filed on 10th September 2014 whereas the 1st respondent's submissions were filed on 11th November 2014.

In support of the appeal, the appellant submits that the trial magistrate should have allowed their application dated 28th August 2006 for reasons that even though they were the registered owners of the accident motor vehicle, the motor vehicle was not owned by the appellant, citing Section 8 of the Traffic Act which enacts that:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

The appellants also referred to the Court of Appeal decision in **Securicor (K) Ltd vs Kyumba Holdings (Ltd) (2005) e KLR** where the Court of Appeal held that although the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party, and that therefore the true owner of the motor vehicle could not have been the appellant as the vehicle had been sold out to another person and that it was not even being driven by the appellant's driver or employee on the occasion. Further, that it was not shown that the appellant had any interest in the matatu business, that business not being its concern.

The appellant further relied on **Ramadhani Ali Ruwa vs Private Safaris EA Ltd CMCC 191/2012** where the 1st defendant successfully applied to have the suit struck out from the suit on account that it had been wrongly enjoined as it was not the owner of or in possession of the motor vehicle KAQ 472D when the accident occurred though it remained the registered owner of the motor vehicle according to the Registrar of Motor vehicles records.

Further reliance was made on the case of **Mohammed & another vs Haidara (1972) EA 166** that facts made on oath without being controverted on oath are not in issue, to advance the argument that the appellant's assertion that the bank, Investment and Mortgages Bank Ltd was only a financier and not bonafide owner or factual user of the said motor vehicle which fact was not denied by the respondents.

On the power to strike out the suit summarily, the appellant relied on the **Halsbury's Laws of England 4th Edition VOL.37 at paragraph 433** which I have reproduced in this ruling above.

The appellant concluded that it had been wrongly sued and as there was no basis of retaining it in the suit since it was not liable in whatsoever manner to the 1st respondent for the fatal injuries sustained by the deceased in the alleged accident, this court should allow this appeal and the application dated 28th August 2006.

The 1st respondent Nancy Thumari in her submission by her advocate on record Gaita & Company Advocates opposed the appeal and maintained that the appellant was properly sued since the motor vehicle KAH 042 E in question was registered in its name of the appellant at the time of the accident and that the 3rd defendant was hiding behind the fact that at the time of the alleged accident on 8th October 2003, the motor vehicle in question was not registered in its name.

In her view, the law is that a party can only be struck off the proceedings if no reasonable cause of action exists against it. Further, that striking out is a draconian remedy that can only be resorted to in plain and obvious cases where there is no single triable issue, relying on **DT Dobie & Company (K) Ltd vs Muchina (1982) KLR** where it was held at page 2 that”

“ The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case. The court should aim at sustaining rather than terminating the suit. A suit should only be struck out if it is so weak that it is beyond redemption and is incurable by amendments. As long as the suit can be injected with life by amendments it should not be struck out.”

It was further submitted that the appellant and 3rd respondents’ application were mischievous as the 3rd defendant denied having bought the accident motor vehicle hence the need to put that issue to trial since under Section 8 of the Traffic Act, only the trial can prove that a sale happened or that ownership changed, since registration is prima facie evidence which can only be rebutted by evidence to the contrary and that the issues raised could not be determined at the interlocutory stage.

In her view, the pleadings raised the following triable issues:-

- i. Ownership of motor vehicle KAH 042 E.
- ii. Whether the defendants and their respective drivers or agents were negligent as pertains the manner in which the said motor vehicle was driven on the date of accident.
- iii. Whether the negligence occasioned the deceased’s death.
- iv. Which of the defendants is liable for the accident and the resultant loss
- v. Which party is liable to my costs.

Finally, the 1st respondent contended that the attempt by the defendants to extricate themselves from the proceedings is legally untenable as the issues at hand cannot be resolved without a full trial. She supported the order of the trial magistrate.

The 3rd defendant/respondent Nyoro Construction Company filed written submissions on 19th December 2014. They maintain that the copy of records show that the appellant herein was the registered owner of motor vehicle KAG 042E at the time of the accident, together with another and that, that fact is supported by the appellant’s own supporting affidavit and exhibit PN2 which did not offer sufficient basis upon which the court could make a finding as to whether the appellant herein had sold its interests in the said motor vehicle at the material time.

