REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEALNO. 124 OF 2017

NYAGA JOHN WANJOHI.....1ST APPELLANT

KENYA POWER & LIGHTING COMPANY LIMITED.....2ND APPELLANT

VERSUS

JAPHETH KIMATHI MUTUNGI.....1ST RESPONDENT

PETER MUSAU MUTUA.....2ND RESPONDENT

(Being an appeal from the Ruling of the Senior Principal Magistrate

(Hon. Abdul Lorot) in Machakos CMCC No. 735 of 2016

delivered on 25th August, 2017)

~BETWEEN~

JAPHETH KIMATHI MUTUNGI.....PLAINTIFF

~VERSUS~

NYAGA JOHN WANJOHI.....1ST DEFENDANT

KENYA POWER & LIGHTING COMPANY LIMITED.....2ND DEFENDANT

PETER MUSAU MUTUA.....3RD DEFENDANT

JUDGEMENT

1. By his plaint dated 24th November, 2016, the 1st Respondent herein sued the Appellants and the 2nd Respondent seeking damages arising from a road traffic accident which allegedly occurred on 11th October, 2015 involving the 1st Respondent's motor vehicle registration no. KBJ 661B and motor vehicle registration no. KBK 882T which the 1st Respondent alleged was registered in the names of the Appellants while the 2nd Respondent was the reputed owner thereof. According to the 1st Respondent, as a result of the said accident, which was caused by the negligence of the driver of motor vehicle registration no. KBK 882, his said motor vehicle was extensively damaged and he consequently suffered loss and damage which eh particularised as amounting to Kshs 245,900.00, an amount which he claimed from the Appellants and the 2nd Respondent jointly and severally. He also sought for the interests thereon and the costs of the suit.

2. It would appear that a default interlocutory judgement was entered against the 2nd Respondent for default of appearance and defence.

3. Before the suit could be heard the Appellants, vide a Motion on Notice dated 28th March, 2017 sought that they be struck out from the suit. and in the alternative that the suit against them be struck out. The application was based on the fact that the said motor vehicle registration no. KBK 882T was bought by the 1st Appellant through a loan advanced to him by his employer, the 2nd Appellant. As a result, the said vehicle was registered in the joint names of the Appellants. However, on 17th November, 2014 during the currency of the said joint

ownership, the said vehicle was extensively damaged by a collapsed building and upon the report being made to the insurance company, Jubilee Insurance Company of Kenya Limited, the said vehicle was declared as a constructive total loss and its pre-accident value was placed at Kshs 720,000.00 which amount the said insurance company settled in full and took possession, ownership and interests in the salvage after being discharged by the Appellants. Subsequently, the said salvage was disposed of to the 2nd Respondent herein. It was accordingly contended that neither of the Appellants had any interest in the said vehicle as at the time of the subject accident and that they were wrongfully sued. The Appellants annexed copies of the documents relating to the said transaction between them and the insurance company.

4. In his replying affidavit, the 1st Respondent deposed that he sued the Appellants because they were the registered owners of vehicle registration no. KBK 882T which was involved in the accident having confirmed the same from a copy of the records and the police abstract. Since legally the copy of the records is deemed as conclusive proof of ownership, he deemed it prudent to sue the Appellants as well despite the fact that the police abstract report also indicated the 2nd Respondent's name. According to him, he was not sure about the genuineness of the documents relied upon by the Appellants in support of their application whose veracity he was of the view ought to be tested trough cross-examination. He therefore contended that to allow the application would prejudice his suit in the event that the 2nd Respondent was to deny ownership of the vehicle hence leaving him remediless.

5. In his ruling the learned trial magistrate declined to allow the application holding that the issues raised were better of being dealt with at the full hearing of the suit.

6. In this appeal, the Appellants have raised the following grounds of appeal:

1) That the learned magistrate erred in law and in fact in failing to find that the names of the 1st and 2nd Appellant ought to have been struck out under Order 1 Rule 10 (2) of the Civil Procedure Rules.

2) That the learned magistrate erred in law and in fact in failing to identify issues raised by the Appellants and thereby failing to give findings on issues raised in the Appellant's Application dated 28.3.2017.

3) That the learned magistrate erred in law and in fact in failing to find that the Appellants had rebutted the presumption of ownership of the motor vehicle in question at the alleged time of the accident.

