



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Charo v Kiilu (Civil Appeal E014 of 2022)
[2023] KEHC 22205 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 22205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E014 OF 2022
F WANGARI, J
FEBRUARY 24, 2023**

BETWEEN

JIMMY SAFARI CHARO APPELLANT

AND

PETER NDUTU KIILU RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate's Court at Mombasa (Hon. Muchoki) dated 16th December, 2021 in Civil Suit No. E354 of 2021)

JUDGMENT

1. This is an appeal against the ruling delivered by Honourable Muchoki, Resident Magistrate on 16th December, 2021. The Appellant being dissatisfied with the said ruling has preferred this appeal.
2. The Appellant preferred the following seven (7) grounds of appeal in urging this court to set aside the ruling and orders made on 16th December, 2021: -
 - a. The learned magistrate erred in law and in fact by failing to consider the provisions of section 8 of the *Traffic Act* and that legally, a police abstract cannot be a record of ownership of a motor vehicle.
 - b. The learned magistrate erred in law by failing to consider the submissions of the appellant as well as case law relied upon and as a result arrived at a decision which was manifestly and fundamentally erroneous.
 - c. The learned magistrate erred in law and in fact by providing an irrelevant justification for dismissing the Notice of Motion dated 30th June, 2021 by determining that the 1st Defendant had not attempted to explain how his name came to be recorded as the owner of the subject motor vehicle, thereby altering the incidence of proof as the 1st Defendant cannot be called upon to prove why



he has been erroneously joined in the suit after having brought proof that he is in fact not the registered owner of the subject vehicle.

- d. That the Learned Magistrate erred by finding that it would require a trial to prove that the 1st Defendant is not the owner of the subject vehicle as an official search whose contents have not been challenged by the Plaintiff shows beyond any doubt who the registered owner of the vehicle is.
 - e. That the Learned Magistrate failed to consider that that a plaint which, in breach of Order 4 Rule 5 of the Civil Procedure Rules, fails to contain a statement showing how the 1st Defendant is interested in the relief claimed or how he is liable to be called upon to answer the claim fits the very definition of a frivolous suit and an abuse of court process.
 - f. That the Learned Magistrate therefore failed to take into account relevant matters which he ought to have taken into account or otherwise took into account irrelevant matters which he ought not to have taken into account and either way arrived at a ruling which was plainly and manifestly wrong.
 - g. The Learned Magistrate erred in law by failing to determine and rule on the other order sought by the Appellant for the provision of security and dismissed the same without according any reasons for not allowing the prayer for security.
3. The Appellant thus sought for the appeal to be allowed and the ruling delivered on 16th December, 2021 be set aside in its entirety and the Appellant's Notice of Motion dated 30th June, 2021 be allowed in terms of prayer 1 or in the alternative, in terms of prayer 2.
 4. Directions were taken and the appeal was disposed of by way of written submissions where all parties duly complied and relied on various decisions in support of their rival positions.
 5. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd*. (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).
 6. I have carefully perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the ruling ought to stand or otherwise I will carefully revisit the record.
 7. The Respondent vide a plaint dated 8th February, 2021 and filed on 9th March, 2021 sought for general and special damages from the Appellant for an accident that allegedly occurred on 15th June, 2020 occasioning the Respondent serious injuries. The plaint was later amended on 24th May, 2021 wherein a 2nd Defendant by the name of Watu Credit Limited was introduced. The 2nd Respondent in the Lower Court file was sued as a third party. From the record, appearance was entered for the 1st Defendant on 20th April, 2021 and a statement of defence filed on 6th May, 2021. As for 2nd Defendant, appearance was entered on 22nd June, 2021 and a statement of defence filed on 6th July, 2021.
 8. Through an application dated 30th June, 2021 and filed on 9th July, 2021, the Appellant sought for among other orders that the name of the 1st Defendant be struck out from the amended plaint dated



24th May, 2021 and the suit against the 1st Defendant be struck out with costs. The application was heard and through a ruling delivered on 16th December, 2021, the application was dismissed with costs. It is this ruling that precipitated the present appeal.

Appellant's submissions

9. The appellant made reference to Order 4 rule 5, Order 26 rule 1 and Order 2 rule 15 of the *Civil Procedure Rules*, 2010. Section 8 of the *Traffic Act* was also referred to. The Appellant submitted that the Learned Magistrate failed to consider that section 8 of the *Traffic Act* expressly stipulates that the person in whose name the motor vehicle is registered shall unless the contrary is proved be deemed to be the legal owner of the vehicle. The Giving the definition of ownership, the Appellant contended that a police abstract does not confer, transfer, allocate or even act as proof of complete dominion, title or proprietary right in a thing or claim. Citing the case of *Petrocity Enterprises (U) Ltd v Roseline Sikudi suing as legal rep. of the estate of Pascal Ngadi (Deceased) & 2 others* [2017] eKLR, the Appellant submitted that search bearing particulars of the owner of motor vehicle is conclusive proof of ownership and defeats the police abstract which is proof of a complaint.
10. The Appellant further submitted that the Learned Magistrate placed an unreasonable burden on the Appellant to explain why the Respondent reported to the police that the Appellant was the owner of the motor vehicle. Relying on the case of *National Industrial Credit Bank Limited v Esther Wangui Ngugi* [2019] eKLR, the Appellant submitted that the Learned Magistrate did not consider that as evidence, the Appellant's motor vehicle search for the subject motorcycle outrightly vindicated the Appellant from any liability.
11. Making reference to Order 4 rule 5 of the *Civil Procedure Rules*, the Appellant submitted that the Learned Magistrate failed to consider and determine that the amended plaintiff failed to show any fact that the Appellant is liable to answer to the Plaintiff's claim. According to the Appellant, there was no nexus between the Appellant and the Respondent. On the failure of the Trial Court to determine and rule on the other orders sought by the Appellant, reference to Order 21 rule 4 of the *Civil Procedure Rules* was made. The Appellant submitted that judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decisions. He submitted that failure to give reasons for rejection of the prayer for security for costs was an error in law.
12. He therefore urged that the appeal be allowed and in the alternative, the prayer for security for costs not determined by the Lower Court be considered and allowed.

