



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 16 OF 2014

Arising from the judgment in Meru CMCC No. 308 of 2014

made on 18th March 2014 by the Hon. E. Wambugu (RM).

(CORAM: F. GIKONYO J.)

GEORGE KIGAMBIA.....APPELLANT

-Versus-

BUURI DAIRY FARMERS

CO-OPERATIVE SOCIETY.....RESPONDENT

JUDGMENT

[1] This is an appeal from the judgment in Meru CMCC No. 308 of 2014 made on 18th March 2014 by the Hon. E. Wambugu (RM). The Appellant was the plaintiff in the primary suit. He alleged that on or about 2nd April 2012 he was driving motor vehicle KBM 525S when it was hit from behind by motor vehicle KAC 816U belonging to the Respondent/defendant. As a result of the accident the Appellant incurred damages.

[2] The Respondent who was the Defendant in the primary suit neither entered appearance nor filed a statement of defence. After trial, the court only awarded the Appellant half of the costs of the suit. The Appellant was aggrieved by the said decision and filed this appeal citing the following grounds:

- 1. The Learned Magistrate erred in law and fact in dismissing the Appellant's claim while same was proved with all materials produced***
- 2. The trial Magistrate erred in law and fact in dismissing the claim on technicalities contrary to the provisions of Article 10 (2) (b), 159 (2) (a), (b) (d), (e) of the Constitution and the provisions of Section 1A, 1B and 3A of the CPA Cap 21***
- 3. The court erred in failing to award the Appellant full costs as provided by Section 26 and 27 of CAP 21***
- 4. The judgment is unfair, inequitable against the Constitution and all sense of justice.***

[3] The appeal was canvassed by way of written submissions. The Appellant in his submissions argued that the trial Magistrate erred in not appreciating that there was no dispute as to the occurrence of accident. And as a result of the said accident, the Appellant's vehicle was extensively damaged. He urged further that it was not challenged the Appellant incurred expenses thereto. More was submitted; that whereas the best way to prove ownership would be to produce a document from the registrar of motor vehicles, the police abstract produced in court would suffice as its content was not denied. According to the Appellant, the trial magistrate put undue reliance on the technicality that the receipts did not comply with the provisions of the Stamp Duty Act instead of giving the Appellant an opportunity to pay the requisite stamp duty and prescribed penalty on the unstamped documents.

[4] The Respondent submitted that the appeal lacks merit on both facts and law and ought to be dismissed with costs. According to the Respondent, the Appellant did not prove special and general damages which he claimed in his suit. He specifically stated that he failed to prove especially the special damages. To them, the allegation that the claim was rejected on technicalities does not hold as Article 159 of the Constitution cannot be reverted to when a party is in clear breach of the law. In addition, the Appellant did not prove ownership of the motor

vehicle as he failed to produce a copy of record from the registrar of motor vehicles.

Duty of court

[5] I know my duty as first appellate court; to evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they gave evidence. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. However, what must be avoided is merely rehashing of evidence as was recorded. Instead, the court should employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insist on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. I will then make my overall impression of the evidence, facts and the law applicable in absolute clarity and directness. I shall so proceed.

[6] **PW1 George Kigamba** adopted his witness statement and list of documents annexed as number 1 -12. He stated that on that material day as he was driving along Meru Mosque road within Meru town when an Isuzu MKR KAC 816U owned by Buuri Dairy Co-operative Society rammed into his vehicle from behind. The vehicle was extensively damaged on the rear side and the frontal part. He took his vehicle for repair at CMC Motors Group Limited on 3rd April 2012 which was released on 29th June 2012. During that period he hired a vehicle from Mt. Kenya Car Hire and Travel starting from 4th April 2012 for Kshs 5,000 and Kshs 3000 for the weekdays and weekends respectively. He produced three receipts dated 4th April 2012, 12th May 2012 and 30th June 2012 enumerating amounts of Kshs.20, 000, Kshs, 149,000 and Kshs 218,000 respectively. In addition, he paid Kshs 24,000 to his insurer as excess.

[7] The foregoing is the evidence. In the plaint, the Appellant claimed general and special damages. What does these remedies entail? General damages is defined by Bryan A. Garner, *Black's Law Dictionary*, Seventh Edition, 1999, St, Paul Minn at page 394 to be:

“Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained.”

And, special damages are defined at page 396 (ibid) to be:

“Damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved.”

[8] The subject of special damages and the type of proof required is replete with judicial decisions which I do not wish to multiply. Except, to cite the case **Coast Bus Service Ltd v Murunga Danyi & 2 Others, Civil Appeal No. 192 of 1992 (UR)** where it was stated as follows:-

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars...” (emphasis mine)

[9] In this appeal, it has been argued that special damages were not proved as required. The trial magistrate in the judgment stated as follows:

“The receipts on the Plaintiff's list of documents, which he adopted in his evidence, are dated 21/04/2012 and 30/06/2012 for Kshs. 90,000/ and 345,000/- respectively.