4) That the learned magistrate erred in law and in fact in failing to consider the evidence adduced by the Appellants in support of the Application dated 28.3.2017.

5) That the learned magistrate erred in law and in fact in finding that the issue of possession of the motor vehicle could only be canvased in evidence.

6) That the learned magistrate erred in law and in fact in finding that the other alternative would be for the Appellants to seek for indemnity from the 3rd Defendant.

7) That the learned magistrate erred in law and in fact in finding the continuation of having the names of the Appellants in the copy of records meant that the case was merited against them.

8) The learned magistrate erred in law in failing to consider the submissions filed by the Appellants.

9) That the learned magistrate erred in law and in fact in failing to exercise his discretion judiciously in determining the Application and failed to apply settled legal principles thereby arriving at injudicious decision of dismissing the Application.

10) That in all the circumstances of the case, the learned magistrate failed to render justice to the Appellants.

7. Based on the above grounds, the Appellants have prayed for the following orders:

a) The appeal be allowed with costs.

b) The ruling of the Honourable A. Lorot, Senior Principal Magistrate delivered on 25.8.2017 in Machakos CMCC No. 735 of 2017 be set aside in its entirety.

c) This Honourable Court be pleased to allow the Appellants' Notice of Motion Application dated 28.3.2017 by striking out the names of the 1st and 2nd Defendants from the suit in the trial court.

d) The costs of the Appeal and in the subordinate court be borne by the Respondents.

e) The Court be pleased to make any order or further order that it may deem fit.

8. It is submitted on behalf of the Appellants that the trial Court erred in law and in fact in failing to find that the names of the appellants ought to be struck out of the suit under Order 1 rule 10 of the ***Civil Procedure Rules***. According to the Appellant's application before the trial court, the Appellants (as defendants) sought for the striking out of their names from this instant suit. In the alternative, the application sought to have the suit struck out and be dismissed on account of the suit's failure to raise a reasonable cause of action against them /or for being scandalous, frivolous and/or for being an abuse of the court process. The application was based on, *inter alia*, the fact that as at the

time of the alleged accident (11.10.2015), neither the 1st nor 2nd defendant was the true or apparent owner of the motor vehicle registration number KBK 882T ("the motor vehicle"). Through the two supporting affidavits to the application, it is evident that as at the time of the accident, neither the 1st nor 2nd defendant had possession or ownership of the motor vehicle. Instead, the 3rd Defendant was the true and/or apparent owner of the motor vehicle.

9. It was submitted that the trial Court was obliged to consider and make a finding on the ownership of the motor vehicle based on the law particularly Section 8 of the ***Traffic Act***, Chapter 403 of the Laws of Kenya. In support of the submissions the Appellants relied on the cases of **Nancy Ayemba Ngana vs. Abdi Ali [2010] eKLR** and ***PNM & Another vs. Telcom Kenya Ltd and 2 Others [2015] eKLR*** *and it was contended that applying the aforesaid provision of the law and principle, the trial court ought to have found that, on a balance of probability, the 1st and 2nd Appellants were not the actual owners of the motor vehicle as at the time of the accident since in the supporting affidavits to the Appellants' application before the trial Court, the 1st and 2nd Appellants clearly provided evidence to contradict what is contained in the registration certificate or police abstract in respect of the accident, the subject matter of the instant suit.*

10. *This Court was therefore urged to* find that indeed the 1st and 2nd Appellants were not the actual owners of the motor vehicle as at the time of the alleged accident and that the presumption of ownership under section 8 of the ***Traffic Act*** was successfully rebutted by the Appellants in their Application before the trial Court. Ssimilarly, as regards the issue of the Respondent's (Plaintiff's) failure to raise a reasonable cause of action against the Appellants, the trial Court failed to find that indeed the Plaint fails to disclose a reasonable cause against the Appellants.

11. In light of the foregoing submissions, it was submitted that the trial Court erred in law and in fact in failing to exercise his discretion judiciously in determining the Application. It failed to apply settled legal principles thereby arriving at injudicious decision of dismissing the Application hence failed to render justice to the Appellants.