Albeit the 3rd respondent had also sought to be expunged from the proceedings in the lower court for not being the registered owners of the accident motor vehicle, in this appeal, they supported the ruling of the learned trial magistrate for finding that it was in the interest of justice that the issues raised by the appellant be determined at the full hearing, since copy of records dated 3rd November 2006 issued on 18th March 2005 indicate that the 1st and 2nd defendants were registered as joint owners of the said motor vehicle as at 8th October 2003 when the accident occurred.

The 3rd respondent also relies on Section 8 of the Traffic Act that a person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle, as was held in **Superfoam Ltd & Another vs Gladys Nchororo Mbero (2014) e KLR**. They maintain that the documents in support of the application dated 28th August 2006 did not offer sufficient basis upon which the court could make a finding as to whether the appellant had sold its interests in the motor vehicle KAG 042E at the material time.

In response to ground 2 of the Memorandum of Appeal, the 3rd respondent relied on the decision in **Abubakar Zain Ahmed vs Premier Savings & Finance Ltd & 4 others (2007) eKLR** where the judge relied on 3 cases of **Samuel Kanyi Gitonga vs Peter Mugweru Nairobi HCC 3356/89**(unreported) Bosire J referring to striking out as :_

i. A “draconian measure” and held that it must be done only in the clearest of cases, where it is clear that the defence or plaint as the case may be is beyond resuscitation by amendment.

ii. **Trade bank Ltd vs Kersam Nairobi HCC 6662/91** Lall J held that :

“ the exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the face of it unsustainable” and

iii. **Nitin Properties vs Jagir singh Kalsi Nairobi CA NO. 132/89** (unreported) where this court stated that:-

“ striking out is a drastic remedy and it has been held time and again that striking procedure can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution.”

Finally, the 3rd respondent relied on **Blue Sky EPZ Ltd vs Nataka Polyakora & Another (2007) e KRL** where the court stated that:

“ the power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed.”

In their view, the case against the appellant is not unsustainable on the face of it hence the appellant should be retained in the proceedings as per the further amended plain as it discloses a reasonable cause of action against it. The 3rd respondent prayed that this appeal be dismissed.

Determination

I have carefully considered this appeal in line with the applicable law, decided cases and submissions by the respective parties’ advocates. As the first appellate court, my duty is stipulated in Section 78 of the Civil Procedure Act 10(1) subject to such conditions and limitation as may be prescribed to:

- a) Determine the case finally
- b) Remand a case
- c) Frame issues and refer them for trial
- d) Take additional evidence or to require evidence to be taken
- e) Order a new trial

Subject as aforesaid, to perform as nearly as may be the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of such instated therein.

Albeit the appeal arises from an interlocutory decision of the trial court and therefore it may not necessarily be intended to terminate the entire suit bearing in mind the fact that there were other parties to the suit besides the appellant herein, who sought to be excluded, I am mindful of my duty as an appellate court of first instance to evaluate and consider the affidavit evidence and the law and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own independent conclusion, but in so doing, I must give an allowance of the fact that I neither saw nor heard the parties submissions first hand, see **Selle vs Associated Motor Boat Company Ltd (1968) EA R3**.

In addition, as the 1st appellate court, I will only interfere with the lower court's finding if the same is founded on wrong principles of fact or law as guided by the Court of Appeal case of **Nkuba vs Nyamiro (1983) KLR 403** where it was held that:-

“ a Court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”. Per Law JA, Kneller, Hanox Ag JJA. The Court of Appeal further held that the appellate court is however not bound by the trial court's finding of fact *“ If it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally”* See also **Ndiritu vs Ropkoi & Another EA LR 354 per O'kubasu, Githini, Waki JJA and Mwangi & another vs Wambugu (1983) 2KLR 100** where the principles enunciated in **Selle** case (supra) were restated.

Having evaluated and analyzed the evidence on record and submissions, I find that there is only one main issue for determination in this appeal and that is: Whether the trial magistrate erred in law and fact in dismissing the appellant's application seeking to strike out the appellant from the suit on the ground that it had proved that it did not own the accident motor vehicle registration No. KAH 042 E at the material time of the accident on 8th March 2003.

I have heard and analyzed so much on the submissions on striking out of pleadings and or suits.

In the appeal before me, however, the question is striking out a party who claims that no cause of action is disclosed against it and that it would be a waste of judicial time to allow for a full trial of a claim against it after it has laid before the court sufficient material to extricate it from liability.

