Kenya Commercial Bank Limited v Opiyo & another (Civil Appeal E027 of 2022) [2025] KEHC 182 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 182 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E027 OF 2022

DK KEMEI, J

JANUARY 17, 2025

BETWEEN

KENYA COMMERCIAL BANK LIMITED ..... APPELLANT

AND

DICKSON OTIENO OPIYO ..... 1ST RESPONDENT

COUNTY MOTORS LIMITED ..... 2ND RESPONDENT

(Being an appeal from the decision of the Hon. L.N Sarapai, PM dated and delivered on 28.4.2022 in Ukwala PMCC No. 3 of 2020)

JUDGMENT

1. The Appeal arises from the judgement of Hon. L.N Sarapai, PM dated and delivered on April 28, 2022 in Ukwala PMCC No. 3 of 2020. Vide the Plaint dated January 21, 2020, the 1st Respondent, owner of motor vehicle registration number KCC 686W, Mitsubishi Fuso sued the Appellant and the 2nd Respondent, joint owners of motor vehicle registration number KBB 900 G, Man truck for an accident that occurred on or about January 10, 2017. The 1st Respondent sought for; a) Kshs. 1,726,702 being repair costs; b) Kshs. 550 being motor vehicle search fees; c) costs of and incidental to the suit; and d) interest on (a) and (b) at court rates from the date of filing suit until payment in full.

2. Interlocutory judgment was entered against the 2nd Respondent for failing to file its statement of defence.

3. The Appellant filed a Notice of Motion dated February 2, 2021 on February 10, 2021 seeking that the suit against it to be struck out for being frivolous and vexatious as did not disclose a cause of action. According to the Appellant, it was only a financier of the 2nd Respondent, thus the motor vehicle was jointly owned as security to protect the Appellant's interest in the repayment of the credit facility offered to the 2nd Respondent. The Appellant objected to any liability being apportioned to it. The

application was supported by the affidavit of Sharon Achieng Omollo, the Appellant's advocate sworn on even date.

4. The 1st Respondent opposed the application vide the Grounds of Opposition dated 17th February, 2021 inter alia; that the application is an abuse of the court process; that the motor vehicle in question is still registered in the names of both Defendants making them jointly and severally liable to the claim; that striking out the 2nd Defendant will prejudice the Plaintiff/Respondent; that the issue of liability is tagged to the ownership of the vehicle which the 2nd Defendant is trying to escape despite being a registered joint owner of the suit vehicle.

5. A brief perusal of the trial court proceedings is that on 31/3/2022 when matter came up for hearing of the application, Counsel for the Appellant and 1st Respondent informed the court that parties had filed written submissions. A ruling for the application was fixed on 28th April, 2022 but on the same date in the absence of the Appellant and 2nd Respondent, the learned trial Magistrate dismissed the Appellant's application with no orders as to costs. The order was issued on 20th May, 2022. From the record, the court cannot find a copy of a ruling in respect of the application save for an order dismissing the application.

6. Aggrieved, the Appellant has lodged its memorandum of appeal dated 30th May, 2022 contending that:

    1. The learned trial magistrate erred in law and in fact by failing to give a concise ruling entailing the facts of the case, the points of determination, her decision thereof and the reasons guiding her decision, with the result that the purported ruling delivered thereon did not constitute a ruling or decision or determination as contemplated under Order 21 Rule 5 of the Civil Procedure Rules as read with Article 47 of *the Constitution* of Kenya and Sections 3, 4(1) and (2) of the *Fair Administrative Action Act*, 2015.

    2. The learned trial magistrate erred in law and fact by failing to consider the Appellant's submissions and thereby ignoring the relevant guiding facts to reach a fair and reasoned determination and thereby erroneously dismissing the Appellant's Notice of Motion Application dated 2nd February, 2021 without justification.

    3. The learned trial magistrate erred in law and fact by failing to strike out the Appellant from the suit and instead dismissing the Appellant's Notice of Motion application dated 2nd February, 2021, without appreciating that the Appellant's co-registration in the motor vehicle registration number KBB 900G/ZC 8314 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 2nd Respondent

    4. The learned trial magistrate erred in law and fact by issuing orders dismissing the Appellant's Notice of Motion dated 2nd February, 2021, against the weight of the exculpatory overwhelming evidence tendered by the Appellant thereby arriving at an erroneous finding of not striking out the Appellant from the suit.

