



**Kenya Commercial Bank Ltd v Nyandoro & 2 others (Civil Appeal E004 of 2021) [2023] KEHC 21344 (KLR) (9 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21344 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E004 OF 2021  
GL NZIOKA, J  
AUGUST 9, 2023**

**BETWEEN**

**KENYA COMMERCIAL BANK LTD ..... APPELLANT**

**AND**

**LUCY NYABOKE NYANDORO ..... 1<sup>ST</sup> RESPONDENT**

**LEVIS OGOSI OGEKA (LEGAL REPRESENTATIVE OF THE ESTATE OF  
RICHARD OGEKA NYAGUCHA) ..... 2<sup>ND</sup> RESPONDENT**

**RAHAB WAMBUI KANGETHE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the ruling delivered by Hon. E. Kelly (SRM) at the Chief Magistrate's Court at Naivasha vide Civil Case No. 132 of 2020 dated 14th September 2021)*

**JUDGMENT**

1. The appellant herein was sued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, as the 2<sup>nd</sup> Defendant in the Chief Magistrate's Civil Case No. 132 of 2020. The 3<sup>rd</sup> Respondent was sued therein as the 1<sup>st</sup> Defendant. The appellant's case is that on the 5<sup>th</sup> day of August 2017, the deceased Richard Ogeka Nyagucha was driving a motor vehicle registration number KBW 508P along at Malekia Bridge along Naivasha-Nakuru road.
2. That, at the same time the defendants' agent and/or servant was driving a motor vehicle registration number KCH 982B and drove the said motor vehicle in a careless and negligent manner and caused an accident in which the deceased met his death. That, the motor vehicle KCH 982B is owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
3. That as a result the deceased suffered severe pain and lost his reasonable expectation of life and his dependents' lost their dependency and his estate suffered loss and damage, hence the suit herein seeking



for general damages for pain and suffering, loss of dependency, expectation of life, special damages of Kshs 28, 700, costs and interest, and/or any other relief the court may deem fit to grant.

4. However, upon service of the plaint, the 2<sup>nd</sup> defendant cum appellant herein filed a statement of defence dated; 18<sup>th</sup> September 2020, denying the allegation that it was the registered owner of motor vehicle registration No. KCH 982B. In addition, the appellant filed a chamber summons application dated; 2<sup>nd</sup> November 2020, seeking for orders that, its name be struck out from the suit for misjoinder and the costs of the application be provided for.
5. The application was based on the grounds thereto and an affidavit of the even date sworn by Bonnie Okumu, Director of Legal Service and Company Secretary with the appellant. He avers that, the appellant did not finance the purchase of motor vehicle registration number KCH 982B, as such it is impracticable for the plaintiff to aver that, it had any beneficial interest in the said motor vehicle or that, it was a joint owner.
6. Further, the accident allegedly occurred on 5<sup>th</sup> August 2017, yet the search from NTSA was done on 16<sup>th</sup> April 2018, about nine (9) months after the alleged accident. Neither does the search show that the 2<sup>nd</sup> defendant is the registered owner of the said vehicle.
7. However, the application was opposed by the plaintiffs cum respondents vide a replying affidavit dated; 24<sup>th</sup> November 2020 sworn by the 1<sup>st</sup> plaintiff, Lucy Nyaboke Nyandoro who averred that before filing the suit, the plaintiff's advocate exercised due diligence by applying for ownership particulars of motor vehicle registration number KCH 982B and established the ownership as per the record from NTSA, (attached to the replying affidavit as annexure "LNN2").
8. That from the date of filing the suit, appellant has never stated its ownership status of the subject motor vehicle. That, it is clear from the handwritten endorsement by NTSA, on the copy of the ownership records availed that as at 5<sup>th</sup> August 2017, motor vehicle in question was owned by the appellant and Rahab Kangethe.
9. Upon hearing the parties, the trial court rendered the ruling on the application on 14<sup>th</sup> September 2021, and held that as the main suit is yet to be heard, the issue under consideration would be determined at the hearing of the main suit where the plaintiff will have an opportunity to prove their case against the defendants including the pertinent issue of ownership, after which the court will give its verdict on the issues including costs of the suit and that, the issue of ownership is thus premature.
10. It is against this ruling that, the appellant has lodged the appeal herein on the following grounds as stated in the memorandum of appeal, dated 24<sup>th</sup> January 2022: -
  - a. That the learned Magistrate erred in law and in fact in failing to strike out the applicant from the suit for misjoinder against the weight of evidence.
  - b. That the learned Magistrate erred in law and in fact in holding that the issue of ownership of the motor vehicle could only be substantively determined at the main trial.
  - c. That the learned Magistrate erred in law and in fact in failing to strike out the applicant from the suit yet it is not a necessary party in the proceedings.
  - d. That the learned Magistrate erred in law and in fact in sustaining the 1<sup>st</sup> respondent's suit against the appellant yet there is no proper cause of action against appellant.
11. The appeal was disposed of by filing of submission. The appellant filed submissions dated; 21<sup>st</sup> November 2022, wherein it submitted that it is not a proper defendant as defined under Order 1 Rule



