REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 52 OF 2019

STEPHEN MAINA WAIKA.....APPELLANT

=VRS=

1. SCHOLASTICA WAMBUI KIBATHI.....1ST RESPONDENT

2. GEORGE KENJU.....-2ND RESPONDENT

3. SOMA INDUSTRIES LIMITED.....3RD RESPONDENT

{Being an appeal against the Judgement of Hon. C. M. Makari (Mrs.) – SRM Gatundu dated and delivered on the 4th day of April 2019 in the original Gatundu Chief Magistrate's Court Civil Case No. 38 of 2013}

JUDGEMENT

In the court below the appellant was the 3rd defendant in the suit filed by the 1st respondent against him and the 2nd and 3rd respondents. The suit was a material damage claim (cost of repairs to the 1st respondent's motor vehicle Registration No. KBE 280B) following a collision that occurred on 23rd June 2010between it and motor vehicle KAH 306T. The 1st respondent sued the appellant and the 2nd and 3rd respondents as the registered and/or beneficial owners of motor vehicle KAH 306T. The appellant however denied ownership and stated that he had prior to the accident sold the motor vehicle to the 2nd respondent. He claimed to have himself purchased the motor vehicle from the 3rd respondent as a salvage and repaired it and then sold it to the 2nd respondent at a car yard/showroom called View Options. After hearing evidence and submissions from all the parties the trial Magistrate found the appellant and the 2nd respondent jointly and severally liable at 100% and entered judgement for the 1st respondent for a sum of Kshs. 448,323/= and costs of the suit.

Being aggrieved by the findings of the trial Magistrate the appellant preferred this appeal. The gist of the appeal is that the trial Magistrate's holding that the appellant was the owner of the motor vehicle KAH 306T was erroneous because the police abstract produced by the 1st respondent confirmed it belonged to the 2nd respondent. He also contended that there was evidence to show that the insurable owner of the motor vehicle was the 2nd respondent but not himself and further that he could not have been vicariously liable when there was no evidence to show there existed a relationship between him and the 2nd respondent.

On 15th May 2020 Meoli J gave directions that the appeal would be heard through written directions. However, only those of the appellant and the 1st respondent were received. Counsel for the 1st respondent having informed this court that the appeal was primarily between the appellant and the 1st respondent the court retreated to prepare and write this judgement.

As the first appellate court my duty is to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion albeit keeping in mind that I did not see or hear the witnesses ***(See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123)***. Be that as it may I have also carefully considered the rival submissions and cases cited by Counsel for the parties.

> The **issue for determination by this court is whether the trial Magistrate erred in law and fact in holding and finding that as at the date of the accident the appellant was the registered owner of motor vehicle Registration No. KAH 306T** and **whether the finding that the appellant was jointly and severally liable for the damage to the 1st respondent's vehicle was sound.**

At the hearing the appellant admitted that he purchased the subject motor vehicle from the 3rd respondent and that it was registered in his name. It was his evidence however that he had purchased it as a salvage and that upon repairing it he sold it to the 2nd respondent. It was also his evidence that the 2nd respondent despite paying the full purchase price did not register the transfer of ownership of the motor vehicle to himself. In effect therefore he conceded that at the time of the accident the motor vehicle was still registered in his name although it was insured and was being driven by the 2nd respondent. **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."**

The 1st respondent therefore acted within her right to sue both the appellant and the person who was using the motor vehicle at the time of the accident. This is because she was not privy to whatever had transpired between the appellant and the 2nd respondent. Once sued the appellant could have proceeded in either of two ways: first was to prove that he had indeed sold the motor vehicle to the 2nd respondent and second was to make a claim against the 2nd respondent who was already a party to the suit as provided under **Order 1 rule 24 (1) (c) of the Civil Procedure Rules.** The burden to prove that he was not the owner of the vehicle fell on him because there was prima facie evidence that the vehicle was registered in his name. He did not prove this on a balance of probabilities. He did not adduce any evidence that he had sold the motor vehicle to the 2nd respondent as alleged. The transfer of ownership of motor vehicle produced by the 1st respondent as "Exhibit 4A" and which showed the vehicle belonged to him was not therefore rebutted. The trial Magistrate did not therefore err in arriving at the finding that as the registered owner of the vehicle that negligently caused the collision he was liable. It is clear from the record that the appellant did not make a claim or raise the issue of ownership as against the 2nd respondent so that the trial Magistrate could determine it at the same time it determined the issue between him and the 1st respondent as provided in **Order 1 Rule 24 (1) (c)** of the **Civil Procedure Rules.** This is especially so given that the 2nd respondent did not enter appearance and did not adduce evidence at the hearing to confirm or dispute that the vehicle had in fact been sold to him. The trial Magistrate therefore correctly found the appellant jointly and severally liable with the 2nd respondent.

In the upshot my finding is that there is no merit in the appeal and the same is dismissed with costs to the 1st respondent. It is so ordered.

Signed and dated in Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE