



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 474 OF 2018**

**VINCENT MURIITHI.....APPELLANT**

**-VERSUS-**

**BRIGITTE AOKO ODIPO.....RESPONDENT**

*(Being an appeal from the ruling and order of Honourable E. Wanjala (Miss) (Senior Resident Magistrate) made on 7<sup>th</sup> September, 2018 in CMCC NO. 1982 OF 2016)*

**JUDGEMENT**

1. The respondent being the plaintiff in CMCC NO. 1982 OF 2016 filed a suit against the appellant by way of the plaint dated 21<sup>st</sup> March, 2016 seeking special damages in the sum of Kshs.221,212/ plus costs of the suit and interest thereon. The appellant was sued in his capacity as the registered owner of the motor vehicle registration number KBK 427M (*“the subject motor vehicle”*).
2. Briefly, the respondent pleaded that sometime on or about the 15<sup>th</sup> of October, 2013 while her motor vehicle registration number KBU 082E was lawfully being driven along Ngong Road opposite Karen Police Station, the appellant through his agent or driver negligently drove the subject motor vehicle, causing the same to collide with the respondent’s aforesaid motor vehicle, thereby resulting in extensive damage to her motor vehicle. The particulars of negligence were laid out in the plaint.
3. The respondent further pleaded that as a result of the damage occasioned to her motor vehicle, she incurred costs and loss in the sum of Kshs.221,212/ in a bid to have the said vehicle towed, repaired and re-assessed.
4. The appellant entered appearance on 25<sup>th</sup> July, 2016 and thereafter filed his statement of defence dated 11<sup>th</sup> October, 2017 fundamentally denying ownership or possession of the subject motor vehicle as at the time of occurrence of the accident.
5. Subsequently, the appellant filed a Chamber Summons dated 1<sup>st</sup> February, 2018 seeking an order that he be struck out from the proceedings.
6. The respondent retorted to the application with Grounds of Opposition dated 9<sup>th</sup> May, 2018 and filed on like date.
7. The parties then filed and exchanged written submissions on the Chamber Summons before the trial court, with the trial court ultimately dismissing the application with no order as to costs.
8. Being aggrieved by the aforementioned ruling, the appellant is now before this court on appeal. His memorandum of appeal dated 4<sup>th</sup> October, 2018 advances the following six (6) grounds:

***(i) THAT the learned trial magistrate erred and misdirected herself in law and in fact by failing to find and hold, against the weight of uncontroverted evidence in record as contained in the appellant’s affidavit sworn on 1<sup>st</sup> February, 2018, that the appellant was not the owner of the subject motor vehicle KBK 427M as at 15<sup>th</sup> October, 2013 when the cause of action in the suit arose.***

***(ii) THAT the learned trial magistrate erred and misdirected herself in law and in fact in proceeding to determine the appellant’s application dated 1<sup>st</sup> February, 2018 on the basis that the respondent had filed grounds of opposition on 9<sup>th</sup> May, 2018 to which was annexed a copy of records as at 7<sup>th</sup> November, 2014 indicating the appellant as the registered owner of the subject motor vehicle, which position was not borne out by the court record and in any case, such copy of records would not have demonstrated that the appellant was the owner of the said motor vehicle as at 15<sup>th</sup> October, 2013 when the cause of action arose.***

(iii) THAT the learned trial magistrate erred and misdirected herself in law and in fact in effectively holding that the onus was on the appellant to prove the owner of the subject motor vehicle as at 15<sup>th</sup> October, 2013 when the cause of action arose, thus shifting the burden of proof that in law lay with the respondent as the plaintiff in the suit.

(iv) THAT the learned trial magistrate erred and misdirected herself in law and in fact in holding that the appellant ought to join the owner of the subject motor vehicle as at 15<sup>th</sup> October, 2013 when the cause of action arose, when the appellant's case as pleaded does not disclose any claim for contribution or indemnity from any party.

(v) THAT the learned trial magistrate erred and misdirected herself in law and in fact by failing to consider or sufficiently consider the submissions filed on behalf of the appellant and apply the binding authorities cited therein, thus arriving at an erroneous conclusion that the appellant's application dated 1<sup>st</sup> February, 2018 was without merit.

(vi) THAT the learned trial magistrate erred and misdirected herself in law and in fact in dismissing the appellant's application dated 1<sup>st</sup> February, 2018.

9. When the appeal came up before this court on 12<sup>th</sup> June, 2019 it was agreed by consent of the parties that the same be disposed of through written submissions, which the parties have ensured to file. On his part, the appellant contended that the respondent had not controverted the position that the appellant had purchased the subject motor vehicle following the accident, yet the trial court still went ahead to dismiss the appellant's Chamber Summons which then meant that the trial court had deemed that the appellant was at all material times the registered owner of the subject motor vehicle.

