Sambura v Rono & another (Civil Appeal E091 of 2023) [2024] KEHC 1618 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1618 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E091 OF 2023

SM MOHOCHI, J

FEBRUARY 21, 2024

BETWEEN

SAMBULA ROSEMARY AKA ROSEMARY SAMBURA .... APPELLANT

AND

GILBERT KIPKEMOI RONO .... 1ST RESPONDENT

ABASS MULUWE MUKWHANA .... 2ND RESPONDENT

(Appeal from the Ruling of the Hon. Resident Adjudicator (D.M. Macharia) dated 19th January 2023 in Nakuru Small Claims Court Case No. E217 of 2022)

JUDGMENT

Background

1. The Appellant (then the Claimant) instituted a claim against the Respondents herein (Then the 4th and 5th Respondents) in the Small Claims Court at Nakuru arising from a Road Traffic Accident that occurred on or about 23rd day of May 2022.

2. The Claim against the 1st and 3rd Respondents in the lower Court was withdrawn while the 2nd, 4th and 5th Respondents did not enter appearance nor file Defence as a result of which interlocutory judgement was entered against them and therefore the matter proceeded by formal proof against them by way of documents only under Section 30 of the Small Claim Court Act which allows parties to proceed as such.

3. By his judgment the Adjudicator found the 2nd Respondent liable but dismissed the claim against the 4th and 5th Respondents and being dissatisfied of the judgment the Appellant preferred this instant Appeal.

4. By memorandum of Appeal dated 17th May 2023, the Appellant anchors his case on the following grounds;

   i. That, the Learned Trial Magistrate/Adjudicator erred in law by dismissing the Claimant's claim against the 4th and 5th Respondents therein.

   ii. That, the Learned trial Adjudicator erred in law by not properly, as expected and or dutifully analyzing and or considering the pleadings, evidence,

   iii. Submissions and or other materials on record and the applicable principles of law when reaching at his judgement as required of him.

   iv. That, the Learned Trial Adjudicator erred in law by failing to find that the Court's role after entering interlocutory judgment was only to assess damages.

   v. That, the Learned Trial Adjudicator erred in law by not finding that the claimant's against case the 4th and 5th Respondents unopposed uncontroverted.

5. The Appellant prays for the following reliefs;

   a. This appeal be allowed and the judgment / decree of the honorable Court delivered on or about 19/1/2023 be reversed, reviewed and/or set aside.

   b. This honorable Court be pleased to revisit the issue of Claimant's claim against the Respondents therein and come up with an appropriate and independent determination/finding in respect thereto.

   c. This honorable Court be pleased to allow the Appellant's claim against Respondents in the lower Court with costs.

6. This Appeal was admitted on the 14th July 2023 and parties were directed to file and exchange their respective written submissions within 30 days.

7. The Appellant filed their written submissions on the 19th September 2023 while the Respondents elected not to defend the appeal or file written statement.

Appellant's Submission

8. The Appellant submits that, the grounds upon which an Appellate Court will interfere with decision of the trial Court was laid by the Court of Appeal in the case of Hellen Gathoni Mbuthia & Anor v Nelson Wachira Murage [2016] eKLR, Appellate Court will not interfere with the decision of the lower Court unless: -

   a. The trial Court acted under a mistake of law or

   b. The trial Court acted in disregard of principles or

   c. The trial Court considered irrelevant matters or failed to take into account relevant matters or

   d. The trial Court acted under a misapprehension of facts/evidence or

   e. Where injustice would result if the Appellate Court does not interfere.

9. The Appellant has consolidated her four grounds into one issue for determination namely, whether the learned trial adjudicator erred in lạw by dismissing the Appellant's case against the 1st and 2nd Respondents in this appeal?

