REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 44 OF 2016

(Formerly Nakuru HCCA No. 99 OF 2013)

(Being an appeal from a Ruling of the Chief Magistrate's Court at Naivasha Civil Case No.590 of 2011, E. BOKE - PM)

DIAMOND TRUST BANK KENYA LIMITED……APPELLANT

-VERSUS-

RICHARD MWANGI KAMOTHO……..…….1ST RESPONDENT

RISING STAR COMMODITIES LIMITED…....……...2ND RESPONDENT

WILLIAM MUTAVI MULU…….…….3RD RESPONDENT

J U D G M E N T

1. In 2011, **Richard Mwangi Kamotho** (the 1st Respondent herein) filed a suit for damages against **Rising Star Commodities** (2nd Respondent), **Diamond Trust Bank Kenya Limited** (the Appellant herein) and **William Mutavi Mwilu** as the two joint owners and driver of an accident vehicle respectively. The suit, **SPMCC 590 of 2011**, now stayed, pursuant to an order made herein by **Mshila J** on 16th June 2014, arose from a road traffic accident. The 1st Respondent averred *interalia* in his plaint that:

> **"At all times material to this suit the 1st and 2nd Defendants were registered owners of motor vehicle KAW 433G SCANIA , and the 3rd Defendant was their agent, servant and/or employee in driving managing and/or controlling the same" (sic)**

2. It was further averred the road traffic accident which occurred on 24th October, 2009 was occasioned by negligence on the part of the driver of the vehicle **KAW 433G SCANIA** and that the 1st Respondent, a passenger in the vehicle **KAW 139R Toyota Station Wagon** involved in a collision with the former vehicle, sustained several injuries. Paragraph 8 of the Plaint stated that:

> **"The 3rd Defendant was acting in the cause and within the scope of his employment with the 1st and 2nd Defendant and the 1st and 2nd Defendant were vicariously liable."**

3. The Appellant (2nd Defendant in the lower court suit) filed a Defence denying *interalia* being the registered joint owner or at all of the accident vehicle **KAW 433G SCANIA** (hereinafter SCANIA vehicle) in the material period. In the alternative, the Appellant averred that:

"……if at all it was registered as a co-owner of motor vehicle Registration Number KAW 433G SCANIA together with the 1st Defendant, which is denied, then the same was done merely to protect its interest a financier of the 1st Defendant (1st Respondent herein) in the purchase of the said vehicle and as such the 2nd Respondent exercised no possession and/or management and had no control over the use and/or individuals in whose custody and/or care and/or ……..under whose management and/or control the said motor vehicle was placed. In the circumstances the 2nd Defendant is improperly enjoined to the suit herein and shall at an opportune time, notice whereof is hereby given, apply to have its name struck out from suit herein."

4. The Appellant further denied that the 3rd Defendant (3rd Respondent) was its employee servant and or agent, thus liable for his actions. A defence statement described generally as "**Defendants' Statement of Defence**" was also filed, presumably by the advocates of the 1st and 3rd Defendants (1st and 3rd Respondent herein). They denied ownership of the **SCANIA** vehicle and liability for the accident.

5. In June 2012 the Appellant made good their notice by filing a Chamber Summons under Order 1 Rule 10 (2) and 25 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, seeking to have their name (as 2nd Defendant) struck out from the suit. The grounds therein and supporting affidavit, reiterated the denials raised in the Appellants defence regarding the ownership, possession and control of the **SCANIA** vehicle and vicarious liability for the accident. The motion was argued before **Boke, PM**. Her ruling thereon, delivered on 12th June 2013 is the subject of this appeal.

6. The Memorandum of appeal contain 6 grounds as follows:-

"1. THAT the Learned Magistrate erred in law and in fact in holding that the appropriate stage for determining whether or not the bank was a mere financier should be at trial.

2. THAT the Learned Magistrate erred in law and in fact by misdirecting herself on the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules.

3. THAT the Learned Magistrate erred in law by failing to consider the grounds and the evidence in support of the Appellant's application dated 22nd June 2012 and in particular the Hire Purchase Agreement annexed therewith.

