Radheshyam Transport Limited v Ndoka (Civil Appeal E179 of 2020)
[2024] KEHC 16830 (KLR) (15 August 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E179 OF 2020

BM MUSYOKI, J

AUGUST 15, 2024

BETWEEN

RADHESHYAM TRANSPORT LIMITED ..... APPELLANT

AND

RAPHAEL GICHUKI NDOKA ..... RESPONDENT

(Being an appeal from judgement and decree of Honourable Stephen Jalango SPM dated 6-07-2023 in Mavoko Chief Magistrate Court civil case no. 212 of 2020)

JUDGMENT

1. This is an appeal arising from judgment and decree in Mavoko Chief Magistrate's court civil case number 212 of 2020 in which the respondent had sued the appellant claiming Kshs 2,152,964.00 being cost of repairs, assessment fees, investigator's fees and towing charges as special damages suffered following an accident which occurred on 28-03-2017 involving motor vehicles registration numbers KCH 973B and KBH 107V. The suit was brought by Metropolitan Cannon General Insurance Co. Limited (hereinafter referred to as 'the insurance company') through the respondent under the doctrine of subrogation. After a full hearing, the court found for the respondent and awarded the amount as prayed.

2. Being aggrieved by the judgment, the appellant has raised 6 grounds of appeal. I have gone through the grounds of appeal in the memorandum of appeal dated 31-08-2023, the pleadings, the lower court's proceedings and the parties' submissions and I do agree that the issues for determination in this appeal are as summarised by the appellant in its submissions which in my view covers the all the grounds of appeal. The appellant has identified the following issues which I hereby adopt;

    a. Whether the learned magistrate erred in law and fact in holding that the respondent had an insurance policy with Metropolitan Cannon General Insurance Company Limited;

b. Whether the learned magistrate erred in law and fact in holding that the appellant was liable for the alleged accident; and

c. Whether the learned magistrate erred in law and in fact in holding that Metropolitan Cannon General Insurance Co. Ltd was entitled to compensation from the appellant.

3. This being first appeal, this court has an obligation to conduct it in form of a re-trial where it must re-evaluate, re-analyse and re-examine the evidence on record and come to its own independent conclusion. It should however be alive to the fact that it did not take the evidence of the parties and had no opportunity of observing the witnesses and as such should give consideration to that as it considers matters of facts. To enable me bring the evidence of the parties to perspective, I will reproduce an abridged version of the parties' evidence produced in the subordinate court.

4. The appellant called two witnesses. The first witness was one Benjamin Nduva who described himself as Claims Recovery Assistant with the insurance company. He testified that the insurance company was the insurer of motor vehicle registration KCH 973B which was owned by the respondent. On 28-02-2017 while the insurance policy was in force, the respondent's motor vehicle was involved in an accident upon which the insurance company appointed Hossaro Assessors to assess the damage and cost of repairs. The assessors estimated the costs of repairs at Kshs 2,084,834.00. The insurance company paid the assessors a sum of Kshs 10,928.00. The repairs were carried out and the insurance company's internal inspector re-inspected the vehicle. They also engaged investigators who established that the offending motor vehicle registration number KBH 107V as at the date of the accident was owned by the appellant. They paid the investigators Kshs 18,130.00. Thereafter, their advocates issued a demand letter which was not responded to. The witness produced the following documents as exhibits;

1. Demand letter dated 17-01-2020.
2. Police abstract dated 29-03-2017.
3. Assessment report dated 30-03-2017.
4. Repair invoice dated 29-03-2017.
5. Re-inspection report dated 5-05-2017.
6. Towing invoice dated 28-03-2017.
7. Payment voucher dated 14-06-2017.
8. EFT funds transfer confirmation dated 24-07-2017 for Kshs 1,976,998.00.
9. EFT funds transfer confirmation dated 24-07-2017 for Kshs 9,960.00.
10. Satisfaction note dated 5-05-2017.
11. Claim form dated 31-03-2017.
12. Invoice dated 7-01-2020.
13. Investigations report dated 7-01-2020.
14. Copy of records dated 15-09-2019.
15. Payment voucher dated 13-03-2020.
16. Witness satement by one Benjamin Nduva.