- 3 of the Civil Procedure Rules, 2010 (herein after “the Rules”) as no cause of action or relief exists against it.
12. That, a proper cause of action was defined in the case of; V.K Construction Co. Ltd v Mputa Investment Limited Nairobi HCC 257 of 2023 as a factual situation that would entitle a person to obtain a remedy against another person and that has some chance of success when only the averments in the plaint are considered.
  13. That in the present case, the appellant is not the registered owner of the subject motor vehicle as its name does not appear on the official motor vehicle search from NTSA dated; 16<sup>th</sup> April 2018 which was obtained eight (8) months after the accident. Further, the search indicates the previous owner as; Joseph Muchai and Mary Wanjiru Ndungu as the current owner.
  14. That, section 8 of the Traffic Act (Cap 403) Laws of Kenya states that, registration of a person as the owner of a motor vehicle is prima facie evidence of ownership unless the contrary is proved. Further, the courts have affirmed that an official document from the Registrar of Motor vehicles is adequate evidence of ownership as held by the Court of Appeal in the case of; Joel Muga Opija vs East African Sea Food Limited [2013] eKLR.
  15. Further in the case of; Nacny Ayiamba Ngaira v Abdi Ali [2010] eKLR it was stated that a registration certificate obtained from the Registrar of Motor Vehicles shows the name of the registered owner of a motor vehicle and proves ownership.
  16. That, the appellant is a complete stranger on the issue of ownership of the subject motor vehicle and thus the 1<sup>st</sup> and 2<sup>nd</sup> respondent have no right of relief against it. Consequently, it is only prudent, fair and in the interest of justice that the court finds the appellant is improperly joined in line with Order 1 Rule 3 of the Rules.
  17. The appellant further submitted that it is not a necessary party to the suit. That, the test of whether a party is a necessary party was laid out in the case of; Elisheba Muthoni Mbae v Nicholas Karani Gichohi & 2 Others (2014) eKLR where the court cited the case of Werrot Co. Ltd v Andrew Douglas Gregory & others Nairobi Milimani H.C.C.C No. 2363 of 1998 (UR) and Ringera J (as he then was) stated that, the guiding principle in deciding whether the to add as party is whether their presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved.
  18. That the court set out two tests in applying the principle that; there must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings and it should not be able to pass an effective decree in absence of such party.
  19. That, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have failed to demonstrate that the appellant was a mere financier and the inclusion of the appellant in the matter is inconsequential to the adjudication and determination of liability in the suit and neither does the appellant owe a duty of care to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In the circumstances the court should exercise its unfettered discretion under Order 1 Rule 10 of the Rules and strike the appellant out of the proceedings as an unnecessary party.
  20. That, the appellant filed an application for misjoinder that revolved around the question of ownership making it an interim point of determination which could have been determined conclusively at the interim stage. Reliance was placed on the case of; Diamond Trust Bank Kenya Limited vs Richard Mwanfi Kamotho & 2 others [2017] eKLR where the court held that, certain matters such as wrongful joinder can be tried through affidavit or oral evidence at the preliminary state and it is futile to argue otherwise or insist a full trial be conducted.



