



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL. NO. 168 OF 2017**

**ALFA HAULAGE LIMITED.....APPELLANT**

**VERSUS**

**CHRISTOPHER KYEVA NZIOKA.....1<sup>ST</sup> RESPONDENT**

**MOHAMMED ABDULKADIR.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Ruling/Order of Senior Principal Magistrates Court**

**at Mavoko, Hon C.C. Oluoch dated and delivered on 6.12.2017**

**in Mavoko SPMCC No. 1 of 2015)**

**JUDGEMENT**

1. The instant appeal arises from the ruling of Hon. C.C. Oluoch, Senior Principal Magistrate in **Mavoko SPMCC No. 1 of 2015** delivered on 6<sup>th</sup> December, 2017. By the said ruling, the learned trial magistrate dismissed the appellant's application dated 2<sup>nd</sup> August, 2017 seeking the following orders, inter alia:-

**a. That this honourable court be pleased to review and or set aside the judgement of the court dated 10<sup>th</sup> August, 2016 in respect of the 1<sup>st</sup> defendant only.**

**b. That an order do issue to the effect that the 1<sup>st</sup> defendant is not vicariously or otherwise liable for the negligence occasioning and or leading to the accident that occurred on 29<sup>th</sup> September, 2012.**

2. The said application was canvassed by way of submissions and in a reasoned ruling, the learned trial magistrate dismissed the appellant's application holding inter alia, that the appellant had not demonstrated that there was any reason upon which the court should exercise its discretion and review the judgement. Equally, the learned trial magistrate held that the plaintiff could pursue the claim jointly and severally against the defendants which essentially would be wholly settled by the company that has insured the motor vehicle. The learned trial magistrate further found that there was no indication that the defendant would likely be prejudiced. The court found no merit in the application and dismissed it with no order as to costs.

3. The appellant being dissatisfied/aggrieved by the decision/ruling of the learned trial magistrate, has appealed to this court and sets out 7 grounds of appeal in its memorandum of appeal that are summarized as follows:-

**1. THAT the learned trial magistrate erred in law and fact by dismissing the appellant's application dated 2.8.17.**

**2. THAT the learned trial magistrate erred in law and fact by relying on the abstract as evidence of ownership of the suit vehicle.**

**3. THAT the learned trial magistrate erred in law and fact by failing to consider the appellant's exhibits.**

4. The appellant prayed for the appeal to be allowed and the ruling dated 6.12.2017 set aside and substituted with an order allowing the application dated 2.8.2017.

5. The brief background to this matter from a perusal of the lower court record is that the 1<sup>st</sup> respondent who was the plaintiff in the lower court sued the appellant who was the 1<sup>st</sup> defendant claiming general and special damages as a result of injuries sustained due to an accident that was alleged to have been attributed to the negligence of the defendants. The defendants entered a consent on liability and an award was issued against them in the sum of Kshs 4,734,880.32 on 10<sup>th</sup> August, 2016. On 31<sup>st</sup> March, 2017 the 2<sup>nd</sup> defendant received a letter addressed to him trading as the 1<sup>st</sup> defendant informing him that the insurance company shall not settle any amount of the decretal amount above Kshs 3,000,000/-. Thereafter on 26<sup>th</sup> July, 2017, the firm of Rahma Jillo & CO Advocates wrote to the said insurance company seeking clarification on ownership and the insurance company replied vide letter dated 27<sup>th</sup> July, 2017 clarifying that the suit vehicle was sold to the 2<sup>nd</sup> defendant and thus Alfa Hauliers had never been insured by Takaful Insurance. However when issuing instructions to Njeri, Lukorito and Mungai Advocates, they did so under the mistaken belief that the 2<sup>nd</sup> defendant was trading as Alfa Hauliers and thus instructed the said advocates to act on behalf of both defendants.

6. As a consequence, the appellant's application dated 2<sup>nd</sup> August, 2017 was filed alleging that the 1<sup>st</sup> Defendant sold the suit vehicle to the 2<sup>nd</sup> Defendant and this information was not available at the time of trial. The judgment entered in favour of the respondent was never set aside and hence a warrant of attachment was served on the defendants.

