REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.232 OF 2010

BETWEEN

EQUITY BANK LIMITED ……..…… APPELLANT

AND

NAFTAL ANYUMBA ONYANGO ……..….. 1ST RESPONDENT

KENYA BUS SERVICES MANAGEMENT LTD. …….. 2ND RESPONDENT

KIMATHI GERRALD ……..…. 3RD RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Kisii by the Hon. K.T. Kimutai, SRM, delivered on 6th October, 2010 in the CMCC No.103 of 2009)

JUDGMENT

Introduction

1. The appeal herein arises from the judgment of the Senior Resident Magistrate K.T. Kimutai in Kisii CMCC NO.103 of 2009 delivered on the 6th October 2010.
2. Briefly the appellant herein Equity Bank Limited who were the 2nd Defendant in the lower court financed the 3rd defendant (3rd respondent) to acquire a chattel which was Motor Vehicle Registration Number KAY 715 F. For purposes of security and tracking the borrower, the motor vehicle was jointly registered in the name of the appellant and the 3rd respondent herein until such a time when the loan account was fully serviced. Unfortunately, the above mentioned motor vehicle registration NO. KAY 715 F was involved in a road traffic accident on or about the 21st day of December 2008 in which the 1st respondent (plaintiff) was injured. He filed a suit against the registered owners of the suit motor vehicle.
3. At the time of the alleged accident, the suit motor vehicle was being managed by Kenya Bus Services Management Limited, the 2nd respondent who entered into a memorandum of understanding with the 3rd respondent whereby the 2nd respondent allowed the 3rd respondent to use the 2nd respondent's name/logo/colours on motor vehicle KAY 715 F under certain terms.
4. It is on record that the 3rd respondent did not file any memorandum of appearance nor a defence after being served and so judgment was entered against him in default of defence.
5. In his judgment the learned trial magistrate found that the 2nd and 3rd defendants that is the appellant herein and 3rd respondent were co-owners of motor vehicle registration NO. KAY 715 F and that the 3rd respondent could not sell the security without the appellant's consent. The learned

trial magistrate went ahead and found that the plaintiff had duly proved his case on a balance of probability and he entered judgment for the plaintiff (1st respondent) against the defendant (it is not clear which defendant) in the sum of Kshs.209,310/= with costs and interest.

The Appeal

6. Being aggrieved by the decision of the trial court, the appellant filed this appeal on the following 10 grounds of appeal:-

1. *That the learned trial magistrate erred in fact and law in failing to appreciate that no liability could lie against the appellant as a financier and or lender to the purchase of the motor vehicle, Registration Number KAY 715 F.*
2. *That the learned trial magistrate erred in fact and law in failing to appreciate that the appellant's co-registration in the motor vehicle registration number KAY 715F was exclusively as a security measure for a lender and that the risk over the motor vehicle at all times remained with the borrower, the 3rd defendant in the lower court.*
3. *That the learned trial magistrate erred in fact and law in failing to appreciate that at the material time of the accident, the subject motor vehicle was not in possession and or control of the appellant and therefore liability could not attach to the appellant whatsoever or at all.*
4. *That the learned trial magistrate erred in fact and law in failing to appreciate that the driver of the subject motor vehicle at the material time of the accident was not an employer of the appellant and was driving with neither express nor implied authority of the appellant thus no vicarious liability would attach to the appellant whatsoever or at all.*
5. *That the learned trial magistrate erred in fact and law in failing to hold that mere registration of the appellant as a co-owner in respect of the subject motor vehicle to secure financial interest did not invite risk or liability, vicarious or otherwise whatsoever or at all.*
6. *That the learned trial magistrate erred in fact and law in failing to appreciate that there was no agency relationship between the driver of the subject motor vehicle and the appellant and therefore liability, vicarious or otherwise could not be imported or attach.*
7. *That the learned trial magistrate erred in fact and law in failing to appreciate that the subject motor vehicle and or its driver at the material time of the accident was not driven and or driving on the appellant's behalf and or on its benefit thus no liability could attach or at all.*
8. *That the learned trial magistrate erred in fact and law in holding that the appellant was jointly and severally liable yet the motor vehicle at the material time of the accident was not driven at the appellant's request or instruction and neither did the appellant have interest, concern nor control whatsoever or at all.*
9. *That the holding of the learned trial magistrate flies on the face of established doctrines of excluding negligence liability against financiers or lenders ignored the doctrine of strare decis thus rendering the entire judgment as against the appellant erroneous and a proper candidate for setting aside.*
10. *That the judgment of the learned trial magistrate was entered against the weight of the exculpatory overwhelming evidence tendered by the appellant thereby deriving an erroneous finding of not exonerating the appellant but condemning it to 100% liability.*

7. The appellant seeks orders:-

a. *That the appeal be allowed with costs.*
b. *That the judgment of the subordinate court in Kisii CMCC NO.103 of 2009 and all consequential orders there from be set aside with costs to the appellants both in the lower court and on Appeal.*
c. *The civil suit number 103 of 2009 be dismissed with costs.*

Submissions on Appeal

8. Parties agreed to canvass the appeal by way of written submissions. The submissions were duly filed and exchanged as agreed.

