



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 275 of 2009

ASHA CHIKU WANJE.....PLAINTIFF

VERSUS

1. MOHAMMED KIZITO WANYAMA.....1ST DEFENDANT

2. EVANS TOBIAS ABUNDO.....2ND DEFENDANT

3. WOOD VENTURE (K) LTD.....3RD DEFENDANT

RULING

1. The present application was brought by way of Chamber Summons filed on 24th November, 2009 by the Plaintiff under Order VI Rule 13(i) (b) and (d) of the old Civil Procedure Rules, Section 3A of Civil Procedure Act, and Section 24 of the Evidence Act. It seeks to strike out the 3rd Defendant's defence dated 7th September, 2009, the 2nd and 3rd Defendants' defence dated 8th September, 2009 and 1st and 2nd Defendants' amended defence dated 23rd September, 2009.

2. The grounds of the application are as follows:

“1. That the filed Defence are a sham, frivolous and an abuse of the court process and that they seek to delay and obstruct the course of justice as they only deny what the defendants have already admitted to.

2. That the subject matter of this suit is damages for injuries resulting from a road traffic accident involving the motor vehicle KAZ 011 A on the 14th November, 2007.

3. That the 2nd Defendant has already admitted ownership of the motor vehicle KAZ 011 A and that the road traffic (sic) occurred on the 14th November, 2007.

4. ***That the 3rd Defendant has already admitted joint ownership of the Motor vehicle KAZ 001 A together with the 2nd Defendant and that the road traffic accident occurred on the 14th November, 2007.***
5. ***That the 3rd Defendant had two defences on record which is an abuse of the court process.***
6. ***That the Plaintiff was a passenger of the Motor Vehicle KAZ 011 A being driven by the 1st Defendant whilst it was involved in the “Road Traffic Accident on the 14th November 2007 and suffered serious injuries.***
7. ***That the Defences filed by the Defendants only seek to delay and obstruct the course of justice and delay the Applicant quest for a fair trial.”***

3. The Defendants all oppose the application. 1st and 2nd Defendants filed grounds of opposition on 16th December, 2009 and the 3rd Defendant filed a Preliminary Objection dated on 2nd December, 2009.

4. The old Order VI Rule 13 (1) (b) and (d) invoked by the Plaintiff for striking out permits striking out a pleading on the grounds that:

“...(b) it is scandalous, frivolous or vexatious

...(c) it is otherwise an abuse of the process of the court.”

These are the matters the Applicant must demonstrate, taking into account the legal principles in respect of striking out as posited under the case of **DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another** (1982) KLR 1. These were held to include:

“...3 As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.”

5. This principle is usually read together with the following *obiter dicta* of Madan JA in the **DT Dobie** case, as follows:

“8 The power to strike out should be exercised only after the court has considered all the 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 opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

“9. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

6. The Plaintiff argued that the defences constitute shams as they deny what the Defendants have already admitted, such as joint registration and joint beneficial ownership of the accident vehicle. However, I note that the third Defendant's defence at paragraph 3 makes an express denial of ownership. Paragraphs 3 of 1st and 2nd Defendants' defence also make a general denial as to ownership. The non-admission of ownership is further evidenced by exhibit “ACW 4” Hire Purchase agreement by which the vehicle is shown to be owned by 2nd Defendant only. Ownership is therefore a disputed issue in these proceedings.

7. Further, liability or apportionment thereof is not admitted anywhere in any of the defences. This therefore remains a disputed point.

8. On the alleged multiple defences filed by the 3rd Defendant, I observe as follows. The first defence filed by the 3rd Defendant was on 8th September, 2009 by Karigithu Kinyua and Company Advocates. It was filed on behalf of 2nd and 3rd Defendants. Following that, a second Defence was filed on behalf of 3rd Defendant by Njonjo & Associates Advocates on 9th September, 2009. However, on 25th September, 2009 M/s Karigithu Kinyua filed an amended defence substituting every reference to the 3rd Defendant with the 1st Defendant. They also equally amended their Memorandum of Appearance to include acting the 1st Defendant and excluded the 3rd Defendant.

Accordingly, there is only on record one defence for the 3rd Defendant that is, the one filed by Njonjo & Associates on 9th September, 2009. I so find and hold.

9. Taking into account all the foregoing, the application to strike out must fail and is hereby dismissed with costs to the Respondent.

Orders Accordingly.

Dated, signed and delivered this 15th day of January, 2013

R.M. MWONGO

JUDGE

Read in open court

Coram:

Judge: R.M. Mwongo

Court clerk: M. Matano

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....