REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

Civil Suit 121 of 2012

ASIF SADIQ.....……..…….....…….PLAINTIFF

VERSUS

MUMBI HOLDINGS LTD.....1ST DEFENDANT

JOHN MBUU.....…..……2ND DEFENDANT

R U L I N G

By a Notice of Motion dated 13th June 2012 expressed to be brought under Order 2 rule 15(1)(d), Order 51, Order 30 rule 9 of the Civil Procedure Rules and sections 2 of the Civil Procedure Act, Cap 21 Laws of Kenya, the defendants are seeking primarily an order that the Defendant's statement of defence be struck out and that judgement on 100% be entered against the Defendants and thereafter the matter be referred to formal proof as regards General and Special damages. The plaintiff also prays that the Defendants bear the costs of the application.

I must say that although section 2 of the Civil Procedure Act was cited, I am unable to find the relevance of the said section to the present application since the said section deals with definitions and as far as I know has nothing directly to do with an application seeking the striking out of pleadings.

The grounds on which the application is based are that the defence is an abuse of the court process as the Defendants admit the occurrence of an accident on 29th May 2011 along Nakuru Naivasha road involving motor vehicles KBE 183P and KAP 847K; that the 2nd defendant pleaded guilty to the charge of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 Laws of Kenya; and that the defendants attempt to attribute the cause of the accident on **Randeep Lochab** who is now deceased is ridiculous.

The application is supported by two affidavits sworn by **Asif Sadiq**, the plaintiff herein on 13th January 2012 and 9th July 2012. According to the said affidavits, on 29th May 2011 an accident occurred along Nakuru Naivasha Road involving motor vehicles KBE 183P and KAP 847K caused by the negligence of the 2nd defendant who was charged in court with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act Cap 403 Laws of Kenya to which he pleaded guilty. Exhibited to the said affidavit are copies of the court proceedings in the said Traffic Case. Accordingly, it is deposed that the said plea of guilty amounts to an admission of negligence on the part of the 2nd defendant. Therefore, according to the deponent, an attempt by the said defendant to attribute the cause of the said

accident to the late **Randeep Lochab** is ridiculous and hence the statement of defence by the Defendants is an abuse of the court process and ought to be struck out.

In opposition to the application the defendants filed grounds of opposition dated 4th July 2012 on 5th July 2012 which are as follows:

1. That the Application seeks to take away the Defendants' constitutional right to a fair trial.

2. That the court proceedings referred to in paragraph 5 of the Supporting Affidavit have not been annexed. In any event this court must try the issue of contributory negligence as against Randeep Lochab(deceased).

3. That the Defendants only admitted to the occurrence of the accident but not the negligence attributed to them.

4. That this suit should be tried on merits and not by way of affidavit evidence.

The 2nd defendant also swore a replying affidavit on 11th July 2012 in which while admitting the occurrence of the accident he denied that the accident was caused by his negligence and attributed the negligence to the deceased. According to him, the said conviction does not mean that he is entirely to blame for the accident and the reason why he chose to plead guilty was due to his busy schedule and therefore the court ought to try the issue of contributory negligence rather than depriving him of his Constitutional right to fair trial.

The application was prosecuted by way of written submissions. According to the plaintiff, the plaintiff was a passenger in motor vehicle KBE 183P which was being driven by **Randeep Lochab** and which as a result of the negligence of the latter was involved in an accident in which the plaintiff sustained serious injuries. Apart from reiterating the contents of the foregoing affidavits, it is submitted that the said defendant pleaded guilty to a charge of causing death by dangerous driving whose particulars were that he overtook a fleet of other vehicles without having checked on the clarity of the road ahead and collided with an on-coming vehicle No. KBE 183P and was thereby fined Kshs. 40,000.00. Distinguishing the case of **Philip Keipto Chemwolo & Mumias Sugar Co. Ltd vs. Augustine Kubende [1982-88] 1 KAR 1036 at 1039-1040**, it is submitted that in the latter case there was no plea of guilty and the matter went to full hearing in which facts emerged suggesting an aspect of contributory negligence on the part of the plaintiff. It is submitted that by dint of the 2nd defendant's own plea of guilty, there are no facts emerging from the said traffic case record that would suggest contributory negligence on the part of **Randeep Lochab** and hence the plaintiff's application should be allowed.