9. The firm of Mose, Mose & Milimo filed their written submissions on the 28th March 2013 in which they reiterated the grounds on the face of the memorandum of appeal.
10. They submitted that the appellant simply financed the 3rd respondent (3rd defendant) to acquire the motor vehicle and to that extent the appellant did not have control over the borrower on how to manage the said motor vehicle. The agreement creating the relationship of lender and borrower has been captured at page 22-29 of the record of appeal and it was submitted the appellant being a financier could not be held vicariously liable for the cause of the accident. **Clause 10 (1)** thereof reads:-

> **"Risk in the motor vehicle shall remain with the Borrower for the whole duration of this Agreement."**

11. On the second ground it is submitted that the purpose of security and of tracking the borrower, the motor vehicle registration NO. KAY 715 F had to be jointly registered in the names of the appellant and 3rd respondent until such a time when the loan account was fully serviced. It is argued by the appellants that the business of the appellant being a banking institution is to lend and among the measures to mitigate any loses is to ensure that the security cannot be disposed without their consent, thus in the absence of co-registration it would be very difficult to control and monitor the movement of the security while the loan so advanced is pending. That as to the issue of risk the same remained with the 3rd respondent as the appellant was not a co-owner sharing profits, but only for purposes of ensuring that its interest of a lender was secure. See **Clause 10 (1)** of the **Agreement** (supra).
12. Thirdly, it is submitted that as at the time of the accident, motor vehicle KAY 715 F was exclusively under the control of the 3rd respondent, that the appellant's hand in management of the said vehicle was ousted the moment the vehicle was dispatched to the 3rd respondent and the only interest that remained was that of a financial nature ensuring that the monthly installments as per the loan agreement were being monitored, liability therefore could not attach to the appellant.

13. On the fourth issue it is submitted that the 3rd respondent upon acquiring the said motor vehicle had the sole responsibility to hire a driver and other employees to manage the vehicle, that it was not within the domain of the appellant to employ a driver or any other person in relation to the management of the said vehicle. That at the time of the accident the driver of the said motor vehicle was not driving it under the express or implied authority of the appellant thus no vicarious liability would attach on the appellant whatsoever or at all.

14. On the sixth ground it is submitted that the appellant in his defence had clearly disclosed his interest in the said vehicle as that of a financier thus could not invite any risk or otherwise, and that any risk remained with the 3rd respondent.
15. On the seventh ground it is submitted that the management, possession and control of the said motor vehicle was exclusively under the 3rd respondent herein and that at no point did the driver act as an agent, employee and/or servant to the appellant herein and therefore in the absence of any agency relationship between the driver and the appellant herein liability could not lie.
16. It is also submitted that the appellant was not in the picture on how the said motor vehicle was being driven, where it was being driven and by whom and that it was not being driven at his request or benefit but instead the vehicle was being driven for the benefit of the 3rd respondent.
17. Lastly it is submitted that with the material put forth by the appellant it is crystal clear that the person in control of the motor vehicle which allegedly caused the accident giving rise to any injuries that may have been suffered by the 1st respondent was the 3rd Respondent. Counsel submitted that the judgment of the trial magistrate was entered against the weight of the exculpatory overwhelming evidence tendered by the appellant thereby drawing an erroneous finding of not exonerating the appellant but condemning him to 100% liability for the alleged accident.
18. The appellant referred the court to some four authorities which I have carefully considered. Counsel prays that the appeal be allowed with costs.

