



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**HIGH COURT CIVIL APPEAL NO. 3 OF 2018**

**SYNERGY INDUSTRIAL CREDIT LTD.....APPELLANT**

**VERSUS**

**MONIKAH MUKENYI NDUNG’U (Suing as the legal representative**

**Of the estate of JOHN MUCHAI).....RESPONDENT**

*(Being an appeal from the Ruling of Hon V Chianda SPM delivered on 14<sup>th</sup> December, 2017 in CMCC No 253 of 2013)*

**JUDGMENT**

**Background and Issues**

1. The plaint in the lower court alleged that on or about 4<sup>th</sup> May, 2010, the deceased was fatally injured in an accident as he walking along Gilgil Naivasha road. The accident occurred when the driver of Lorry registration number KBH 956S/ ZD 1165 caused it to collide with vehicle registration number KAH 172N Nissan causing it to veer off the road and fatally crashed into the deceased. The plaintiff sought compensation in damages.
2. The suit was filed against the appellant (who was the 1<sup>st</sup> defendant), AO Basid Limited as 2<sup>nd</sup> defendant and joint registered owner of the Lorry accident vehicle; Abdi Basid Omar the third defendant as driver, and Gilgil Hills academy as fourth defendant as registered owner of the Nissan accident vehicle. The 1<sup>st</sup> defendant denied the claims, further averring that its registration as a joint owner of the accident vehicle was limited to financing the purchase through a hire purchase. It annexed the letter of offer and Hire purchase agreement dated 5<sup>th</sup> February 2010.
3. By an application dated 25<sup>th</sup> August, 2017, under Order 2 Rule 15 (1)(b)-(d) the 1<sup>st</sup> defendant sought that the suit insofar as it related to it, be struck out or dismissed with costs. The grounds were that no cause of action arose against it as it was neither the registered owner of the suit vehicle nor in control or possession of it, and that it was a financial institution whose role was restricted to the financing of the suit vehicle. Order 2 Rule 15 avails for striking out on grounds that there is no cause of action, for frivolity, for potential prejudice or embarrassment to court, and abuse of process.
4. In its ruling of 12<sup>th</sup> December, 2017, the trial court dismissed the application on grounds that the 1<sup>st</sup> defendant had not demonstrated that it was a mere financier, nor had they shown the steps they took when served with the demand letter.
5. Dissatisfied with the ruling, the appellant filed this appeal. The grounds are essentially that the trial court: disregarded numerous binding authorities and based its ruling on wrong principles; that it failed to take into account the 1<sup>st</sup> defendant’s deposition that the vehicle was used as a collateral for a credit facility and 1<sup>st</sup> defendant was not statutorily in possession of the vehicle.
6. I have perused the application and supporting affidavit of the 1<sup>st</sup> defendant’s legal officer, with annexures. It deposes that the 1<sup>st</sup> defendant was a financier to the 2<sup>nd</sup> defendant for the accident vehicle; it annexes a hire purchase application made by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant; it annexes a Hire Purchase Agreement between the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant. In essence the Hire purchase agreement makes the 2<sup>nd</sup> defendant the hirer and the owner is the 1<sup>st</sup> defendant. Significantly, Clause 4a) of the agreement provides that the hirer is obligated to indemnify the owner against any claims regarding the usage of the accident vehicle.
7. I have also been provided with the trial court’s file as this is a first appeal and have been able to peruse the original pleadings, application and annexures contained in the file.

8. In the lower court, the applicant herein relied on three authorities:

- **Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 others [2017] eKLR** where the ruling and order of the lower court dismissing the Appellant's motion in the lower court was set aside on the grounds that it agreed that in the context of this case, the trial court erred by ignoring or dismissing the uncontroverted affidavit evidence and legal authorities concerning ownership and liability that were tendered in respect of the application by the Appellant; and secondly that by compelling, against all odds, the Appellant to remain a party to the suit notwithstanding the material placed before her, the learned trial magistrate was in error.

- **National Industrial Credit Bank Ltd v Felister Mwendu Musyimi & another [2016] eKLR** where Nyamweya, J held that the trial court, armed with evidence as to the hire purchase ought to have interrogated the issue as to whether the Defendant was a proper and necessary party in the suit, in light of various decisions that have held that a financier of a buyer of a motor vehicle cannot be held vicariously liable for the acts of an agent of the buyer. As such, the court stated as follows:

*“In the present appeal, the material and relevant time for rebuttal of ownership of motor vehicle registration number KBW 063 G would be at the time of the accident, which according to the Plaintiff filed in the trial Court was on 24<sup>th</sup> December 2014. Therefore, it was possible and proper at the time of hearing of the Appellant's application in the trial Court to rebut such ownership. Given that there was evidence of the existence of a financing or hire purchase agreement between the Appellant and 1<sup>st</sup> Defendant 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 Appellant from the suit.”*

