



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 558 OF 2010

FRANCIS MUCHENE KANYENJE.....APPELLANT

VERSUS

DOMINIC KARANJA GACHANJA.....1ST RESPONDENT

STANLEY M. KARANJA.....2ND RESPONDENT

NAIROBI BOTTLERS LTD.....3RD RESPONDENT

J U D G M E N T

1. The Appellant herein filed a suit premised on a claim against three Respondents herein for special and general damages arising from personal injuries he sustained on or about 4th February, 2003 following a road accident along Kikuyu Road involving motor vehicle registration number KAK 558H (owned jointly by the 1st and 2nd Respondents) and motor vehicle registration number KAG 446H owned by the 3rd Respondent. The Appellant was a fare paying passenger on board motor vehicle registration number KAK 558H at the time of the accident.

2. The 1st and 2nd Respondents filed their joint statement of defence through the firm of Sereti and Company Advocates while the 3rd Respondent's statement of defence was filed on 6th November, 2003 to deny the Appellant's claim.

3. The trial court found both drivers liable and entered judgment on 26th April, 2010 for the Appellant against the Respondents. The Respondents were found liable jointly and severally. The trial magistrate apportioned liability 50%: 50% against the 1st and 2nd Respondents on the one part and the 3rd Respondent on the other.

4. The record shows that the 3rd Respondent's insurance settled the judgment sum equivalent to 50% apportionment. It would appear that instead the Appellant pursuing the 1st and 2nd Respondents to recover the balance he went ahead to instruct Galaxy Auctioneers to execute the decree by attachment against the 3rd Respondent. This prompted the 3rd Respondent to seek the protection of the trial court.

5. The 3rd Respondent on 17th September, 2010 made an application for seeking review of the judgement entered on 26th April, 2010. The application sought clarity on the judgment delivered on 26th April, 2010 as the Appellant herein had issued a proclamation notice claiming the decretal sum of Kshs. 152,250 whereas the 3rd Respondent had paid the decretal sum as per the judgment. The application was opposed by the Appellant citing misconception of liability of joint or concurrent tortfeasors. The trial court was urged to clarify and pronounce that the decretal sum had been satisfied when the 3rd Respondent settled his portion of liability given that the Respondents were found to be jointly and severally liable. The Court on 2nd November, 2010 found that it could not review its own judgement and consequently dismissed the application and ordered that the 1st and 2nd Defendants were jointly and severally liable to the extent of 50% of the decretal sum and the 3rd Defendant was held liable for the other 50% decretal sum.

5. The Appellant felt aggrieved by the order and subsequently filed this appeal and put forward the following grounds: -

i) The learned magistrate erred by failing to enter judgment against all the defendants jointly and severally.

ii) The learned magistrate erred by failing to correct the error apparent on the face of the record.

iii) The learned magistrate erred by giving contradicting orders in the ruling.

vi) The learned magistrate erred by finding that the Appellant should pursue the Defendants severally for execution.

7. When the appeal came up for hearing, this court directed that the appeal be disposed of by written submission.
8. I have re-evaluated the arguments that were made before the trial court and I have also considered the written submission.
9. Though the Appellant put forward a total of three grounds of appeal, it is apparent that the central issue revolves around the meaning of the terms 'jointly' and 'severally' used in the judgment.
10. It is the submission of the 3rd Respondent that having settled the part of the judgment apportioned to it, it was fully discharged from liability and, therefore, the Appellant should pursue the 1st and 2nd Respondents for the balance of the decretal sum of apportioned by the trial court.
11. The appellant is of the submission that he is entitled to pursue any of the Respondents to settle the decree in full, therefore, the trial magistrate erred when he purported to rule otherwise.
12. The issue has previously been raised and settled by this court. In the case of **Republic Vs PS in Charge of Internal Security ex parte Joshua Paul [2013] eKLR**. It was held **inter alia**: -

***“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them.*”**

13. The appeal is found to be meritorious. It is allowed.
14. Consequently, the order given on 2nd November, 2010 is set aside and substituted with an order directing that the Plaintiff (now Appellant) is at liberty to execute the decree to recover the entire decretal sum against any one of the Defendants or against each one of the Defendants (Respondents) according to their individual liability.
15. The judgment should, therefore, be amended to read that the judgment is against all the defendants jointly and severally for the entire judgment sum.
16. In the circumstances of this appeal, I think a fair order on costs is that each party should meet its own costs of the appeal.

Dated, Signed and Delivered in Nairobi this 28th day of September, 2018.

J.K. SERGON

JUDGE

In the presence of:

.....*For the Appellant*

.....*For the 1st & 2nd Respondents*

.....*For the 3rd Respondent*