19. The 1st respondent filed his written submissions on the 29th April 2013 through the firm of M/s Oguttu-Mboya & Co. Advocates. Briefly it is submitted for the 1st Respondent that the appellant having raised the issues of mis-joinder in the proceedings before the subordinate court which application was dismissed, the appellant herein is barred from raising similar issues pertaining to mis-joinder which was subject of the interlocutory application that was dismissed. It is argued that the issue of mis-joinder founded on whether the applicant ought to have been joined in the proceedings on account of co-ownership is res-judicata. Counsel relied on **Section 7 (4)** and **68** of the **Civil Procedure Act Chapter 21 Laws of Kenya** and the holding in **G.R. Mandavia –vs- Rattan Singh [1965] EA pages 1118-125** for the proposition that: **where a preliminary issue alleging misjoinder, limitation lack of jurisdiction or res judicata fails and a suit is permitted to proceed, no preliminary decree arises but only an order; the unsuccessful party has a right of appeal with leave."**

20. Secondly it is the 1st respondent's submissions that evidence abounds that the appellant and the 3rd respondent were joint beneficiaries of the suit omnibus which gave rise to the suit accident, that it was incumbent upon the appellant to tender credible evidence to the effect that same –

i. *Appellant had not employed and/or engaged the driver who was driving the suit omnibus at the time of the accident;*
ii. *The suit omnibus was not being driven for the joint benefits of the appellant and the 3rd respondent*
iii. *The appellant had no control over the usage and/or management of the suit omnibus.*
iv. *The appellant had no control over the driver of the suit omnibus at the material time.*
v. *There was no common interest in the use of the vehicle.*

21. It is submitted that the appellant failed to offer any rebuttal evidence and what remained on record was the evidence of co-ownership and the fact that such co-ownership, confers upon the appellant such rights and liabilities attendant to and/or derivable from the usage of the suit omnibus. It is further submitted by the 1st respondent that the liability of the appellant herein arises from the fact that the appellant was the employer and/or master of the driver of the suit omnibus and thus vicarious liability of the employer is pegged on the employee's negligence. Reliance is placed on the case of **Ndungu –vs- Coast Bus Company Ltd.[2000] 2 EA pages 462-466** ratio at page 464 paragraph I- to the effect that liability against the employer of a driver of an accident motor vehicle largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee's liability but to his negligence whether such driver is joined in an action for damages or not.

22. In conclusion, the 1st respondent contends that the employment of the driver of the suit omnibus was a matter within the special knowledge of the appellant and the 3rd respondent. That consequently either the appellant or the 3rd respondent was obliged to disprove the issue relating to employment of the driver which was not done and thus the only inference that the honourable court could draw was the fact that the driver of the suit omnibus was an employee of both the appellant and the 3rd respondent and hence both the appellant and the 3rd respondent had a common interest in the usage of the suit omnibus.

23. Further that the appellant herein was obliged to tender to court and produce the security instrument evidencing the extent and tenor of her relationship with the 3rd respondent, for the interrogation of the court which they did not.

24. In view of the foregoing the 1st respondent submits that the appellant herein cannot take the benefit of the authorities quoted without having laid a foundation for the same and/or tendered evidence to show lack of common benefit over and in respect of the suit omnibus and that the law can only be applied to a set of facts either tendered vide admissible evidence or which the court is able to take judicial notice of. 1St respondent thus submits that the appeal is devoid of merit and the same ought to be dismissed with costs to the 1st respondent.

25. The 2nd respondent filed their written submissions on the 14th May 2013 through the firm of M/s Siganga & Company Advocates. It is submitted that the 2nd respondent merely allowed the 3rd respondent to use the 2nd respondent's name/logo colours on the said motor vehicle through a memorandum of understanding signed by both parties in the month of May 2007.

26. That the memorandum of understanding clearly stated at paragraph 2.3 that the franchisee (3rd respondent) would indemnify the franchisor (2nd respondent) from any liabilities arising from undisclosed facts, accidents or incidentals arising on the signing of the memorandum of understanding with regard to this. It is submitted that in the event that the 2nd respondent is still held liable for the said accident then such liability should be transferred to the 3rd respondent in compliance with the indemnity clause.
27. Secondly on the issue of ownership of motor vehicle registration number KAY 715 F it is submitted that no evidence has been led to prove that the 2nd respondent was the registered owner of the same. It is submitted that the log book produced clearly showed that the registered owners of the suit motor vehicle were the appellant and the 3rd respondent.
28. It is further submitted by the 2nd respondent that on the date of the accident it was undisclosed and therefore unknown to the 2nd respondent that the 3rd respondent had diverted the bus to ply a route that it was not licensed to ply as agreed and further that the 3rd respondent did not use the approved ticket machine while charging the passengers neither did they charge the amounts approved as per the memorandum of understanding. Thus the 3rd respondent was acting out of the scope of agreement between himself and the 2nd respondent.

29. Lastly on the issue of whether the 2nd respondent could be held liable jointly and severally it is submitted that the same could not hold as the 2nd respondent was not a registered owner of motor vehicle registration No. KAY 715 F at the time of the said accident and that the 3rd respondent was acting out of the nature and scope of the agreement between the 2nd and 3rd respondents herein.
30. It is submitted that in light of all the foregoing circumstances it was erroneous for the learned trial magistrate to condemn the second respondent to 100% liability and the 2nd respondent prays that the court finds merit in their submissions and accordingly dismiss liability against the 2nd respondent with costs.