On the part of the defendants it is submitted that in their defence, the defendants admitted the occurrence of the accident but denied liability for the same and attributed negligence to the deceased **Randeep Lochab** (deceased). Therefore, in the defendant's view, the plaintiff's application seeks to deny the defendants a chance to prove contributory negligence on the part of the said deceased. The fact that the 2nd defendant was charged and convicted of causing death by dangerous driving does not mean that the deceased was blameless, it is contended. Therefore, the defendants submit, they deserve an opportunity to demonstrate the deceased's contribution to the accident. When an accident occurs involving more than one vehicle, it is the defendants' position that it is possible that all the drivers are negligent at various degrees hence opportunity ought to be afforded to the Defendants to prove the deceased's contributory negligence moreso as the right to be heard is a Constitutional right enshrined under Article 50(1) of the Constitution. Relying on the above case of **Chemwolo & Another vs. Kubende**, it is further submitted that the standard of proof in a traffic case is beyond reasonable doubt despite conviction and that conviction is not conclusive proof that the defendant is fully to blame. Striking out, it is submitted is a very draconian action and the Court is urged to allow trial on the merits.

I have considered the foregoing. Section 47A of the Evidence Act provides as follows:

A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

In my view what the foregoing provisions mean is that once a conviction becomes conclusive by virtue of the aforesaid provision, the issue whether or not the convict was guilty of the offence cannot be subject of a subsequent inquiry. It does not necessarily mean that that person is 100% liable in negligence. The decision to charge one and not the other person is usually at the discretion of the police and the mere fact that one of two drivers is charged does not necessarily mean that the other driver is not liable at all. Whereas the person convicted of a criminal offence cannot, where the circumstances under section 47A aforesaid prevail, question that conviction, the issue of contributory negligence is always open to the party despite the conviction. In Robinson vs. Oluoch [1971] EA 376, it was held that:-

"Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent; but that is a very different matter from saying that a conviction for an offence involving negligence driving is conclusive evidence that the convicted person was the only person whose negligent caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the judge was right in not striking out the defence as a whole."

See also Queens Cleaners And Dryers Ltd vs. East African Community and Others [1972] EA 229.

In **David Kinyanjui & 2 Others vs. Meshack Omari Monyoro Civil Appeal No. 125 of 1993,** the Court of Appeal held that a conviction does not close the door to a defence on liability, as the issue of contributory negligence is open to the defendant. However, in **Francis Mwangi Vs. Omar Al-Kurby Civil Appeal No. 87 of 1992** the same Court was of the view that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence and therefore where both the Appellant and the Respondent do not give evidence but there is evidence of conviction, there is nothing on record to show in what way, if at all, the Respondent contributed to the accident.

What the foregoing means is that whereas a conviction *per se* does not close the door to plea of contributory negligence, where there is a conviction and both parties do not adduce evidence, there would no evidence on record in respect of contribution by the person who was not convicted.

In **Chemwolo & Another vs. Kubende** (supra) the Court of Appeal stated:

"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case...It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages".

The plaintiff has, however, attempted to distinguish this case on the basis that there was no plea of guilty and that the matter was heard and there was no evidence of contribution on record. To say that in the present case there is no evidence of contribution on record at this stage is, with due respect, premature. The decision whether or not there is evidence of contribution on record must necessarily come from the civil case record and not the criminal case record since the latter is not concerned with contributory negligence. I therefore agree with the defendants that to lock them out from giving evidence on the ground that there is no evidence of contribution in the Traffic Case record, as a result of the plea of guilty, would amount to breach of the provisions of Article 50(1) aforesaid.

This is not to say that in Road Traffic Accident claims, the defence can never be struck out. In appropriate cases the court would be perfectly entitled to strike out a defence if the same is found to be frivolous, vexatious or otherwise amounting to an abuse of the Court process. However, in the exercise of

its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a suit, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and or is brought or is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did".

In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made

for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment".

When can it be said that there is an abuse of the Court process? In the case of **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** **Kimaru, J** expressed himself as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

Taking into account the foregoing, I am not convinced that the defence of contributory negligence of the deceased is *demurrable* and something worse than *demurrable.* I am further unconvinced that the defence is completely bad to the extent that not even an amendment can save it. The fact that it may not necessarily succeed since the allegations are being made against the deceased whereas the facts of the charge were admitted does not render the defence hopeless, in my view.

Accordingly, the application dated 13th June 2012 fails and is dismissed with costs.

Dated at Nairobi this 5th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Mr Liko for the Plaintiff

No appearance for the Respondent