REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E023 OF 2023

ZIPPORAH NYAGUTHI .....PLAINTIFF/ RESPONDENT

VERSUS

GEDE ENTERPRISES LTD.....1ST DEFENDANT/RESPONDENT

LIBERA EMPIRE.....2ND DEFENDANT/RESPONDENT

SYNERGY INDUSTRIAL CREDIT LTD.....3RD DEFENDANT/APPLICANT

MOHAMED SWALEH ABUBAKAR.....4TH DEFENDANT/RESPONDENT

SAAB EXPRESS LTD.....5TH DEFENDANT/RESPONDENT

RULING

THE APPLICATION

Before me is an application dated 26/6/2025 filed by the 3rd defendant mainly pursuant to the provisions of Order 1 rules 10 and 14 of the Civil Procedure Rules. The application seeks the following orders:

1) That the suit against the 3rd defendant Synergy Industrial Credit Ltd be struck out with costs;

2) That the costs of this application and this suit be borne by the plaintiff.

The application is supported by the affidavit sworn by one Jacob Mbae Meme, who claimed to be a legal officer and recognized agent of the 3rd defendant and is premised on the following general grounds:

i. The 3rd defendant was merely a financier in the acquisition of motor vehicle registration number KBQ 236B by virtue of the financing agreement made between the 3rd defendant and the 4th defendant;
ii. The said motor vehicle was registered in the joint names of the 3rd and 4th defendant merely to protect the interest of the 3rd defendant as a financier;
iii. The 4th defendant seized possession, care and control of the motor vehicle at all times and the 3rd defendant did not at any time have care, control and/or management of the motor vehicle;
iv. The 3rd defendant's interest in the motor vehicle ceased on or about 20/6/2022 when the 3rd defendant discharged the motor vehicle and logbook and a logbook in the sole name of the 4th defendant was issued;
v. At the time of the alleged accident herein, the 3rd defendant had no interest whatsoever in the motor vehicle;

In the affidavit, the 3rd defendant reiterated the grounds in the application and annexed copies of various documents to support the application.

THE RESPONDENTS' RESPONSES

On 30/6/2025, counsel for the 2nd, 4th and 5th defendants indicated that they were not opposed to the application. It was alleged that the plaintiff had filed grounds of opposition to the application. However, I have carefully checked the CTS and the physical record but I have not seen any grounds of opposition to the application. It would appear that the plaintiff served the same upon the 3rd defendant but failed to file them in court. Without filing the grounds of opposition in court, the same cannot be considered to be part of the record. The effect of such failure is that the application is unopposed by all the other parties, including the plaintiff.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues for determination are as follows:

i. Whether the 3rd defendant's name ought to be struck out from the suit;
ii. Who should bear costs of the application?

SUBMISSIONS BY THE 3RD DEFENDANT/APPLICANT

The 3rd defendant filed written submissions. The submissions buttressed the grounds upon which the application was premised. The 3rd defendant relied on several authorities but did not bother to annex copies thereof. I have always held that it is improper for parties to cite authorities but fail to attach copies thereof. It is not the duty of the court to go out and search for the authorities relied upon by counsel.

SUBMISSIONS BY THE PLAINTIFF

The plaintiff also filed written submissions on the mistaken belief that she had filed grounds of opposition. I have already indicated that no response by the plaintiff was filed on record. Without a filed response, the submissions have no basis. I will thus disregard the plaintiff's submissions.

ANALYSIS AND DETERMINATION

I have considered the application and given due regard to the submissions made by the 3rd defendant. 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."

Order 10 rule 14 provides:

"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 application ought to have been made by way of Chamber summons. However, filing a notice of motion was not fatal. The above provisions reveal that the application may be made at any stage of the proceedings. It can even be made by a defendant before filing a defence provided the defendant has entered an appearance. The power of the court to strike out a party improperly joined is donated by Order 1 Rule 10(2) of the Civil Procedure Rules which authorizes the court, at any stage of the proceedings, to strike out the name of a party who is neither a necessary nor a proper party to the suit.

