REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 40 of 2019

ROYAL HISHAM (K) LIMiTED.....APPELLANT

VERUS

DIAMOND TRUST BANK (K) LTD.....1ST RESPONDENT

MILLICENT AKINYI LUTE.....2ND RESPONDENT

(Being an appeal arising from the Ruling of Hon. D.Wangeci (Principal magistrate Voi) In PMCC Civil case No 87 of 2018 delivered on the 18th November, 2019)

JUDGMENT

1. The appeal herein arises from the ruling of Hon Wangeci delivered on 18th November, 2019 in Voi PMCCNo.87/2018. Briefly, through the plaintdated 1st March, 2018 and filed on 12th March, 2018 Millicent Akinyi Lute the second respondent in this appeal, filed a suit against Royal Hisham Kenya Ltd now the appellant seeking; General damages, Special damages and costs of the suit plus interest all arising from injuries allegedly suffered on 7th January, 2018 while lawfully travelling as a passenger aboard motor vehicle reg No KCF 641 UD Bus along Mwatate - Wundayi road when the said motor vehicle was so negligently driven and or managed by the authorized driver who lost control, veered off the road hence caused the said accident resulting to injures complained of.

2. It was the plaintiff's claim (2nd respondent) that the defendant (appellant) was the registered and or insured or beneficial owner of the said motor vehicle which was insured by Sanlam General Insurance Limited.

3. Upon being served with the plaint and summons to enter appearance, the appellant (defendant) entered appearance and filed their statement of defence dated10th July,2018 thus denying liability on grounds that; they were not the registered insured nor beneficial owner and that no accident occurred on the 7th January, 2018.

4. Vide a Chamber Summons dated 14th July,2018 and filed on 7th August, 2118, the appellant (defendant) sought leave of the court to issue a 3rd party notice against Diamond Trust Bank now the 1st respondent in this appeal. The application was grounded on the fact that the proposed 3rd party (1st respondent) was a co- registered owner of the Motor vehicle KCF 647 S UD bus and that it is the proposed 3rd party (1st respondent) who sourced Sanlam General Insurance Ltd who insured the said motor vehicle.

5. On 5th November, 2018, the court considered the said exparte chamber summons and allowed the same directing that 3rd party notice to issue to the 1st defendant as 3rd party. A third-party notice was therefore issued to the 1st respondent on the same day. With the consent of all the parties, file No 87/2018 was taken as a test suit considering that there were several suits pending arising from the same accident. By a notice of motion dated 2nd April, 2019 and filed on 8th April 2019, the 1st respondent (3rd party) moved the court for orders that;

> **(1) The Honourable court be pleased to strike out the 3rd party notice for being an abuse of the court process.**
>
> **(2) In the alternative to prayer 1, the honorable court be pleased to order a stay of proceedings pending the hearing and determination of MSA HCCA No. 32/2015 Diamond Trust Bank Kenya vs Sanlam General Insurance Limited and Royal Hisham Kenya Limited and MSA CMCC No 1227/2018 (O.S) & Sanlam General Insurance Vs Royal Hisham Kenya Limited and Diamond Trust Bank Kenya Ltd.**

6. In that application, the 1st respondent argued that the claim was between the plaintiff and the defendant in relation to the negligence occasioned by the defendant's driver's negligence thus causing the accident. That the 3rd party (1st respondent) merely financed the defendant (appellant) to purchase the motor vehicle hence they were not in control nor possession of the motor vehicle and that under section 3 of the insurance Act a 3rd a party cannot be deemed to be an owner of the motor vehicle hence not vicariously liable as there was no

contract between them and the insurance.

7. Through its replying affidavit filed on 4th June, 2019 in response to the application of 2nd April, 2019, the appellant argued that the 3rd party was a co-owner of the motor vehicle in question; the insurance for the motor vehicle was sourced by the 3rd party /1st respondent from Diamond Trust insurance Agency which insurance cover was imposed by the 3rd party; that Sanlam General Insurance had filed a suit in civil application No 1227/2018 Sanlam General Insurance LTD Vs Royal Hisham in which it sought to avoid liability.

8. Having heard the application fully, the trial court pronounced itself on 18th November, 2019 thereby allowing the application of 2nd April, 2019 effectively discharging the 1st respondent from the proceedings as a 3rd party on grounds that; the 3rd party was a mere financier who had no actual possession nor control of the motor vehicle hence there was no legal basis for their continued participation in the proceedings. Further, the learned magistrate held that there was no proof of any insurance contract between the 3rd party and the insurance company regarding the motor vehicle in question.

