



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

`` CIVIL SUIT NO.483 OF 2012

JANE WAIRIMU TURANTA.....PLAINTIFF

VERSUS

GITHAE JOHN VICKERY1ST DEFENDANT

EQUITY BANK LIMITED & MUNENE DON.....2ND DEFENDANT

RULING

The application for determination before me is a Notice of Motion dated 10th December 2012. This application is brought under section 3AA of the civil procedure Act, order 2 Rule 15(1) and (2), Order 1 Rule 10(2) of the civil procedure Rules 2010. The applicant is seeking orders that :-

1. The plaintiff's suit against Equity Bank Limited be struck out.
2. Costs of this suit and the application be awarded to Equity Bank.

The application is premised on the grounds of the supporting affidavit of Joyce Munene who deposes that she is the Legal services Manager of Equity Bank Limited . That the plaintiff instituted this suit against Equity Bank Limited and Equity Bank duly entered appearance and filed a defence . That reading the plaint it emerged that the cause of action is based on the occurrence of a road traffic accident involving the motor vehicle registration number KAY 909 Y and KBI 997R. That Equity Bank's role in the operations regarding motor vehicle registration number KAY 909Y was purely that of a financier and the same is extinguished when the finances are recovered and the transfer and title effected to the borrower as per the terms of the loan agreement entered between Equity Bank Limited ad the borrower Munene Don who has been sued together with Equity Bank Limited . That the letter of offer which the borrower duly signed and accepted clearly states that motor vehicle registration number KAY 909Y was only to be registered jointly with Equity Bank Limited as security for the monies advanced only for the duration of the Loan agreement therefore Equity Bank Limited had no control over the daily the daily use of and management of the suit motor vehicle whose control and or management rests on Munene Don and that the driver of the motor vehicle registration number KAY 909Y at the time of the accident was never the agent or servant of Equity Bank Limited and thus no liability , vicarious or otherwise can attach against the bank for the acts of the said driver. She concludes that the plaintiff has no cause of action against Equity Bank Limited and the suit against Equity Bank Limited ought to be struck out *ex-debito justiciae* for misjoinder and as prayed.

The application is opposed. The Respondent filed a Replying Affidavit on 3rd April 2013 in which she said that motor vehicle KAY 909Y was jointly owned by the Applicant and Munene Don and hence they

were vicariously liable for the negligence that caused the road traffic accident and that they should be liable. That she had been advised that she had a cause of action in tort for the negligence against the 2nd Defendant among others. That she suffered injuries in which she is entitled to special and general damages for the negligence on the part of the 2nd Defendant.

During the hearing of this matter on 19th April 2013. The applicant reiterated the contents of the grounds and the affidavit in support of the application and added that the bank cannot be negligent since it was securing itself by registering the vehicle together with Munene Don and submitted that the loan was still pending. The Respondent was absent served.

I have considered the pleadings, evidence and submissions made in court. The issue is whether the suit as against Equity Bank should be struck out since it does not disclose any reasonable action against the bank. I must on the onset state that striking out a suit is a summary remedy that must be granted in the clearest case with extreme caution since a court of justice should aim at sustaining a suit rather than terminating it by summarily dismissing it. In the case of **Francis Kamande –vs- Vanguard Electrical Services Ltd (1996)** the Court of Appeal held that “*the summary procedure can only be adopted when it can be clearly seen that a claim or answer on the face of it is “obviously unsustainable”*”

The applicant in its pleadings and submissions in court stated that the relationship that was there between itself and Munene Don was a contractual relationship being that the bank co-owned the car as security until Don Munene completed paying the loan he had borrowed to purchase it. Section 8 of the Traffic Act Cap 403 Laws of Kenya states that, “*the person whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the vehicle*”. In the case of **Osapil –vs- Kaddy [2000]1 EALA 187**, the court held that “*a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise*” The applicant has indeed proved on a balance of probability that it was not the owner of motor vehicle KAY 909Y as at the time of the accident

The Respondent raised the issue of vicariously liable since the logbook was jointly owned by the bank and Munene Don. The doctrine of vicarious liability was expounded in the case of **Morgan –vs- Launchbury (1972)2 All ER 606** which stated that to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. Moreover, the fact that the applicant was the owner of the vehicle by way of the logbook being in its name,

Such ownership was not sufficient to create vicarious liability for the negligence of anyone who happened to drive it.

It is a common ground now that the Munene Don was not the servant of the applicant within the normally accepted meaning of vicarious liability from the facts Munene Don and the bank would not ordinarily be vicariously liable for the tort of Munene Don since he was not an agent. The case of **HCM Anyanzwa &2 others –vs-Lugi De Casper &Anor (1981) KLR 10** stated that “*vicarious liability depends not on ownership but on the delegation of tasks or duty*”

From the foregoing I find merit in the application and grant prayer 1 of the application dated 10th December 2012. Costs shall however be in the cause.

Orders Accordingly.

Dated, Signed and Delivered this 16th Day of May 2013.

R. OUGO

JUDGE

In the presence of:-

.....Plaintiff/ Respondent

.....1st Defendant

.....2nd Defendant/Applicant

.....Court Clerk