- **Investments and Mortgages Bank limited v Nancy Thumari & 3 others [2015] eKLR** where Aburili, J said that although the appeal in that case did not concern the agent/principal relationship of the parties to the suit in the lower court, as was the case in the authorities she was reviewing:

*“...the analogy I draw from the above Court of Appeal decision in Victor Mabachi & Another vs Nurtun Bates Ltd [2013] eKLR is that a court can strike out from the proceeding a party who is wrongly enjoined where there is clear evidence that that party ought not to have been sued in the first instance or where it is apparently clear that there are other parties to the suit who are properly sued and the liability attributed to them is not to be shared with the party who is complaining to have been wrongly enjoined.*

9. On her part, the plaintiff/respondent in the lower court relied on the case of **Ambrose Matogo v Benedict Limisi [2013] eKLR** where Waweru, J held that despite having seen documents evidencing the fact that the 2<sup>nd</sup> defendant had advanced to its employee, the 1<sup>st</sup> Defendant, KShs 350,000/00 to purchase motor vehicle, the log book merely showed joint registration of the accident vehicle. The court there referred to **Section 8 of the Traffic Act, Cap 403** which provides:

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

The court noted, however, that the presumption of ownership imbued by the fact of registration as owner can be displaced by evidence.

10. Accordingly, it appears from the cases decided in the High Court, which are persuasive and not binding on this court, that the courts have held positions on both sides of the aisle.

11. The real question in my mind is whether the applicant/appellant could properly be struck out from the suit in the lower court without any prejudice to the plaintiff respondent. If the applicant is a necessary party in respect of which justice cannot be done in the proceedings in the suit unless the applicant is a party, then the applicant cannot be discharged from the proceedings without prejudice being occasioned to the respondent.

12. The respondent in their pleadings and in their response to the application hold out the position that they enjoined the applicant/appellant in the suit essentially because it is a joint registered owner according to the vehicle records. They cling to the position in the **Ambrose Matogo** case which is premised on section 8 of the Traffic Act that a person in whose name a vehicle is registered is presumed to be the owner. However, they have given no answer to the fact that the presumption can be rebutted by proof contrary to the presumption.

13. My view is that where the rebuttal is provided by strong evidence, there can be no rationale for retaining the registered owner as a party to a suit unless the *cause of action*, simply defined as a factual situation the existence of which entitles one person to obtain from the court a remedy against another person, can be placed at that party's doorstep through some other legal principle such as contributory negligence or vicarious liability, none of which are alleged in the plaint.

14. I therefore agree with the appellants that in light of the information brought to light through the defence and the application, they are not a proper party in the suit. The trial court therefore ought to have taken this information into account, and should have struck out the suit against the 1<sup>st</sup> appellant.

15. In this case, it has been made abundantly clear from the material availed in the application in the lower court, that the appellant's relationship with the vehicle is merely that of a financier under a hire purchase agreement. That information was not, however, available to the plaintiff at the time of filing suit and the plaintiff was legally entitled to enjoin the appellant in the suit, at the time, in reliance on section 8 of the Traffic Act.

16. I have seen the demand letter served by the plaintiff on the appellant dated 17<sup>th</sup> October, 2011, and stamped in acknowledgment by the appellant on 11<sup>th</sup> July, 2011. It was the responsibility of the appellant to notify and disclose to the respondents the nature of the relationship between the registered owners of the suit vehicle.

17. In the result, whilst I am inclined to allow the appeal, I do consider that it would be unjust for costs to be borne by the respondent, given that the appellant has not been shown to have taken any early measures to disclose to the plaintiff its relationship with the joint owner of the vehicle.

### **Disposition**

18. In the result, I find that the Appellant's appeal has merit, and hereby set aside the orders of the trial magistrate made in Naivasha CMCC No 253 of 2013 in the ruling delivered therein on 1<sup>st</sup> December 2017.

19. The following orders shall substitute the trial court's orders:

(1) That the suit against the 1st Defendant in Naivasha CMCC No 253 of 2013 is hereby struck out;

(2) That the Plaintiff and Defendants shall each meet their respective costs of this appeal, and of the Notice of Motion dated 25<sup>th</sup> August 2015 and suit in Naivasha CMCC No 253 of 2013.

20. Orders accordingly.

### **Administrative directions**

21. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

22. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

23. Orders accordingly

**Dated and Delivered via videoconference at Nairobi this 25<sup>th</sup> Day of June, 2020**

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**RICHARD MWONGO**

**JUDGE**

Delivered by video-conference in the presence of:

1. Jacob M Meeme, Legal officer of the Appellant (in absence of counsel)
2. Ms Muturi for the Respondent
3. Court Clerk - Quinter Ogotu

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