



Regina Nduku Makau v Umowa Savings & Credit Co-operative Society Limited & 2 others (Civil Appeal E25 of 2020) [2022] KEHC 243 (KLR) (24 March 2022) (Judgment)

Neutral citation: [2022] KEHC 243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E25 OF 2020**

**MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

REGINA NDUKU MAKAU APPELLANT

AND

**UMOWA SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED 1ST RESPONDENT**

JOSEPH KILONZO 2ND RESPONDENT

JANS WYN INVESTMENT COMPANY 3RD RESPONDENT

(Being an Appeal from the judgment and decree of Hon. R. Gitau (RM) in Mavoko Chief Magistrate's Court Civil Case No. 131/2019 delivered and dated 27th October, 2020)

JUDGMENT

Background:

1. Vide the Plaintiff's Complaint dated 21st February, 2019 and filed in Court on 22nd February, 2019 the Plaintiff/Appellant herein stated that on 5th September, 2017, she was lawfully and carefully travelling aboard motor vehicle registration number KBM 733B along Mombasa – Nairobi Road. When the motor vehicle reached Mto wa Mawe near Athi River, the said motor vehicle registration number KBM 733 B which was negligently and/or recklessly driven, controlled and/or managed by the Defendants either by themselves or their authorized driver, agent and/or servant veered off the road getting into a self-involving accident as a result of which the Plaintiff sustained serious injuries.
2. As a result of the accident the Plaintiff/Respondent sustained serious bodily injuries and suffered loss and incurred expenses. Particulars of injuries sustained are blunt head injury, blunt chest injury, blunt both shoulders and blunt injury on the left hip. The Plaintiff prayed for general damages for pain and suffering and special damages of Kshs.4,550/-.



3. The Plaintiff incurred special damages as a result of injuries amounting to Kshs.4,550/-. She prayed for the general damages for pain and loss of amenities, special damages as pleaded and costs and interest.

Defence

4. The 1st Defendant filed its statement of defence dated 29th day of March, 2019 and filed in Court on 11th April, 2019. It admitted that it was the registered owner of motor vehicle registration No. KBM 733 B but denied that it was the beneficial owner in actual control and/or possession of the said motor vehicle and the Plaintiff hereof was to be put to strict proof. It further denied the other allegations in the plaint and averred that if at all an accident did occur at the place and date alleged and the plaintiff sustained injuries, the same was solely or principally as a result of the negligence of the plaintiff. It also stated that no demand and/or notice of intention to sue had been served upon them and put the plaintiff to strict proof thereon.

Evidence

5. The Plaintiff called one (1) witness in support of her case.
6. PW.1 Regina Nduku Makau (The Plaintiff) asked the court to adopt her witness statement dated 22/02/2019 together with her list of documents and rely on them as evidence. She further stated that she blamed the driver of motor vehicle Reg. KBM 733 B for driving negligently. She stated that she had not fully recovered and had problems on her back and cannot carry heavy objects or bend. In re-examination she told the Court that after conducting a search with NTSA she found out that the owner of the said accident motor vehicle is Umowa Saving and Credit cooperative society limited.
7. The defense also called one witness.
8. DW.1 Onesmus Kyalo Ndambuki (Secretary of the Umowa Sacco) asked the court to adopt his witness statement dated 13/07/20220 as his evidence in chief together with the list of documents. He further stated that the motor vehicle subject of these proceedings belongs to one Musyoka Ngata Gitanga who is one of their members but the vehicle is registered under their name because the Sacco had advanced a loan to the owner.
9. The motor vehicle was used as a security and that the management and running of the motor vehicle was done by Musyoka Ngata and he is the one who had hired the driver and the conductor. The Sacco 1st Defendant was not involved in the operations of the motor vehicle and even the insurance was taken out by Musyoka Ngata. 1st Defendant learnt of the road traffic accident after they were served with Court Summons

Judgment of the Trial Court

10. The Trial Court in its judgment delivered on 27th day of October, 2020 the court entered judgement for the plaintiff against the 2nd defendant and 3rd Party jointly and severally as follows: Liability assessed at 100% against 2nd defendant General damages awarded Kshs.140,000/- Special damages Kshs.1,550/- Total Award Kshs.141,550/- The suit against the 1st defendant was dismissed with no order as to costs with interest thereon.

Appeal

11. Aggrieved by the Trial Court judgment the Appellant herein filed his Memorandum of Appeal dated 12th day of April, 2021 and filed in Court on 30th April, 2021 based on the following grounds: -
 - a. That the Trial Magistrate erred in law and fact by arriving at decision that was not based on the evidence on record and thus erroneously apportioned liability.