5. In cross examination, the witness stated that their insured was Raphael Gichuki who had filed the suit. He added that the insurance company had filed the suit under the doctrine of subrogation. He admitted that he did not produce certificate of insurance although they had a contract in form of a policy document. He admitted that he did not produce the policy document. In re-examination, he indicated that they had availed policy schedule claim form filled by their insured.

6. PW2 was Police Constable Pius Kariuki attached to Athi River Police Station. He produced an occurrence book entry extract for a non-injury road traffic accident that occurred on 28-03-2019 at Katani area. He stated that the accident involved motor vehicle registration number KCH 973B driven by Raphael Njuguna and KBH 107V driven my Joseph Makau. According to the witness, KBH 107V was carrying from loading area and it lost control and crushed on KCH 973B damaging the cabin. Both vehicles were extensively damaged and were left at the quarry for repairs. He produced police abstract dated 28-03-2018 as plaintiff's exhibit number 2A. He stated further that motor vehicle KBH 107V was blamed for the accident. He produced the occurrence book as exhibit number 2B and police abstract as plaintiff's exhibit 2A. In two short sentence cross examination, he stated that he did not visit the scene and that he was not the investigating officer.

7. The appellant called one witness a Mr. Mahesh Rabadiya. He told the court that he was employed as manager of the appellant. He stated that the appellant was one time the owner of motor vehicle registration number KBH 107V which was allegedly involved in the accident in issue. He added that the respondent sold the vehicle to one Eric Ndichu who later sold it to Ayodha Enterprises Limited but the two failed to register transfer of the vehicle to themselves. According to him, at the time of the accident, the motor vehicle was under sole control of the beneficial owner Ayodha Enterprises Limited. He added that the defendant was not liable for the actions of the person who was driving the vehicle on the material date. He produced a sale agreement dated 11-04-2013. In cross examination, the witness told the court that the appellant was the registered owner of motor vehicle registration number KBH 107V.

8. The appellant has raised issue with the lower court's finding that the respondent had an insurance policy with the insurance company. The appellant has submitted that any insurance company that seeks to claim under the doctrine of subrogation must prove that there was a contract for insurance failure to which the claim must fail. In a nutshell, the appellant takes position that there was no proof that Metropolitan Cannon General Insurance Company was the insurer of the motor vehicle registration number KCH 973B. The trial court made a finding on the issue by holding that the respondent had an insurance policy with Metropolitan Cannon General Insurance Company and made reference to the police abstract. The appellant takes issue with this finding on the argument that the police abstract indicated Cannon Ass. Co. There is no dispute between the respondent and the insurance company on existence of the policy which according to the appellant is a different entity from Metropolitan Cannon General Insurance Company limited.

9. The appellant submits that the discrepancy in the names of the insurer is so material that the suit should have been dismissed. It argues since Metropolitan Cannon General Insurance Company Limited is the one which had filed the suit under the doctrine of subrogation yet some documents produce by the respondent showed different company, the court should not have ignored the need for production of a policy document. The appellant has referred me to page 4 of the record of appeal which is paragraphs 7 to 10 of the plaint and the prayers where the name of Metropolitan Cannon General Insurance Company is pleaded. The appellant has also referred me to page 10 of the record of appeal which a is police abstract. According to the appellant, these discrepancies in the name should have made the magistrate not to overlook the issue of need for policy documents. If I understand the appellant well,

it was only the policy document or certificate of insurance that could prove existence of insurance contract between the respondent and the insurance company.

10. In his submissions, the appellant has not questioned the fact that the respondent's motor vehicle was repaired although there was a ground to that effect in the memorandum of appeal. It is clear to me that the respondent's motor vehicle was repaired by his insurers be it Cannon Assurance Company Limited or Metropolitan Cannon General Insurance Company Limited. This to me is misdescription of a party. Order 1 Rule 9 provides that;

> No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it.'

