



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 3534 of 1995

P.N. MASHRU LIMITEDPLAINTIFF

VERSUS

THE HON ATTORNEY GENERALDEFENDANT

JUDGMENT

A: PROCEDURE

1. Arising out of the famous prison motor vehicle accident collision between two vehicles that involved several other cases the Attorney General did not apply under Order 37 CPR of stay of proceedings until the issue of liability between the parties was decided. Instead other suits were settled on the issue of liability. The Attorney General field his defence late in this particular case but Mbitio (J) (as he then was) permitted the attorney General to proceed dismissing the claim to strike out the defence. Earlier Kuloba J (as he then was) allowed the withdrawal of the application to enter judgment against the defendant 926.1.96).

2. Delay

2.1 The delay of this suit was occasioned when the parties failed twice to appear before Njai (PDR) (as he then was) for summons for directions. Eventually the rules committee did away with summons for Direction. The parties failed to file their list of documents under Order 10 r 11 (a) CPR and file and read issue. The case was taken out of the call over list of 18.12.02.

2.2. On the 23 July 2003 both the plaintiff and defendant through their advocates field a consent letter dated 1.3.03 on the 22.7.03. On the next day the deputy registration through the ministerial powers given under order 48 CPR recorded the said consent which prayed that liability against the Attorney General be at 100%.

2.3 The suit was to proceed for assessment of damages. It was taken out of the list:-

- i. On 2.10.03 as I was out of the country.
- ii. On 15.3.04 as the key witness was bereaved
- iii. On 31.3.04 the parties intended to settle the matter.
- iv. On 12.05.05 the state was unprepared
- v. The suit finally went to trial on 19.5.05.

B. BACK GROUND OF THE SUIT.

3. On the 1.12.1994 the plaintiff M/s P.N. Mashru Ltd who owned a motor vehicle registration KAB 438Y which was duly being driven by its authorized driver along the Ruaraka Thika road, had this vehicle damaged as a result of a prison motor vehicle colliding into it. The prison vehicle was travelling on the opposite side and on its own dual carriage way. The vehicle lost control and left its side of the dual carriage way veered across the grass verge separating the two dual carriage way and collided onto the plaintiffs motor vehicle KAB 438Y.

C) LIABILITY

4. As a result of the accident many, I believe, were injured fatally. The cause of the accident appears to be the prison vehicle being over loaded, it had worn tyres and break failures. The Attorney General entered into consent on liability in cases filed by other parties at 100%. As stated earlier what the Attorney General ought to have done is to have filed an application under order 37 to have the court decide, in a test suit, on the issue of liability. The Attorney General finally conceded in this matter to enter into a consent on liability at 100%.

b) Assessment of Damages

5. The issue left for determination is the assessment of damages. The effect of the liability at 100% is that judgment on liability is final but under order 9a r 5 CPR the suit must be placed down for hearing on the aspect of assessment of damages.

6. The damages in tort claimed lies in material loss. The plaintiffs vehicle was damaged and they now wish to claim for the refund of the sum of money used. The advocate stated that it is a claim under subrogation. They claim the costs of assessment of damages and medical expenses.

In short, as pleaded:-

a) Pre accident value of motor vehicle Ksh.2,350,000/-

Later amended to read Ksh. 2,122,500/-

b) Costs of assessment of damages Ksh. 48,085/-

c) Medical expenses for driver and turn boy Ksh.415,636.10

Total cost Ksh.2.586,241/10

d) Loss of user

Ksh.50,000 from 1.12.94 to judgment

This was later amended to be from 31.12.94 to 31.3.95

Namely, 186 days x 50,000 = Ksh.9.100,000/-

Total claim Ksh.11,638,136/-

Actual figure being Ksh.11,686,241/00

7. During the formal proof, the plaintiff surprisingly only called one witness called David Olinyo Masai, a representative of the plaintiff who is employed as a claims manager. He informed this court that the vehicle in question was used by his company to transport goods to East and Central Africa from Mombasa. The company had over 400 fleet vehicles. The motor vehicle in question KAB 438Y was a 23 ton vehicle. The vehicle had been insured by KenIndia and a private investigator/loss assessor appointed by KenIndia to prove loss. He then produced a discharge voucher (Ext. P1) of Ksh.2.193,500/- representing the sum paid to them. A sum of Ksh.100,000/- in access was paid.

ii) Material Loss Claim

8. To prove a claim for subrogation both the plaintiff and the representative of the Insurance company must appear to court to give evidence unless the parties by consent disperse with the attendance of the insurance company and put only the documentary evidence of the insurance company in. I have seen instances in the magistrate' courts where only the representative of the insurance company comes to court alone. This indeed is not in order even where an interlocutory judgment has been entered.