- b. That the Trial Magistrate erred in law and fact by not determining that the 1st Respondent was to blame for the accident subject matter of the proceedings before it by virtue of being the sole registered owner of the suit motor vehicle.
 - c. That the learned Trial Magistrate erred in law and fact by reaching her decision on liability for the accident subject matter of the proceedings before it and which was in stark contrast to the evidence adduced by the Appellant and 1st Respondent.
 - d. That the learned Trial Magistrate erred in law and fact by disregarding the grounds and submissions tendered by the Appellant’s Counsel on ownership of the suit motor vehicle.
 - e. The learned Trial Magistrate Court erred in law and fact by making an order dismissing the case against the 1st Respondent.
 - f. The learned Trial Magistrate Court after considering all the evidence and submissions before her arrived at wrong and unjust decision.
12. The Appellant sought the following orders:
- a. That the judgment dated, signed and delivered on the 27th October, 2020, decree and consequential orders therein be set aside.
 - b. That the 1st Respondent be found liable for the accident and liability be thereby apportioned to them.
 - c. Costs of this Appeal be awarded be provided for.

1st Respondent Supplementary Record of Appeal Dated 19th August 2021

13. The 1st Respondent filed their Supplementary Record of Appeal and attached several documents in support of their case to wit; defendants list of witnesses, witness statement and defendants list of documents.

Appellant Submissions

14. As to whether the liability was apportioned erroneously the Appellant relied on Section 107 and 108 of the Evidence Act which provides that;

“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 those facts exist.”

15. In support of their case the Appellant submitted that she presented admissible material evidence for the trial court to give judgment in her favor on the proven facts to support negligence on the part of the 1st Respondent by producing a list of documents which included the police abstract showing that the suit motor vehicle was to blame for the accident and listed the 1st Respondent as the owner of the motor vehicle thus proving ownership of the vehicle. She cited the case of *Ciabaitani M’Mairanyi & Others –v- Blue Shield Insurance Co. Ltd.* CA No. 101 of 200- [2005] IEA 280 held that:

“The burden of proof in an action for damages for negligence rest primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligence act of omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”



16. The Appellant also cited the case of Lord Denning in *My Miller –vs- Minister of Pensions* [1947]2 ALL ER at 37.
17. According to the Respondents statement of defense the respondent did admit that they were in fact listed as the sole registered owner of motor vehicle KBM 733 B but denies being the beneficial owners in actual control and possession of the same motor vehicle but the copy of records only lists the 1st defendant as the registered owner and no further documents were produced by the 1st defendant to the contrary or to explain any change causing the motor vehicle to be registered therefore the appellant submitted that the 1st defendant did not therefore explain away liability.
18. The appellant further submitted that in the lower Court file the Third Party was enjoined as Jans Wyn Investment company limited and not the said Musyoka Ngati Kitonga hence the enjoined third party and the said member are separate legal entitles and can therefore not be used interchangeably regardless of any connection unless on the courts behest.
19. The Appellant submitted that there was no direct claim by herself against the 3rd respondent and that the 3rd respondent was joined in the suit as a third party and that her case was wholly against the 1st and 2nd respondent and the third party could only be called upon to indemnify and or contribute to the 1st and 2nd respondents for any judgment entered against them. The case of *City Hoppa limited – vs- Harrison Kamau Karabi & 2 others* [2021] eKLR the Court affirmed the position in the case of *Sammy Ngigi Mwaura –vs- John Mbugua Kagai & Another* [2006] eKLR was cited where the Court observed as follows;

“The third party has not been directly sued on its own right and has only been brought in by the defendant for indemnity should he be found liable.....”
20. As the copy of records lists the 1st respondent as the sole registered owner of the motor vehicle reg. No. KBM 733 B as well as the police abstract for the accident Section 8 of the *Traffic Act* provides that;

Section 8 of the *Traffic Act*

“Any person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle.”
21. The Appellants cited the case of -YK831 *Ormrod –vs- Crosville motor services ltd* [1954] ALL E.R 763 and the case of Charles Nyabuto Mageto –vs- Peter Njuguna Njathi [2013] eKLR.
22. The Appellant concluded by submitting that the Trial Magistrate erred in law and fact on the erroneous apportion of liability.

1st Respondent Submissions

23. On whether the 1st Respondent proved its case as to the required standard of proof it was submitted that it did not have a beneficial interest on the subject motor vehicle and that the same was registered in its name only for security purposes as it offered a loan to one of its members one Musyoki Ngati Kitonga and that they conducted a search which established that Jans Wyn Investment Co. Ltd the 3rd respondent herein was the beneficial owner of the vehicle and that it held an insurable interest in the vehicle particularly at the time of the accident.
24. In the case of *Gichira Peter –vs- Lucy Wambura Ngaku & Another* [2021] eKLR HCCA No. 37 of 2018; the Court held that having an insurable interest over a vehicle is conclusive evidence that a party is in possession of the same that that they are beneficially entitled to it.