4. THAT the Learned Magistrate erred in law by failing to consider and to make a finding on the Appellant's submissions in support of the application dated 22nd June 2012 and in particular the following points:

a) That the Appellant merely financed the 2nd Respondent to purchase motor vehicle registration number KAW 433G subject to the 1st Respondent's suit and that the inclusion of its name in the registration books was merely to protect its interest.

b) That having handed over possession of the said motor vehicle to the 2nd Respondent and having no interest in the business of the 2nd Respondent, the Appellant cannot be held vicariously liable for the acts and/or omissions of the agents of the 2nd Respondent in the use of the said motor vehicle.

5. THAT the Learned Magistrate erred in law by disregarding the numerous binding authorities cited by the Appellants Counsel and thereby basing the ruling on wrong principles.

6. THAT the Learned Magistrate erred in law by failing to take notice of the provisions of Section 3 of the *Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405, Laws of Kenya)*

whereby it is clearly stated that where a part has acquired a motor vehicle on the hire purchase, the owner is deemed to be the party in possession of the vehicle."

7. The parties filed written submissions in arguing the appeal. The Appellants collapsed their grounds of appeal into two broad grounds to the effect that:

a) The learned magistrate erred by failing to consider the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, the Traffic Act, the Civil Procedure Act and binding legal authorities cited by the Appellant.

b) The learned magistrate considered irrelevant matters in arriving at her decision.

8. Regarding the first broad ground, the Appellant argued that the lower court did not consider the law relating to the liability of a financier in respect of a road traffic accident involving a hire purchase vehicle during the subsistence of a hire purchase agreement. In this regard, the Appellant reiterates facts contained in the affidavit supporting the application in the lower court, and emphasizes that these matters were not controverted as the 1st Respondent only filed grounds of opposition to their motion.

9. These matters include the standing of the Appellant vis-à-vis the accident vehicle and the 1st Respondent. Thus the Appellant contends that it was a mere financier. And that, the **SCANIA** motor vehicle was registered in the joint names of the Appellant and the 1st Respondent to protect the former's interest, even as the custody, control and direction of the motor vehicle was in the latter, who operated it for his own benefit. The Appellant referred to the definitions of 'owner' in relation to motor vehicles as contained in the Insurance (Motor Vehicle Third Party Risks) Act, the Hire Purchase Act and the Traffic Act.

10. The Appellant's view is that, notwithstanding the joint ownership of **SCANIA** vehicle pursuant to a Hire Purchase Agreement between it and the 1st Respondent, liability in respect of the accident in question could not attach on the Appellant being a mere financier. Reliance was placed on the case of **Bachu -Vs- Wainaina [1982] KLR 108**; **Ali Lali Khalifa and 8 Others -Vs- Pollman's Tours and Safaris Limited & 2 Others [2003] eKLR**; **Civil Appeal No. 107 of 1998 Jumbo Transport Co. [1971] Limited -Vs- Mrs Roder Musengwa Mwema** as cited by **Khaminwa J** (as she then was) in **Mombasa HCCC No. 105 of 2002 (RD) – Swaleh Abdalla & 4 Others -Vs- Pollman Tours & Safaris Limited & 2 Others.**

11. The Appellant highlighted portions of the Hire Purchase Agreement regarding the nature of trade and business carried on by the 2nd Respondent as contrasted with the banking business in which the Appellant was engaged. Also highlighted was delivery Report in the Hire Purchase agreement as demonstration that **SCANIA** vehicle was in the possession and control of the 2nd Respondent in the material period.

12. On the second global issue, the Appellant has argued that the trial court erred by treating grounds of opposition and submissions as evidence capable of controverting the repudiation of the Appellant of ownership and liability for the accident. The Appellant takes issue with unsupported hypothetical scenarios contained in the ruling of the trial court and which were part of the reasons for dismissal of the Appellant's motion. That the said reasoning reflected an erroneous approach to execution of judgments and the priority of the financier's interest in a vehicle which is subject to a Hire Purchase agreement. The Appellant therefore urged the court to allow the appeal.

13. Only the 1st Respondent filed submissions in opposition to the appeal. The submissions were file on 22/6/2017. The gist of the 1st Respondent's argument is that the Appellant was properly enjoined as a joint owner of the **SCANIA** motor vehicle and its name could not be struck out at an interlocutory stage. That vicarious liability in this case in the absence of facts to the contrary is presumed against the joint owners of the vehicle, thus the enjoinment of the Appellant. That the Appellant's unsubstantiated defence could not be a basis for it being struck out as a Defendant.