Order 6 Rule 13 (a), (b), (d), (2) and 16 of the Old Civil Procedure Rules under which the application in the lower court was brought was in 2010 repealed and replaced with Order 2 Rule 15 of the Civil Procedure Rules 2010 which in parimateria provides that:-

“ At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that:-

- a) It discloses no reasonable cause of action or defence in law; or
- b) It is scandalous, frivolous or vexatious; or
- c) It may prejudice, embarrass or delay the fair trial of the action; or
- d) It is otherwise an abuse of the process of the court;

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

No evidence shall be admissible on an application under Sub Rule (1) (a) but the application shall state concisely the grounds on which it is made”

From the above provisions it is clear that the power to strike out pleadings is a discretionary one. It therefore follows that the trial court in refusing to strike out the appellant from the pleadings was exercising her judicial discretion. The circumstances under which an appellate court may interfere with a decision of the trial court were clearly set out in the case of **Mbogo vs Shah & Another (1968) EA 93** that:

“ I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion and as a result there has been misjustice.”

The trial magistrate in dismissing the appellant and 3rd respondent’s applications seeking to be struck out of the suit observed that .

“ it is my considered view that it would not be in the interest of justice to consider each of the applications in isolation as the issues raised in the applications are issues that ought to be determined upon full hearing in the circumstances of this case.”

Regrettably, the trial magistrate did not identify any issues for determination by the trial court and neither did she analyze the applications as filed and presented before her. She simply made references to the applications, the provisions under which they were brought, the supporting and replying affidavits and respective annexures without attempting to delve into what the affidavits or even annexures were saying. She then made one statement that ***“I have noted the applications as well as the supporting documents, submissions and the authorities relied on. I have also noted and considered the opposition together with the documents thereto and the submissions.”***

The question I pose is whether the trial magistrate exercised her discretion judiciously. In my view, she did not, for reasons that she did not lay any basis for exercising her discretion not to allow the applications as presented. I however note that the 3rd respondent supports that decision by the trial magistrate, which decision was against it, as it had also sought to be struck out of the suit.

The 3rd respondent’s application was brought under the provisions of Order 1 Rule 10(2) and (22) of the Civil Procedure Rules which provide 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 effectively and completely to adjudicate upon and settle all question involved in the suit, be added.

In my humble view, the appellant’s application ought to have been brought under the above provisions of Order 1 Rule 10(2) and (22) of the Civil Procedure Rules which empowers the court with unfettered discretion to admit or strike out of proceedings a party with or without an application being made .

In **Jan Bolden Nielsen vs Herman Phillipus Steyn & 2 others (2012) e KLR** Honourable Mabeya J held that:

“ In my view, a necessary party is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the court. If a

necessary party is not impleaded, the suit may be a non starter as the reliefs sought is granted, may be ineffective.”

What I gather the appellant pleading is that no action lies against it hence it should not be taken through the trial. But first, I shall endeavour to establish what a reasonable cause of action is, and whether a party who is wrongly joined can seek to be struck out for reasons that there is no reasonable cause of action disclosed against it.

In **DT Dobie & Company (K) Ltd vs Muchina supra** the court summed what unreasonable cause of action” in Order 6 Rule 13(1) of the Civil Procedure Rules as:-

“An action with some chance of success, when the allegations in the plaint only is considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claimed prayer.” In **V.K. Construction Company Ltd vs Mpatia Investments Ltd Nairobi HCC 257/2003** Ringera J (as he then was) stated that “the word “**cause of action**” means an act on the part of the defendant which gives the plaintiff his cause of complaint.”

In **Halsbury’s Laws of England 4th Edition VOL. 37 paragraph 20**, it is posited that:

*“ **cause of action** has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant could have a right to traverse. “**cause of action**” has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter or grievance founding the action, not merely the technical cause of action.”*

According to Ringera J in the **V.K. Construction Company Ltd (Supra)**, and which proposition I agree with that, “*a reasonable cause of action is such a factual situation as would entitle a person to obtain a remedy against another person and which has some chance of success when only the averments in the plaint are considered. In other words, the test for the reasonableness of the cause of action is the possibility of the success thereof when only the plaint is considered.*”

In **Victor Mabachi & Another vs Nurtun Bates Ltd CA 247/2005 (2013) e KLR P. Kihara Kariuki (President, Court of Appeal, P.M. Mwilu, S. Gatembu Kairu JJA**, where the appeal arose out of an interlocutory application before the High Court that the appellants had been improperly joined as parties and that their joinder in the suit before the High Court breached the principle of law that an agent may not be sued where there is a disclosed principal, which application was brought under Order 6 Rule 73 of the Civil Procedure Rules; the Court of Appeal held:

“ The issue of whether the appellants were disclosed agents of the 1st defendant in the suit before the High Court was contested. In our view, the plaint and the record are dispositive of the question whether the appellants herein were agents of a disclosed principal, Mediacom East Africa. The appellants negotiated and signed the said agreement relied on by the respondents on behalf of Mediacom.