25. On whether the Trial court erred in fact and law by not finding the 1st Respondent liable the 1st respondent stated that it was not the beneficial owner of the subject motor vehicle at the material time hence did not exercise any control over the daily operations of the vehicle and since the driver of the said motor vehicle was not acting under the instructions of the 1st respondent the principle of Vicarious Liability does not apply as against them.
26. The 1st Respondents cited several authorities in support of his case: *JRS Group limited vs Kennedy Odhiambo Andwak* [2016] eKLR HCCA No. 180 of 2010, *Charles Nyabuto Mageto –vs- Peter Njuguna Njathi* [2013] eKLR which referred to various types of ownership in interpretation of Section 8 of *Traffic Act*, and *Gichira Peter –vs- Lucy Wambura Ngaku & Another (supra)* which well illustrates that the fact that no liability can attach to a registered owner where the vehicle has exchanged hands to a beneficial owner holding an insurable interest over the same.
27. The Respondent concluded by stating that the Appellant did not discharge her burden of proof on a balance of probabilities to show that the 1st Respondent is liable for the accident subject of this matter/ suit as it proved sufficiently that it only acted in the best interest of the Sacco as a financier and Jans Wyn Investment Co. ltd is the right party to claim compensation from and that this appeal should be dismissed and the Trial court Judgement be upheld as the Appellant has not raised any concrete ground to warrant this court to interfere with the same.

Determination

28. The Court considered the evidence, pleadings and submissions filed by parties' respective Counsel. The issue to be determined is whether the Trial Court erred in entering judgment for the Plaintiff against the 2nd Defendant and 3rd interested party leaving out the 1st Respondent despite the evidence and submissions presented in Court.
29. The Appellant submitted that the 1st Respondent's statement of Defense the 1st Respondent admitted that it was registered as sole registered owner of motor vehicle Reg KBM 733 B but denied being beneficial owner in actual control and possession of the motor vehicle Reg KBM 733 B.
30. The Appellant took the view that, although at the hearing the 1st Respondent produced a loan application form document dated 18/8/2014 marked EMM-1 so as to prove Motor Vehicle KBM 733B was a collateral for the loan advanced to the 3rd Party, Jans Wyn Investment Company of Ksh 1,600,000/- by virtue of Section (f) of the *Traffic Act* the 1st Respondent was deemed to be the owner of the said motor vehicle.
31. However, the Comment Section of the Loan Application indicates approval of the loan was on condition the Logbook should be in the joint names of the 1st Respondent and 3rd Party. Yet the 1st Defendant failed to produce documents to this effect. Therefore, the sole registration of the 1st Defendant as special owner of the motor vehicle is not confirmed.
32. The Plaintiff took issue with the fact the 3rd Party enjoined was /is a limited liability Company, Jan Wyn Investment Company Ltd and not Mr. Musyoka Ngati Kitonga who ought to be joined to the proceedings. He is a member of the 1st Defendant /Respondent enterprise and who obtained the loan and the motor vehicle was registered in the 1st Respondent's name to provide collateral for the loan.
33. The Appellant relied on Section 8 of *Traffic Act* that provides;

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



34. The 1st Respondent denied negligence claims against it through the Plaintiff's claim in the Plaint. The 1st Respondent joined the 3rd Party, Jans Wyn Investment Company and upon service failed to file defense and interlocutory judgment was entered as it was also entered for the driver the 2nd Defendant.
35. The 1st Respondent had the motor vehicle Reg KBM 733 registered in its name only for security purposes as the 1st Respondent offered a loan to its member, Musyoka Ngati Kitonga, the Director of Jans Wyn Investment Company the 3rd party.
36. The 1st Respondent produced in the Trial Court the Loan Application Form of 18/8/2014 to Musyoka Ngati Kitonga ID xxxxxx Cell Phone Number 0722xxxxxx for a loan of Ksh 1,600,000/-.
37. The 1st Respondent produced Certificate of Incorporation No CPR/2011/57670 of Jans Wyn Investments Company Limited of 30th September 2011 which confirms the said Musyoka Ngeti Kitonga as one of the Directors of the Company.
38. The 1st Respondent produced the CR-12 Form from Registrar of Companies of Jans Wyn Investments Company whose Directors are; Januaris Kyalo Mulwa & Musyoka Ngati Kitonga.
39. The 1st Respondent attached the Certificate of Insurance of Reg KBM 733B PSV BUS by Jans Wyn Investments Company issued by Invesco Assurance Co Ltd.
40. The totality of these productions confirm that the 1st Respondent although registered owner of Motor vehicle Reg KBM 733B PSV Bus was for the sole purpose of securing collateral of the loan advance to one of its members; Musyoka Ngati Kitonga. It is the 3rd party that obtained insurance for the said motor vehicle and therefore had an insurable interest in the motor vehicle.
41. The 3rd Party knew and employed the 2nd Defendant as the driver of the said vehicle who drove the vehicle on the day of the accident, 21/2/2019 when the Plaintiff, a fare-paying passenger was in the said vehicle and was involved in an accident. The 3rd Party Company was engaged in the management and day to day running of the vehicle business whose Director was Musyoka Ngati Kitonga
42. The Trial Court in its Judgment of 27/10 /2020 found on the issue of liability as follows;

