



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.A NO. 133 OF 2002

SUPERFOAM LTD.....)

STEPHEN THIONGO KARURA.....) APPELLANTS

VERSUS

GLADYS NCHORORO MBERO..... RESPONDENT

JUDGMENT

The respondent in this appeal filed a plaint against the two appellants dated 1st April, 1999 seeking general and special damages under the Law Reform Act and Fatal Accident Act with costs and interest. The appellants filed their written defence to the respondent's claim through a defence dated 7th May, 1999. That the respondent subsequently filed an amended plaint dated 19th May, 1999 seeking Kshs.478,600/- being material damage with costs and interest.

The appellants did not amend their initial defence though the respondent's prayers had changed. The suit proceeded to hearing in which the respondent who had sued as Administrator to the estate of her deceased husband Peter Mbero M'Ithangatha, gave evidence and called one witness whereas the 1st appellant gave evidence and called one witness. The learned trial Magistrate after hearing all parties found the appellants at 100 percent liable and entered judgment in favour of the respondent for Kshs.453,600/- with costs and interest.

The appellants being aggrieved by the learned trial Magistrate's judgment preferred this appeal setting out two grounds of appeal namely:-

- 1. The learned trial Magistrate erred in law and when he held that the defendants would be liable in-law for the material damages to the respondent's vehicle when the respondent had not established ownership of motor vehicle E31A-5000-218 make Mitsubishi Gallant.***
- 2. That in any case the motor vehicle purchased at Kshs.250,000/- and the general damages of Kshs.453,600/- was based upon wrong principle of law and of the amended plaint.***

When the appeal came up for hearing the advocates for both the appellants and the respondent sought directions that the appeal be determined by way of written submissions and highlighting but after filing of the submissions the advocates opted not to highlight and left the matter to the court to write and deliver the judgment.

The appellants in their first ground of appeal faulted the trial Magistrate for holding the appellants for material damages to the respondent's vehicle when the respondent had not established ownership of the motor vehicle E31A-500-218 make Mitsubishi Gallant. The appellants submitted that in the respondent's amended plaint under paragraph 5, the respondent alleged that:-

“on or about 20th November 1998, the deceased was lawfully driving his motor vehicle number E 31A-500-218 Mitsubishi Gallant GEMCC “ and that under paragraph 7 of the amended plaint the respondent pleaded special damages of Kshs.478,600/- which included pre-accident value of motor vehicle at Kshs.450,000/-. The appellants further argued that the respondent in her evidence testified that the vehicle had a foreign number and was never registered in the deceased's name and therefore he was not the owner of the motor vehicle. The appellants referred to exhibit 8, 9 and exhibit 1 showing the name of the respondent's husband did not appear as the owner of the said motor vehicle. The appellants further submitted the respondent during cross-examination confirmed that at the time of the accident the vehicle was not registered with the deceased's name but still in the names of the vendors.

The appellants went on to submit that despite the fact that the driver of the lorry belonging to the 1st appellant having been charged with causing death by dangerous driving convicted and sentenced to 3 years imprisonment and suspended from driving for 3 years that did not alter that the respondent's husband was not the owner of the vehicle, which the appellants submitted belonged to a third party and therefore could not claim for material damages to the property that the respondent's deceased husband did not own. The appellants in support of this ground relied on Section 8 and 9 of the Traffic Act Cap.403. The appellants also relied on C.A Case No.92 of 1993 Francis Nzioka Ngao V Silas Thiani Nkunga. The appellants submitted that in that appeal the Court of Appeal agreed with the (then Justice Githinji) that; “the driver of the vehicle” was not the respondent under Traffic Act.

The appellants stated that the trial court erroneously held that “but the deceased was the actual owner of the vehicle “when the appellants had proved that he was not as no property had passed to the deceased.

The respondent in her amended plaint dated 19th May, 1999 under paragraph 5 stated partly:-

“on or about 30th day of Nov, 1998 the deceased was lawfully driving his motor vehicle No.E 31A-5000-218 Mitsubishi Gallant GEMMA Saloon vehicle No.KAC 561M Tata Lorry that caused the same to collide with the deceased's motor vehicle occasioning extensive damage to the same thus rendering the same to be a write-off”.

The appellants did not file an amended defence to their defence dated 7th May, 1999 and relied on the same to the respondent's amended plaint. A quick perusal of the appellants written defence reveal that the ownership of motor vehicle E31A-5000-218 by the respondent's deceased husband was not challenged in the appellants' defence.

A party to the suit is not entitled to make an allegation of fact or raise a new ground of claim inconsistent with his/her previous pleadings in a suit.