11. The above provision to me means that the court should adjudicate on the real issue in controversy without regard to technicalities of names. The trial court had the respondent and the appellant before it. What was in controversy was the occurrence of the accident and who was liable for the same. The issue of the principle of subrogation was behind the curtains as the same is usually a matter between the insured and the insurer.

12. The appellant did not tell the court that it had been sued for recovery of damages arising from the same accident by another insurance company or another person. In my view, a policy document and certificate of insurance are not the only documents which can prove existence of a policy. A contract can be inferred from correspondences, acknowledgments, relevant documents and conduct of the parties.

13. In this case, we have the police abstract, payment vouchers in favour service providers and claim forms. The respondent signed a satisfaction note generated by the garage which repaired the vehicle. This garage was paid by his insurers. It is common knowledge and I take judicial notice that official documents are in many occasions written in short forms or abbreviations and unless there is a serious challenge by the parties involved in this case the respondent and the insurance company, the court should not place unnecessary hurdles in names. The police abstract has indicated the policy number of motor vehicle registration number KCH 973B which is the same as indicated in the occurrence book extract produced as exhibit 2B. The totality of all this leads me to conclude that the ground raised by the appellant on this issue is not well founded. It was safe for the lower court to infer existence of the contract of insurance. The appellant had no business in questioning the relationship between the respondent and his insurers. Whether the compensation was to go to Cannon Assurance Limited or Metropolitan Cannon General Insurance Company Limited, the appellant would end up paying for the accident as long as he did not pay more than once. I do not see a reason to disturb the court's finding on liability the purely because of discrepancy in names of the insurance company.

14. The appellant urges that the existence of contract of insurance is the foundation upon which one can determine the risk insured. It submits that there was no proof that the respondent had contract with the insurance company. This is not a suit between the insurer and the insured where strict proof of existence of contract is necessary. I have already made a finding on the existence of the contract. I find the arguments put forward by the appellant as escapist. That is not the purpose of the law or the courts. Parties must be compensated for wrongs done to them without too much reliance on typographical or procedural omissions or errors. It was proved that the money claimed by the respondent was paid for restoration of the motor vehicle. I therefore hold that it was proved on a balance of probabilities that the insurance company was entitled to compensation.

15. It is noted that the appellant did not make an attempt to rebut the respondent's evidence on negligence. It raised the same in its submissions. The main challenge on liability in this appeal is based on argument

that the appellant was not the owner of the motor vehicle because it had sold it to one Eric Ndichu. I note from the lower court's record though the appellant has omitted these documents in its record of appeal that, at some point the appellant was pursuing third party proceedings against the said Eric Ndichu. In his testimony, the appellant's witness stated that Eric Ndichu in turn sold the vehicle to Ayodha Enterprises Limited. The appellant did not tell the court how it came to know this information if it had no interest in the motor vehicle.

16. The appellant applied and obtained judgment against the third party on 28-04-2022. The respondent did not have a case against the third party. Order 1 Rule 19 gives procedure on what should happen once judgment is entered against a third party. Actually, the proviso to that Rule presupposes that that defendant's right to execute against the third party accrues once the defendant settles the decretal sum unless the court gives leave. In that case the appellant is at liberty to pursue compensation or indemnity by the third party independent of the appellant's claim.

17. The entry of judgement against the third party did not exonerate the appellant from disproving the respondent's case against it. The only documents the appellant produced in an attempt to prove that it was not the owner of motor vehicle registration number KBH 107V is a short agreement dated 11-04-2013. That agreement was between one Mr. Ravi Lalji Kerai trading as Radheshyam Transport Limited and Eric Ndichu. The agreement shows that the said Eric did not pay the purchase price for the motor vehicle in full. It does not state how much Eric paid and how much was the balance. It is also not clear whether the motor vehicle was actually released to Eric. Again, as rightly observed by the magistrate, there was no provision as to when the balance was supposed to be paid.

18. Section 9(1) of the *Traffic Act* provides that;

> No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on the road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner thereof.'