In the case of ***Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 others [2017] KEHC 4674 (KLR)***, the court held:

"A plain reading of the foregoing, does not support the general assertion that the Rules anticipate in all cases that a full trial be held before a party may be found to be improperly joined. The rationale behind the provisions is not difficult to find; a party improperly enjoined in a suit does not have to endure the rigour of a full trial and thereby incur expenses before it can vindicate itself. Rule 10 (2) of the Civil Procedure Rules allows parties to move the court to strike out the name of a Plaintiff or Defendant improperly joined or to have a necessary party added 'in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit'. That is only possible when the correct parties are before the court."

The 3rd defendant has exhibited evidence to show that it merely financed the purchase of motor vehicle registration number KBQ 236B. That its registration as a joint owner of motor vehicle registration number KBQ 236B was for the purpose of securing its interests under the Hire Purchase Agreement. There is also evidence to show that its name was eventually discharged from the registration of the said motor vehicle. No contrary evidence has been adduced. The applicable test is whether there exists a right to relief against the party sought to be struck out arising from the matters pleaded. It is not enough that a party

has a commercial or financial interest in the subject motor vehicle. Liability in tort, particularly in road traffic accident claims, is founded on ownership, possession, control, or agency, and not on the mere provision of financing.

Courts in Kenya have consistently held that a financier of a motor vehicle does not incur tortious liability for accidents involving that vehicle merely by virtue of financing arrangements or security interests. Such an interest does not translate into possession or control capable of grounding liability in negligence. For instance, in the case of ***JUSTUS KAVISI KILONZO v COAST BROADWAY COMPANY LTD & another [2008] KEHC 1376 (KLR)***, the court held:

"In the premises, I am of the view that despite the registration of the 2nd defendant as co-owner of the said motor vehicle, as a financier of the 1st defendant, the 2nd defendant is not a necessary party to these proceedings. To use the language of Etyang J (now retired), in Mombasa HCC Number 106 of 2002: ALI LALI KHALIFA & OTHERS –VS- POLLMAN'S TOURS & SAFARIS & 2 OTHERS (UR), the 2nd defendant has demonstrated that it hired out the said motor vehicle to the 1st defendant and the said vehicle was used by the 1st defendant in circumstances which do not allow for the doctrine of vicarious liability to apply to the 2nd defendant. I am alive to the fact that striking out any pleadings should be the last resort of any court and should be resorted to only in plain and obvious cases. In my view however, this is a plain and obvious case where save for the mere registration of the 2nd defendant as a co-owner of the said motor vehicle, the 2nd defendant cannot be liable to the plaintiff vicariously."

Similarly, in ***Kenya Commercial Bank Limited v Opiyo & another [2025] KEHC 182 (KLR)***, the court observed:

"It is trite law that there must be a real or reasonable cause of action against a party. The Appellant's interest was limited only to recovery of the monies lent to the 2nd Respondent for purposes of acquiring the suit motor vehicle. It was not a necessary party in a negligence claim against the 1st Respondent. The learned trial Magistrate erred in the exercise of discretion by dismissing the Appellant's application. In any event, the 1st Respondent being the Plaintiff could still proceed as against the tortfeasor

(2nd Respondent) and obtain a remedy against it. That being the position, the trial court ought to have allowed the Appellant's application and thereafter strike its name from the suit and direct the remaining parties to proceed. I find the Appellant stood to suffer prejudice if it is tied to the suit in which it was not a necessary party. Consequently I allow the appeal……."

In the circumstances of this case, I find that to retain the applicant in the proceedings would serve no purpose other than to subject it to unnecessary litigation, contrary to the overriding objective of the court to facilitate the just, expeditious and cost-effective resolution of disputes. This Court is mindful that striking out a party is a discretionary remedy that must be exercised cautiously. However, where, as here, the misjoinder is apparent and no amount of evidence at trial can convert a financier into a tortfeasor, the court ought not to hesitate to intervene at the interlocutory stage. Accordingly, I find merit in the application.

DISPOSITION

In view of the foregoing, I make the following orders:

a) The application dated 26/6/2025 is hereby allowed;
b) The name of the 3rd defendant is hereby struck out from these proceedings;
c) The suit shall proceed against the remaining defendants;
d) I would have ordered that costs be in the cause but there is evidence to show that prior to the filing of the application, the 3rd defendant wrote to counsel for the plaintiff explaining the position and even supplied documentary evidence. Even after filing the application, the plaintiff insisted on proceeding against the 3rd defendant. In the circumstances, I order that the plaintiff shall bear the costs of the application and those of the 3rd defendant in defending the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 22ND DAY OF DECEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.