14. Defending the impugned ruling of the lower court, the 1st Respondent contended that the subject vehicle remained the property of the Appellant until legal title was passed to the 2nd Respondent. The 1st Respondent also relied on the definition of the term "owner" as contained in the Hire Purchase Act, the Traffic Act and the Insurance (Motor Vehicles Third Party Risks) Act, and emphasized that the definition in the latter Act alone cannot avail to the Appellant in light of the conflicting definitions in the three Acts of Parliament.

15. Citing the dual ownership under the Hire Purchase agreement, the 1st Respondent argues that it would be self-serving and unfair to the 1st Respondent for the Appellant to anchor its case on the provision that suits it best.

16. In the opinion of the 1st Respondent, the Appellant has an interest in the **SCANIA** vehicle and should have waited until the trial to prove through evidence that it was a mere financier. In supporting the foregoing submission the case of **D.T. Dobie & Company (K) Limited -Vs- Wanyonyi Wafula Chebukati [2014] eKLR**. That authorities cited by the Appellant do not demonstrate that the protection of a financier from liability is automatic.

17. The 1st Respondent further asserted that on the contrary, the authorities demonstrate that an owner of an accident vehicle can only escape liability in **'very special'** circumstances proven through evidence. Therefore in the 1st Respondent's view, the trial magistrate could not have struck out the name of the Appellant from the suit without evidence being taken regarding the circumstances of ownership. That the so-called extraneous matters complained about by the Appellant pointed more to the court's concern about the risk involved in releasing a party from liability before the evidence was taken and all issues determined. He therefore urged the court to find no merit in the appeal and to dismiss it.

18. This court has considered all the matters canvassed on this appeal. As stated in **Selle -Vs- Associated Boat Co Ltd. [1968] EA 123,** the duty and the remit of the first appellate court is:

> "**An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**
>
> **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 demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."**
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> See also **Peter -Vs- Sunday Post Ltd [1958) EA 424, Williamson Diamonds Limited -Vs- Brown, [1970] EA 1, Kogo -Vs- Nyamogo & Nyamogo Advocates [2004]1 KLR 367.**

19.The application giving rise to the impugned ruling was expressed to be brought under Order 1 Rules 10 (2) and 25 of the Civil Procedure Rules, *interalia*. It was supported by the affidavit of **Elizabeth Hinga,** the Head of Debt Recovery in the Appellant Company.

20. Order 1 Rule 10 (2) of the Civil Procedure Rules is in the following terms:-

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the**

name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

21. Rule 14 of the Order 1 of the Civil Procedure Rules further provides for the time and manner in which the application envisaged under Order 10 (2) of the Civil Procedure Rules is to be brought. Order 1 Rule 14 of the Civil Procedure Rules states

"Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner."

(See also Rule 25 of Order 1 of the Civil Procedure Rules).

22. A plain reading of the foregoing, does not support the general assertion that the Rules anticipate in all cases that a full trial be held before a party may be found to be improperly joined. The rationale behind the provisions is not difficult to find; a party improperly enjoined in a suit does not have to endure the rigour of a full trial and thereby incur expenses before it can vindicate itself. Rule 10 (2) of the Civil Procedure Rules allows parties to move the court to strike out the name of a Plaintiff or Defendant improperly joined or to have a necessary party added "**in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit**". That is only possible when the correct parties are before the court.

23. That the said, the general circumstances surrounding the lodging of the striking out application in the lower court were as contained in the parties' respective pleading. In this case the 1st Respondent and the Appellant. To my mind, the underlying broad question raised on this appeal is whether the Appellant was properly enjoined as a Defendant in the lower court suit. The question is contingent upon the twin in issues of ownership and liability in respect of the **SCANIA** vehicle. These are the issues which the trial court grappled with in the ruling which is the subject of this appeal.

24. The parties herein have in their respective submissions dwelt at length upon the definition of ownership as contained in the Traffic Act, the Hire Purchase Act and the Insurance (Motor Vehicle Third Party Risks) Act. Each party attempted to demonstrate how the definitions align with their respective positions. In my view however, the definitions contained in the three Acts of parliament, rather than being in conflict, demonstrate that several types of ownership of Motor vehicles contemplated under the law.

