



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 266 OF 2017**

**NELSON KIPKEMOI SITONIK.....APPELLANT**

**VERSUS**

**1. STEPHEN KIRAGU KAGWIMA**

**2. JUDITH MUKUI MUGO.....RESPONDENTS**

**J U D G M E N T**

1. For trial before the trial court was a claim by the 2<sup>nd</sup> respondent seeking special and general damages for personal injuries pleaded to have arisen from a road traffic accident alleged to have occurred on the 21/02/2015 along Moi Avenue, Mombasa, when the said 2<sup>nd</sup> Respondent was knocked down by a motor vehicle Registration No. KBM 076L. The suit was brought against the current appellant as 2<sup>nd</sup> defendant and the current 1<sup>st</sup> Respondent as 1<sup>st</sup> defendant. The two defendants before the trial court were respectively impleaded as the registered or beneficial owner and the driver and insured of the motor vehicle at the time of the accident.

2. To the plaint, the appellant as first defendant in the court below filed a statement of defence on which it was specifically denied that the motor vehicle was registered in his name, or that he was a beneficial owner together with having been in control thereof for which no vicarious liability could attach.

3. Soon after filing the defence the Appellant did file a Notice of Motion dated 5/7/2017 and prayed that his name be struck out for being improperly joined to the proceedings. The application was supported by the Affidavit of the Appellant in which it was deposed and sworn that the motor vehicle was not registered in the name of the Appellant and that the 1<sup>st</sup> Respondent in this appeal was not his driver as to make him vicariously liable. There was reliance on a certificate from the Registrar of motor vehicles showing the 1<sup>st</sup> Respondent as the registered owner together with a police abstract also showing him to have been the owner and driver of the motor vehicle who was charged with the offence of driving without care and attention.

4. That application was opposed by both respondents who filed separate replying Affidavits. The 1<sup>st</sup> Respondent's Affidavit was to the effect that the Appellant was the beneficial owner of the motor vehicle under whose authority he drove the same and that if the application was allowed the 2<sup>nd</sup> respondent would lose her rights under Cap 405 because the insurer would not honour the judgment when passed and that himself the 1<sup>st</sup> Respondent would suffer irreparably by being made to pay personally as the insurer would decline the claim.

5. For the 2<sup>nd</sup> Respondent, a Replying Affidavit filed in opposition to the Application averred and reiterated the position of the 1<sup>st</sup> Respondent that the Appellant ought not be removed from the proceedings because he was the insured of the motor vehicle.

6. After considering the parties written submissions and in a reserved ruling dated the 3/11/2017 the court found and held:-

**“Though the 2<sup>nd</sup> defendant has indicated that he was not the registered owner and/or beneficial owner of the said vehicle I find it to be false. The provisions of Section 7 (sic) of the Insurance (Motor vehicle third party risk) Act and further Section 13 at the same as quoted by the Applicant work as against him (2<sup>nd</sup> defendant). If at all 2<sup>nd</sup> defendant had relinquished his right of ownership to the motor vehicle ought to have visited the insurer necessary charges for action but decided to sit and wait for this eventuality.**

**The contract that the 2<sup>nd</sup> defendant had entered with the insurer UAP was valid at the time of the accident. Though Applicant as per the police abstract was not in control, the 1<sup>st</sup> defendant has indicated that he was the beneficial owner of the same. The authority cited by the 2<sup>nd</sup> defendant being General Motors East Africa Limited vs Eunice Alila & Another [2015] eKLR where vicarious liability depends not on ownership but on the delegation at the task on duty is distinguishable.**

*(emphasis added).*

**Issue as to whether the 1<sup>st</sup> defendant had such authority on duty can Only be known by this court if parties are heard on merit for determination. From the policy the 2<sup>nd</sup> defendant had an interest to the said vehicle which he can't run away from at this stage of hearing though the subject had been transferred to 1<sup>st</sup> defendant.**

**In the case of *Jane Wairim Turente vs Githae John Vickery and 2 Others [2013] eKLR Court of Appeal* held that summary procedure can only be adopted when it can be clearly seen that a claim or ensure on the face of it is “*obviously unsustainable*”.**

**In the present case have found the claim for the plaintiff as against the 2<sup>nd</sup> defendant to be sustainable as policy holder. I further find that the application 5/7/2017 to be immature and to have no merit same is hereby dismissed with costs to plaintiff and 1<sup>st</sup> defendant”.**

7. That is the decision which has provoked the current appeal in which some 8 grounds with 5 sub-grounds are set out. Even is so set, the same would to me amount to no more than 3 grounds if the dictates of Order 42 Rule 2 were to be complied with. I say so because the application as filed and argued before the court below asserted just one point, that the Appellant was not the registered owner and was thus not a necessary party to the proceedings. I will thus in determining the appeal make a focus on the point for determination before the trial court. This I shall do while aware that my mandate as first appellate court is to review and re-examine the entire evidence at trial and come with own conclusions. I will also give regard to law that whereas court need to sustain suits for hearing on the merits, there is no magic in burdening a litigant with the load of having to defend a suit that is hopelessly weak and may not be injected with the real life by an amendment<sup>[1]</sup>.

