



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCA NO. 173 OF 2012

MAXMILLAN KARANJA.....APPELLANT

VERSUS

LOWLAND AUTO GARAGE LIMITED.....RESPONDENT

(Formerly CMC Civil Case 2472/2007 Milimani Commercial Courts, Nairobi)

JUDGMENT

INTRODUCTION

1. The genesis of dispute herein is that the Respondent sued Appellant and the British American Insurance Company Limited 2nd Defendant for payment of repair charges undertaken by the Respondent on car KAT 375R registered in Defendant's names.
2. The Appellant paid part of the claim but failed to pay the balance prompting the suit.
3. The claim was for Kshs125,500/= and interest against the 2nd Defendant.
4. The matter was heard fully but the Defendant No.1 (Appellant) never testified.
5. The trial court entered judgment for Kshs.125, 000/= costs and interest against Defendants.
6. Being aggrieved by the above decision, the Appellant/1st Defendant lodged instant appeal setting out five (5) grounds namely:-

i. THAT the Honourable court erred in law and fact by purporting to enter an unclear judgment in the lower court suit without specifying who the judgment was as against the two Defendants in the suit.

ii. THAT the Honourable court erred in law and fact in entering judgment for the Plaintiff/Respondent as pleaded in the plaint against the 1st Defendant/Appellant when there was no evidence to support his finding imputing liability on the part of the 1st Defendant/Appellant.

iii. THAT the Honourable Magistrate erred in law and in fact by totally misconstruing and ignoring the pleadings, evidence and proceedings before him and thus failing to appreciate the 1st Defendant/Appellant's case and the gist of the entire suit before him.

iv. THAT the Honourable Magistrate erred in law and in fact thus was incompetently biased all together by failing to consider the relevant evidence, exhibits and submissions for and against the Plaintiff/Respondent, the 1st Defendant/Appellant and the 2nd Defendant's case at all as in required in law.

v. THAT the failure by the lower court to comprehensively analyze the pleadings, evidence and submissions has thus resulted into the lower court arriving at the wrong decision that is not premised in any known law.

7. When matter came for hearing, the parties agreed to canvass appeal via submissions but only Appellant filed submissions.

APPELLANT'S SUBMISSIONS

8. The Appellant submitted that, the general issue notwithstanding the 5 grounds of appeal is whether or not the Plaintiff had proved its case for Kshs.125, 500/= on a balance of probabilities.
9. The position for the Appellant is that it did not and thus the judgment ought not to have been entered at all in its favor.
10. He argues that, PW1 stated that motor vehicle KAT 375R belonging to the Appellant was delivered to it for repairs. It raised an invoice of Kshs.170,500/=(exhibit 3) out of which only Kshs.20,000/= was paid as per receipts (exhibit 5).
11. He contends that there was a big contradiction with regard to the sums payable to the Plaintiff and it was up to it to prove the same but it failed so too. DW1 and DW2 greatly punched holes in the Plaintiff case by producing and showing to the court that different figures were issued by the Plaintiff.
12. He argues that, whereas the Plaintiff's claim against the Appellant is based on the Agreement that Kshs.125,500/= would be payable to it by the Appellant if Kshs.125,500/= was to be paid to it, if the Appellant was paid by UAP insurance there is no proof that the Appellant was paid this Kshs.125,500/=.
13. As a matter of fact, DW1 states that the 2nd Defendant only paid Kshs.87, 700/= by cheque on 13th February, 2006 – this payment was against the likely repair estimate of Kshs.89, 500/= as raised by the Plaintiff.
14. Without prejudice to the above and from DW1 evidence at page 151 aforesaid he did produce Plaintiff's receipts for Kshs.100, 000/=, Kshs.45, 000/= and Kshs.25, 400/= as DEX 4(a), (b) and (c) showing that as a matter of fact if these payments had been made against the invoice for Kshs.170, 000/= (DEX 3) then the Plaintiff would have no claim against both the Defendants.
15. The Plaintiff was ultimately not able to surmount or explain why he raised an estimate for a different figure and not Kshs.125, 000/= and also why he did issue the above receipts confirming settlement of all its dues.

DUTY OF THE APPELLATE COURT

16. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

EVIDENCE TENDERED.