    5. The learned trial magistrate erred in law and fact by failing to appreciate 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 the Appellant is an unnecessary party to the suit as the issue of risk remains with the 2nd Respondent as the borrower.

    6. The learned trial magistrate erred in law and fact by failing to interrogate the issue as to whether the Appellant was a proper and necessary party in the suit, in light of the various decisions that

have held that a financier or buyer of a motor vehicle cannot be held vicariously liable for the acts of an agent of the buyer.

7. The learned trial magistrate erred in law and fact by failing to analyse the evidence on record, and thereby arriving at a wrong decision to wit; that the Application dated 2nd February, 2021 is not meritorious thereby dismissing the same, without appreciating that evidence confirming the contrary was on record.

8. The learned trial magistrate erred in law and fact by failing to appreciate that the Appellant's involvement regarding the suit motor vehicle herein was purely that of the 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 2nd Respondent.

9. The learned trial magistrate erred in law and fact by failing to appreciate that the Appellant had discharged the burden of proof placed on it on contemplation of the express and mandatory provisions of Sections 107, 108 and 109 of the *Evidence Act* by placing concrete evidence in support of its Notice of Motion dated 2nd February, 2021 before the Court in view of which the said application ought to have been allowed.

10. The learned trial magistrate erred in law and fact by failing to appreciate that the only available option in the circumstances was to allow the Appellant's Notice of Motion dated 2nd February, 2021 rather than dismissing the same, with the result that the Appellant is condemned to suffer grave injustice by having to incur the costs of defending a suit in which it is not a necessary party.

7. The Appellant pray that the ruling be set aside and its Notice of Motion dated 2nd February, 2021 be allowed. Costs of this appeal be borne by the Respondents.

8. The appeal was canvassed by way of written submission. The Appellant submits that through the Vehicle and Asset Finance Agreement dated 27th November, 2007 and the Agreement for Restructuring of Outstanding ABF Debt dated 8th March, 2012, it has been able to prove that it was a mere financier for the purposes of acquisition of suit motor vehicle by the 2nd Respondent. Reference is made on Clause 9 of the Vehicle and Asset Finance Agreement wherein it is provided that; The customer shall indemnify, hold harmless and defend the Bank on a full and unqualified indemnity basis against:.....liabilities, damages, actions, claims, proceedings(whether civil or criminal) ...judgments, legal costs and other costs and expenses.....". According to the Appellant, the suit motor vehicle was at all material times under the direct control, use and management of the 2nd Respondent in circumstances which do not allow for the doctrine of vicarious liability to apply to the Appellant. The Appellant submits that it is not a necessary party to these proceedings since its interest was limited to recovery of the monies lent to the 2nd Respondent for purposes of acquiring the suit motor vehicle. The Appellant placed reliance on Nairobi HCC No. 4772 of 1980, Richard Obiero Mwai vs E.Guerci & Co.Ltd & Diamond Trust of Kenya Ltd (Unreported) Bosire J. (as he then was); Ali Lai Khalifa & 8 Others vs Pollman's Tours & Safaris & 2 Others (2003) eKLR; Ormrod vs Crossville Motors Services Ltd (1954)2 ALL ER 752; Jane Wairimu Turanta vs Githae John Vickery & 2 Others [2013] eKLR.

9. The 1st Respondent submitted that under Section 8 of the *Traffic Act*, Cap 403, unless the contrary is proved, the registered person is deemed to be the owner of the vehicle. According to the 1st Respondent, the search conducted on 17th July, 2019 established the Appellant and 2nd Respondent as the registered owners of the suit motor vehicle. The Respondent submits that under Clause 8 of the Restructuring Agreement ABF, the subject motor vehicle KBB was never subject of the said