7. The record shows that the appellant and the 2<sup>nd</sup> Defendant appointed the firm of Njeri Lukorito & Mungai Advocates on 8<sup>th</sup> April 2015 to act jointly for them vide a notice dated 8<sup>th</sup> April, 2015 and filed on 22<sup>nd</sup> April, 2015 while the 2<sup>nd</sup> Defendant appointed the firm of Rahma Jillo & Co Advocates on 20<sup>th</sup> July, 2017 to act for him vide a notice of appointment dated 20<sup>th</sup> July, 2017 and filed on 21<sup>st</sup> July, 2017.

8. On 2<sup>nd</sup> August, 2017 the firm of Rahma Jillo Advocates filed an ex parte Notice of Motion seeking that the Firm of Rahma Jillo be allowed to come on record for the 1<sup>st</sup> Defendant/ Applicant in place of Njeri, Lukorito & Mungai Advocates; stay of execution of the judgement delivered on 10<sup>th</sup> August, 2016, the decree and all consequential orders emanating therefrom in respect of the 1<sup>st</sup> defendant and also seeking an order that the 1<sup>st</sup> Defendant is not vicariously liable for negligence leading to the accident that occurred on 29.9.2012. The interim order of stay of execution was granted.

9. The foregoing is the contextual background against which this appeal has to be evaluated. As in the norm this court being the appellate court of first instance, I have to evaluate the appeal on the basis of the evidence and material that was before the trial magistrate to determine whether the learned magistrate arrived at the correct decision having regard to the facts and the law.

10. The appeal as earlier pointed out is against the ruling of the trial court delivered by Hon. C.C Oluoch, SPM Mavoko arising from the appellant's application dated 2<sup>nd</sup> August, 2017 which was dismissed vide the said ruling. The appeal was argued by the parties by way of written submissions. The appellant's submissions were filed on 19<sup>th</sup> September 2018 while those of the 1<sup>st</sup> respondent were filed on 4<sup>th</sup> December 2018.

11. The appellant's submissions are predicated on the argument that due to an error of instructions emanating from Takaful Insurance of Africa the instructing firm of Njeri, Lukorito & Mungai Advocates who by error of instruction represented the appellant in the lower court and the same error was corrected by the said insurance company vide letter dated 27<sup>th</sup> July, 2017. The appellant submitted that this information was brought to the attention of the court but however the court selectively applied the contents of the letter dated 27<sup>th</sup> July, 2017 and placed more reliance on the police abstract as evidence of ownership of the suit vehicle as opposed to a copy of official search from the registrar of motor vehicles. The appellant thus contended that in so doing, they were deprived of the right to be heard.

12. The appellant further in the submissions faults the learned trial magistrate's failure to appreciate that great prejudice will be occasioned on the appellant if the review orders were not granted in that an innocent party will be made to shoulder a judgement debt and will lead to financial loss.

13. The appellant argued that there was documentary evidence to prove that there was new facts that the court ought to have exercised its discretion to grant the review order. The appellant further contended that the averments were uncontroverted and thus the appellant was entitled to the order sought.

14. The appellant further submitted that the suit vehicle having been sold to the 2<sup>nd</sup> defendant and documentation presented before court then this was reason enough to show that the appellant was not in ownership, control of the suit vehicle, and instead, it is the 2<sup>nd</sup> defendant who had ownership, control and possession of the suit motor vehicle as from the date of the sale and the date of the accident.

15. The 1<sup>st</sup> respondent in his brief submissions defended the decision of the learned trial magistrate and submitted that the learned magistrate properly disallowed the appellant's application for the reasons that indeed the respondent was sued as the beneficial owner and in the case of **Charles Nyambuto Mageto v Peter Njuguna Njathi (2013) eKLR** beneficial ownership may be proved by various forms including the police abstract report. The respondent further submitted that the Appellant did not fulfil the requirements for grant of the orders sought because the matter of evidence that they seek to introduce as new was within their knowledge.