25. In **Nancy Ayemba Ngaira –Vs- Abdi Ali (2010) eKLR** the court identified various forms of vehicle ownership including actual ownership, beneficial ownership and possessory ownership which may in some instances override the details of ownership in a certificate of registration. In the case of **Charles Nyabuto Mageto -Vs- Peter Njuguna Njathi [2013] eKLR** the court discussed the various categories of ownership of Motor Vehicles as follows:

"From the interpretation of Section 8 of the Traffic Act as elucidated above, a person claiming or asserting ownership needs to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms of ownership, that is say, actual, possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report even, as held in the Thuranira and Mageto cases (supra) that the Police Abstract Report is not, on its own, proof ownership of a motor vehicle."

26. With regard to the instant case, the 1st Respondent's suit was based on the fact now admitted, that the Appellant was a joint registered owner of the **SCANIA** vehicle with the 2nd Respondent the time of the accident. Further that the driver thereof was an agent of both the owners. The 1st Respondent's suit was tortuous claim based on negligence. Thus the need to go beyond the bare provisions of the three Acts of parliament defining ownership, to the relevant case law regarding situations when an owner of a vehicle

will be liable for negligence in respect of an accident motor vehicle.

27. On that aspect, I did not hear the 1st Respondent dispute the case law as stated in the authorities cited in the lower court and before me on this appeal. What the 1st Respondent asserted, as did the trial magistrate is that, it was necessary in this case for evidence to be led at the trial before the question of ownership and liability could be considered and determined. What was before the trial court was an application for striking out the name of the Appellant (2nd Defendant) from the suit. The Appellant supported the motion with affidavit evidence and annextures.

28. Black's Law Dictionary 8th Edition, defines the term evidence as follows:

> **"Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact"**

And the term affidavit as:

> **"A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public. A great deal of evidence is submitted by affidavit especially in pretrial matters such as summary-judgment motions."**

29. On the content of a Notice of any Motion brought under the Civil Procedure Rules Order 51 Rule 4 thereof provides that:

> **"Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served"**

30. Further Order 19 Rule 2 (1) of the Civil Procedure Rules provides that:

> **"(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.**
>
> **(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs."**

31. In the instant case, the Civil Procedure Rules provide for the question of joinder to be tried by affidavit evidence, or even by oral application. That is the gist of the provisions of Order 1 Rules 10 and 14 and 25 of the Civil Procedure Rules. This is not the only question that can be tried at an interlocutory stage in a suit by a way of affidavits. Order 36 of the Civil Procedure Rules allows a claimant to apply for summary or partial judgment before the hearing, while under Order 2 Rule 15 of the Civil Procedure Rules a pleading such as a defence may be struck out on the application of a Plaintiff and judgment entered against a Defendant.

32. In such cases, it would be a misdirection to construe the term evidence in a narrow sense that effectively excludes affidavit evidence. This appears to be the invitation made to the lower court and before this court by the 1st Respondent. Further purpose of the subject Motion, affidavit evidence is proper evidence.

33. The Appellant in this case through affidavit evidence presented reasons why its name ought to be struck off from the suit. The 1st Respondent was equally entitled to file a Replying affidavit to answer the Appellant's deposition as provided in Order 51 Rule 14 of the Civil Procedure Rules.

34. The 1st Respondent did not file a Replying affidavit, instead, he relied on grounds in opposition to the application to the effect that:-

"1. THAT the 2nd Defendant is the legal and the registered owner of the subject motor vehicle.

2. THAT the 2nd Defendant is properly enjoined in this suit as the owner.

3. THAT the 2nd Defendant is the 'Principal' in the Hire Purchase Agreement and therefore is vicariously liable for the actions of the 3rd Defendant.

4. THAT the application is unmerited, misconceived and ill-advised and an abuse of the process of court.

5. THAT the application is incompetent and should be dismissed with costs."

35. Apart from ground 3 which made reference to the Appellant's annexture namely the Hire Purchase agreement, the other grounds merely repeated averments contained in the Plaint. By stating in ground 3 that the Appellant was vicariously liable as a 'principal' of the **SCANIA** vehicle driver, the 1st Appellant was restating the statement in the plaint to the effect that the said driver (3rd Respondent) was an agent of the Appellant.

36. In totality therefore, the grounds of opposition did not raise any new matter or rebut the Appellant's affidavit evidence. It is trite that where a party facing a motion fails to file a Replying affidavit to controvert issues raised in a rival's Supporting affidavit he is deemed to have admitted the facts set out in the affidavit, of the rival Applicant. Similarly, as the impugned ruling of the lower court indicates the 1st Respondent did not file submissions in support of the grounds in opposition to the motion.