First Appeal

31. This appeal, being a first appeal places an obligation upon this court to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. This court is also under a duty to consider and carefully weigh the judgment of the trial court with the aim of establishing whether the conclusions reached by the said court were well founded both in law and fact. See **Selle & another -vs- Associated Motor Boat Company Ltd. & others [1968] EA 123**.

Issues for determination

32. I have gone through the proceedings in the lower court, the memorandum of appeal by the appellants, the written submissions on the appeal by parties to the appeal together with the cases and authorities relied upon and I find that there are three (3)

crucial issues for determination by this court:-

1. *Whether or not the appellant herein is vicariously liable for the acts and/or omissions of the 3rd respondent, its servants, agents and/or employees.*
2. *Whether liability could lie against the appellant who was a financier and/or lender for the purchase of motor vehicle registration No. KAY 715 F which allegedly caused the accident;*
3. *Whether co-registration was a mere security measure between the appellant and the 3rd respondent.*

Findings

33. On the first issue of vicarious liability, it is argued by the appellant that it was the 3rd respondent's

responsibility to deal with any employment related issues concerning the motor vehicle in question. That at the time of the accident the driver of the said motor vehicle was not driving it under express or implied authority of the appellant, thus no vicarious liability would attach on the appellant. It is the 1st respondent's argument that the liability of the appellant herein arises from the fact that the appellant was the employer and/or master of the driver of the suit omnibus and that vicarious liability of employer is pegged on the employee's negligence. The second respondent's argument is that in the event that they are still held liable for the said accident, then such liability should be transferred to the 3rd respondent in compliance with the indemnity clause from the Memorandum of Understanding between them.

34. Form the law, I do not agree with the arguments made by the 1st respondent that the appellant herein was vicariously liable for the acts of negligence of the 3rd respondent. It is clear from the record that the role the appellant played in the operation regarding the motor vehicle was purely that of financier.

35. It is the 2nd and 3rd respondents who entered into an agreement by way of a memorandum of understanding which allowed the 3rd respondent to use the 2nd respondent's name/logo/colours on the said motor vehicle. The said memorandum of understanding had a clause at paragraph 3.3 that stated clearly that the 3rd respondent would indemnify the 2nd respondent from any liabilities arising from undisclosed facts, accident, or incidentals arising from the signing of the memorandum of understanding.

36. I further find that the said motor vehicle was never in the control of the appellant as at the time of the accident but the same was totally under the control of the 3rd respondent. The appellants did not manage the said motor vehicle for the reason that their only interest was that of a financial nature to ensure that the monthly installments as per the loan agreement were being monitored. On this ground I find that the appeal herein had merit.

37. Secondly on the issue of liability of the appellant as the financier I do find that the same cannot lie as against them. My reasoning is that the appellant did not have control over the borrower on how to manage the motor vehicle. His interest was only on the repayment of the loan by the 3rd respondent. He never benefited from the business by the 3rd respondent neither did he manage the same. As earlier stated the only persons liable for the said accident were the 3rd respondent and the 2nd respondent. No evidence was placed before the trial court by the 1st respondent that the appellant herein managed the suit motor vehicle on a daily basis nor that the appellant received any benefit (other than the loan repayment) from the use of the said motor vehicle on a daily basis. The appellant's involvement regarding the motor vehicle herein was purely that of financier and the same was extinguishable upon the finances being recovered and the transfer and title effected to the borrower as per the terms of the loan agreement entered into between the appellant and the 3rd respondent.

38. Lastly I do find and hold that co-registration between appellant and 3rd respondent was a security measure between the appellant and the 3rd respondent herein. The appellant's interest remained that of financier which could not invite any risk or otherwise. There was no relationship either in employment, agency or servant between the appellant herein and the driver who drove the motor vehicle which allegedly caused the said accident.

Conclusion

39. I therefore make a finding that the judgment entered by the learned trial magistrate was erroneous and the same is set aside. In lieu thereof, I enter judgment on liability at 100% as against the 2nd and 3rd respondents. I find that the appeal herein has merit and the same is allowed with costs to the appellant.

Dated and delivered at Kisii this 26th day of June, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Otara (present) for the Appellant

Mr. Anyona for Oguttu (present) for 1st Respondent

N/A for 2nd Respondent

N/A for 3rd Respondent

Mr. Bibu - Court Clerk