



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 607 OF 2015**

CATHERINE MUGENDI.....APPELLANT

VERSUS

BROOKSIDE DAIRY LTD.....RESPONDENT

(Being an appeal from the Judgment and Decree delivered on 2<sup>nd</sup> December, 2015

by Hon. L. Kassan (Mr.) (Senior Principal Magistrate) Chief Magistrate's Court

at Milimani Commercial CMCC No.2824”B” of 2004).

**JUDGMENT**

1. The Appellant, Catherine Mugendi sued by the Respondent, Brookside Dairy Ltd vide the plaint dated 19<sup>th</sup> March, 2004. The Respondent's claim was for Ksh.86,734/= claimed as material damage to its motor vehicle registration No. KAM 213 V Suzuki Maruti which was involved in an accident with the Appellant's motor vehicle registration No. KAE 517 K Toyota Saloon. The Respondent blamed the accident on the alleged negligent manner that the Appellant's motor vehicle was being driven at the material time.

2. The claim was denied as per the Statement of Defence dated 16<sup>th</sup> December, 2005. The Appellant raised a counter-claim for Ksh.131,119.50 stated to be damages suffered when her goods were auctioned by the Respondent.

3. The Respondent filed a reply to the Defence and Defence to the counter-claim. The contents of the plaint were reiterated. It was further stated that the counterclaim is *res judicata*.

4. The Appellant filed a reply to the Defence to the counterclaim and denied that the issue of execution was *res judicata*.

5. The case proceeded to a full trial. The trial magistrate entered judgment in favour of the Respondent. The Appellant was aggrieved by the said judgment and filed this appeal.

6. The grounds of Appeal are that:

**1. That the learned magistrate totally erred in his appreciation of the case, the evidence and/or arrived at incorrect decisions on matters of law and/or facts.**

**2. Failing to find that the Respondent had not proved its case on liability or negligence against the Appellant on a balance of probabilities.**

**3. Holding that the Appellant was the owner of the suit motor vehicle or has not disproved ownership.**

**4. Shifting the burden of proof to the Appellant on the plaintiff's case.**

**5. Failing to take into account relevant matters or took into account irrelevant ones in arriving at his decision.**

**6. Failing to have due regard for Appellant's submissions.**

**7. Failing to consider the counterclaim or the defendant's evidence thereon or by dismissing the same.**

**8. Reaching a decision not supported by law or facts.**

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

8. A perusal of the Record of Appeal reveals that *ex-parte* judgment was entered in favour of the Respondent on 5<sup>th</sup> November, 2004 for failure to enter appearance and file a defence. Execution proceedings were commenced but subsequently the said judgment was set aside by consent of the parties signed on 14<sup>th</sup> December, 2005 and adopted in court on 15<sup>th</sup> December, 2005. Subsequently the Respondent's case was dismissed for non-attendance but subsequently reinstated upon terms and conditions. The case was subsequently heard inter-parties.

9. On the Respondent's side PW1 Bernard Mweresa Eboso gave evidence on the sequence of events. He contended that the Counterclaim was not valid. That the auctioneers obtained Warrants of Attachment and Sale lawfully and that the execution was a consequence of the entry of a valid judgment. During cross-examination, PW1 conceded that the Appellant was sued as the registered owner of the motor vehicle KAE 517 K but that the police abstract reflected the owner of the said motor vehicle as Gachuhi Kariuki.

10. The other witness called by the Respondent was PW2 Joseph Nderitu, a motor vehicle assessor who assessed the damage caused to the Respondent's motor vehicle. PW3 Soti Omullow from the insurance company testified that he had insured the Respondent's motor vehicle. He confirmed payment of the assessed costs of repairs at Ksh.72,733/= and Ksh.10,500/= payment to the accident investigators. PW3 confirmed in his evidence that the police abstract reflected the driver of the motor vehicle KAE 517K as Gachuki Kariuki but stated that they did not try to trace the said driver and only looked for the registered owner of the motor vehicle.

11. Catherine Kareithi Mugendi testified on the Appellant's side. Her evidence was that she sold the motor vehicle to Nahashon Gachohi on 1<sup>st</sup> October, 2002 as per the sale agreement entered into. That as per the time of the accident, the said motor vehicle had already been sold and she informed the motor vehicle assessor accordingly. She claimed the value of her goods which were sold by the auctioneers. During cross-examination, DW1 contested that she signed the transfer form for the motor vehicle which she handed over to the purchaser.

12. No evidence of any eye witness was adduced by the Respondent in respect of the occurrence of the accident. However, the police abstract produced by the Respondent reflects that motor vehicle KAE 517K was the one to blame for the accident. This evidence was not controverted by the Appellant whose position was that she was not the owner of the motor vehicle.

13. The central issue in this Appeal is the ownership of motor vehicle KAE 517K. The copy of Records issued by Kenya Revenue Authority (KRA) produced by the Respondent reflects that Mugendi C. Karendi was the registered owner of Motor vehicle registration No. KAE 517K the police abstract reflects the owner of the said motor vehicle as Gachuhi Kariuki.