Although there is no documentary evidence to prove why the vehicle was registered in the sole name of the Sacco, contrary to the condition of approval of the loan facility, there is evidence on a balance of probability that the Sacco was merely a financier and had no control of the vehicle. In the circumstance, I find that the motor vehicle was owned by Jans Wyn Investment Company.
43. This Court's evaluation of the evidence record confirms that despite the 1st Respondent being the registered owner of motor vehicle Reg KBM 733B PSV BUS was only as security to the loan advanced to Musyoka Ngati Kitonga.
44. The evidence adduced by the 1st Respondent was not controverted by the 2nd Defendant and 3rd Party whom despite service of Summons and Plaint failed to enter appearance and file defenses and hence Interlocutory judgments were entered against them. The Court finds the Judgment by the Trial was /is on firm legal ground and the evidence placed before it. This Court upholds the reasoning and finding of the Trial Court.
45. However, the lingering issue is that the 2nd Defendant and 3rd Party hope that by dead silence they will escape culpability and compensation of the Plaintiff of the claim against them.



46. There is a valid, regular and legal judgment of the Trial Court and a decree that awaits execution. The 3rd Party cannot legally employ the Corporate veil to evade and subvert justice by fronting the Company, Jans Wyn Investment Company in its place as it is a separate legal entity from the member of the 1st Respondent, Sacco.
47. In civil proceedings, the [Civil Procedure Rules](#) Order 1 Rule 9 is explicit 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 interests of the parties actually before it.”
48. In [Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor.](#) (2014) eKLR the Court stated;
- “It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd v Salomon* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.”
49. In the case of [Michael Kyambati vs Principal Magistrate Milimani Commercial Courts Nairobi & Anor](#) [2016] eKLR, the Court observed as follows in referring to [Peter O.Ngoge T/A OP Ngoge & Associates vs Ammu Investment Co Ltd](#) [2012] eKLR;
- The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents. Usually the Board of Directors. A Company may in many ways be likened to a human body; it also has hands which hold tools and act in accordance with directions from the center. Some of the people in the Company are mere servants and agents.....[and] others are directors and managers who represent the directing mind and will of the company, control what it does.....ultimate responsibility rests with the directors.
50. The 3rd Party, Musyoka Ngati Kitonga is the actual owner of motor vehicle Reg KBM 733B PSV BUS purchased from the loan obtained from 1st Respondent in 2014 vide the Loan application forms presented as evidence in the Trial Court. Although, the Company Jans Wyn Investment Company is a separate legal entity from its promoters and directors, legally, the Company operates through its directors and managers who are ultimately responsible for the Company’s actions and omissions.
51. There are instances, where the law requires the piercing of the corporate veil, when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. Therefore, in the interest of justice or in public interest the law identifies and punishes the persons who misuse the medium of corporate personality.



52. In the instant case, the Court shall and hereby pierces the corporate veil of the Company Jans Wyn Investment Company because the directors have used the Company to evade liability and hindered execution of lawful judgment and decree of 27th October 2020 against Musyoka Ngati Kitonga for the accident that occurred on 5/09/2017 and resulted in Plaintiff's injuries.

Disposition

1. The appeal is dismissed and the judgment of 27th October 2020 is upheld, that the 1st Respondent was registered owner of motor vehicle KBM 733B PSV BUS only for purposes of securing collateral of the loan to the 3rd Party.
2. The 2nd Defendant, Joseph Kilonzo, driver of motor vehicle KBM 733B PSV BUS and the 3rd Party after lifting the Corporate veil shall hold Musyoka Ngati Kitonga directly culpable and settle the Decretal amount.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH MARCH 2022. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MWAMBILI FOR 1ST RESPONDENT – PRESENT IN COURT

MR. MWANZIA FOR APPELLANT - PRESENT IN COURT

GEOFFREY - COURT ASSISTANT

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