9. Aggrieved by the said decision, the appellant moved to this court vide a memorandum of appeal dated 25th November, 2019 and filed on 26th November, 2019 citing 11 grounds of appeal as follows;

(1) That, the learned magistrate was totally wrong to allow the application on the basis that the third party 1st respondent had rebutted the presumption of ownership on affidavit evidence alone, without reference to the email communication and ownership documents as to the procurement of the insurance policy.

(2) That the learned magistrate was totally wrong in her decision to allow the application and based on affidavit evidence at the stage.

(3) That the learned magistrate failed to appreciate that the issue of procurement of the insurance was at the center of the dispute and not just the control of the motor vehicle which issue the magistrate failed to address.

(4) That the learned magistrate totally fell into error when she failed to address the issue of who pays the claim, when the insurance was directly and explicitly procured by the 1st respondent and failure by the magistrate to address it.

(5) That learned magistrate totally erred and fell into error, when she concluded that the 1st respondent is only a financier not acknowledging the 1st respondent interest and its role in procuring the faulty insurance cover and exposing the appellant to huge loss and damages.

(6) That the learned magistrate was totally wrong to arrive at the decision that there was no contract between the insurance company and the 1st respondent yet she failed to address the issue of the 1st respondent's role and interest in the motor vehicle insurance cover.

(7) That, learned magistrate failed to appreciate the purpose and legal requirements for 3rd party notice and its consequence. The purpose of third-party indemnity for loss and exposure to claim present or future. In view of the insurance company repudiation of the insurance policy procured by the 1st respondent.

(8) That the learned magistrate fell into error and arrived at a wrong decision by treating the application as a full hearing without the benefit of production of evidence and cross examination.

(9) That in arriving at a decision on a matter that was not raised in the application the magistrate fell into error and arrived at a wrong decision.

(10) That the whole ruling was based on facts that are not in contention and were erroneously entertained by the learned magistrate.

(11) That third party notice was to indemnify the appellant for any lability because of the negligence and recklessness in procuring the insurance cover by the insurance issued to the 1st respondent and the magistrate therefore fell into error.

10. On 12th March, 2020, the appellant filed a notice of motion dated 11th March, 2020 seeking stay of the lower court proceedings pending hearing and determination of the appeal. Having stayed the proceedings, the court directed parties to file written submissions to dispose their appeal.

Appellant's submissions

11. Through the firm of Ambwere Advocates the appellant filed submissions on 26th January, 2020 thus arguing the appeal on two aspects; Firstly, that the 1st respondent having procured the subject motor vehicle insurance cover cannot run away from liability bearing in mind that the insurance company Sanlam General insurance had filed a suit seeking to repudiate the contract.

12. That to protect the appellant from exposure of massive liability, it was necessary to introduce the 1st respondent as a 3rd party. Learned counsel attached a judgment in respect of HC Civil Case Appeal No 32/2019 Diamond Trust Bank Limited Vs Sanlam General Insurance Ltd

and Royal Hisham Kenya Ltd (same parties as in this cause.) where the court disallowed Sanlam's application to repudiate the insurance cover. Counsel submitted that Sanlam insurance cover is now in full force and in case of liability the 1st respondent would be at liberty to seek indemnity.

13. Secondly, that as a co-registered owner, the 1st respondent was liable and any claim against them can be indemnified by the insurance. It was counsel's argument that the learned magistrate did not consider several material and or evidence attached to their replying affidavit in response to the 3rd party's application to have their name removed from the suit.

14. It was learned counsel's submission that the learned magistrate did not appreciate the role of 3rd party proceedings in this case and the connection between the 1st respondent and the insurance cover.

1st respondent's submissions.

15. Through the firm of Mohamed Madhani and Company Advocates, the 1st respondent filed their submissions on 8th January, 2021 arguing the appeal on two issues namely;

> **(1) Whether the lower court erred in law and in principle by holding that a mere financier has no possessory or actual control of the motor vehicle in question;**
>
> **(2) Whether the lower court erred in law and in principle in holding that the insurance contract between the appellant and Sanlam General Insurance did not extend to the bank.**

16. Learned counsel submitted that, under Section 8 of the Traffic Act, a person in whose name the motor vehicle is registered shall be deemed to be the owner of the motor vehicle unless there is evidence to the contrary. He further referred the court to section 3 of the insurance Act which recognizes the owner of a motor vehicle in a purchase agreement as a person in possession.