restructuring or hire purchase agreement as alleged. It is submitted that the agreements were silent on whether the contemplated ownership of the motor vehicles was possessory, beneficial or registrable. According to the Respondent, it is not clear whether payment of the loan facility if any in which the suit motor vehicle was being held as security, was ever completed. It is submitted that no evidence was produced to the effect that the 2nd Respondent took possession of the suit motor vehicle together with the original log book and transfer forms in their name or at all and as such the Appellant is and ought to remain as a necessary party. The 1st Respondent submits that the Appellant's application was intended to circumvent the need for a trial, block cross-examination and prevent thorough scrutiny of any scintilla evidence sought to be relied upon. The 1st Respondent submits that the question as to whether a sale indeed happened or whether or not title to the suit motor vehicle passed to the 2nd Respondent at the material time could only be determined upon trial and not by way of affidavit evidence. According to the 1st Respondent, the application was misguided as it intended to ask the trial Court to conduct a mini trial as regards the ownership of the suit motor vehicle when the issue could only be established through a trial and not examination of affidavits. The 1st Respondent submits that this appeal is tantamount to an abuse of court process hence the learned trial Magistrate was right in dismissing the Appellant's application. The 1st Respondent urges this court to dismiss this appeal with costs. Reliance is placed on the case of D.T Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another (1980) eKLR that no suit ought to be summarily dismissed unless it appears plainly and obviously discloses no reasonable cause of action. Further reliance is on *Madison Insurance Company Ltd vs Augustine Kamanda Gitau* (2020) eKLR on the proposition that the exercise of powers for summary procedure are draconian, coercive and drastic.

10. The 2nd Respondent has not filed written submissions.

11. I have given due consideration to the submissions filed by the parties as well as the record of appeal. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same.

12. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, with regard to the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

13. The Court forms the view that the issues that fall for determination are:

    i. Whether the learned trial Magistrate complied with the provisions of Order 21 Rule 5 of the Civil Procedure Rules.

    ii. Whether the Appellant's Notice of Motion application dated 2nd February, 2021 was merited.

    iii. Whether the Appellant is entitled to costs.

14. When the matter came for ruling in respect of the Appellant's application, the learned trial Magistrate dismissed the Appellant's application with no orders as to costs. The parties had filed written submissions and a ruling had been scheduled for delivery on 28th April, 2022.

15. Order 21 of the Civil Procedure Rules provides for "Judgment and Decree" but Order 21 Rule 5 in my view provides for a general requirement for the court to give reasons which may also apply when writing a ruling. Rule 5 provides:

> In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.

16. In Royal Star Ltd and Another vs Kimeu Wambua Civil Appeal No. 156 of 2011 where the court cited the case of *South Nyanza Sugar Co. Ltd vs Omwando* (2011) eKLR in which Makhandia, J. (as he then was) stated as follows:

> " ...Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of Order 21 rule 4 of the Civil Procedure Rules which provides that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision...The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which made him arrive at a particular decision on liability and apportionment thereof...Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it."

17. In *Trustees, Nzoia Sugar Co.Ltd Staff Retirement Benefits Scheme 2007 vs Makhanu t/a Architects N Systems* (Civil Appeal E088 of 2023) [2024] KEHC 9923 (KLR) (29 July 2024) (Judgment) I stated that:

> " In my view, judicial writing and decisions should accord with the law; state the parties' case; state the issues, determine the issues and reasons thereof; and, effectually and completely determine the dispute. But, there is another aspect of judgment writing; communication, effective communication: every sentence must carry the reasoning forward in a manner which creates and keeps legitimate excitement constantly renewed to reach the significant conclusion of the judgment. This avoids much bald and dry judgments...The obligation to give reasons for the decision is not merely a common law or statutory requirement, but also has a constitutional dimension within the principle of substantive justice. See Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 ('Osmond') and Wainohu vs New South Wales (2011) 243 CLR 181. Therefore, a decision devoid of reasons is hollow, and cannot be said to determine the dispute effectively and effectually."

18. The court finds the learned trial Magistrate erred by failing to comply with Order 21 Rule 5. The failure to dispose the Appellant's application via a ruling denied the Appellant a right to Fair Administrative action envisaged under Article 47 of *the Constitution*.

19. In its Notice of Motion dated 2nd February, 2021 and filed on 10th February, 2021 the Appellant sought for striking out the suit against it for being frivolous and vexatious as it did not disclose a cause of action. The Appellant contends that through the Vehicle and Asset Finance Agreement dated 27th November, 2007 and the Agreement for Restructuring of Outstanding ABF Debt dated 8th March, 2012, it has been able to prove that it was a mere financier for the purposes of acquisition of suit motor vehicle by the 2nd Respondent. The Appellant asserted that it was not a necessary party in the suit. In the converse, the 1st Respondent contends that under Section 8 of the *Traffic Act*, Cap 403, unless the contrary is proved, the registered person is deemed to be the owner of the vehicle, and in

this case the search conducted on 17th July, 2019 established the Appellant and 2nd Respondent as the registered owners of the suit motor vehicle. The 1st Respondent contends that under Clause 8 of the Restructuring Agreement ABF, the subject motor vehicle KBB was never subject of the said restructuring or hire purchase agreement as alleged. That the agreements are silent on whether the contemplated ownership of the motor vehicles was possessory, beneficial or registrable and that there is no evidence produced to the effect that the 2nd Respondent took possession of the suit motor vehicle together with the original log book and transfer forms in their name or at all. According to the 1st Respondent, the Appellant's application was intended to circumvent the need for a trial, block cross-examination and prevent thorough scrutiny of any scintilla evidence sought to be relied upon.