10. It was similarly the appellant's submission that the copy of records annexed to the Grounds of Opposition filed by the respondent confirm that the respondent was the registered owner of the subject motor vehicle as at 7<sup>th</sup> November, 2014 but not as at 15<sup>th</sup> October, 2013 when the accident occurred. Moreover, the appellant maintained that the documents annexed to his affidavit are a clear indication that he purchased the subject motor vehicle sometime in May, 2014 from Kenya Alliance Insurance Company Limited as a salvage, but that the trial court ignored this fact in choosing to dismiss his application. The appellant carefully mentioned that in any case, the respondent did not avail a copy of a police abstract proving the appellant's ownership of the subject motor vehicle as at the time of the accident.

11. The appellant further submitted that the trial court fell into error in placing on him the burden of proving an absence of ownership of the subject motor vehicle when the cause of action arose despite the law being clear that the onus lay with the respondent to prove the ownership, placing reliance on the case of *Alfred Kioko Muteti v Timothy Miheso & another [2015] eKLR*.

12. In his submissions, the appellant argued that the trial court further fell into error by determining that he ought to have joined the owner of the subject motor vehicle at the time of the accident by way of third party proceedings despite the fact that the appellant's defence made no mention of a claim for contribution or indemnity from any other party within the provisions of Order 1, Rule 15 of the Civil Procedure Rules, further relying on the reasoning taken in *General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR*. The appellant added that the trial court did not take his submissions and cited authorities into account in making her ruling, which authorities were binding upon it, thus applying wrong legal principles and arriving at an erroneous finding.

13. The respondent on her part began by submitting that a motor vehicle search was undertaken on the subject motor vehicle prior to filing the suit, the results of which revealed that the appellant was its registered owner at all material times. On this note, the respondent argued that the appellant ought to have raised the present issue at the time of service of the demand letter upon him, as this would have enabled the respondent carry out further investigations.

14. The respondent maintained that in any event, the appellant has the opportunity of bringing in a third party to the proceedings who would shed more light on the facts in issue. The case of *Tom Odhiambo Achillah T/A Achillah T.O & Co Advocates v Kenneth Wabwire Akide T/A Akide & Company Advocates & 3 others [2015] eKLR* was cited in this regard. The respondent further contended that the appellant, being well aware of the identity of the registered owner as at the time of the accident, is better placed to have such person enjoined in the proceedings. The respondent thus deems the appellant's presence in the proceedings as necessary for the adjudication of the issues that will be raised at trial. In the end, it was the respondent's stand that the appeal is deserving of dismissal so that the matter can proceed for hearing.

15. I have taken into account the rival written submissions in respect to the grounds of appeal raised. As is required at this juncture of appeal, I have re-evaluated and re-analyzed the arguments presented before the trial court as relates to the Chamber Summons as well as the evidence. I have equally taken a second look at the ruling in question.

16. From my reading and understanding of the six (6) grounds of appeal, I have gathered that the same raise issues of a two-fold nature: that is, the issue of ownership of the subject motor vehicle and consideration of the appellant's submissions. I will therefore articulate the said grounds under the two heads.

17. The foremost issue of ownership is catered for under grounds (i) to (iv) of the appeal and is closely tied to the issue of whether the plaintiff discloses a cause of action against the appellant. Turning to the affidavit sworn by the appellant in his Chamber Summons before the trial court, he stated *inter alia*, that he was at all material times aware of the accident involving the subject motor vehicle and the respondent's motor vehicle registration number KBU 082E on the material day. The appellant also stated that he purchased the subject motor vehicle from Kenya Alliance Insurance Company LIMITED as a salvage back in 2014 and annexed copies of relevant documents evidencing the transaction. As such, it was his averment that he was improperly joined in the suit as a defendant since he was not the registered owner of the subject motor vehicle at the time of the accident.

18. In her Grounds of Opposition, the respondent argued that a search undertaken on the subject motor vehicle confirmed the appellant as its registered owner at the time of the accident and that in any event, the appellant's averments were never communicated to the respondent at the earliest opportunity despite him having been served with a demand letter.

19. Through his filed submissions, the appellant reiterated his position that he was neither the registered owner of the subject motor vehicle nor in possession of the said vehicle at the time of the accident, hence the respondent has not disclosed a cause of action against him. The appellant went on to argue that the respondent has not offered any proof that a search was conducted prior to filing the suit and that in any event, the registration certificate of a motor vehicle is not conclusive proof of ownership, in line with Section 8 of the Traffic Act, Cap. 403.