16. The Civil Procedure Rules Provide for the procedure for change of advocates after judgement has been entered vide rule 9A which provided thus:-

**“9A. When there is a change of advocate, or when a party decides to act in person having engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”**

17. I have looked at the order dismissing the application, and the same did not address the application made by the appellant under Order 9A, and I find that it was erroneous to omit to make a finding on the same vide the ruling dated 6.12.2017.

18. The application for review seems to hinge on the aspect of ownership or non-ownership of the suit vehicle. I am guided by the decision in **Ruth Wanjiku Muthee v Kenya Sugar Board [2014] eKLR** and hold that where it has not been proved that an accident motor vehicle belongs to the defendant, there is no basis for finding the defendant liable for an accident caused by such a vehicle. Further, that a document from the registrar of motor vehicles showing the ownership of a vehicle is the best evidence. Also that a police abstract is not conclusive evidence of ownership of a motor vehicle. Therefore I respectfully hold a different view with the learned trial court that there has indeed been discovery of new facts warranting the review orders

19. Upon review of the record, I find that there is a consent on liability that had been entered against the defendants. Therefore the issue of liability in absence of a setting aside of the consent is not open to discussion.

20. In the plaint dated 1.12.2014 the Respondent asserts:

**“2. The 1<sup>st</sup> Defendant.....at all material times relevant to this suit was in control, possession and/ or ownership of motor vehicle registration number KBQ 215Y Prime Mover.....**

**3. The 2<sup>nd</sup> defendant ... at all material times to the suit was the registered owner of Motor Vehicle Reg No KBQ 215Y.....**

**4. The defendants are sued vicariously for the acts and/ or omissions of the driver, servant and/ or agent.”**

21. In light of the consent on liability, the appellant admitted the production of a police abstract showing that the motor vehicle belonged to Alfa Haulage Limited of P. O. Box 5329 Nairobi. The searches showing that Motor Vehicle Registration No. KBQ 215Y prime mover belonged to the 2<sup>nd</sup> Respondent were admitted by the appellant as well.

22. I have perused that evidence and find that the same is at a variance with the evidence that the appellant sought to introduce. How was the Magistrate supposed to reconcile this evidence? Hear how my brother Ngaah Jairus, J reconciled such evidence in **Ruth Wanjiku Muthee (supra)**:

**“The respondent, through the transport manager, DW1, discounted the appellant’s claims and denied that the respondent owned the vehicle in question. In support of the respondent’s case, the witness produced an extract from the registrar of the motor vehicles showing that as at 6<sup>th</sup> February, 2010, when the accident occurred, the vehicle belonged to one Samuel Kang’ethe.”**

23. The learned Judge proceeded to analyse various authorities that had been cited before him and concluded that:

**“I am bound to agree with the learned counsel for the respondent that the police abstract could not, in these circumstances, be taken to be conclusive proof that the respondent was the owner of motor vehicle registration number KAA 223J. In my view, that piece of evidence was rebutted, controverted or challenged to the satisfaction of the trial court. The burden was on the appellant to present something more than a police abstract to prove that the respondent was the owner of motor vehicle registration number KAA 223J at the material time. I hold that she did not discharge this burden, regrettably.**

**It therefore follows that liability was not proved; without proof of ownership of the accident vehicle, there is no basis upon which the respondent could be said to be liable, vicariously or otherwise. The link between the accident and the respondent was not proved on a balance of probabilities.”**

24. The reasoning of the Judge ties up well with the statement of the Court of Appeal in **Joel Muga Opila v East African Sea Food Limited [2013] eKLR** where it held that:

**“In any case in our view an Exhibit is evidence and in this case, the Appellant’s evidence is that the Police recorded the Respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with the words to the effect that the owner was East African Sea Food was not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in Court without any objection its contents cannot be later denied.”**

25. It must indeed be appreciated that the police abstract showed that the suit vehicle belonged to the Appellant. There was no resistance to the production of the police abstract and neither was there an attempt to demolish its contents. However, the police abstract was not the only evidence placed before the Court on the ownership of the accident vehicle. There is also undisputed evidence on record that the suit vehicle was sold by the appellant to the 2<sup>nd</sup> Respondent. That evidence came by way of search records conducted by both the 1<sup>st</sup> Respondent and the Appellant. As stated by the Court of Appeal, the evidence of the Registrar of Motor Vehicles is the best and better evidence. Between a police abstract and the records of the body charged with registering motor vehicles, the evidence of the body charged with registration of motor vehicles in a given country carries more weight. I do not therefore understand why the trial Court opted to rely on the police abstract and not the records of Kenya Revenue Authority. Unfortunately, the investigating officer did not testify so as to enable the court to understand the basis of his decision.

26. I am satisfied that the review application introduces evidence that disconnects the appellant from the suit vehicle. Nevertheless there was no evidence to discharge or vary the consent on liability that was entered and that being the case, there is no basis for discharging the appellant from liability.

27. I am guided by the provisions of **Order 25 Rule 5 of the Civil Procedure Rules** that states:

**“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith”**

28. It is trite law that a Consent Order is a binding agreement between the parties since that consent is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation has already commenced, bring it to an end. Hence when it complies with the requisites and principles of contracts, it becomes a valid agreement which has the force of law as between the parties. That consent once given judicial approval, becomes more than a contract. Having been sanctioned by the court it becomes a determination of the controversy and has the force and effect of a judgment. This position was held by the court in the case of **Agrafin Management Services Ltd V Agricultural Finance Corporation & 5 Others (2012) eKLR**

29. The circumstances in which a consent judgment maybe interfered with were considered by the Court in **Hirani vs Hirani (1952) 19 EACA** where the following passage from Set on Judgment and Order 7th Ed Vol 1 pg 125 was approved;

**Prima facie, any order made in the presence and with consent of Counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to public policy of the Court, or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.**

30. In **Flora Wasike v Destino Wamboko (1982-88) 1 KAR** the Court of Appeal (Hancox J) stated:-

**“it is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled...”**

31. I have reviewed the application dated 2<sup>nd</sup> August, 2017 and the affidavit in support and in opposition and the submissions by the parties and I find no basis upon which I can fault the learned magistrate. From the record, it is clear that the 1<sup>st</sup> defendant/appellant as early as 28.4.2017 was aware that a judgment had been entered against it and that a consent had been entered. On the said date, the appellant did not make any attempt to set aside the consent and instead filed the mentioned application. The judgment resulting in the execution has never been set aside.

32. The appellant’s Notice of Motion dated 2.8.2017 was predicated on the view that the judgment against the appellant was null and void and all orders emanating and/or ensuing thereafter were a nullity and ought to be cancelled. The appellant had every opportunity to challenge the consent and the judgement but did not do so.

33. Although I agree with the learned magistrate that there was no merit in the application, my view is that the application ought to have persuaded the court to annul the consent and the subsequent and consequential orders from the date the judgement was entered.

34. Nevertheless, the court is enjoined under Sections 1A and 1B of the Civil Procedure Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that the appeal would partially succeed and I would set aside the dismissal order and only allow prayer 2 of the application dated 2.8.2017. The rest of the prayers in that application stand dismissed.

35. Before concluding this judgment, I would wish to comment on the competence or otherwise of the appellant’s notice of motion dated 2.8.2017 and advice the appellant to seek the appropriate remedy. It is a cardinal rule of natural justice that no party should be condemned without being heard. Were the court to have granted the orders sought by the appellant in the notice of motion, the court would be putting the cart before the horse. Except to the extent that the appeal has been allowed, the appellant’s application before the learned magistrate was misconceived and was an abuse of the court process.

36. In view of the foregoing observations it is the finding of this court that the instant appeal is without any merit. The same is dismissed with costs to the respondents.

Orders accordingly.

**Signed, dated and delivered at Machakos this 30<sup>th</sup> day of May, 2019.**

**D.K. KEMEI**

**JUDGE**