



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 197 of 2010

HAYER BISHAN SINGH & SONS LTD.....APPELLANT

VERSUS

HAGIRA MOHAMMED (*suving as the legal representative of the estate of SALEH OMAR(Deceased)*).....RESPONDENT

J U D G M E N T

The appellants Memorandum of Appeal dated 10-12-2010 is composed of 18 grounds. The same can be summarized as hereunder:-

(a)The trial court erred in law and in fact in concluding that the respondent suit based on limited letters of administration ad colligenda was bad in law.

(b)The trial magistrate erred in law and in fact in determining that the appellant was the registered proprietor of the suit motor vehicle.

(c)The learned trial magistrate erred in facts and in law by finding that one Mohammed Said Omari was the appellant's agent or driver.

(d)The trial court erred in arriving on the assessment of damage.

Facts

DW1 Idd Rajah Shujaa, testified that on 26-4-2003 they were travelling from Miwani to Kisumu after attending a wedding ceremony. The motor vehicle they were using was registration No. KAY 758R a mini bus. The driver whom he referred to as the owner was driving the said vehicle at an excessive speed.

As a consequence of the said speed the vehicle lost control and the deceased died.

PW2 Haymm Mohammed is the widow of the deceased. She did not witness the accident. She produced the certificate of death as well as the letter of administration.

She further told the court that the deceased had a kiosk and used to have some shop selling spares.

PW3 P.C. Sammy Musau, produced the police abstract. The same showed that the accident was caused by motor vehicle Reg. No. KAJ 748A owned by the appellant. On cross examination however he admitted that he only relied on the police abstract and did not look at the police file.

DW1 Calbros Oduor Sandika, the transport manager of the appellant testified that he is in charge

of the appellant's motor vehicles as well as the drivers. He denied that the appellant is the registered owner of the motor vehicle. He produced the list of the appellant's motor vehicles and the drivers as well as the search certificate from the Registrar of Motor Vehicles. He denied that Mohammed was the appellant's driver.

I have carefully perused the evidence on record as well as the exhibits produced in court and the judgment of the trial magistrate.

The first issue to determine is whether one Mohammed Said was the appellant's employee. The records produced in court by the appellant were unilaterally prepared. Nothing could have stopped the appellant from **“doctoring”** the same as submitted by the respondent. It is not possible therefore to assume that he was not the driver. The police abstract exhibit P6 does not help things either. The same does not indicate the name of the driver.

Nonetheless, I do not have any contrary evidence that he was not the driver as confirmed by PW1.

The next issue raised by the appellant is the legitimacy of the suit. According to the appellant the same was not properly instituted as the respondent did not have *locus standi* as the grant of administration produced that is *colligenda bona* was wrong. On the contrary the appellant submitted, the respondent ought to have applied for the grant of letters of administration *ad litem*.

The fifth schedule of the Law of Succession Act in particular section 14 states:-

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administer is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased therein or in any other cause or suit which may be commenced in the same or in any other court between the parties or any other parties touching the matters or issues in the cause or suit and until a final decree shall be made therein, and carried into complete execution” (underlining mine).

Rule 36 (1) of the Probate and Administration rules on the other hand states:-

“Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased.”

My understanding of the two portions of the law is that under the “letters of administration *ad litem*” one files the same where there is an ongoing suit. Whereas the *ad colligenda* letters are applied any time for purposes of preservation of the deceased estate till the substantive grant is granted in any event.

The letters of administration *ad colligenda* obtained by the respondent in my view were properly obtained. There was no ongoing suit and in any case there is absolutely no prejudice that the appellant suffered or is likely to suffer.

Further, section 236 (2) thereof permits the holder of the said grant to undertake all that is necessary to ensure that the deceased estate is preserved pending the further grant being made.

On this score therefore, I do not find the appellant's argument meritorious. The authority cited of **Morjaria -VS- Abdalla [1984] KLR** does not depart from this.

Further and in any case the grant issued to the respondent was not illegal in any way.

The other issue to determine is the proprietorship or ownership of the suit motor vehicle. There are two

documents which parties have relied on namely, the police abstract exhibit P6 and the exhibit D1 the record of the registrar of motor vehicle. According to exhibit P6 the registered owner is **“Hayer Bishan Singh of P.O. Box 253, Kisumu”**.

On the other hand a copy of records from the registrar of motor vehicle exhibit D1 shows that the motor vehicle is owned by **“Busia Mumias R Project of P.O. Box 253, Kisumu.**

The only similarity here is the address of the proprietors. The appellant has argued that based on the records from the registrar of motor vehicles it is not the registered owner of the motor vehicle.

