REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 23 OF 2018

TSUSHO CAPITAL KENYA LIMITED.....1ST APPELLANT

TRINITY TRANSPORTERS & LOGISTICS LIMITED.....2ND APPELLANT

VERSUS

VNN (minor suing through her Next friend and mother JNM.....RESPONDENT

(Being an Appeal from the Ruling and Order of the Chief Magistrate's Court

at Mombasa dated and delivered on 6.2.2018 by Hon. J. Nang'ea (MR)

in CMCC No. 165 of 2017)

JUDGMENT

1. This Appeal arises from the ruling of *Hon. J. Nang'ea* in *CMCC No. 165 of 2017* by which the court dismissed an application dated 27.06.2017 seeking to strike out the appellant's name from the suit.

2. In the suit the Respondents had by a Plaint dated 19.12.2016 sued the 1st Appellant on the tort of negligence seeking an award of General damages, Special damages, costs of hiring House help, Loss of future earning as well as the costs of the suit and interest at courts rate. The cause of action was pleaded to have arisen from negligence of the 3rd Appellant in the manner of driving the subject motor vehicle leading to an accident in which the minor plaintiff was injured thus suffering loss and damage for which she blamed the 3rd Appellant and holds the 1st and 2nd Appellants vicariously liable.

3. The Appellants when served, filed statement of defense dated 2.3.2017 and denied every allegation of fact contained in the Plaint stating that if at all any accident occurred as alleged and the Respondent suffered the alleged injuries, then the same was wholly caused or contributed to by the negligence of the Respondent. That is the defense upon which the application to have the 1st Appellant's name to be struck out of the suit with cost.

4. After the Application was heard, the learned Magistrate found that the 1st Appellant had not made out a case for the reliefs sought in the said Application and the same was dismissed with costs.

5. The Appellant on being dissatisfied with the above decision lodged the instant appeal and set out six grounds namely: -

i) That the learned magistrate erred in fact and in law in failing to appreciate that no liability could lie against the 1st Appellant in tort merely by virtue of the 1st Appellant being a financier and/or lender to the purchase of motor vehicle Registration Number KCF 008A that was involved in the accident that is the subject matter of this suit.

ii) That the learned magistrate erred in fact and in law and further misdirected himself in failing to appreciate that the 1st Appellant's registration as a co-owner of motor vehicle Registration Number KCF 008A was exclusively done to protect its interest as lender/financiers and that the risk over the said motor vehicle at all times remained with the borrower.

iii) That the learned magistrate erred in fact and in law and further misdirected himself in failing to appreciate that at the material time of the accident giving rise to these proceedings, the subject motor vehicle was not in the custody, possession and/or in control of the 1st Appellant and therefore liability could not attach to the 1st Appellant in any manner whatsoever or at all.

iv) That the learned magistrate erred in fact and in law and further misdirected himself by completely disregarded the Appellants' Supplementary Affidavit on record filed on 1st November 2017 which annexed the full copy of the Master installment Sale Agreement and thereby rendered a determination without consideration of the full facts.

v) That the learned magistrate erred in law and further misdirected himself by failing to appreciate that the Matter Installment Sale Agreement dated 12th October 2015 did not require any form of registration thereby arriving at a wrong finding that the Master Installment Sale agreement was of no probative value for want of registration.

vi) That the learned magistrate erred in law and further misdirected himself in disregarding the numerous binding authorities cited by the appellants' Counsel and thereby basing the ruling on erroneous principles.

6. When the appeal came up for directions, the court gave directions that the appeal be disposed by way of written submission. Both parties filed their submissions and opted not to highlight the same. Consequently, a judgment date was fixed for the 30.11.2020 but some error by the registry this file and two others were never availed to me when I went on transfer and were only sent to me on the 31.03.2021.

Submissions by the parties.