The two receipts do not correspond with those produced in court. The receipt dated 21/04/2012 for Kshs. 90,000/- was produced. The receipt dated 30/06/2012 which was produced is for Kshs.218,000/-. Other receipts which were produced, but not enumerated on Plaintiff's list of documents, are dated 04/04/2012 and 12/05/2012 for Kshs. 20,000/- and Kshs. 149,000/- respectively. These receipts do not comply with the provisions of sections 19, 20 and 21 of the stamp Duty Act, Cap 480 Laws of Kenya.”

[10] The Appellant submitted that the court held that the receipt produced in cost dated 30th June 2012 for Kshs. 218,000 as other produced as not and not enumerated on the last document are for 4th April 2012 and 12th May 2012. He submitted that this was a terminal offset that cannot be said to jeopardize justice being served.

[11] The Appellant produced three receipts for the car hire service dated 4th April 2012, 12th May 2012 and 30th June 2012 for a sum of Kshs. 20,000/-, Kshs. 149,000/- and Kshs. 218,000/- respectively. He also produced a receipt of Kshs. 24,000/- being payment he made to his insurer. This totaled to Kshs. 411, 000/- which is specifically pleaded in the plaint. But, the trial Magistrate rejected these receipts and seemed to be relying on the case of **Agnes Wanjiku Ndegwa v Kenya Power & Lighting Company [2014] eKLR** where Justice H. I. Ongu'di agreed with the holding in **Leonard Nyongesa Vs Derrick Ngula Righa Civil Appeal NO. 168/2008 (Mombasa)** that:-

“The position, therefore, is that a receipt for which payment of stamp duty is required under the Stamp Duty Act is admissible in evidence on condition that the person issuing the same takes it for stamp duty assessment before the Court can attach any probative value to it. In my opinion, if that is not done, the Court cannot award damages based on such a receipt.”

[12] My reading of the above decision and the law is that such non-compliant receipts are not rendered inadmissible in evidence. An error

similar to the one that was committed by the trial magistrate in this case was considered by the Court of Appeal in the case of **PAUL N.NJOROGE vs. ABDUL SABUNI SABONYO [2015] eKLR** and held;

“21. The finding is often made by lower courts that documents which do not comply with the Stamp Duty Act, Cap 480, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of Stallion Insurance Company Limited v. Ignazio Messina & Co S.P.A [2007] eKLR where it stated thus:

“Mr. Mbigi submitted that the guarantee document relied on by the Respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the Stamp Duty Act. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is Diamond Trust Bank Kenya Ltd vs. Jaswinder Singh Enterprises CA No. 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -

“The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of Suderji Nanji Ltd. -vs- Bhaloo (1958) EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in Bagahat Ram -vs- Raven Chond (2) 1930 A.I.R Lah 854 that:

**“before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty
.....**

The Appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/Respondent and he must be given the opportunity”.

We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the Stamp Duty Act. At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof.

22. We have examined the record and it is evident that Njoroge testified on the medical expenses he incurred over a period of eight months and periodically thereafter for out-patient treatment from the time he was discharged from Forces Memorial Hospital. The clinical officer, Thetu Theuri Gitonga (PW7-sic), and the consultant physiotherapist, Paul John Mwangi (PW7), both of whom attended to him and issued receipts for payments he made testified to that. There was also evidence that Njoroge bought the plates which were fixed on the leg for Kshs.38,735/= and there was a receipt to show for it. Other documents on medical expenses were also tendered in evidence by consent of the parties without calling the makers thereof.”

[13] Applying the test of law, the learned trial magistrate was clearly in error in rejecting the receipts without giving the Appellant an opportunity to have the receipts stamped and to pay penalties attendant thereto as provided in the Stamp Duty Act. Non-compliance thereof does not *per se* invalidate or render the receipts herein inadmissible in evidence. The Appellant ought to have been given an opportunity to comply or pay the requisite penalty. The Appellant proved that his vehicle was involved in an accident and was damaged as a result; he repaired it and incurred expenses which he paid.

Ownership of motor vehicle

[14] On proof of ownership of a motor vehicle, registration of a person creates a rebuttable presumption the person registered is the owner. Therefore, a document from the registrar of motor vehicles only provide *prima facie* proof that the person registered is the owner of the vehicle. Other evidence may be used to prove ownership of a vehicle, such as police abstract. In this case, the Appellant produced the police abstract which was not challenged. Here, I am reinforced by the decision of **JOEL MUGA OPIJA vs. EAST AFRICAN SEA FOOD LIMITED CIVIL APPEAL NO. 309 OF 2010 [2013] eKLR** where the Court of Appeal held that:

“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.”

[15] Accordingly, the vehicle which caused the accident was owned by the Respondent. The evidence shows that this vehicle was solely to blame for the accident. I therefore set aside the judgment of the trial magistrate and enter judgment for the Appellant in the sum of Kshs. 411,100, cost and interest. The appeal is allowed.

Dated, signed and delivered in open court at Meru this 30th day of May, 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Kaimenyi advocate for Mr. Gikunda advocate for Respondent

Mr. Muriuki advocate for M/s. Kiome advocate for Appellant.

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F. GIKONYO

JUDGE