10. The Appellant submits that, taking into account all the materials on record, the learned trial adjudicator erred in law by dismissing her case against the 4th and 5th Respondents in the lower Court for the following reasons:

    i. Firstly, the learned trial adjudicator erred by holding that, there was no evidence to apportion blame against the said 4th and 5th Respondents as there was no nexus between them and the cause of action herein as captured in his judgement at Page 127 & 128 of the Record.

    ii. The police abstract at Page 21 of the Record and which was produced in evidence and referred to by the Learned trial magistrate in his judgement reveals that the 4th Respondent in the lower Court GILBERT KIPKEMOL RONO Was the beneficial owner of the Il -fated lorry herein KCC - 991Z / ZG 7409 (see line 10-20 of the said abstract) and which evidence is equally buttressed in the copy of motor vehicle record of trailer no. ZG - 7409 at page 28 of the record line 16 onwards where his name also appears as the owner thereof and which document suffices as adequate prove of ownership of a motor vehicle as was held in the case of Nancy Ayemba Ngaira -VS- Abdi Ali [2010] eKLR cited herein after.

    iii. Similarly, documents filed by the 3rd Respondent in the lower Court including hire purchase agreement, between him and the accident herein was erroneous as he would he held vicariously liable for acts and or omission of the driver thereof who was his agent/servant.

    iv. That the adjudicator's decision that, there was no nexus under the doctrine of vicarious liability and hence she urge the Court to interfere with the said lower Court's decision. She relies on the case of Nancy Ayemba Ngaira -VS- Abdi Ali [2010] eKLR where it was held that;

        > "In judicial practice, concepts have arisen to describe such alternative forms of Ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the Certificate of registration: and in the instant case at the trial level, had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question. The trial Court, therefore, had no legal basis for limiting ownership to 2nd defendant whose name was shown on the certificate of registration for the motor vehicle.

        The correct decision would have been to attach liability not just to 2nd defendant, but to both defendants."

11. The Appellant submits that failure by the learned trial adjudicator to note and or take into account the foregoing evidence can only be explained by the fact that the learned trial magistrate did not properly , carefully, exhaustively and or as expected carry out his legal duty of considering all the materials on record while arriving at his decision and which failure amounts to an error of principle and or misdirection which entitles this honourable to interfere with his decision as was held case of Kinnock Trading Limited v Evans Mangi Dogo & 131 others (Civil Appeal 153 of 2019) [2021] KECA 274 (KLR) (3rd December 2021)(Judgment):-

    > "That said, there was material placed before the Court through the supporting affidavit of Cynthia Onyango that demonstrated that: on 1st August 2016, Nyange Sharia Advocate filed a notice of appointment and a statement of defence and counterclaim on behalf of

six respondents; on 10th August 2016, the firm of Kenga & Company entered appearance and filed a statement of defence in the suit on behalf of "the defendants"; and on 25th September 2018, the firm of Miller George & Gekonde Advocates filed a memorandum of appearance "for the defendants." bThe record further shows that when the matter was first scheduled for hearing before the learned Judge on 20th April 2017, Mr. Nyange appeared for the respondents. On a subsequent occasion, on 25th September 2018, a Mr. Miller appeared for the respondents before the learned Judge and stated that, I had spoken to Mrs. Oballa and we are trying to settle the matter. We pray for another date" whereupon the learned Judge re-scheduled the hearing to 16th January 2019. On this date, it was Mr. Nyange, and not Mr. Miller, who appeared for the respondents and prayed for the dismissal of the suit. There was also a Valuation report that was exhibited to demonstrate that negotiations with a view to settlement had progressed. even though it is contended that the George & Gekonde Advocates had no mandate in the matter. In rejecting the application to set aside the order dismissing the suit, and in declining to reinstate the suit, the learned Judge does not respectfully. appear to have considered this material. Neither does the learned Judge appear to have considered that respondents had themselves mounted a counterclaim, asserting rights Over the suit property. In our view, had the Judge considered the additional material to "G We have referred, we think he would, proportionally, have come to a different conclusion. We are persuaded that the learned Judge misdirected himself in failing to consider those matters with the result that he arrived at a wrong Conclusion. We are therefore entitled to interfere with his decision, which we hereby do. We allow the appeal."

12. That the learned trial adjudicator erred in law by holding that even after interlocutory judgment in default had been entered in favour of the Claimant against the Respondents in the lower Court, the Claimant was still bound to prove liability against them.