20. The law on striking out of pleadings is well settled. The Court of Appeal in *D. T. Dobie & Co Ltd vs Muchina and Anothe*r [1982] KLR 1 held that the power to strike out a suit is drastic and should be exercised with great circumspection and only in the clearest of cases where amendment cannot cure the defect. Madan JA., observed that, "No suit ought to be summarily dismissed unless it appears so helpless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendments."

21. The contention by the Appellant is that it is just a financier of the 2nd Respondent, thus no liability should be apportioned to it. The Appellant's application was supported by two documents; Vehicle and Asset Finance Agreement dated 27th November, 2007 and the Agreement for Restructuring of Outstanding ABF Debt dated 8th March, 2012. The 1st Respondent was not a party to the agreements between the Appellant and 2nd Respondent.

22. In Nairobi C.A 272/06 *Savings and Loan Ltd (K) Vs Kanyenje Karangaita Gakombe & Another* (2015) e KLR the court held that;

> " As a general rule, a contract affects only the parties to it. It cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to refuse or make him liable upon it".

23. In the Plaint, the Appellant was only mentioned as a joint owner of the suit motor vehicle with the 2nd Respondent. In Nairobi HCCC No. 4772 of 1980, *Richard Obiero Mwai v. E. Guerci & Co. Ltd and Diamond Trust of Kenya Ltd*., Bosire, J. (as he then was) said:

> " The application must be of necessity be granted for two main reasons. Firstly, that the plaint does not contain any averments as to how the liability of the 2nd defendant arises. Secondly, if as it has been contended and argued on behalf of the 2nd Defendant/Applicant, its position is merely as a financier, then it did not owe any duty of care to the plaintiff/respondent as would have given rise to liability to the plaintiff."

24. Azangalala, J. (as he then was) in *Justus Kavisi Kilonzo vs Coast Broadway Company Ltd. and Diamond Trust (K) Ltd*. Mombasa HCCC 169 of 2007 stated as follows:

> " ...I am alive to the fact that striking out any pleadings should be the last resort of any court and should be resorted to only in plain and obvious cases. In my view however, this is a plain and obvious case when save for the mere registration of the 2nd defendant as a co-owner of the said motor vehicle, the 2nd defendant cannot be liable to the plaintiff vicariously. The upshot is that the 2nd defendant's application dated 18/12/07 is allowed as prayed and the plaint struck out as against the 2nd defendant and the plaintiff's suit is dismissed as against

it." See Etyang J. (now retired) in Mombasa HCC Number 106 of 2002: Alic Lali Khalifa & Others v. Pollman's Tours & Safaris & 2 Others.

25. In view of the foregoing observations, it is my finding that this appeal is bound to succeed in its entirety for non-compliance with Order 21 Rule 5 by the learned trial Magistrate. It is trite law that there must be a real or reasonable cause of action against a party. The Appellant's interest was limited only to recovery of the monies lent to the 2nd Respondent for purposes of acquiring the suit motor vehicle. It was not a necessary party in a negligence claim against the 1st Respondent. The learned trial Magistrate erred in the exercise of discretion by dismissing the Appellant's application. In any event, the 1st Respondent being the Plaintiff could still proceed as against the tortfeasor (2nd Respondent) and obtain a remedy against it. That being the position, the trial court ought to have allowed the Appellant's application and thereafter strike its name from the suit and direct the remaining parties to proceed. I find the Appellant stood to suffer prejudice if it is tied to the suit in which it was not a necessary party. Consequently I allow the appeal on the following terms:

    a. The order of the trial court dated April 28, 2022 be and is hereby set aside and substituted with an order that the Appellant's Notice of Motion dated February 2, 2021 is allowed as prayed.

    b. The Appellant's costs of this appeal shall be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY 2025.

D. K. KEMEI

JUDGE

In the presence of:

M/s Anyango..... for Appellant

M/s Achieng..... for 1st Respondent

N/A .....for 2nd Respondent

Mboya.....Court Assistant