21. Further in the case of; Ali Lali Khalifa & 8 others vs Pollman Tours and Travel Safaris Ltd, Diamond Trust Bank (K) Ltd, Salim Khalid Said [2003] eKLR, the court struck out the 2<sup>nd</sup> defendant holding that, it was a mere financier of the 1<sup>st</sup> defendant for purposes of acquisition of the suit motor vehicle and that its interest was merely recorded in the records of the Registrar of Motor Vehicles for purposes of securing its interest under a Hire Purchase Agreement.
22. Furthermore, in the case of; Ali Abdi Dere v Hash Hauliers Limited & another [2018] eKLR the court struck out the case against the 2<sup>nd</sup> defendant on the grounds that the plaint did not contain any averments as to how its liability arose and that it was a mere financier and thus did not owe a duty of care to the plaintiff to give rise to liability.
23. However, the respondents in their submissions dated; 30<sup>th</sup> March 2023 argued that the trial magistrate properly dismissed the applicant's application. That, before filing the suit in the trial court, the respondents carried out a search with the Registrar of Motor Vehicles on the 16<sup>th</sup> April 2018 to find out the registered owner. That a hand-written endorsement at the bottom of the search, duly signed and stamped by the National Transport and Safety Authority, indicated that the appellant and 3<sup>rd</sup> respondent were the registered owners of the vehicle as at 5<sup>th</sup> August 2017. That it is on the basis of the said search that the defendants are sued and therefore the appellant is properly before the court.
24. Further, the appellant did not provide proof such as a Hire Purchase agreement to prove that it was a mere financier of the suit motor vehicle as required under section 8 of the *Traffic Act* (Cap 403) law of Kenya. That its averments remained mere allegations and failed short of section 107 of the *Evidence Act*.
25. Further, the trial court in its ruling gave the appellant an opportunity to prove ownership of the subject motor vehicle at a later date but the appellant is looking for a short-cut through the appeal and is misleading the court by stating that the issue of ownership was never delved into by the trial court.
26. Having considered the appeal, I find that the main issue for determination is whether the appellant should be struck out of the suit on the ground of misjoinder. It suffices to note that, indeed the learned trial Magistrate did not pronounce herself on the issue deferring it to be determined alongside other issues in the main suit terming it as premature.
27. However, the key question is whether indeed the issue is premature. I do not think so. In my considered opinion, the trial court should have dealt with the issue at this stage. If for anything else but to save any unnecessary costs that may be incurred and loaded on the plaintiff, (if at all) at the end of the trial, which may last for as long as it can, the court finds that, the 2<sup>nd</sup> defendant was not properly enjoined in the suit.
28. Be that, as it were, the role being the first appellate court, is to evaluate the evidence adduced afresh and reach its own decision. In that regard  
I note right from the pleadings that, nowhere does the plaintiffs aver state that, the appellant was the driver of the subject motor vehicle registration No. KCH 928 but avers that: -
  - a. The appellant was the registered joint owner thereof with the 1<sup>st</sup> defendant.
  - b. That, the motor vehicle was being driven by the 1<sup>st</sup> and 2<sup>nd</sup> defendant's driver, agent and/or servant who disappeared after the accident and whose particulars the defendants have failed to disclose to the police.
29. Pursuant thereto, the respondents need to prove, that; the appellant is a joint registered owner of the motor vehicle registration No. KCH 982 and/or is vicariously liable for the acts of the driver thereof at the time of the accident (if at all).