12. It was the Appellants' case that the question of ownership could be litigated at this interim stage and did not have to wait for trial and that the trial Court had power to conclusively determine the question of ownership and possession at that stage based on Order 1 Rule 10(2) of the ***Civil Procedure Rules.***

13. This Court was therefore urged to find that instant appeal is merited and grant the orders as prayed.

14. I have not seen any submissions filed on behalf of the Respondents.

Determination

15. I have considered the appeal as well as the submissions on record. Order 1 Rule 10(2) of the ***Civil Procedure Rules*** provides as follows:

> ***The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.***

16. The question then is whether the Appellants herein were improperly joined as a party to the suit. According to the Plaintiff, a search at the office of the registrar of motor vehicles revealed that the Appellants were at the material time the registered owners of motor vehicle registration no. KBK 882T which was the vehicle involved in the accident. This position is not denied. The Appellants however aver that their interest in the said vehicle was terminated after the said vehicle was declared as a constructive total loss and its pre-accident value, placed at Kshs 720,000.00, was settled in full by the insurance company and the salvage subsequently disposed of to the 2nd Respondent herein.

17. The Court of Appeal in **Francis Nzioka Ngao vs. Silas Thiani Nkunga Civil Appeal No. 92 of 1998** held that:

> **"In terms of section 8 of the Traffic Act, Cap. 403, Laws of Kenya, the registered owner of a motor vehicle is deemed to be its owner unless the contrary is proved on a balance of probabilities…Whether the property in a chattel being sold has or has not passed to the buyer is a question of fact to be determined on the facts of each individual case…A judge is perfectly entitled to draw an inference that by dint of section 9 of the Traffic Act, a purchaser of a motor vehicle is not supposed to use on the road for more than 14 days the said motor vehicle after the transfer unless he is registered as the owner thereof and therefore after the said period the original owner remained the registered owner…If a person is the registered owner of a motor vehicle and he transfers that ownership he must inform the Registrar of motor vehicles within seven days of the change of ownership in the prescribed form."**

18. It follows that unless the contrary is proved, the Appellants herein who are the registered owner of the subject motor vehicle are deemed to be its owner. The 1st Respondent has raised doubts as regarding the authenticity of the documents relied upon by the Appellants and has questioned their veracity.

19. Order 1 rule 7 of the ***Civil Procedure Rules*** provides that:

> ***Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.***

20. In light of the doubts harboured by the 1st Respondent, the 1st Respondent cannot be faulted, based on the said provision for joining the Appellants and the 2nd Respondent to the suit. In other words, without the authenticity of the documents relied upon by the Appellants being verified, it cannot be said at this stage that the Appellants herein have been improperly joined as parties to this suit. They are *prima facie* the owners of the said vehicle until proved otherwise. That proof is required to be on a balance of probabilities. In light of the averments by the 1st Respondent, what this Court has are the averments of the Appellants supported by secondary evidence against the legal presumption. Proof on a balance of probabilities was described by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred. That is not the case in election petitions."**

21. Can this Court on the basis of the cold-print affidavits filed herein by the parties, make a conclusive finding regarding the ownership of motor vehicle registration no. KBK 882T? I think not. I associate myself with the position taken in **Daphine Parry vs. Murray Alexander Carson [1962] EA 515** where it was held that:

> **"The court cannot order that the defendant be 'dismissed from the suit' without holding that the plaint discloses no cause of action against him, or that on the face of the pleadings as a whole the plaintiff has no chances of success. But to so hold would be to pre-judge the pending case itself, one of the issues in which, raised in the written statement of defence, is that the plaint discloses no cause of action. Although no counter-affidavit has been filed challenging the facts alleged in the applicant's supporting affidavit, the court cannot decide the application on the basis of truth of any of those allegations which are or may be in issue in the pending suit."**

22. In **Marwaha vs. Pandit Dwarka Nath [1952] 25 LRK 45** it was held that:

> **"This application under Order 1, rule 10(2) to strike out the second defendant is misconceived as the ground on which he seeks to be struck out amounts in substance to a defence on a point of law, namely his non-liability upon actions in tort at the time when the cause of action arose. That being so, the proper course would have been to file a defence and to plead this point in it, under Order 6, rule 27."**

23. It is similarly my view that the Appellants ought to raise the issues being raised herein in their defence which defence will be considered by the Court in the usual manner. It would be a travesty of justice if this court was to strike out the Appellants from the suit at this stage only to find that the veracity of the documents relied upon by them in support of the Application are doubtful.

24. In the premises, I find that the decision of the learned trial magistrate cannot be faulted. It was based on sound law. Consequently, this appeal fails and is dismissed but with no order as to costs as the Respondents never filed any submissions.

25. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 29th day of June, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey