



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 410 of 2003

CHARLES S. MBINDYO.....APPELLANT

VERSUS

BENJAMIN MUA KABALERESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Benjamin Mua Kabale (hereinafter referred to as the respondent). He had sued the appellant, Charles S. Mbindyo and Konoike Construction Company Ltd, (hereinafter referred to as the 1st defendant). The respondent sought damages for general and special injuries suffered by him as a result of an accident which the respondent maintains was caused by the negligence of the appellant for which the 1st defendant was vicariously liable.
2. The 1st defendant filed a defence denying the respondent's claim. The 1st defendant denied that it was the owner of motor vehicle Reg. No.KYN 732. In the alternative the 1st defendant maintained that if there was an accident then the same was caused either wholly or substantially by the negligence of the respondent.
3. The appellant also filed a defence in which he denied the respondent's claim. In particular, the appellant denied that he was the owner of the motor vehicle Reg. No.KYN 732.
4. On 11th March, 2002 the appellant filed a chamber summons under Order VI Rule 13(1)(a), (b), (c) & (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking to strike out the respondent's plaint against the appellant. The application was heard by a Senior Resident magistrate N.A. Owino, who delivered a ruling on 2nd May, 2002 in which she found that the plaint against the appellant was neither frivolous nor vexatious nor an abuse of the process of the court. The Senior Resident Magistrate dismissed the application maintaining that the issue as to whether the appellant was the owner of motor vehicle Reg. No.KYN 732 or the driver at the time of the accident, are issues which can only be determined after hearing evidence at the trial.
5. On 12th November, 2002, the appellant brought another application under Order 1 Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for striking out the appellant from the suit. The appellant alleged that he was improperly enjoined in the suit because he was not the owner of motor vehicle Reg. No.KYN 732 nor a servant or employee of the owner of the motor vehicle.
6. A preliminary objection was taken on behalf of the respondent on the ground that the matter was *res judicata* in view of the court's previous ruling of 2nd May, 2002. The matter was heard by R.N. Nyakundi, a Senior Principal Magistrate, who ruled that the matters raised were directly and substantially

the same as those in the previous application and involve the same parties. He therefore upheld the preliminary objection that the matter was *res judicata*.

7. On 16th May, 2003, the appellant filed yet another application under Order XLIV Rule 1, Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, for orders that the court be pleased to set aside and review the order made on 18th September, 2002 and grant the prayers sought in the chamber summons application dated 11th March, 2002. The application was grounded on the fact that the appellant had discovered new and important evidence, which could not be produced by him at the time when the order of 18th September, 2002 was made, and that the new evidence conclusively proves that the 1st defendant was the insured at the time of the accident and therefore the owner of motor vehicle Reg. No.KYN 732.

8. The application was supported by an affidavit sworn by the appellant. The appellant exhibited a policy renewal advice and a policy schedule indicating that motor vehicle KYN 732 was comprehensively insured by Kenindia Insurance Co. Ltd and that the insured's name was Konoike Construction Co. Ltd. i.e. the 1st defendant. The appellant denied having been co-owner of the subject vehicle or having been in control of the motor vehicle.

9. The application was opposed by the respondent through grounds of objection filed on 11th June, 2003. The respondent maintained that the application was frivolous, vexatious, brought in bad faith and intended merely to delay the hearing of the suit. It was further contended that the issues raised were *res judicata* and the alleged discovery of new evidence was in fact not new evidence as the documents had been annexed to an earlier application filed in court on 12th November, 2002.

10. The application was heard by Mrs. N.A. Owino, Senior Resident Magistrate who delivered a ruling on 19th June, 2003 in which she found that the application was *res judicata* and that the alleged new evidence was not new evidence and further that the application had been brought after inordinate delay which had not been explained. She therefore dismissed the application.

11. Being aggrieved by that ruling, the appellant has filed this appeal raising 4 grounds in the amended memorandum of appeal as follows:

- (i) The learned magistrate misdirected herself in law in not finding that the appellant was non-suited.
- (ii) The learned magistrate misdirected herself in law in not finding that there was new and important discovery of facts to warrant a review of the order dated 2nd May, 2002.
- (iii) The learned magistrate misdirected herself in law in not finding that the respondent has no cause of action against the appellant.
- (iv) The learned magistrate misdirected herself in law in not finding that the appellant was improperly joined as a defendant.

12. Mr. Omollo who appeared for the appellant, referred the court to a charge sheet and a copy of records from the Registrar of Motor Vehicles which were annexed to the appellant's affidavit, filed in support of his application dated 11th March, 2002, both of which reflected that the 1st defendant as the owner of motor vehicle Reg. No.KYN 732. It was contended that there was no evidence adduced before the court to show that the motor vehicle was transferred to the appellant nor was there any evidence adduced to show that the appellant was driving the motor vehicle. It was therefore submitted that the appellant was wrongly enjoined in the suit.

13. For the respondent, it was submitted that there was an issue as to which appeal was before the court. It was maintained that the appellant was sued as a driver and co-owner of motor vehicle Reg. No.KYN 732 and that there was an issue as between the appellant and the 1st defendant as to who owns

the motor vehicle. The respondent was therefore at liberty to bring the two to court so that the issue can be determined at the trial. With regard to the copy of record from the Registrar of Motor Vehicles, It was contended that the document did not show who was the owner of the motor vehicle at the time of the accident, while the importation document does not confirm the registration numbers of the subject vehicle.

14. I have reconsidered and evaluated all the applications which were before the trial magistrate, the submissions which were made and the rulings. From the submissions made before me by the counsel for the appellant, it is evident that the appellant is complaining against the ruling which was delivered on 2nd May, 2002 dismissing his application dated 11th March, 2002. The counsel has endeavoured to demonstrate that the application was meritorious. However, the appeal before me as is clear from the amended memorandum of appeal, is against the ruling dated 19th June, 2003 in which the trial magistrate dismissed the application dated 16th May, 2003 for review of the order of dismissal made on 2nd May, 2002. The issue which is before me therefore, is not whether the application dated 11th March, 2002 was meritorious, but whether there was sufficient grounds before the trial magistrate to justify the review and setting aside of the order of dismissal made on the 2nd May, 2002 and issued on 18th September, 2002.

15. The basis upon which the application was made was discovery of new and important evidence which could not be produced by the appellant at the time when the order was made. I have examined the policy renewal advice and policy schedule annexed to the appellant's affidavit sworn on 16th May, 2003 which was alleged to be the new evidence. I find, firstly, that the alleged period of insurance was for 10th September 2002 to 9th September 2003. This was long after the date of the alleged accident and cannot therefore be the basis of determining ownership of the subject motor vehicle at the time of the accident which was 3 years before the policy was taken.

16. Moreover, it is apparent that the policy neither relates to the period of the alleged accident nor 11th March, 2002 the date of the application. The alleged new evidence is not evidence which is consequential at this stage. Moreover, under Order 1 Rule 7 of the Civil procedure Rules, a plaintiff is entitled when in doubt to join two or more defendants in order that the question as to which of the defendants is liable and to what extent may be determined as between all parties.

17. The trial magistrate was therefore right in finding that the issue as to whether the appellant was the owner of the motor vehicle Reg No.KYN 732 or the driver at the time of the accident are issues which can only be determined after hearing evidence at the trial. I find that the application dated 16th May, 2003 was rightly dismissed as the appellant did not satisfy the requirements of Order XLIV Rule 1 of the Civil Procedure Rules. For these reasons I find no merit in this appeal and do therefore do dismiss it with costs.

Dated and delivered this 10th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Omollo for the appellant

Ndurumo for the respondent

Erick – Court clerk