Based on the record before us, we agree with the appellant’s submissions that there had been disclosure by the appellants to the respondents of the principal on whose behalf their actions were undertaken it is therefore an finding that the appellants were agents of Mediacom East Africa Ltd, being the disclosed principal .

It remains now to consider the second issue whether the enjoinder of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is a disclosed principal. In Anthony Francis Wareheim t/a Wareheim & 2 Others vs KPOSB CA Nairobi 5/48 of 2002 at page 70 this court (CA) unanimously held as follows:-

“ It was also prima facie imperative that the court should have dismissed the respondents claim against the second and third appellants for they were impleaded as agents if a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the 2nd and 3rd appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal”

The Court of Appeal proceeded to allow the appeal on the ground that the appellants ought not to have been joined in the suit before the High Court and struck out the respondent's suit in the High Court against the appellants with costs.

Albeit the appeal herein does not concern the agent/principal relationship of the parties to the suit in the lower court, the analogy I draw from the above Court of Appeal decision in **Victor Mabachi case** is that a court can strike out from the proceeding a party who is wrongly enjoined where there is clear evidence that that party ought not to have been sued in the first instance or where it is apparently clear that there are other parties to the suit who are properly sued and the liability attributed to them is not to be shared with the party who is complaining to have been wrongly enjoined.

This court also acknowledges all the decisions right from **DT Dobie vs Muchina (supra) Francis Kamande vs Vanguard Electrical Services Ltd (1996), Olympic Escort International Company Ltd & 2 Others vs Parmunda Singh Sandhu & Another (2009) e KLR** –that:

The summary procedure of striking out suits can only be adopted when it can be clearly seen that a claim or answer on the face of it is obviously unsustainable and further, that there is no triable issue. Triable issue is not necessary one that the defendant would ultimately succeed on. It need only be bona fide.

In this case, the appellant contends that the suit against it by the 1st respondent should be struck out ex debito justitiae for misjoinder, whereas the 1st and 3rd respondents maintain that as the appellant was the legal owner(registered) owner of the motor vehicle KAH 042 E at the time of the accident, it is a necessary party. The appellant has availed evidence to prove the fact that prior to the suit in the lower court being instituted, it received a demand letter concerning the material accident and in a rejoinder, it wrote to the 1st respondent's advocates stating that it was not the owner of the accident motor vehicle as its interest was only limited to being its financier under a hire purchase agreement with the 2nd respondent. It went ahead to provide evidence of sale of the said motor vehicle to the 3rd respondent and an acknowledgement of a cheque for shs 1,500,000 being purchase price for the motor vehicle whose possession it parted with in favour of the 3rd respondent.

The 1st respondent nonetheless went ahead to enjoin the appellant to the suit in the lower court for reasons that it was still the registered owner, jointly with the 2nd respondent of the accident motor vehicle at the time of the accident. The 1st respondent maintains that under Section 8 of the Traffic Act Cap 403 Laws of Kenya, the person in whose name a vehicle is registered shall unless the contrary is proved, be presumed to be the owner.”

In other words, prima facie, the appellant is the owner of the accident motor vehicle KAH 042E. The appellant vehemently denies, ownership or interest in the vehicle as it was sold to the 3rd respondent and the police abstract discloses the owner thereof as the 3rd respondent, with the 4th respondent Mutinda Mutunga being its driver. The 3rd respondent also filed an application seeking to be struck out of the proceedings as it was not the registered owner of the accident motor vehicle and after its application too was dismissed, it has now changed tact and supports the 1st respondent's position that indeed, it is the person in whose name the vehicle is registered who should be the owner and therefore that is a triable issue which can only be determined at a full hearing.

