



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 436 OF 2014

**FAITH MBULA LUCAS (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF THE LATE TIMOTHY NZOMO MUKWATA).....APPELLANT**

VERSUS

BENSON MACHARIA MAGUTA.....1ST RESPONDENT

MBUTHI STANLEY.....2ND RESPONDENT

**(Being an appeal from the Judgment delivered on 9th September, 2014 by Hon. M. Murage (Mrs.)
Chief Magistrate in The Chief Magistrates Milimani Commercial Courts in CMCC No.3607 of
2008)**

JUDGMENT

1. The Appellant, Faith Mbula Lucas who was the Plaintiff in the lower court filed suit as the legal representative of her Late husband , Timothy Nzomo Mukwata (hereinafter the deceased). The deceased who was a pedestrian was fatally injured on 16th September, 2016 when he was involved in an accident with motor vehicle Registration No. KAR 050B. In the amended plaint dated 27th May, 2011, the Plaintiff attributed the accident to the negligent manner the motor vehicle was being driven by the driver or agent of the 1st Defendant, Benson Macharia Maguta (hereinafter Macharia) and the 2nd Defendant, Mbuthia Stanley (hereinafter Mbuthia).
2. The 1st Defendant did not enter appearance nor file any defence.
3. The 2nd Defendant in the statement of defence (amended) denied ownership of the motor vehicle and stated that he was a total stranger to the Plaintiff's allegations and was therefore non-suited and was wrongly and unlawfully sued.
4. The hearing of the case commenced on 28th April, 2014. There was no attendance by the 1st Defendant, Benson Macharia Maguta and no interlocutory judgment had been entered against him.
5. The Plaintiff testified (DW1). Her evidence was that she was the widow of the deceased. That the 1st Defendant, Benson Macharia who was the driver of the motor vehicle in question was charged with the offence of causing the death of the deceased. Among the documents she produced as exhibits were the grant of letters of administration, the police abstract, the death certificate and a certified copy of the

proceedings and judgment in Traffic Court case No. 41202/2016 wherein the driver of the motor vehicle, Benson Macharia was convicted and fined Ksh.50,000/=. Other documents produced included the copies of records from Kenya Revenue Authority (hereinafter KRA) in respect of the ownership of the motor vehicle in question.

6. The 2nd Defendant, Mbuthi Stanley testified that he purchased the motor vehicle in question on 12th October, 2006 from one Alganesh Abraha. He produced the sale agreement, a copy of the bankers cheque for the purchase price of Ksh.1,100,000/=:, a bank statement and two copies of records from KRA for the motor vehicle. The 2nd Defendant denied knowing the 1st Defendant and stated that he was not aware of the accident until the day he was served.

7. The trial magistrate in her judgment held that the 1st Defendant (Macharia) had not been served personally nor interlocutory judgment entered against him. The trial magistrate also held that the case against the 2nd Defendant (Mbuthia) was not proved. The Plaintiff's suit was dismissed. The trial magistrate assessed the damages that she would have awarded had the Plaintiff's case succeeded at Ksh.1,216,593/= in total

8. The Plaintiff was dissatisfied with the judgment of the trial court and appealed to this court on six grounds of appeal. The grounds are as follows:

“1. The learned Chief Magistrate erred in law and in fact by failing to hold that the Appellant had proved her case on a balance of probabilities.

2. The learned Chief Magistrate erred in law and in fact by holding that the search certificate produced by the Respondent was the one to rely on and then on this point dismiss the appellant suit without looking at the search certificates presented by the Appellant and analyse the details (sic).

3. The learned Chief Magistrate erred in law and in fact by holding that no Interlocutory Judgment was entered against the 1st Respondent when no such issues were communicated by the court to the Appellant.

4. The learned Chief Magistrate erred in law and in fact by dismissing the suit against the 1st Respondent who the court stated was not properly served and instead of giving the Appellant a chance to serve the 1st Respondent and proceed with the case the court dismiss the suit of the Appellant (sic).

5. The learned Chief Magistrate erred in law and in fact by failing to hold that the burden of proof on the Appellant as regards the ownership of the motor vehicle was not as high as the one of the Respondent.

6. The learned Chief Magistrate erred in law and in fact by holding that the Respondent had on 23rd September, 2013 applied to the court to issue summons to the Registrar of Motor Vehicle and by failing to call the said Registrar meant that the said officer was to give unfavourable evidence to the Respondent”

9. During the hearing of the appeal, the parties opted to file written submissions. I have considered the said submissions.

10. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

11. In his submissions, the learned counsel for the Appellant argued the grounds of appeal in two broad categories. That is on the burden of proof in civil cases and whether the trial magistrate erred in dismissing the case against the 1st Respondent (Macharia) who had been duly served and interlocutory judgment requested but not entered by the court.

12. From the judgment of the lower court, it is clear that the Appellant's suit against the 1st Respondent (Macharia) was dismissed for lack of personal service of the summons to enter appearance and secondly because the request for judgment had not been acted upon by the court. The proceedings in the lower court started in the presence of both the Appellant and the 2nd Respondent's (Mbuthia) side. No entry was made by the trial court regarding the position of the 1st Respondent and none of the counsels made any remarks concerning the position of the 1st Respondent.

