



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 231 OF 2013**

**AUTO SELECTION (K) LIMITED.....APPELLANT**

**VERSUS**

**EVANS NJERU.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 5<sup>th</sup> April, 2013 by Hon. T. W. C. Wamae (Chief Magistrate) Milimani Commercial Courts in CMCC No.8508 of 2009)**

**JUDGMENT**

1. The Respondent, Evans Njeru was the owner of motor vehicle KAD 098Q. On 30<sup>th</sup> June, 2009, the Respondent's said motor vehicle collided with motor vehicle Registration KAN 876P which was registered in the name of the Appellant, Auto selection (K) Ltd. The Respondent's motor vehicle was damaged. The Respondent blamed the accident on the alleged negligent manner that the Appellant's motor vehicle was being driven at the material time. The Respondent made a special damage claim of Ksh.183,020/= and claimed Ksh.30,000/= damages for loss of user.

2. The Appellant in his statement of defence denied ownership of the motor vehicle KAN 876 P and denied the allegations of negligence. It was stated that prior to the material date the motor vehicle in question had been transferred to one Lawi Otieno. The Applicant issued a Third party Notice to one Lawi Otieno. On 16<sup>th</sup> January, 2012, the case proceeded to hearing. The trial court was informed that the Third Party Notice was served and that the affidavit of service was on record. The Third party was not present and no appearance was filed.

3. The Respondent (Plaintiff) gave evidence that motor vehicle KAN 876P was overtaking a lorry at the material time and in the process motor vehicle KAN 876P went to his lane, hence the accident. The motor vehicle assessor, PW1 Michael Ndungu assessed the damage caused by the accident at Ksh.164,140/=. He charged Ksh.4,500/= for the report and charged Ksh.5,000/= for attending court to testify.

4. The Appellant called Boniface Wanyonyi, its branch manager as its witness. His evidence was that the motor vehicle was sold to one Lawi Otieno in the year 2001 at Ksh.850,000/=. That the payment of the purchase price was made through a bankers cheque and the purchaser given the log book to go and transfer the motor vehicle. Efforts made by the Appellant to produce copies of the sale agreement, the delivery note and a letter to the Registrar of Motor Vehicles were objected to. The objection was sustained and after several adjournments the case was closed without the Appellant's side having produced the said documents.

5. The trial magistrate in her judgment found the Appellant 100% liable for the accident and judgment was entered for the Respondent for Ksh.179,340/= plus interest and costs.

6. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:

**“1. That the Honourable Magistrate erred in fact and in law in failing to consider the evidence on record that the subject motor vehicle had been sold to a Third Party who had been enjoined in the suit.**

**2. That Honourable Magistrate erred in fact and in law by failing to take into account the evidence adduced by the Appellant thereby arriving at a wrong conclusion.**

**3. That Honourable Magistrate erred in fact and in law by failing to take into account the authorities relied on by the Appellant thereby arriving at a wrong conclusion.**

**4. That Honourable Magistrate erred in fact and in law by not taking into account evidence on record that the Appellant did not have control of the motor vehicle after selling it to a Third party.**

**5. That Honourable Magistrate erred in fact and in law by failing to take into account the fact that default judgment should have been entered against the Third Party herein having not defended the case upon being served with a Third Party Notice.”**

7. During the hearing of the Appeal, the parties opted to file written submissions. I have considered the submissions and the authorities cited.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

9. He who alleges must prove. The Appellant asserted that he had sold the motor vehicle to a Third party. Despite several adjournments, the Appellant was not able to produce any documents in support of his assertion. The Appellant did not dispute the motor vehicle was Registered in it’s name. In the absence of any sufficient evidence to prove the contrary, under Section 8 of the Traffic Act Cap 403 Laws of Kenya the Appellant was deemed to be the owner of the motor vehicle.

10. The certified copy of the log book produced by the Appellant reflects that the motor was in the name of the Appellant at the time of the alleged transfer. The certified copy of the transfer form contains entries by the seller only i.e the Appellant.

11. It is noted that the defence by the Appellant was that the motor vehicle was sold to a Third party. Although the issue of the Appellant being a financier has cropped up in their submissions, there are no pleadings or any evidence in support of the said submissions. The Appellant failed to prove the sale of the motor vehicle to the Third party. It appears the trial magistrate proceeded on the assumption that the Third party Notice was served but there was no appearance. Consequently, the provisions of Order 1 rule 17 and 19 came into operation. It is therefore the Appellant’s responsibility to take steps in accordance with Order 1 rule 19 Civil Procedure Rules if it so wishes.

12. With the foregoing, I find no merits in the Appeal and dismiss the same with costs.

**Date, signed and delivered at Nairobi this 8<sup>th</sup> day of Feb, 2018**

**B. THURANIRAJADEN**

**JUDGE**