13. The Appellant submitted that in view of the interlocutory judgment having entered against the Respondents, the issue of liability was deemed already determined in her favor and cited the case of Nicholas King'oo Kithuka v Jap Quality Motors & another [2021] eKLR to that effect. In her humble view, the law on this matter is well settled to the effect that once an interlocutory judgement has been entered in favour of a Plaintiff/Claimant against a Defendant/Respondent in a negligence claim, the issue of liability is deemed to have been determined in favour of the Plaintiff/Claimant against the Defendant/Respondent at 100% and the claimant need not prove the same and hence any position to the contrary is plainly per incuriam/erroneous, she rely on the case of lbrahim Ahmed (Suing as The Personal Legal Representative of the Estate of Anisa Sheikh Hassan (Deceased) v Lem Lem Teklue Muzolo where it was held that: -

> "Interlocutory judgment having been entered, I hold the Defendant 100% liable for the accident."

14. That the Court of Appeal in Abdulahi lbrahim Ahmed v Lem Lem Ahmed CA NbI No.278 of 2005 during the appeal in respect of the orders striking out the suit herein stated as follows:

> "Regarding the first principle we can do no better than to repeat what was said by this Court in the case of Felix Mathenge v Kenya Power & Lighting Co. Ltd Civil Appeal No 215 of 2002 that:- "The role of the Court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never

be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages.

15. Further Reliance is placed on the case of David Maina Nioroqe vs Ginaalili Farm Limited Civil Case No 191 of 2010 at Nakuru where the judge observed: -

> " having entered interlocutory judgment. it was not open once again for the same Court in the instant case to state that the Appellant had not proved liability against the Respondent. The role of the Court after entering the interlocutory judgment In Such a case like this was only to assess damages since the interlocutory Judgment having been regularly obtained there can never be any doubts that Judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to quantum of damages.

16. Finally, the Appellant cites the case of Nicholas King'oo Kithuka v Jap Quality Motors & Another [2021] eKLR where the Court held that;

> " Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondents even if the appellant chose to remain silent. However, in this case, there was an interlocutory judgement against the 1st Respondent who defaulted in entering an appearance and to file his defence. The position as regards liability where an interlocutory judgement has been entered is now clear."

17. And In Charles Ogendo Ayieko vs. Enoch Elisha Mwanyumba Mombasa HCCC No. 1035 of 1983, the Court held that:-

> " Where an ex parte interlocutory judgement has already been entered against the defendant the Court does not have to decide on the question of liability. "

18. That the reason why the Court should not decide the liability according to the Court of Appeal in Makala Mailu Mumende vs. Nyali Gulf & Country Club Civil Appeal No. 16 of 1989 [1991] KLR 13 is that: "Judgement in default of appearance presupposes that there is a cause of action... The judge cannot set aside a Judgement without an application before him, as he has no jurisdiction to do so...Justice though must be done to both parties must be done in accordance with the law...Where judgement is entered in default liability is admitted and the Court must proceed to assess damages.

19. That this was echoed in Julius Murungi Murianki vs. Equitorial Services Ltd. & Another Nairobi HCCC No. 2714 of 1988 where it was held that:

> " The defendants herein filed no defence and they are deemed to have admitted the facts complained of under Order 6 rule 9(1) of the Civil Procedure Rules since failure to file a defence operates as an admission of all the allegations in the plaint except damages."
>
> That decision was based on the decision in Cleaver-
>
> Hume vs. British Tutorial College (Africa) Ltd [1975] EA 323 to the effect that: "The effect of Order 6 rule 9 (which deems to be admitted pleadings not traversed) is to ensure that the parties are ultimately, but definitely, brought to an issue, and that at the close of the pleadings the issues between the parties are clearly and precisely defined. Thus if no defence is served in answer to the statement of claim or no defence to counterclaim is served in answer to the counterclaim, there is no issue between the parties; the allegations of fact made in the statement of claim or counterclaim are deemed to be admitted and the plaintiff or defendant, as the case may be, may enter, or apply for, judgement in default of pleading...A

failure to file a defence must now be regarded, save as to damage, as an admission of each of the allegations in the plaint. This is a far-reaching provision which should reduce in some measure the expense and delays in undefended suits." What these decisions state is that once a default judgement is entered, the issue of for determination is quantum of damages, if any. The Court cannot either ignore liability is also determined and the only issue and fact of the said judgement or purport to suomoto set it aside after hearing evidence on quantum and then party as the learned trial mod to dismiss the suit against the defaulting respectfully did. Accordingly, as far as the 1st Respondent was concerned liability against him was a foregone conclusion."