20. The appellant made the submission that the respondent had not placed before the trial court a police abstract to ascertain the true owner of the subject motor vehicle at the time of the accident, maintaining that it was at all material times the responsibility of the respondent to prove ownership, which she did not.

21. In her brief submissions, the respondent simply maintained that a search was properly conducted and the same confirmed the appellant as being the registered owner of the subject motor vehicle, further maintaining that there was no way she would have known of the facts raised in the application. It was also the respondent's submission that the appellant is at liberty to add any party to the suit if he sees it fit.

22. The learned trial magistrate, having acknowledged the averments made by the parties, reasoned that while it may be true that the appellant purchased the subject motor vehicle from Kenya Alliance Insurance Company Limited, it would also appear the appellant has knowledge of the owner thereof at the time of the cause of action, hence she found the application to be premature and deemed it fit to have the appellant remain in the proceedings and if he so wishes, to make an application for the owner(s) of the subject motor vehicle as at 15<sup>th</sup> October, 2013 to be enjoined in the suit.

23. Having re-evaluated the above alongside the record, I wish to first mention that at this point in time, it is not for me to delve into the merits of the suit since the same is yet to proceed for hearing. I must therefore ensure that in addressing the appeal, I refrain from doing so as much as possible.

24. To begin with, the appellant referred both the trial court and this court to the case of *General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR* where the High Court expressed itself in the following manner as concerns what amounts to a cause of action:

***“As to what a cause of action is, Pearson J in Drummond Jackson v Britain Medical Association (1970)2 WLR 688 at pg. 616 defined a cause of action as:***

***“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint. Therefore, what the plaintiff needed to show was that he had a prima facie case against the defendants. The principles set down in D.T. Dobie & Co Ltd v Muchina & Another (1982) KLR 1 are clear that if a pleading does not disclose any reasonable cause of action or defence...it ought to be dismissed.”***

25. The respondent's suit emanates from an accident claim involving her motor vehicle and the subject motor vehicle. Going by the copy of records annexed to the Grounds of Opposition filed before the trial court, the appellant is indicated as being the registered owner of the subject motor vehicle as at 7<sup>th</sup> November, 2014. The appellant admits that he purchased the subject motor vehicle from Kenya Alliance Insurance Company Limited as salvage sometime in 2014. Such position is supported by the documents which were annexed to his supporting affidavit evidencing the transaction. It is however not clear at this stage when exactly the subject motor vehicle was registered in his name.

26. Be that as it may, **Section 8 of the Traffic Act, Cap. 403** provides that the person whose name appears on the registration document in respect to a motor vehicle will be considered the owner of the same. However, the courts have rendered that the above only constitutes prima facie evidence of ownership which is to say that it can be disproved by evidence. The appellant quoted the case of *Nancy Ayemba Ngaira v Abdi Ali [2010] eKLR* before the trial court, where the court held thus:

***“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership, beneficial ownership, possessory ownership.”***

27. My understanding of the above reasoning is that ownership is not restricted to the person whose name appears on the registration document/certificate. On his part, the appellant maintained that he was not the registered owner of the subject motor vehicle as at the time of the accident.

28. Further to the above, it is not clear why the respondent sued the appellant. Though the respondent has contended that the appellant was the registered owner of the subject motor vehicle at the material time when the accident occurred, he has not annexed a certificate of official search to that effect or a copy of the police abstract for the accident. On the other hand, the certificate of official search annexed by the respondent to the grounds of opposition in support of the application indicates that the appellant was the registered owner of the subject vehicle as at 7<sup>th</sup> November 2014. As such, the ownership of the vehicle at the time of the accident is an issue that can only be determined by the trial court after taking the evidence of the parties.

29. I am deliberately refraining from delving into the merits of the suit at this juncture and hence, do not deem it appropriate to analyze the impact of what I have observed in paragraph 28 above as the court best placed to do so, would be the trial court.

30. The court has reviewed the impugned ruling and I have noted the reasoning by the Learned Magistrate in arriving at the decision that she

did in her ruling delivered on the 7<sup>th</sup> day of September, 2018 and though I do not agree with part of her reasoning, (reasons which I do not wish to disclose at this point so that none of the parties is prejudiced at the trial), I am in agreement that the application is premature at this point. In any event, should the respondent fail to prove the case against him, he shall be compensated by way of costs.

31. The upshot is that the appeal lacks merit and is hereby dismissed with no orders as to costs. The ruling and order made by the trial court on 7<sup>th</sup> day of September, 2018 is hereby upheld.

It is so ordered.

**Dated, signed and delivered at NAIROBI this 31<sup>st</sup> day of October, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent