

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 61 OF 1999

GREEN FILED INVESTMENTS LTD.....APPELLANT

VERSUS

FRANCIS MUSYOKA MUNYAO.....RESPONDENT

J U D G E M E N T

The present appellant was the defendant in the lower court. The appellant was sued in the lower court for general and special damages arising from a road traffic accident which occurred on 11.11.1997 along Kitui – Machakos road. The appellant was sued as the owner of motor vehicle KAH 493Q which collided with motor vehicle KST 874 in which the plaintiff/respondent was a passenger. The appellant joined the owner of motor vehicle KST 874 as a 3rd party to the suit though the 3rd party did not appear. After close of pleadings the matter came up for hearing on 11.2.1999 when it was partially heard and put off to 18.3.1999 when it came up for hearing again. The defence counsel was not present and the Magistrate declined to grant adjournment and proceeded to hear the plaintiffs evidence and delivered his judgement on 29.4.1999.

The appellant is dissatisfied with this judgement against which appellant now appeals. The plaintiff/respondent was awarded kshs.200,000.00 as damages and special damages of Kshs.4,000/= and costs of the suit.

The appellant filed memorandum of appeal dated 3.5.1999. I will go ahead to consider each ground raised.

The first ground raised is that the Magistrate erred by refusing the Appellants application for adjournment as there was an application to have the suit transferred from Kangundo court to Machakos Senior Principal Magistrate’s court. I have looked at the record of appeal and the lower court’s file, there is no evidence of such application. Even in the record of appeal where the application for adjournment was made is page 27, there was no mention of a pending application earlier. I find this ground of appeal baseless and cannot succeed.

The 2nd ground is that the Appellant was denied opportunity to proceed with formal proof against the 3rd party. Indeed 3rd party notice was issued and the 3rd party did not enter appearance. I see from the record that interlocutory judgement was entered against the 3rd party at page 26 on record of appeal. However as per provisions of order 1 Rule 16 and 17 Civil Procedure Rules the defendant has to satisfy the claim and then pursue the 3rd party for compensation. The magistrate did not error in any way.

Thirdly the appellant claims to have been denied a hearing by the magistrate. As per record of appeal at page 27 this matter came up for further hearing on 18.3.1999 having been adjourned on 11.2.1999. The defence counsel was not present but one Nzavi held his brief and sought an adjournment but the court declined to grant the adjournment on grounds that one Mrs. Musembi who had conduct of the case had been before the same Magistrate on the same day and could not be said to be held up elsewhere. The record speaks for itself – that it is Mrs. Musembi for defendant who had been present when PW1 started testifying on 11.2.1999. The Magistrate considered the application for adjournment and found it to be unsatisfactory. From the record on 15.10.1998, the matter had come up for hearing case partially proceed in absence of Mr. Masika advocate for defendant but he appeared later and the matter was put off to

22.10.1998. It was again adjourned to 11.2.1999 without any reason being given. It was partially heard when plaintiffs advocate asked for adjournment to get the abstract. It was adjourned to 18.3.1999 when the Magistrate declined to adjourn and proceeded to hear the matter in the absence of counsel for defendant for reasons given above that Mrs. Musembi had been in the same court that same day and not be said to be held up and yet she had been handling this matter before. Looking at the record of adjournments on the file I also find that the court did exercise its discretion judiciously and it cannot be said that defendant was denied a chance to be heard.

On the issue of the award being excessive, based on the medical report and injuries sustained and case law cited, this court would have made a less award of about Kshs.150,000/=.

At paragraph 2A of amended defence at page 16 of appeal record, the defendant specifically denied that the defendant owned the motor vehicle KAH 493Q Ireco lorry at anyone time. Though the defendants were not available to offer their defence, it is trite law that he who alleges must prove. The plaintiff pleaded at paragraph 3 of the plaint, page 3 that the defendant is the owner of the motor vehicle KAH 493Q Ireco lorry. It was upto the plaintiff to prove that the said lorry belongs to the defendant. It is not upon the defendant to prove that the lorry is not theirs. Counsel for respondent in response said that a letter from Kenindia Assurance to their replying affidavit confirmed that the lorry was owned by the applicants. By annexing a letter from the Insurance Company which indicated that they were the insurers of the defendants vehicle.

The court considered the application and allowed the amendment in which the defendants denied ownership of the lorry. That being the case it was upon the plaintiff/respondent to prove that the lorry belongs to the defendants which they have not done. I do agree with appellants that ownership of the motor vehicle KAH 493Q was not proved by the respondents and judgement should not have been entered against the appellant without such proof. The appellant's appeal must succeed on that ground alone. I accordingly set aside the lower court's judgement and order that the matter be heard a fresh before Chief Magistrate's court at Machakos. Costs of appeal to appellants.

Dated, read and delivered at Machakos this.....day of,2004.

R. WENDOH

JUDGE