30. As regards the first issue, the law is settled that, he who alleges proves. In that regard, section 107 of the Evidence Act (Cap 80) Laws of Kenya states: -
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
31. Furthermore, in civil litigation the burden of proof of the claim lies on the plaintiff, unless otherwise shifted. Thus, it is for the plaintiffs cum respondents to prove that, the appellant is the registered owner of the subject matter.
32. It is also settled law that the ownership of a motor vehicle is proved by records held by the Registering authority in this case NTSA. In an effort to prove the allegation the respondents have annexed to the affidavit in response of the application, records from NTSA, marked as “LNN2”. A perusal and/or consideration thereof, reveals that, the registered owner of the subject motor vehicle as at 16<sup>th</sup> April 2018, is Mary Wanjiru Ndungu. It is noteworthy that, the appellant’s name is not reflected anywhere on this record. It is also suffices to note that, the same document “LNN2” shows that, the previous owner of the said motor vehicle was Joseph Muchai.
33. Thus there is no record indicating that, the appellant is or has been the registered owner of the subject motor vehicle. The question is: if the documents availed at this stage do not establish that the appellant is the registered owner of the motor vehicle, where then will the respondents get any other evidence to prove the same?
34. Furthermore, the record relied on “LNN2” does not show the registered owner of motor vehicle KCH 982B as at the date of the accident. It is after the accident. Why didn’t the plaintiffs seek for records as at the date of the accident. Even if the court were to go by the record produced, it is not clear when the previous owner Joseph Muchai, transferred the vehicle to the current registered owner
35. It is also noteworthy that the respondents aver at paragraph 8 of the replying affidavit that a hand-written endorsement by NTSA on the copy of record of ownership shows the appellant was the registered owner. Unfortunately, I was not able to see the said endorsement but even if I did, how is that hand written endorsement to be admitted in evidence. Why handwritten. Why not printed. Who will authenticate it, and at what stage.
36. All in all, based on the evidence availed, I find no shred of evidence to indicate the appellant was the registered owner of the motor vehicle at the time of the accident.
37. Be that, as it may, even for whatever reason, assuming the appellant was a financier of the subject motor vehicle as alleged, the question is: would the appellant as a financier be vicariously liable for the alleged negligence of the driver of the motor vehicle at the time of the accident?
38. To appreciate where the court is coming from, it is noteworthy that, the doctrine of vicarious liability is the liability held by a person or entity that is in charge (called the principal or master) of another person (called the agent or servant). The person, usually an employer, is responsible for the actions of their employee (or other subordinate) if that employee causes harm or injury to another person.



39. Indeed, the principle of vicarious liability has been considered in various court decisions and in that regard, in the case of; *Amalgamated Logistics International Ltd & another v MMK (2020)* eKLR the Court of Appeal stated as follows: -

“Vicarious liability has been well elucidated in *Salmond on Torts*, 1<sup>st</sup> ed at Pg 83 as;

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.”

This Court in *Joseph Cosmas Khayigila V Gigi & Co. Ltd & Another*, Civil Appeal No. 119 of 1986 established a clear test for vicarious liability as follows: -

“In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that at the material time the driver was acting on the owner’s behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner’s request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”

40. Similarly, in the case of; *Securicor Kenya Ltd v Kyumba Holdings Ltd (2005)* eKLR, the Court of Appeal stated that : -

“What is Vicarious Liability? *Winfield and Jolowicz on Tort*, 14th Edn says: -

“The doctrine may be stated as follows: - Where A, the owner of a vehicle, expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A Will Be Vicariously Liable For B’s Negligence In The Operation Of The Vehicle. Thus In *Ormrod Vs. Crossville Motor Services Ltd*. (71) A, the owner of a car, asked B to drive the car from Birkenhead to Monte Carlo, where they were to start a holiday together. It was held that A was liable for B’s negligent driving even though B might be said to be partly pursuing his own interests in driving A’s car. On the other hand, liability was not imposed in *Morgans Vs. Launchbury* (72) where the husband, who normally used his wife’s car to go to work, got a third person to drive him home after visits to several public houses. In no sense was the husband acting as his wife’s agent in using the car for his work and still less was the third person her agent. It is now clear that mere permission to drive without any interest or concern of the owner in the driving does not make the owner vicariously liable, nor is there any doctrine of the “family car”. Where, however, the facts of the relationship between owner and driver are not fully known, proof of ownership may give rise to a presumption that the driver was acting as the owner’s agent.” (71: [1953] 1 W.L.R. 1120 72: [1972] A.C. 127)”

41. Be that as it may, there is nowhere in the pleading where the appellant is said to be vicariously liable for any person’s negligence and so, where is the claim against it arising from?
42. Indeed, section 1B of the *Civil Procedure Act* implores the courts to exercise its duty of furthering the overriding objective specified in section 1A, by handling all matters presented before it for the purpose of attaining the following aims—
- (a) the just determination of the proceedings;



- (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology. (emphasis added)
43. The upshot of the aforesaid is that, the respondents are unlikely to sustain a claim against the appellant and it will not be in the interest of justice to retain the appellant in this matter.
44. In that case I set aside the decision of the trial court declining to strike the appellant from the suit and allow the chamber summons dated; 2<sup>nd</sup> November 2020, in terms of prayer (1) and (2).
45. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 9<sup>TH</sup> DAY OF AUGUST 2023.**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Opondo for the appellant

Mr. Okerosi Ochako for the respondent

Ms. Ogutu court assistant