7. **Mr. Mbugua,** Learned Counsel for the Appellants, submitted that the 1st Appellant interest in the suit motor vehicle was that of a mere lender of the sum of Kshs. 4,500,000/= and it was neither in possession thereof nor in control of the persons under whose control over the same was at the time of the relevant proceedings. Therefore, it was argued, vicarious liability could not attach by virtue of Section 3 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya since in relation to a vehicle, which is subject of a hiring agreement or hire- purchase agreement, means the person in possession under the agreement.

8. **Mr. Mbugua** further submitted that the Respondent failed to prove that at the material time of the accident, the subject motor vehicle was being used to the benefit of the 1st Appellant and not a public service operator like the 2nd Appellant**.** Consequently, Counsel urged this Court to find that the 1st Appellant had been properly enjoined in the suit. He cited the case of **Ali Lali Khalifa And 8 Others Vs Pollman's Tours And Safaris Ltd (2003) Eklr And ,Diamond Trust Bank (K) Ltd, Salim Khalid Said[2003] Eklr** where the Court held that a mere financier or lender could not be held liable for an accident involving the financed motor vehicle.

9. On the issue of the requirement for registration of the Master Instalment Sale Agreement, Counsel stated that the agreement relied upon by the 1st Appellant was not a Hire purchase agreement to be governed under the provisions of Hire purchase Act. The said agreement was a simple commercial lending instrument, which required no registration for it to become enforceable.

10. **Mr. Mbanda** Learned Counsel for the Respondent submitted that the trial Court rightfully held that the issue of ownership of the subject motor vehicle would be best ventilated through a full trial. However, the 1st Appellant opted not to pursue the issue of ownership in the primary suit and Judgment was entered in favour of the Respondent jointly and severally against the appellants. Consequently, the Appeal was filed prematurely. Counsel cited the case of **Goldston vs. Am. Motors Corp, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).** Where the Court held that the party wishing to appeal the interlocutory order must wait until there has been a final judgment in the case before the interlocutory order may be appealed.

11. Counsel further submitted that upon delivery of Judgment after a full and final determination of a suit, all interlocutory orders being appealed against are non-existent since they lapsed upon delivery of Judgment. Counsel relied on the case of **Leonard Munyua Mbugua t/a Munleo Hardware & another v Justline Investments Limited; Amoco Construction Group Limited (Third Party) [2020] eKLR** to buttress him argument**.**

Analysis and Determination

12. In considering this appeal, I will be guided by the case of **Selle vs Associated Motor Boat Co.** [1968] E.A. 123 at page 126 and innumerable decisions thereafter where the Court of Appeal set the mandate of a first appellate court.

13. It is trite law that an appellate court can only interfere with findings of fact made by the lower court if such findings were based on no evidence or on a misrepresentation of the evidence or if the trial court in reaching its decision applied the wrong legal principles. **See the case of *Sumaria & Another V Allied Industrial Limited, [2007] 2 KLR 1; Jabane V Olenja, [1986] KLR 661; Simon Muchemi & Another V Gordon Osore, [2013] eKLR***.

14. Bearing in mind the principles in that case, and having read the record in satisfaction of the court's mandate, I do find the following two issues to isolate selves for determination by the court:

a. Whether the Appeal was prematurely brought before Court

b. Whether the trial magistrate erred in dismissing the 1st Appellant's Application dated 27/6/2017 seeking to strike out its name from the suit.

Whether the Appeal was prematurely brought before Court

15. From the onset, I note that in dismissing the 1st Appellant's Application dated 27/6/2018 the trial Court held as follows:

…these issues need to be ventilated in a full trial. To this extent, the case law "supra" on which the 1st Defendant pitches its tent is distinguishable. If the sale agreement had no legal effect for want of registration, then the same cannot successfully advance the 1st Defendant's case. I must however stress that the factual and legal position can only be determined during trial.

16. The ruling on the interlocutory Application seeking to have the 1st Appellant's name struck out of the proceedings of the lower Court was never varied and/or set aside. Upon lodging the appeal, the Appellant sought and obtained a conditional stay of proceedings subject to the filing of a record of Appeal within 60 days and thereafter and taking a hearing date at the registry on priority basis. The Appellants never met the conditions on the allegations that the ruling on stay of proceedings was delivered in their absence and by the time they became aware of the ruling delivered on 31/10/2018 compliance period lapsed and the Respondent had already fixed the suit for *inter partes* hearing for 20/2/2019 and on 24/4/2019 a Judgment was delivered.