13. According to the learned counsel for the Appellant, the court failed to notify the Appellant's counsel that the interlocutory judgment had not been entered and also failed to allow the Appellant to reserve the summons or allow the withdrawal of the case against the 1st Respondent. On the other hand, the 2nd Respondent's side took the position that the trial court had the discretion to give directions if there was no proper service or dismiss the case.

14. In my view the Appellant's counsel had the responsibility of checking whether interlocutory judgment had been entered or not before proceeding to the hearing of the case. The trial magistrate also fell in error when she proceeded with the case without noting the absence of the 1st Respondent and failed to give directions in that regard before the proceeding to record evidence. The case against the 1st Respondent having not been heard, the trial court ought to have struck out the same as opposed to dismissal. This could have given them Appellant the leeway to possibly resurrect the case against the 1st Respondent.

15. On the question of the burden of proof, the trial magistrate held that the Appellant's case was not proved as there was no proof of the ownership of the motor vehicle. Both the Appellant and the 2nd Respondent produced ownership documents before the trial court. The Appellant who testified as PW1 produced a copy of records dated 7th April, 2008 from KRA which reflects that the 2nd Respondent, Mbuthia Stanley, was the owner of the motor vehicle in question as at the 16th November, 2006. PW1 further testified that the 16th November, 2006 turned out not to be the date of the accident. Another search certificate dated 29th September, 2010 was produced which reflects that the 2nd Respondent, Mbuthia Stanley was the registered owner as at the 16th September, 2006, which is the material date as per the amended plaint. The copy of records dated 29th September, 2010 reflects the colour of the motor vehicle on the material date (16th September, 2006) as Beige. The copy of records dated 7th April, 2008 reflects the colour of the motor vehicle as Red/Maroon/Pink as at 16th November, 2016

16. The 2nd Respondent (Mbuthia) testified as DW1. He produced documents which include the following:

- A sale agreement dated 12th October, 2006 which reflects he purchased the motor vehicle on the said date from one Alganesh Abraha for the sum of Ksh.1,100,000/= .
- A copy of a banker's cheque for the said amount of money.

- A bank statement which reflects the said transaction.
- A certificate of insurance for the motor vehicle which was issued on 12th October, 2006.
- A copy of records dated 6th December, 2006 from Kenya Revenue Authority which reflects the motor vehicle ownership as at 30th September, 2006
- A copy of record dated 19th August, 2013 from Kenya Revenue Authority which reflects ownership details of the motor vehicle as at 16th September, 2006.

17. All the four copies of records for the motor vehicle produced were purportedly issued by the Registrar of motor vehicles, Kenya Revenue Authority. The receipts for obtaining the copies of records have been produced by both parties. The Appellant's copy of records dated 29th September, 2010 (P exhibit 8) in respect of the material date (16th September, 2006) reflects the owner of the motor vehicle as the 2nd Respondent (Mbuthia Stanley). The colour of the motor vehicle is reflected as Beige. The copy of records dated 19th August, 2013 (exhibit 4c) produced by the 2nd Respondent in relation to ownership details of the motor vehicle on the material date reflects the owner of the motor vehicle as Alganesh Abraha Kibreab & CFC bank. The colour of the motor vehicle is reflected as Red/Maroon/Pink. Thus the relevant copies of records produced reflect different owners and different colours of the same motor vehicle as at the material date.

18. In his submissions the learned counsel for the Appellant submitted that the name reflected in the copy of record produced by the 2nd Respondent reflects the name it's addressed to as Stanley Chege and not Mbuthia Stanley. That some details e.g the log book number, the year of manufacture, the stamp and the name of the person who printed the same are all missing from the same. The copies of records produced by the Appellant bear the log book number of the motor vehicle, the year of manufacture and the name of the person who printed the same. The Appellant's copy is reflected as signed by one S.A. Asiachi while the 2nd Respondent's reflects that it is signed by somebody else on behalf of S.A. Asiachi. It was impossible for the trial court to tell which of the copy of records was the genuine one. My view is that only the Registrar of motor vehicles could have been able to point out the genuine copy of records.

19. The copies of records were produced by both parties without the calling of the Registrar of motor vehicle. The Appellant's counsel in his submissions stated that the trial court ought to have exercised discretion to summon the Registrar of motor vehicles. According to the 2nd Respondent's counsel the plaintiff had the duty to prove his case and therefore had the burden of proving which copy of records was genuine. I agree with the position taken by counsel for the 2nd Respondent. The burden of proof fell on the Appellant (See Section 107 ,108& 109 of the evidence Act Cap 80 Laws of Kenya)

20. In the case at hand, the assertion that the 2nd Respondent was the owner of the motor vehicle was not proved. The Appellant failed to prove her case against the 2nd Respondent (Mbuthia) on a balance of probabilities. There was no trial against the 1st Respondent (Macharia) whose position I have dealt with herein above

21. With the foregoing, I find no merits in the appeal against the 2nd Respondent and dismiss the same with costs. The appeal against the 1st Respondent succeeds to the extent that the judgment of the trial magistrate dismissing the same is substituted with one striking out the same.

Dated, signed and delivered at Nairobi this 20th day of Sept., 2017

B.THURANIRA JADEN

JUDGE