I disagree with the respondent's position on ownership of a motor vehicle for the following reasons:-

i. That there is clear evidence to the contrary that the accident motor vehicle registration No. KAH 042 E, in as much as the appellant was the registered owner thereof, that the evidence show that the accident motor vehicle was sold and possession taken by the 3rd respondent 2 years before the accident although the transfer had not been effected.

ii. That the appellant acknowledged receipt of purchase price of shs 1,500,000/- from the 3^d respondent and that agreement for sale or sale thereof has never been repudiated or voided.

iii. That albeit the 3rd respondent is not the registered owner of the accident motor vehicle, he is undoubtedly the beneficial owner having legally purchased and paid for it and taken possession thereof from the appellant and the 2nd respondent he was also the person directly benefiting from the use of that vehicle.

iv. That the 4th respondent who is named as the driver/agent/servant of the 3rd respondent at the time of the accident in question did not deny that fact and neither did he state that he was acting as the agent of the appellant, who was not in control or management of the accident motor vehicle at the time of the accident.

v. That a registration card or log book was only prima facie evidence of title to a motor vehicle and the person so registered having proved, on a balance of probabilities that he was not, in fact, the owner of the said motor vehicle, it would be an absolute absurdity, scandalous and vexatious to drag him into the proceedings and trial to achieve nothing out of it see **Osapil vs Kaddy (2001) I E ALR 181**.

vi. That the doctrine of vicarious liability depends not on legal/title ownership of the motor vehicle, but on the declaration of the task or duty (see **Anyanzwa & 2 Others vs Luigi de Casper & another (1981) KLR 10**).

In other words, prima facie, there is no evidence that the 4th respondent's acts of negligence would bind the appellant to be held vicariously liable where it is clear like in this case that the 4th respondent was not an agent or servant of the appellant at the time of accident.

I am fortified by the holding in **Morgans vs Lauchbuy (1972) ALL ER 606** where it was stated that:

"To establish agency relationship, it is necessary to show that the driver was using the car at the owner's request express or implied or on its instruction and was doing so in the performance of the task or duty thereby delegated to him by the driver."

I also accept the holding by **Ougo J in Jayne Wairimu Turanta vs Githae John Vickery & Equity Bank Ltd & Munene Dan** wherein the Equity Bank Ltd was enjoined to the suit for the sole reasons that it was the financier of the accident motor vehicle KAY 909 Y which collided with KBI 997R. In this case, It was argued that the bank was only a registered owner as security for monies advanced to Don Munene for the duration of the loan agreement and that it had no control over the daily use of and management of the suit motor vehicle whose control and or management rested with Munene Don and that the driver of the said motor vehicle at the time of the accident was never an agent or servant of Equity Bank Ltd thus no liability, vicarious or otherwise could attach against the bank for the acts of the said driver.

In allowing the application/prayer to strike out the plaintiffs claim against the Equity Bank Ltd, the court observed, as had been submitted by the appellant that **"the bank could not be negligent since it was securing itself by registering the vehicle together with Munene Don until the latter completed paying the loan he had borrowed from the bank to purchase the motor vehicle."**

In the present case, even though the appellant and 2nd respondent were shown to be registered owners of the motor vehicle, such ownership was not sufficient to create vicarious liability for the negligence of the person who drove it at the time of the accident as an agent of the appellant, who was not in fact, in control or management of the accident motor vehicle at the time of the accident on behalf of the appellant.

Finally, there having been full disclosure of the relationship between the appellant and the 3rd respondent before the institution of suit in the lower court, it was unnecessary to drag the appellant into those proceedings merely because he was the registered owner of the accident motor vehicle. And even after instituting such suit against the appellant, it was incumbent upon the 1st respondent, at the earliest opportunity, to seek to exclude the appellant from the pleadings or proceedings.

In my view, the appellant is not a necessary party to those proceedings whether as plaintiff or defendant and in the exercise of the powers conferred to this court by Order 1 Rule 10(2) of the Civil Procedure Rules, I find that the joinder of the appellant to the suit giving rise to this appeal was wrong and I proceed to strike out the name of the appellant from the proceedings in the lower court, that being the only expedient order that appear to be just in the circumstances of this case.

Accordingly, I allow this appeal, set aside the order of the trial magistrate refusing to strike out the name of the appellant from the suit and substitute it with an order striking out the appellant's name from those proceedings.

Each party to bear their own costs of the application in the lower court and of this appeal.

Dated, signed and delivered in open court at Nairobi this 6th day of July 2015.

R.E. ABURILI

JUDGE

6/7/2015

Coram R.E. Aburirli J

C.C. Samuel

Mr Thuita for the respondent

No appearance for the appellant

Court Judgment read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

6/7/2015