19. Subsection 9(2) provides that;

> Upon the transfer of ownership of a motor vehicle or trailer, the registered owner thereof shall, within seven days from the date of the transfer, inform the Registrar in the prescribed form of the sale or disposition, name, postal and email addresses and telephone number of the new owner, the mileage recorded in the mileage recorder (if any), of the motor vehicle, and such other particulars as may be prescribed , and shall deliver registration book in respect of such vehicle to the Registrar together with the transfer fees, whereupon the vehicle shall be registered in the name of the new owner'.

20. In Muhambi Koja vs Said Mbwana Abdi (2015) eKLR the Court of Appeal held that;

> For instance, Section 9 of the *Traffic Act* recognises this situation and requires that when a motor vehicle or trailer is transferred by the registered owner it can only be used on the road for a period not exceeding fourteen (14) days after the date of such transfer, unless the new owner is registered as the owner thereof. The registered owner must, within seven days from the date of the transfer inform the Registrar in a prescribed form. He is also required to furnish the name and address of the new owner and deliver the original registration book to the new owner.'

21. In a similar case of Jared Magwaro Bundi & Another vs Primarosa Flowers Limited (2018eKLR the Court of appeal had the following to say;

> It was therefore held in Muhambi Koja (supra) that Section 8 of the Traffic recognises registration book or the Registrar's extract of the record as prima fascie evidence of title to a vehicle and the person in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de fact owner, a beneficial owner or possessory owner.'

22. The appellant did not produce evidence to show that he wrote a notice to the registrar to inform him of change of ownership. It is my view that the said section of the law was meant to eliminate the mischief where owners of motor vehicles simply come up with all manner of documents in order to avoid liabilities attached to the motor vehicles. An owner who fails to take an overt and positive actions to get their names removed from the registrar of motor vehicles should have themselves to blame once the motor vehicles get involved in incidents where liability attaches. The onus of proving that the registered owner of the vehicle had no control is on the registered owner. I am not convinced that the agreement produced by the appellant was sufficient for avoiding liability in this matter.

23. Other than the agreement, the appellant should have tendered evidence to show that it transferred the motor vehicle to Eric Ndichu. The respondent produced a copy for records which shows that the vehicle was even at the time of filing the suit owned by the appellant. Once the respondent did that, the appellant had a duty of producing evidence to rebut that, which I find it failed to do. The agreement without further documents or proof of further action by the appellant cannot stand. The fact that the appellant claims to have discovered that Eric Ndichu in turn sold the vehicle Ayodha Enterprises Limited was an indication that it still had interest in the vehicle. If indeed the appellant sold the vehicle to Ndichu, it can only blame itself for failing to make a follow up and transfer the vehicle to him. As things stood at the time of hearing, the appellant was still the owner of motor vehicle.

24. The appellant has not made submissions on the issue of whether the driver of motor vehicle registration number KBH 107V was negligent although the same is raised in the memorandum of appeal. Despite that, it is important that I deal with it. PW2, the the police officer testified and told the court that motor vehicle registration number KBH 107V was blamed for the accident. He produced the OB extract and police abstract which attested to this fact. The appellant did not bother to rebut this evidence. It concentrated on its line of defence that it had sold the vehicle. In its defence, the appellant did not proof negligence on the part of the respondent's motor vehicle. On a balance of probabilities, the magistrate was justified in holding that the appellant's motor vehicle was to blame.

25. The appellant argues that the respondent did not establish relationship between it and the driver of the motor vehicle registration number KBH 107V. It argues that the magistrate was wrong in naming the driver from nowhere. It is my position that it is not necessary that the driver of the motor vehicle be joined or disclosed in the suit. It is enough for a claimant to establish ownership of the motor vehicle.

26. I have already held that the court did not err in finding that the insurance company was entitled to be paid compensation for damages incurred. The third issue raised by the appellant is therefore intertwined with the first one and I will not go back to that.

27. In conclusion and based on the above analysis, it is my finding that the appeal herein lacks merit and I proceed to dismiss it with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF AUGUST 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in the presence of;

Miss Obwori for the appellant; and

Mr. Odek for the respondent.