20. That the applicability of the legal position in foregoing decisions in this matter is that once interlocutory judgement was entered against the 4th and the 5th Respondents in the Lower Court, the issue of liability against them was a foregone conclusion and the and the Court only issue that remained for the Court was assessment of damages needed not to revisit the issue of liability as it did and thereby arriving at an erroneous decision in respect thereto.

21. The Appellant submit that the learned trial adjudicator misapprehended the law in regard to the legal effect of entry of interlocutory judgment while reaching his decision/findings on liability in respect to the 4th and 5th Respondents and urge this Court to interfere with the same as it falls within the grounds enumerated in the case of Hellen Gathoni Mbuthia & another v Nelson Wachira Murage [2016l eKLR.

22. That if the learned trial magistrate had taken into consideration the police abstract and copy of motor vehicle records which proved that the 4th Respondent in the lower Court (Now 1st Respondent in the Appeal herein) have held him liable for was owner of the lorry herein, then in all likelihood the accident herein under the doctrine of vicarious liability as there was clearly a nexus between him and the accident as submitted herein-above.

23. That had the learned trial adjudicator appreciated the fact that once interlocutory judgement was entered in favour of the Claimant against the 4th and 5th Respondents in the lower the issue of liability was deemed determined in favour of the Claimant against them at 100% and the claimant therefore needed not to prove the same, then we also opine that he would have proceeded to hold the 4th and 5th Respondents in the lower Court liable for the accident herein and proceed to assess damages.

24. It is the Appellant's submission that, in view of the totality of the foregoing she urge this Court to allow the Appeal and set-aside the Lower Court's judgement dismissing the Claimant's case against the 4th and 5th Respondents herein and instead hold them liable jointly and or severally liable for the same.

25. The Appellant prays for costs of this appeal since it follow event in accordance to Section 27 of The *Civil Procedure Act*.

26. The Appellant has framed two issues for the consideration of the Court;

Analysis and disposition

27. This Court has refined the issues under consideration to be:

    a. Whether this appeal is merited?

    b. Whether the Appellants are entitled to costs in this appeal?

28. This being a first Appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced in the trial Court in order to arrive at its own independent conclusion considering the fact that, it did

not have the advantage of seeing and hearing the witnesses as they testified. (Selle vs. Associated Motor Boat Company Ltd [1968] EA 123.)

29. The Main Bone of contention by the Appellant is that the 1st Respondent was identified as motor vehicle owner in the police abstract and an NTSA official search report and that sufficient proof was disregarded by the Adjudicator leading to the dismissal.

30. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

31. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    i. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    ii. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

32. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in Court. subsection (2) Refers to the legal burden of proof.

33. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that, the burden of proof as to any particular fact, lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the Court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

34. The question therefore is, whether the Appellant herein discharged the burden of proof that the Respondent was liable in negligence for the occurrence of the accident wherein the plaintiff was allegedly injured

35. During a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

36. This Court observes that there exists a separate registration regime for trailers and that ownership of a trailer does not necessarily imply ownership of the Lorry pulling the trailer.

37. The Court notes that, the NTSA official search as at 6th August 2022, for the Motor vehicle prime mover KCC 991Z was jointly registered to Alios Finance Kenya Limited and Kevin Ngotho Njenga and neither the 1st Respondent ort the 2nd Respondent are mentioned herein.

38. The Court further notes that, the NTSA official search as at 6th August 2022, for the Trailer ZG7409 was jointly registered to in the Name of the 1st Respondent and NCBA Bank.

39. I find no fault in the Trial adjudicator finding that no evidence was led by the Appellant in proof of ownership against the 1st Respondent and no evidence at all was led against the 2nd Respondent.

40. This Court thus concludes that, the trial Court did not act under a mistake of law or in disregard of principles, or the trial Court considered irrelevant matters or failed to consider relevant matters or acted under a misapprehension of facts/evidence to arrive at the judgment dated 19th January 2023 to warrant interference by this Court.

41. I accordingly find this Appeal to be without merit and the same is accordingly dismissed.

42. There shall be no orders as to costs as the Appeal was undefended.

It is so ordered

DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU ON THIS DAY OF 21ST DAY OF FEBRUARY, 2024.

....

S. Mohochi

JUDGE