37. The trial court however correctly considered the 1st Respondent's grounds in its ruling but attached undue weight to what comprised of a repeat of averments in the plaint. Whereas it is true that pleadings must remain mere allegations until probative evidence is adduced by the parties, where the law has provided, as in this case that certain matters such as wrongful joinder can be tried through affidavit or oral evidence at a preliminary state, it is futile to argue otherwise; or to insist that a full trial be conducted.

38. Through his failure to produce affidavit evidence at the hearing of the application to justify the enjoinment of the Appellant, the 1st Appellant lost the match. Secondly, based on the uncontroverted facts contained in the Appellant's affidavit and annextures supporting the Motion in the lower court, the applicable law was on the Appellant's side.

39. As earlier observed, the 1st Respondent's claim was based on the tort of negligence and based on the alleged joint ownership of the accident vehicle by the Appellant and its alleged master/servant (Agent) relationship with the vehicle driver. This had been denied in the defence and substantiated through the affidavit evidence in respect of the motion. The annexed Hire Purchase Agreement clearly set out the existence of a hire purchase agreement between the Appellant and the 2nd Respondent in the material period.

40. Regarding the case law presented at the hearing of the motion in the lower court, it is not correct as stated by the lower court that 'most' of the decisions cited by the Appellant were made subsequent to trial and not at interlocutory stage. Three of the Appellant's authorities, namely **Swaleh Abdalla, Ali Lali Khalifa and Richard Obiero** were rulings in respect of interlocutory Motions brought to strike out the names of the respective Defendants, while **Bachu -Vs- Wainaina** was an appeal from a suit that had been fully heard.

41. On the other hand, the suit cited as 1st Respondent's authority **Peter M. Mailany -Vs- Mohammed Hassan Musa & 2 Others** was heard exparte and no application for striking out had been made even though the 3rd Defendant therein – **Diamond Trust (K) Limited** had pleaded in its defence that its interest in the accident motor vehicle "**was limited to that of a financier and that (it) did not have**

control over the running and operations of the …….motor vehicle."

42. In my considered view, where a Defendant, at interlocutory stage or full trial succeeds in demonstrating its position to be as above in regard to a tortious claim arising from a road traffic accident, the applicable law is the same.

43. In **Bachu –Vs- Wainana**, the Court of Appeal stated after setting out authorities placed before it by counsel for the Plaintiff challenging the dismissal of his case against one of the Co-Defendants:

> **"With respect to the learned counsel these authorities do not in my view assist the plaintiff's case. On the contrary, they show clearly that where a person owns a vehicle which is driven by another person, even with the permission of the owner, that owner will not be vicariously liable in tort for the negligence of the driver unless it is established that the driver was acting as a servant or agent of the owner, or was using the vehicle for the benefit of the owner or of something in which the owner had an interest either alone or jointly with the driver."** (emphasis added)

44. In the **Lali Khalifa** case, **Etyang J** (as he then was) observed in his ruling as follows:

> **"In response Mr. Luseno submitted that the mere fact that the period of repayment of installments under a Hire-Purchase Agreement is limited, does not mean that at the expiry of that period the relationship of hirer and financier did not exist. He submitted that, at the time of the said accident that relationship still existed and therefore the 2nd Defendant, as a mere financier of the 1st Defendant, is not liable for this accident.**
>
> **The legal position is this: if it can be demonstrated that a registered owner of a motor vehicle hired it out to a third party or the said vehicle was used in the circumstances which do not allow for the doctrine of vicarious liability on the part of the registered owner, to apply, then the latter is not liable.**
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> **In ORMROD –VS- CROSVILLE MOTOR SERVICES LTED (1954) 1 AII E.R 763 at page 755 Lord Denning said:**
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> > **"The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."** (emphasis added)
> >
> > **In the circumstances of the present case the following facts have been proved to exist**
> >
> > **(a) The second defendant was a mere financier of the first defendant of the purposes of the acquisition of motor vehicle Registration number KAE 520H by the first defendant, and the second defendant's interest in the aid vehicle was merely recorded in the Registration Book or in the records held by the registrar of motor vehicles for the purpose of securing its interests under the Hire Purchase Agreement.**
> >
> > **That interest is the balance of the loan or advances to the first Defendant.**
> >
> > **(b) ……..;**
> >
> > **(c) The second defendant had neither interest in the first defendant's business nor in the third defendant's matatu business.**
> >
> > **(d) The accident the subject matter of this suit, arose at the time when the said**

vehicle was being driven wholly for the purpose of the business of the Third Defendant."