17. According to the appellant, the owner of the motor vehicle is the appellant being the party in actual possession and control of the motor vehicle hence liable. To support this proposition, reliance was placed in the case of **William Waweru Wanyoike Vs Dinesh M.Achar and another (2001) e KLR**

18. It was further argued that, the 1st applicant was a mere financier and the purpose of joint registration was basically intended to protect their outstanding financial interest having advanced the appellants Ksh 16,232 to purchase the motor vehicle.

19. The court was further referred to several authorities among them **Beatrice Adhiambo Ngiela and another V Mehul Kishorchand Shah & another (2012) e KLR** and **Swalleh Abdalla Mjahid and 3 others V Pollmans Tours and Safaris Limited & 2 others Msb Hcc 105/2002** where Khaminwa J held that a person who is in actual control and possession of a motor vehicle is deemed to be the owner of the motor vehicle in respect of a claim. In particular, learned Judge observed that, it would be hard for financial institutions to carry on with their vehicle purchase financing if they were to be included in every litigation.

20. The court was further urged to find that there was no privity of contract between the 1st respondent and the Sanlam General insurance. Counsel submitted that the insurance was between the appellant as the insured and Sanlam General Insurance as the insurer hence a 3rd party cannot be held liable as enforcement of such contract is only between the parties who executed the contract. In support of this argument, counsel referred to the case of **Agricultural Finance Corporation V Lengetia Limited (1985) eKLR 765,**

21. To Further fortify their claim that they were not party to the contact, the 1st respondent referred to the purchase of the motor vehicle agreement clause 2 (j) which laid the obligation to secure an insurance cover upon the purchaser in this case the appellant.

22. It was urged that Diamond Trust Insurance Agency is an insurance broker which connects insurance companies to customers of the bank hence an independent legal entity from the 1st respondent.

23. Lastly, counsel submitted that the issue of the insurance cover being repudiated by Sanlam has since been resolved in MSA HCC No 32 of 2019 (Supra)

2nd Respondent's submission

24. The second respondent (plaintiff) filed submissions through the firm of Njoroge Waweru advocate on 8th February,20212. According to the 2nd respondent, the 1st respondent was not a party to the contract hence not liable. To buttress this assertion, the court was referred to the case of Nairobi C.A 272/06 **Savings and Loan Ltd(K) Vs Kanyenje Karangaita Gakombe & another (2015) e KLR** where the court held that;

> **"As a general rule a contract affects only the parties to it. It cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to fuse or make him liable upon it''.**

25. Counsel submitted that there is no justification in including the 1st respondent as a 3rd party hence misjoinder of parties.

26. Basically, the second respondent took the approach taken by the 1st respondent that the 1st respondent cannot be held liable simply because they had financed the purchase of the motor vehicle. In this regard the court was referred to the case of Mombasa HCC No 1006/2002 **Al Lali Khalifa & others Vs Polloman's Tours and Safaris Ltd and 2 others (2003) e KLR** where the court found that a bank which finances the purchase of a mother vehicle cannot be held liable.

Determination.

27. I have considered the grounds of appeal herein, submissions by parties' respective counsel and the impugned ruling.

28. It is trite that as a first appellate court, I am duty bound to re-evaluate, reconsider and re-examine evidence and or materials placed before the trial court and make an independent determination and or conclusion after taking into account that I never had the advantage to hear, see and or assess the demeanor of the witnesses. See **Selle Vs Associated motor Boat Co. Ltd (1968) E.A 123**.

29. However, in a case like this one which revolves around an application, the court is more interested on whether the trial court improperly exercised discretion in allowing the impugned ruling. In the case of **Mbogo and another V Shah (1968) E.A 93** the court had this to say;

> **"An appellate court will interfere if the exercise of discretion is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in excising his discretion has misdirected himself and has been clearly wrong in the exercise of discretion and that as a result there has been an injustice.**

30. In this case, the appellant has alleged that the magistrate erred in discharging the 1st respondent from being enjoined as 3rd party in the proceedings on grounds that they were not in actual control and possession of the subject motor vehicle and that there was no contract for the motor vehicle insurance cover between the 1st respondent and Sanlam General insurance company.

31. Having considered the application herein and the oral submissions by the parties, I am inclined to condense the grounds of this appeal into two as hereunder;

> **(1) Whether the 1st respondent ought to have been enjoined in the proceedings as third party by virtue of being a co-registered owner of the motor vehicle KCF647S.**
>
> **(2) Whether the 1st respondent having sourced for the insurance cover for the subject motor vehicle is liable and therefore enjoined to seek indemnity from Sanlam General Insurance company.**

32. There is no dispute that the motor vehicle Reg No KCF 648 S UD bus was purchased by the appellant through a loan facility advanced by the 1st respondent. It is also not in dispute that the motor vehicle was covered by Sanlam General insurance company through Diamond Trust insurance Agency. From the material attached to the replying affidavit to the 1st respondent's application giving rise to the impugned ruling, the 1st respondent did facilitate the acquisition of the insurance cover. It is also a fact that the insurance cover issued by Sanlam General Insurance was acquired by the appellant.

33. Can the 1st respondent be held liable on account of being a co -owner having prayed a key role in the acquisition of the insurance cover? Was the appellant entitled to take out 3rd party proceedings under Order 1 Rule 15? Order1 Rule15 of the civil procedure rules underscores circumstances under which a party can take out 3rd party notice or proceedings as follows;

> **"15. (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-**
>
> **(a) that he is entitled to contribution or indemnity; or**
>
> **(b) that he is entitled to any relief or remedy relating to or connected with the original subject -matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or**
>
> **(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them.**
>
> **he shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called third party notice) to that effect, and such leave shall be applied for by summons in chambers ex-parte supported by affidavit."**

34. The objective of 3rd party proceedings is to indemnify a party found liable in a claim for damages. The 1st appellant was brought on board on a count of being a co- owner to the motor vehicle in question and as a party who sourced for the insurance cover.

35. There are several authorities in our judicial system which have addressed similar issues The starting point is, is the 1st respondent legally liable as to be bound to indemnify the appellant or be held responsible in satisfying any claim made by or payment of any damages awarded

or likely to be awarded to the 2nd respondent(plaintiff)?. The answer lies on who is vicariously liable as a principle for the negligent acts or omissions of the driver who was in control of the motor which caused the accident. To further answer that question, the court must determine who the owner of a motor vehicle is in the context of an accident claim and who is vicariously liable.

36. Who is deemed to be the owner of a motor vehicle? Section 8 of the Traffic Act provides that the person in whose name a motor vehicle is registered shall be deemed to be the owner of the motor vehicle unless evidence to the contrary is adduced; from my understanding of this section, there are two facets of ownership of a motor vehicle. The first one is, appearance of the name in the log book. If you take this plainly without entertaining any further explanation, the first respondent will be deemed to be the owner of the motor vehicle in question.

37. However, on the second aspect on ownership, an entity or person whose name appears in a logbook can dispute ownership by adducing evidence to the contrary thus explaining the objective for inclusion of its or his name in the logbook. In other words, the mere appearance of a litigant's name in a log book does not automatically make him or her the owner of a motor vehicle for purposes of satisfying an accident claim or claims.

38. Therefore, for purposes of accident claims, a person who is in actual control, possession and or beneficial owner is deemed to be the owner of the motor vehicle. That is why a financier who finances a borrower for the purchase of a motor vehicle does not have a right of user nor claim of any benefit out of money generated from say any commercial activities in which the motor vehicle may be engaged in. Obviously, the beneficial owner is the person in actual control and or possession of the motor vehicle and any driver so engaged is at the instruction of the actual owner. If such driver causes an accident, it is the employer (principal) in this case the appellant who is vicariously liable through employer -employee principle -agency relationship.

39. **Further,** section 3 of the insurance Act (Motor vehicle third party Risks Act) does define who the owner of a motor vehicle is by providing that;

> **"in relation to a vehicle which is the subject of a hiring agreement or a hire purchase agreement means the person in possession under that agreement".**

40. In the circumstances of this case, the 1st respondent was a mere financier. Their responsibility was to ensure that the money advanced in the purchase of the motor vehicle was secure. The entry of the name in the logbook was objectively intended to act as security in rieu of actual furnishing of an independent or separate security by the appellant before getting the loan. By virtue of registration, they cannot be deemed to be owners for any other purpose other than securing their finances. To that extent, it is my holding that a financier for all purposes and intents cannot be held liable of any claim arising out of an accident occasioned by any authorized driver by the purchaser of the motor vehicle. It will be unfair to hold the co-owner liable for such claims and doing so will amount to imposing unwarranted claims for indemnity for actions not authorized by them.