There must be a plaintiff

In this case, the absence of the representative of the insurance company to give information on the claim and to state they are asking for a subrogation claim through the plaintiff is effectively crucial and important. The plaintiff cannot again wish to be paid as they have already been paid. The representative of the insurance company would tender their payments made and receipts received for such payment from the other party. Proof of payment of taxes such as VAT, is essential that would be reflected in their documents.

C (ii) Assessment of Damages

9. The plaintiff has shown that they have been paid

Ksh. 2,122,520/-. This sum has to have proof of the:-

- a) Pre accident value
- b) Less salvage to give the material loss claim.

Where repairs has been under taken alone the assessors should come to tender his assessment report to show the total costs of repairs. The document by the assessors would outline all the damage made to the vehicle and each costs to replace the damage of the spare parts. This report should demonstrate that the cost of the repairs is less than the value of the car. If the value is more to repair the vehicle would be termed as a "write off".

No such representative had been called to give evidence nor was a report tabled to this court. It is unclear what the meaning of "costs of assessment of damages K.shs.48,085/-". I can only guess that this perhaps may either be the total costs of damages assessed on the vehicle or alternatively the fee the assessor was charged.

C (ii) Medical Expenses

10. A claim in the amended plaint was made for the sum of K.Shs.415,636/10 being medical expenses the company used to pay for the driver and turn boy. The driver and turn boy are not party to this suit.

Their names are not disclosed. Both failed to attend court to give evidence that they sustained injuries, were treated and discharged. That they are to state that their employer paid their hospital bills. The representative of the plaintiff would then give evidence to state that they claim a refund of this sum by way of a subrogation claim. It is also unclear whether the driver and the turn boy filed their separate suit under common law for general damages for pain and suffering. A medical doctor was not called to prove the particulars of injuries, not pleaded.

11. From the foregoing, I find that the plaintiff has failed to formally prove the damages that has occurred in Tort against the defendant. If asked for the possible award, only Khs.212,252.01 would have been made.

12. I now turn to the claim for loss of user.

Originally the plaintiff claimed loss of user of the said motor vehicle from 1st December, 1994 to the finalization of this suit. After trial the advocate for the plaintiff conceded that the vehicle was back on the road. It was unserviceable from 31.12.94 to the 31.3.95 (I believe 31.12.94 may have been a typographical error). This is 4 months. The plaintiff states that it requires Kshs. 50,000/= per day. According to the calculation by the plaintiff this is 186 days at 50,000/= per day giving a sum of Ksh.9,100,000/- actually claimed. The state argued that the plaintiff had 400 vehicles. One vehicle not being used would make no difference. I am of the opinion that it is a right, for the plaintiff, to claim the loss of user for the days the vehicle is unserviceable no matter how many other vehicles they may have. The actual fact that comes out is an accident occurred. The vehicle having been damaged was unserviceable until 31.3.95. This is a total of 4 months or 120 days (121 days). The amount of income it was making of K.Shs.50,000/= would give a sum of K.Shs 6 million. It is not always that a vehicle would be on the road 24 hours. There are times it would go for service and times when there would actually be no work for the vehicle. Eventualities have to be taken into place. I hereby note that the plaintiff has not fully established loss of user but is entitled to it by law – such a situation requires that nominal damages be awarded. I do so at Ksh. 3 million.

I accordingly enter judgment on the nominal damages claim that the court found established.

In summary

10.1 Accident between two vehicles

10.2 Material loss claim

10.3 Liability 100% against the defendant Deputy Registrar recorded consent (upon reading letter dated 1.3.03 and filed on 22.7.03) on the 23.7.03 through ministerial powers given under order 48 CPR.

10.4 Quantum

I: Special Damages Claim

a) Pre accident value of vehicle Ksh.2,350,000/-

Nil dismissed later amended to read Ksh.2.122.520/-

c) Costs of assessment of damages of Ksh 48,085/-

Nil dismissed

d) Medical expenses for driver and