14. On the other hand, the Appellant produced the motor vehicle sale agreement which reflects her as the seller and one Nahashon Kariuki Gachuhi as the purchaser. The said agreement is dated 1<sup>st</sup> October, 2002 and it reflects that it was signed by both the seller and the purchaser. That the purchaser took out an insurance cover for the motor vehicle with Blue Shield for the certificate of insurance in the name of Nahashon K Gachuhi commencing on 21<sup>st</sup> January, 2003. The evidence of sale of motor vehicle KAE 517K was not rebutted butted by the Respondent.

**15. Section 8 of the Traffic Act (Cap 403) of the Laws of Kenya provides:**

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

16. The Court of Appeal in *Securicor Kenya Limited v. Kyumba Holdings Limited [2005] 1KLR 748*, held that:

**“It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the Traffic Act when she states that the true owner of the motor vehicle was the appellant.”**

17. In *Muhambi Hoja-v- Said Mbwana Abdi (2015) eKLR* cited by the Appellant, the court stated that:

**“ In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if demonstrated that the person named in the registration (log) book has since transferred**

**and directed himself of its ownership to the person named in the abstract report or in that other form of evidence,”**

18. The Police Abstract and the Certificate of Insurance indicating Nahashon K. Gachuhi as the owner of KAE 517K was sufficient proof to dispel ownership in the Copy of Records.

19. *In Wellington Nganga Muthiora vs Akamba Public Road Services and Another CA Kisumu 2010 eKLR the Court of Appeal held that:*

**“where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence and not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within standards of probability and not beyond reasonable doubt as it is criminal cases. However, where it is challenged by evidence or in cross examination the plaintiff would need to produce certificate from the registrar of motor vehicle or any other proof such as an agreement for sale of the motor vehicle which would be conclusive evidence in the absence of the proof to the contrary.”**

20. Similarly, from the above decision, the agreement for sale of motor vehicle produced by the Appellant at the trial should have been conclusive evidence that Nahashon K. Gachuhi was the beneficial owner of KAE 517K.

21. The burden of proving the ownership of motor vehicle No. KAE 517K fell on the Respondent. In that respect, it was the Respondent to ensure Nahashon K. Gachuhi was a party in the suit and not the Appellant.

22. In determining whether the Appellant was vicariously liable for the actions of the driver of KAE 517K, the learned magistrate placed reliance on the ownership of the motor vehicle and not on whether an agency relationship existed between the Appellant and the driver.

**23. The Court of Appeal in John Nderi Wamugi vs. Ruhesh Okumu Otiangala & others [2015] eKLR held that:**

**“Vicarious liability is not pegged on legal ownership but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor.”**

24. **The Court of Appeal in John Nderi (Supra) went further to define vicarious liability by quoting the Black’s Law dictionary as follow:**

**“BLACK’S LAW DICTIONARY, 9<sup>th</sup> edition at page 998 defines vicarious liability in the following words:**

**“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”**

25. In the instant Appeal, the trial court did not establish the relationship between the Appellant and the Driver of the suit motor vehicle in order to establish an agency relationship. There is no proof that the Appellant had supervisory roles over the driver or that the driver was an employee of the Appellant. It follows that the trial court erred in making a finding that the Appellant was vicariously liable by virtue of being a registered owner of the suit motor vehicle.

26. The Respondent claimed the counter-claim was settled by the consent between parties. I have looked at the said consent at page 16 of the record. The consent between parties was to the effect that the default judgment on the counterclaim be set aside and be heard on merit. At no point did the Appellant or either party compromise the counter-claim in the consent. It cannot, therefore be said to be *res judicata*.

27. The Appellant counterclaimed for Kshs. 131,119.50 being the value of household furniture, legal fees and throw away costs. The Appellant produced receipts of the goods that were attached. It is not in dispute that execution as against the Appellant was done.

28. The trial court found that the Appellant was duly served with summons to enter appearance and with the Request for Judgment but failed to enter appearance. The Appellant has not disputed service by evidentiary proof or the irregularity of the judgment. The goods that were attached were as a result of execution of a valid judgment of the court. The Appellant did not enter appearance or file a defence. The execution process was a natural consequence of the entry of the judgment. There was no proof by the Respondent that the auction was carried out irregularly or unlawfully. The counterclaim therefore fails.

29. In the upshot, I find merits in the Appeal in respect of the Respondent’s case against the Appellant and allow the Appeal to that extent. The Appeal in respect of the Appellants Counterclaim fails and is dismissed. Consequently, the judgment of the lower court is set aside and substituted with a judgment dismissing the Respondent’s case and dismissing the Appellants Counter Claim. Consequently, each party to bear own costs in the lower court. The Appeal having been partially successful, each party to bear own costs.

**DATE, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPT, 2021**

**B. THURANIRA JADEN**

**JUDGE**