8. After the directions were given, parties filed submissions but come the date of highlighting the submissions, only the Appellant and 2<sup>nd</sup> Respondent attended but the 1<sup>st</sup> Respondent did not. Even with such default I have taken time to read the three submissions filed together with the decided cases cited and I will give full consideration to the said submissions.

9. The issue for determination in this general present itself to me to be this:-

**“With the pleadings filed and documents exhibited, did the plaintiff present facts to show the Appellant as a necessary party to the proceedings?”**

10. In the amended plaint which introduced the appellant to the suit, the only reason the Appellant was sued is revealed to have been the fact that he was the insured in respect of the motor vehicle. The necessity of the Appellant in that suit can be traced to the 1<sup>st</sup> Respondent by his statement of defence dated and filed in court on the 14/8/2015 which it is pleaded that the Appellant was the insured in respect of the subject motor vehicle.

11. Beyond that pleading, there was no wrong alleged against the Appellant. Not even the fact that the 1<sup>st</sup> Respondent was an employee or agent of the Appellant for whom he could be vicariously liable. At paragraph 4, to be precise, it is pleaded that on the material day the motor vehicle was ‘*being driven by the 1<sup>st</sup> Respondent himself or his authorized driver*’. It would therefore beg the question whether there was any wrong alleged against the Appellant as to entitle him to be dragged through the trial process. Is it that being an insured to a motor vehicle makes one a necessary party or vicarious for every driver’s wrongdoing without more?

12. I do not think so. I do understand the law and practice of insurance to demand that one be possessed of insurable interest before he can be insured and that even after taking an insurance policy if there occurs a loss, and it be established that the insured had no insurable interest the policy would be to no avail<sup>[2]</sup>.

13. But parties are bound by their pleadings and none can be allowed to depart from the pleadings on record even by evidence because to do that would be to compromise the right to a fair hearing by encouraging trial by ambush.

14. Here the plaintiffs had sued on the basis of negligence and the only other person who could genuinely be made a party to those proceedings apart for the registered owner could only be an employee or driver proved to have been in the cause of employment and within then scope of authority and that is purely for purposes of weaving a connection between the driver and the owner of the offending motor vehicle with the application of principle of vicarious liability.

15. Here no such connection was alleged. While it remains true that registration is merely prima facie, the prima facie condition is only tinkered with evidence to the contrary. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> respondent had anything to say about the connection of the Appellant with the motor vehicle save that there was a policy issued in his name without an iota of explanation how a motor vehicle owned and driven by the 1<sup>st</sup> Respondent came to be insured in the name of the appellant. The trial court would have perfectly right had there been evidence that even if registered in the name of the 1<sup>st</sup> Respondent, the Appellant had an interest and control over the notice relied.

16. I do find that the trial court ran into an error when ignored the fact of registration and came to the finding that the pleading by the Appellant that he was neither the registered or beneficial owner was false. That also goes for the finding that Section 7 (sic) 8 of the Traffic Act cited by the Appellant went against him.

17. I do find that the only reason the trial court should have gone against the evidence tendered by the plaintiff herself in the certificate of search and police abstract was by another piece of evidence showing what kind of ownership was possessed by the Appellant over the motor

vehicle.

18. In the absence of such, the finding by the trial court was wholly erroneous cannot be sustained. I do set it aside and in the placed of the ruling dated 3/4/2017 dismissing the application. I do substitute an order allowing the application with the consequence in the Appellant's name is struck out from the suit with costs.

19. I award the costs of the appeal to the Appellant to be paid by the Respondents.

**Dated and delivered at Mombasa this 25th day of October 2019.**

**P.J.O. OTIENO**

**JUDGE**

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[\[1\]](#) D.T. Dobie and Company Ltd vs Muchina [182] KLR

[\[2\]](#) Lion of Kenya Insurance Co. Ltd vs Edwin Kibuya Kilonge [2018] eKLR