17. This Court vide ruling delivered on 3rd September 2020, on the issue of interlocutory Appeal being overtaken by events held as follows:

"Even though the judgment sought to be stayed has not been challenged by the current appeal, which is essentially an interlocutory appeal preferred prior to the delivery of the judgment, the appellant fears that nothing would stop having the judgment executed against it in which event no meaningful purpose would survive to merit pursuing the appeal. I get the appellant to say that the judgment against the appellant finds its foundation on the finding by the trial court subject of this appeal."

18. The Court of Appeal In **Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR** while relying in the persuasive authority in **Goldston vs. Am. Motors Corp,(SUPRA)** *stated that, a party wishing to appeal the interlocutory order must wait until there has been a final judgment in the case before the interlocutory order may be appealed. The reason for this rule was articulated by the Supreme Court of North Carolina in* ***Veazey v. City of Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)*** *as follows:*

"There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer "right and justice . . . without sale, denial, or delay."

However, in the comparative cases cited, there are exceptions. An interlocutory order is immediately appealable if it falls in one of the following general categories: (1) the order affects a substantial right; (2) the order is final as to some but not all of the parties or claims; (3) the order in effect determines the action and prevents a judgment from which appeal might be taken; (4) the order discontinues the action; (5) the order grants or refuses a new trial; (6) the order rules upon the court's jurisdiction over the appellant's person or property adversely to the appellant."

19. Looking at the ruling made by the trial magistrate, it is my view that the same does not meet the threshold set in **Alba Petroleum Limited v Total Marketing Kenya Limited(supra)** reason being that the orders by the trial Court did not affect any substantial right of the 1st Appellant; the order made by the trial magistrate was not final; there was no limitation of time in the 1st Appellant exercising its right of Appeal; the orders by the trial magistrate did not discontinue the suit and/or refuse a new trial and finally, the trial Court orders did not relate to its jurisdiction over the cause of action. Consequently, this Court finds that the 1st Appellant appeal was premature.

20. Be that as it may, there is currently a regular Judgment, which was delivered when the stay of proceeding orders had lapsed. The Court of Appeal in **Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR** when dealing with the in issues of an interlocutory Appeal where Judgment had already been delivered in the suit held as follows:

"We agree that this Court should not make orders in vain. We reiterate that this appeal arises from an interlocutory ruling and it is trite law that any and all interlocutory orders lapse upon delivery of judgment after the full and final determination of a suit."

21. **T**he logic behind this dictate of the law is very evident in this matter. The trial court did not in the ruling appealed against, determine the liability of the appellant to the respondent. It refrained from such a determination and left the door open for evidence to be led at trial. In deed to deal with the merits of that evidence after the master of facts has dealt with it and in the absence of an appeal from a decision based on such evidence would be in vain and most irregular. As I write, I have no evidence placed before the trial court at a trial conducted while this appeal was pending just as much as I do not have the resultant judgment. I am thus in no doubt that if the final judgment did offend the appellant then it still has the liberty to challenge that decision in an appropriate manner.

22. Accordingly, the question whether the lower court erred in finding that the 1st appellant had not established a *on a balance of probability that* its name was entitled to be struck from the trial proceedings is now but an academic exercise that is not sensitive to judicial economy since a Judgment has already been delivered which in essence automatically lapse all interlocutory orders leaving the instant Appeal with no legs to stand on since presently the orders the 1st Appellant seeks to challenge have lapsed.

23**.** The upshot is that this instant Appeal is spent and overtaken by events. The same is hereby dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF APRIL, 2021.

P.J OTIENO

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** coupled with the fact that I am on leave away from the court premises, this Judgment has been delivered to the parties online with their consent. They are deemed to have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court.