



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 84 OF 2015

DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT

VERSUS

MONICA AWINO ANYANGO.....1ST RESPONDENT

ERIC ONYANGO OTIENO.....2ND RESPONDENT

(Being an appeal from the judgment and order of the Hon. M. Chesang (Mrs) Resident Magistrate delivered on 5th February 2015 in Milimani CMCC No.486 of 2013)

JUDGMENT

The respondents herein sued the appellant in the lower court in their capacity as administrators of the Estate of Charles Otieno Ahaya who died as a result of a road traffic accident that took place on 2nd March, 2010. They blamed the appellant for the said accident being the registered owner of motor vehicle registration No. KTM 523 Mercedes Benz lorry, which at the time of the accident was being driven by its authorised driver, servant and or agent and collided with motor vehicle registration No. KAP 960R in which the deceased was the passenger.

The appellant filed a defence denying the respondents' claim, and in particular that it was the registered owner of motor vehicle registration No. KTM 523- ZA. Further it was pleaded that the appellant was registered as co-owner of the said motor vehicle, which however was denied, but merely to protect its interest as financier of one Ali Aidid Abdi in the purchase of the said motor vehicle. In effect, the defendant exercised no possession and or management and had no control over the use or individuals in whose custody or care the said motor vehicle was placed. In the alternative, the deceased was variously blamed. There was then a reply to the said defence.

After the close of the pleadings the appellant filed an application by way of Notice of Motion seeking to strike out the plaint for being frivolous, vexatious and an abuse of the court process. The thrust of the application was that, the motor vehicle was registered in the name of the appellant to protect its interest as the lender of Kshs. 1,015,000/= to one Ali Aidid Abdi which acted as security. It therefore cannot be deemed to be the owner of the said motor vehicle for purposes of incurring liability for 3rd party risks under Section 3 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.

In fact, the borrower had repaid all the money loaned to him, and that the said Ali Aidid Abdi failed to inform the Registrar of Motor Vehicles of his clearance of the loan. The said Abdi was the actual and beneficial owner of the said motor vehicle but not the appellant. It was reiterated that the appellant, at the time of the alleged accident, did not exercise any possession or management and had no control of the said motor vehicle. The application was opposed and there was an affidavit sworn by Monicah Awino Onyango

In a ruling delivered on 5th February, 2015 the lower court dismissed the said application in the following words,

“Indeed, it appears that the subject motor vehicle was registered in the sole name of the defendant as security for a loan as opposed in the joint names of the borrower and lender as it is the usual practice.

Having perused the plaint, it is obvious that the plaint has a justifiable cause of action. Dismissing the plaint for the reasons stated by the defendant will deny the plaintiff the opportunity to prosecute the plaint for reasons for which the plaintiff had no control over, that is, that the defendant ought to have caused the motor vehicle to be registered in the joint names of the borrower and lender and after the completion of payment of the loan ought to have caused a transfer of the subject motor vehicle to be registered in the name of the alleged borrower. (3rd Party)

The applicant would have escaped being joined as a party to this suit if the log book would have been jointly owned by the bank and the borrower as it was held in the case of Morgan vs. Launchbury (1972) ALL ER and quoted with approval in Jane Wairimiu Turanta vs. Githae John (2013) e KLR.”

I have looked at the submissions made by the parties herein. The appellant was the sole registered owner of the said motor vehicle. The Traffic Act provides at Section 8 that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

Several cases have addressed this subject including the fact that, where the plaintiff alleges the motor vehicle which caused the accident belongs to the defendant, it is up to the defendant to rebut such an allegation by bringing evidence to the contrary. It should be borne in mind that he who alleges is required to provide proof of such an allegation. – see **Jotham Mugalo vs. Telkom Kenya Limited (2005) e KLR and JRS Group Limited vs. Kennedy Odhiambo Andwak (2016) e KLR.**

As at the time of the subject accident, the appellant was the sole registered owner of the motor vehicle said to have caused the accident. The name of Ali Aidid Abdi was not in the registration (log) book. *Prima facie* therefore, the respondents were correct to have sued the appellant. In the lower and in this appeal, the appellant is represented by counsel. I have no doubt that they are aware of what should be done in the circumstances of this case to protect its interest. The issues raised in the defence and the application filed by the appellant cannot be decided at this stage. I am fortified in so holding by the observation made by Potter JA in the case of **Cassam Vs. Sachania (1982) 191 at page 197** where the Judge stated,

“But summary determinations are for plain cases. Both as regards facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial.”

The learned trial magistrate was correct in the appreciation of the law, the facts and the cited cases. The findings in the ruling were correct, and having considered the material placed before me, I find the appeal lacking in merit. It is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 20th Day of December, 2018.

A.MBOGHOLI MSAGHA

JUDGE