41. By holding as above, I am guided by judicial precedents in similar cases interalia; **William Waweru Wanyoike V Dinesh M Achar & another (supra)**where the court held;

> **"for an owner to be held liable for an injury caused by his motor vehicle when the same was under the use of another, it must be shown that the motor vehicle was being used at the request of the owner and for his benefit or on his instructions in the performance of a duty or task delegated to that other person by the owner."**

42. In this case, the driver of the subject motor vehicle was not authorized by the 1st respondent to drive the motor vehicle hence they cannot be held vicariously liable. Indeed, if financiers were to be held liable for every accident involving a motor vehicle they financed for its purchase by advancing a loan, they will close shop as their business is lending finances and not managing buses or matatus they have facilitated in their purchase. See **Swaleh Abdalla Mjahid & 3 others (Supra)** where Khaminwa J stated ;

> **"It would be impossible for financial institutions to carry on their vehicle purchase business financing if they were to be involved (in) every litigation in which they have financed purchase of vehicles."**

43. Similar position was held in **Diamond Trust Bank Kenya limited Vs Richard Mwangi Kimotho and 2 others (2017)** and **National Industrial Credit Bank Ltd Vs Filister Mwende Musyimi & another (2016) e KLR** where the court stated that

> **"Given that there was evidence of the existence of a financing or hire purchase agreement between the appellant and 1st appellant by the date of the said accident, the fact of actual and beneficial ownership by the appellant by way of registration at the time of the accident involving the said motor vehicle was thus effectively rebutted and there was an error made in not striking out the appellants from the suit".**

44. From the above finding, I am satisfied that the learned magistrate properly relied on affidavit evidence in arriving at the conclusion that it was the appellant who was in actual control and possession of the motor vehicle hence the entity liable to answer the claim. There was no misdirection in so holding in the circumstances of this case.

45. Considering the question of whether the 1st respondent was privy to the insurance contract, the law on contract is clear that a contract is only binding to the parties who executes it.

46. Apart from facilitating the acquisition of the insurance, the 1st respondent was not the insured. The insured was the appellant pursuant to clause 2 (j) of the hire purchase agreement signed between the appellant and the 1st respondent when advancing the loan thus bestowing the

obligation upon the appellant to seek for an insurance cover for the motor vehicle. The fact that the 1st respondent assisted the appellant in searching for an insurance through an independent insurance broker (Diamond Trust Insurance brokers) does not confer liability upon them. That is not aground to include them into the insurance contract which is between Sanlam General Insurance and the appellant. To do so will amount to rewriting a contract clearly executed. The fear that Sanlam had attempted to repudiate the insurance policy is already sorted by the court which declared that Sanlam cannot repudiate the indemnity in HCC Case No 32/2019 Diamond Trust Bank Kenya Limited vs Sanlam insurance Ltd and Royal Hisham KenyaLtd (Supra).

47. The insurance contract herein is only binding between the appellant and Sanlam Insurance. See **Agricultural Finance Corporation (supra)**

48. In a nut shell, I need not emphasize the fact that, the 1st respondent was improperly joined to the proceedings as a 3rd party and that the trial magistrate properly addressed herself on the facts and material laid before her before arriving at the impugned decision. The argument that the learned magistrate did not understand what 3rd party proceedings entails is not correct. If at the earliest opportunity possible, a court is convinced that a party is improperly joined into litigation, it will not hesitate to dissociate such party from such proceedings to avoid wastage of resources, save on precious judicial time as well as that of the innocent party.

49. The fact that misjoinder of parties does not automatically render a suit bad in law, due diligence is necessary to avoid embarrassing innocent litigants from running around the corridors of justice when they should be engaged in other profitable activities, There must be real or reasonable cause of action against a party. Litigation is not a ritual which must go on a full circle even when there is no justification to do so. In this case the learned magistrate had no business entertaining a suit that was out rightly bound to fail at the end of the day.

50. Accordingly, it is my finding that the appeal herein lacks merit and the same is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF MAY 2021.

J. N. ONYIEGO

JUDGE