17. The Plaintiff's case is that PW1 (Plaintiff) operates a garage called Lowland Auto Garage. The 1st Defendant was his client while the 2nd Defendant was a co-owner of the motor vehicle that was repaired. The 1st Defendant's motor vehicle was repaired under the instructions of the 2nd defendant but the whole amount was not paid. This was on 30th November 2005. The motor vehicle is registration number KAT 375R
18. PW1 did issue a job card. After 2 weeks the 1st Defendant did visit the Plaintiff. An assessor from UAP came. The Plaintiff prepared a quotation but the Defendant did not pay. PW 2 also prepared another quotation of Kshs.170, 500/=.
19. The quotation was given to the 1st Defendant. Defendant left with the motor vehicle and after December he brought back the motor vehicle. PW1 did repair the motor vehicle but before writing an agreement. An agreement of Kshs.20, 000/= was entered into which money was paid. Another cheque of Kshs.25, 000/= was issued. The Plaintiff did learn later on that the 1st Defendant had been paid by UAP.
20. PW 1 did instruct a lawyer. He produced demand notice. PW1 did give evidence which in support of Plaintiff's case. DW1 told the court that the 2nd Defendant was insured by UAP through British American Company. Motor Vehicle registration number KAT 375R was covered comprehensively. The motor vehicle was owned by Sali Alhemed as 1st owner and 2nd owner Maxmillan Kinyua Karanja and British American Company.
21. The company did receive a letter dated 12th January 2006 written to Maxmillan Karanja and complied with 1st Defendant. The motor vehicle was inspected at Lowland Garage. The likely repair charges was Kshs.89, 500/=.
22. On cross examination, PW 1 said that the claim was for Kshs.125,000/=. According to the agreement, Kshs.125,500/= was to be paid when UAP paid. He had no evidence insurance company paid.
23. The insurance company was not party to the agreement. The 1st Defendant/Appellant acknowledged that he would pay even if the insurance company would not pay.
24. On re-examination, he said the 1st defendant was satisfied and promised to pay. 1st Defendant was paid by UAP.
25. PW2 testified that he was the owner of the garage. The repair cost was Kshs.170,000/=. Motor vehicle was released upon some payments. The balance as per the agreement was Kshs.125,000/=.
26. DW1 did receive invoices dated 10th January 2006 from Lowland for Kshs.170, 500/=. There were receipts for Kshs.100,000/=,

Kshs.45,000/= and Kshs.25,400/=. Receipts were issued by Lowland Motor Garage. Kshs.87,700/= was paid by cheque No.300295 on 13th February 2006.

27. DW2 did testify that Maxmillan Karanja was an agent of British American Company. Staff loan application by Karanja for motor vehicle registration No. KAT 375R was produced as defense exhibit. A sale agreement was produced. A log book was produced.

28. DW2 denied issuing instructions to Lowland to repair the motor vehicle. A letter dated 29th August 2007 was produced as exhibit 9. A letter also dated 6th September 2006 was produced as exhibit 10. Exhibit 11 is letter dated 28th September 2009.

ISSUE, ANALYSIS AND DETERMINATION

29. After going through the evidence on record I find the issues are;

1) Whether the Plaintiff proved its case on a balance of probability?

2) What is the order as to costs?

30. The Trial Court found that, the Defendant's motor vehicle was repaired at a cost of Kshs.170, 500/=. It is also found that it was true that Kshs.45, 000/= was paid leaving a balance of Kshs.125, 500/=. Before repairs were done the 1st Defendant signed job card and quotation which the 1st Defendant signed.

31. It is to be noted that the 1st Defendant and Plaintiff entered into an agreement of payment of Kshs. 125,000/=. This was not denied by the 1st Defendant as he did not testify.

32. Even before the drafting of exhibit No. 4 the Defendants had documents indicating that payment was processed on or about 14th February 2006. In an effort to remove itself from the suit, the 2nd Defendant did attempt to distinguish between Lowland and Lowlands. These have been denied.

33. The 2nd Defendant also stated that they were only financiers. They had letter dated 17th January 2006 produced by the Defendant that reached their insurance on the same day. This exhibit is a clear testimony that the Plaintiff was not paid.

34. The trial court thus held that it would hold that nothing was paid to the Plaintiff save for Kshs.45,000/=.

35. The Appellant failed to appear in court to contest the Respondent claim. The court finds that the uncontested claim as against Defendant No1/Appellant was on balance of probabilities proved and that the appeal has no merit.

36. The court thus makes the following orders;

i. The appeal is dismissed.

ii. No orders as to costs as the respondent did not participate in the appeal.

DATED, DELIVERED, SIGNED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

HON. C. KARIUKI

JUDGE