The respondent submitted that the writings on the side of the said vehicle indicated the appellant as the owner.

PW3 the police officer who produced the police abstract told the court that :-

“I only rely on the police abstract I did not look at the police file. I did not know the other people involved in the accident. I saw no other ownership document on the motor vehicle with log book or search”.

My deduction of the above testimony is that what the witness did was to simply produce the police abstract. There is no other supporting documents in terms for example of who reported the incident, sketch maps or any other evidence to bolster his case.

What is the strength of a police abstract *viz a viz* the records from the registrar of motor vehicle?

The police abstract merely indicates the details as they appear in an accident. Had the witness (PW3) been candid enough he would have brought to court the rest of the file. He did not bother and his confessions say as much.

The respondent argued and indeed submitted in paragraph 4 of the plaint that the respondent is the owner of the suit motor vehicle. The appellant rebutted this in its defence.

These are just pleadings which ought to be proved or disapproved by evidence.

Justice Mada (the late) said in the case of **CMC Aviation Ltd -VS- Cruisair Ltd (No. 1 [1978] KLR 103 at page 104** that:-

“The pleadings contain the averments of the three parties concerned. Until they are proved or disapproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence”.

As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved.

Averments are matters the truth of which is submitted for investigation. Until that truth has been established or otherwise they remain unproven. Averments in no way satisfy for example the following definition of “evidence” in Cassels English Dictionary page 394 “Anything that makes clear or obvious, grounds of knowledge, indication or testimony, that which makes truth, or renders evident to the mind that it is truth”.

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or immediately admitted as then the admission itself is evidence. Evidence is usually given on oath.

Averments are not made on oath. Averments depend upon evidence for proof of their contents”.

In light of the above long quotation did the respondent establish that the appellant was the sole registered proprietor of the motor vehicle? Was the production of police abstract sufficient?

Section 8 of the Traffic Act Chapter 403 states:-

“The person in whose name a vehicle is registered shall unless the contrary is proved be decreed to be the owner of the vehicle”.

In my opinion therefore put in the scale of a police abstract and a record of the registrar of motor vehicle it is obvious that the details from the registrar of motor vehicle carries the day. My conclusion is buttressed by the provisions of section 8 of the Traffic Act quoted above.

I have no doubt in my mind that the records from the registrar of motor vehicle is not the only means one can establish ownership. In our day today operations the court is alive to the fact people at time dispose off their vehicle and the purchasers invariably do not bother to change the ownership despite holding transfer documents.

This is a matter of evidence though and one has to prove this in line with the provisions of section 8 of the Traffic Act earlier quoted above. The assenting party must show by evidence that he or she is not the registered proprietor of the motor vehicle in question.

The provisions of section 116 of the Evidence Act buttresses this, thus:-

“When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who confirms that he is not the owner”.

It was held in Ezekiel Aljwala Otin -VS-C.M. Motors Ltd Kisumu, HCCA No. 90 of 2008 [unreported] that:-

“The appellants established through the police abstract and PW4 that *prima facie* the owner of the motor vehicle that caused the accident was the respondent. The respondent in my opinion at that point ought to have rebutted this. As it were the burden shifted to it to established that indeed he was not the owner of the motor vehicle in question”.

In the instant case the appellant rebutted the respondents evidence by producing the copy of the record from the registrar of motor vehicles. The record clearly showed that the appellant was not the registered proprietor of the motor vehicle. The exhibit was adduced as a piece of evidence and it does not hold water for the respondent to submit now that the appellant ought to have produced the record as at the date of the accident. If the respondent had been dissatisfied he would have objected to its production.

The upshot of my findings therefore is that on this ground the appeal ought to succeed.

On the issue of quantum I do not think the trial court misdirected itself. I do not think that the quotation was excessive or too low in the circumstances. The case of Butt -VS- Khan 1981 [KLR] 349 permits this court to disturb the quantum only when the same is inordinately high or low as to represent an entirely erroneous estimate. Neither do I think that the trial court proceeded on a wrong principle. The amount of Kshs. 500/= per day earned by the deceased represented a reasonable estimate even in the absence of proven documents.

The appeal for the reason that the respondent failed to sue the right party ought to succeed. There is no sufficient reason to show that the appellant was the registered proprietor of the motor vehicle.

Although the address of the proprietor of the motor vehicle in the police abstract and the copy of the registrar of motor vehicle, no evidence was led to show that they were one and the same.

I shall thus allow the appeal with costs.

Dated, signed and delivered at Kisumu this 25th day of March, 2013.

**H.K. CHEMITEI
JUDGE**

In the presence of:

.....for the appellant

.....for the respondent

HKC/va