Respondent's submissions

13. For the Respondent, it was submitted that after the alleged accident, he obtained a police abstract from Changamwe Police Station which showed the owner as Jimmy Safari Charo C/O Watu Credit. Relying on the same, he filed suit against the Appellant seeking both general and special damages arising out of the said road traffic accident. It was submitted that when the Appellant filed its statement of defence, it filed a list of documents amongst them a motor vehicle search dated 27th April, 2021 that showed the current owner as the 2nd Defendant, Watu Credit Limited. That is what led to the amendment of the plaintiff. The Respondent submitted that the Appellant was a necessary party to the proceedings to help and identify and determine who was the owner of motor vehicle registration number KMEV 147Q TVS.
14. The Respondent contended that both the police abstract and the motor vehicle search contain conflicting information as to the owner of the subject motor vehicle and striking out the Appellant's



name at this juncture would be prejudicial as the court has to determine this ownership dispute. Making reference to Order 1 rule 7 of the *Civil Procedure Rules*, the Respondent submitted that a doubt had been created as to the ownership of the subject motor cycle with the police abstract stating that the Appellant as the owner while the search showed the 2nd Defendant as the owner. Therefore, the Appellant was a proper party to the suit and his name ought not to be struck out.

15. The Respondent urged the court to dismiss the appeal by upholding the Lower Court's ruling.

Analysis and Determination

16. After considering the pleadings, proceedings, submissions and the law, I find that there are two (2) issue for determination: -

- a. Whether the Learned Magistrate erred in dismissing the application dated 30th June, 2021.
- b. Whether the Learned Magistrate erred in failing to determine the other prayers sought in the application dated 30th June, 2021.

17. The crux of the appeal is the trial court's ruling dismissing the application dated 30th June, 2021. The relevant provision is Order 1 rule 14 of the *Civil Procedure Rules* which provides that any application to add or strike out or substitute a Plaintiff or Defendant may be made to court at any time before trial by chamber summons or at trial of the suit in a summary manner. As provided by the rules, the application is by chamber summons. I notice that the application on record was made by way of notice of motion. Be that as it may, as was held by the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013] eKLR, the court will in the interest of justice not interpret procedural provisions as being cast in stone.

18. The Lower Court in dismissing the application held that the Defendant (Appellant herein) had not attempted to explain how his name was recorded as the owner of the subject motor cycle. The police abstract and the motor vehicle copy of records contained conflicting information and thus the issue of ownership had to be determined by the court after receiving evidence at the trial. Was this correct?

19. In answering the question above, it is imperative to consider the probative value to be attached to a police abstract on the issue of ownership of motor vehicle vis a vis motor vehicle copy of records. Section 8 of the *Traffic Act* provides as follows;

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

20. It is not in doubt that a police abstract can be relied on to show who the owner of a motor vehicle is but that is in cases where there is no other contrary evidence. In *Joel Muga Opija v African Sea Food Ltd* [2013] eKLR, the Court of Appeal held as follows: -

“...We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied...”

21. However, in the present case, the police abstract which showed the Appellant as the owner was rebutted by the motor vehicle copy of records attached to the Appellant's affidavit in support of the application dated 30th June, 2021. The Learned Magistrate equally held that there was an ownership issue which



had to be determined. Is this position correct? I hold that this was a misapprehension of the facts of the case. I say so because from the pleadings on record, there are no competing claims as to who is the owner of the subject motor cycle registration number KMEV 147Q TVS.

22. On 6th July, 2021, the 2nd Defendant filed its statement of defence dated 5th July, 2021. At paragraph 3 of the said defence, the 2nd Defendant admitted that it was the registered owner of the subject motor cycle. This clearly rules out the issue of ownership. In relation to the first issue, I hold that the Learned Magistrate fell into error when he dismissed the application dated 30th June, 2021 on an account of ownership issue.
23. On the second issue, the application dated 30th June, 2021 had two (2) substantive prayers. The Lower Court having made a determination on the first substantive issue was bound to render itself on the second issue as it was framed in the alternative. Since the court dismissed the application for striking out, it was required to consider the issue of security for costs. However, from the record, it is clear that the Learned Magistrate never considered the alternative prayer as the ruling is silent on security for costs. As was held in *Galaxy Paints Co. Ltd v Falcon Guards Ltd* [2000] 2 EA 385, the general rule is that courts should determine a case on the issues that flow from the pleadings and therefore a court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.
24. The Lower Court was required to pronounce itself on the second prayer on whether the Respondent was liable to deposit security. Having not done so, the Learned Magistrate fell to error. Having found the first issue in the affirmative, I need not consider whether security is necessary.
25. Having found as above, I do find the appeal has merit and the same is hereby allowed.
26. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -
 - a) The Appeal is hereby allowed;
 - b) The ruling by Hon. Muchoki delivered on 16th December, 2021 is set aside in its entirety and the Appellant's Notice of Motion dated 30th June, 2021 is hereby allowed in terms of prayer (1).
 - c) Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF FEBRUARY, 2023.

.....

F. WANGARI

JUDGE

*In the presence of:

For the Appellant.....

For the Respondent.....

Court Assistant.....