Order 2 Rule 6 of the Civil Procedure Rules provides:

6. (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

The respondent in her evidence and through several exhibits produced before court demonstrated that the deceased was a beneficial owner of motor vehicle in question and that he was in actual possession. This piece of evidence was not challenged by the appellants. The respondent produced sale agreement between the deceased and the vendors of the questioned motor vehicle as exhibit 4. Application for registration as exhibit 5. Permission to enter motor vehicle into home use as exhibit 6 from KRA, import declaration form as exhibit 7 granting the deceased permission to arrange for inspection, import declaration form as exhibit 8, clean report of findings as exhibit 9, certificate of examination and test of

vehicle as exhibit 12. In Kenya it is a fact that often times, vehicles change hands but the records at the Registrar of motor vehicles remain unchanged. This I believe is a situation envisaged by Section 8 of the Traffic Act(Cap.403) which provides:

“The person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle“

This to my understanding means a logbook or certificate of search is not conclusive proof of ownership though such document may purport to show the registered owner but may not be conclusive proof of actual ownership of a motor vehicle as the above section clearly points out or provides that the contrary can be proved. This is a clear recognition of a fact that often times, vehicles change hands but records are not adjusted to reflect the actual position.

In the case of **SAMWEL MUKUNYA KAMUNGE V JOHN MWANGI KAMURU Civil Application No.34 of 2002** Hon. H. M. Okwengu, J as she then was stated:-

“It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the Traffic Act provides that the contrary can be proved. This is in recognition of the fact that often time’s vehicles change hands but the records are not amended.

I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent.

I also on this point refer to the case of **WELLINGTON NGANGA MUTHIORA V AKAMBA PUBLIC ROAD SERVICES LTD & ANOTHER CA NO.260 OF 2004**(Kisumu) (2010) eklr Court of Appeal sitting at Kisumu held:

“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”

In the instant appeal as earlier on stated in this judgment, during the trial before the trial Magistrate the respondent produced a sale agreement made between the respondent’s deceased husband and two vendors. The sale agreement was not challenged by evidence or through cross-examination. The sale agreement I find was a proof that the vehicle had been sold to the deceased and he had taken possession thereof as a beneficial owner and as such the respondent did not need to prove that the deceased as a beneficial owner needed to be registered to claim material damage. I find the authority relied upon by the appellants in the case of **FRANCIS NZIOKA NGAO V SILAS THIANI NKUNJA C.A. NO.92 of 1998** not relevant and distinguishable in that Section 8 of the Traffic Act(Cap.403) is not mandatory and leaves a room for any other proof to be adduced.

I therefore find that the trial Magistrate was correct in his finding that the deceased was the owner of

motor vehicle E31A-5000-218 and his ownership was not disputed. I find the sale agreement amongst other documents having been produced showing the deceased as the purchaser of motor vehicle E31A-5000-218 and there being no other party claiming ownership of the said vehicle and there being no response or defence filed denying the deceased ownership of the vehicle and the appellants having not offered any evidence to contradict the sale agreement and various documents showing the deceased as beneficial owner of the suit vehicle, the respondent had established on balance of probability that motor vehicle E31A-5000-218 was owned by her deceased husband. I therefore find no merits in ground No.1 of the appeal and the same is dismissed.

The appellants second ground of appeal is that in any case the motor vehicle purchased at Kshs.250,000/- and the general damages of Kshs.453,600 was based upon the wrong principles of law. The appellants submitted that the vehicle could not have appreciated from 250,000 to 450,000/- and that no insurance policy was produced as to the value of the vehicle and therefore the court erred on the principle of quantum and could not be sustained. The respondent's claim of Kshs.450,000/- as opposed to the purchase price of Kshs.250,000/= is as I understand therepondent's evidence based on the AXIS INDEX ASSESSOR'S VALUATIOIN Report which was produced as exhibit 2 by PW1. The Axis AccidentAssessor's Report show pre-accident value of Kshs.450,000/-. The appellant's advocate who was present at the time of the production of the assessor's report did not challenge its production nor did he cross-examine the respondent on the said report. The appellants in their evidence did not produce any assessors' report contracting or challenging the respondent's assessors report. In contrast I would like to point out that it is a well-established doctrine of contract that consideration must be sufficient but need not be adequate. In the celebrated case of CHAPPEL & CO. LTD V NESTLE CO. (1960)AC 87 it was held that a contracting party can stipulate whatever consideration he chooses.

My understanding of the said decision is that the courts cannot interfere with the parties freedom to contract on their own terms and if the vendors for example in the subject motor vehicle thought it wise to dispose of their vehicle at KSHS.450,000/- or at less half its price, the court has no right to say they should not have done so. The trial court was supposed to consider the pleaded specials and consider whether the same was specifically proved. The trial court was bound by the assessor's report which showed the assessed value of the vehicle and not otherwise. The appellants should have challenged the assessor's report but choose not to do so. They cannot now do so in the appeal and there is no evidence contrary to the respondent's assessor's report.

I therefore find and hold that the said appellant's grounds of appeal is without merits and the same is dismissed.

The upshot is that the appellants appeal is without merits and the same is dismissed with costs and interest to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 18th DAY OF FEBRUARY, 2014

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. MR.Bali Sharma & Bali Sharma Advocate for the appellants
2. Mr. M. Kariuki for the respondent.

J. A. MAKAU

JUDGE