45. In her ruling based on a similar application **Khaminwa J** (as she then was) stated in **Swaleh Abdalla Mjahid** that:

> **"I have perused the authorities relied upon by both counsel. It is quite clear that the owner of a vehicle is vicariously liable when negligence is proved against the driver of his vehicle. <u>But that the owner will escape liability if it is shown that he had hired the vehicle to a third person to be used for purposes in which the owner has no interest or concern.</u> This is from the passage quoted in Civil Appeal 107 of 1998 – Jumbo Transport Co. (1971) Limited and Mrs. Roder Musengwa Mwema. <u>It would be impossible for the financial institutions to carry on their vehicle purchase financing if they were to be involved in ever litigation which they have financed purchase of vehicles.</u>**
>
> **<u>In the present case the applicant had no interest in the business carried on by the hirer of the vehicle – first Defendant. The vehicle was not being driven by a driver agent or servant of the Applicant. The Applicant cannot therefore be found liable in negligence."</u>** (emphasis added)

46. **Bosire J** (as he then was) went further in his ruling in **Richard Obiero** by asserting that the proven financier in the purchase of a vehicle is a nominal owner having no custody or control of the vehicle, and he doubted whether such a financier owed a duty of care to a claimant "**as would have given rise to (vicarious) liability**" against the financier.

47. I agree with the Appellant's submissions therefore that in the context of this case, the trial court erred by ignoring or dismissing the uncontroverted affidavit evidence and legal authorities concerning ownership and liability that were tendered in respect of the application by the Appellant.

48. The Appellant's second complaint is equally valid. In explaining her second justification for her decision, the trial magistrate stated *interalia* that:

> **"On top of that the reason why I say that it is wise to let case proceed the way it is so that court may determine at the end whether or not 2nd defendant is liable and also why I am saying that each case should be treated on its own merit, I am wondering what would happen if we say at this stage that the financier is not properly on record and after that, it happens that 1st defendant did not pay fully for the motor vehicle and 2nd defendant following the Hire Purchase Agreement between him and 1st defendant decided to repossess the motor vehicle in question and then repossesses the motor vehicle in question and then after judgment for the plaintiff against 1st defendant it occurs that the said motor vehicle ought to be attached and sold to recover the decretal sum for one reason or the other. We cannot then hold 2nd defendant accountable for the motor vehicle because it will not be party to the suit after it is struck out from suit. And at the same time we cannot stop 2nd defendant from repossessing and disposing of the motor vehicle in case 1st defendant had failed to pay for it as per the Hire Purchase Agreement because it (2nd defendant) will not be party to the suit after being struck out. We should try to guard against such a scenario because at time of occurrence of accident the hire purchase agreement was still in existence." (sic)**

49. This passage reflects several misdirections, firstly as to the execution options available to the 1st Respondent in the event of his suit succeeding, secondly regarding the priority of the registered interest of the financier vis-à-vis a Judgment Debtor and finally it ignores the fact that the accident vehicle was insured (per the Hire Purchase Agreement) pursuant to the provisions of the insurance (Motor Vehicle Third Party Risks) Act requiring mandatory insurance in respect of third party risks.

50. The misdirections though seemingly partly motivated by the lower court's desire to secure justice for the 1st Respondent cannot be excused; a court of law cannot, by ignoring the law purport to achieve

justice for one party through an injustice to another party. The court engaged in unnecessary speculation in the above passage. By compelling against all odds, the Appellant to remain a party to the suit, notwithstanding the material placed before her, the learned trial magistrate was in error. The trial court fell into error by entertaining extraneous matters in its ruling.

51. In the result, I am persuaded that the appeal before me is merited and I will allow it. The ruling and order of the lower court dismissing the Appellant's subject motion in the lower court is set aside and an order substituted therefor to the effect that the Motion is allowed. The 1st Respondent will bear the costs of the appeal and of the Motion in the lower court.

Delivered and signed at Naivasha this **30th** day of **June, 2017**.

In the presence of:

Miss Wanuma holding brief for Mr. Kisinga for the Appellant

Miss Kithinji holding brief for Mr. Njuguna for the Respondents

Court Assistant - Barasa

C. W. MEOLI

JUDGE