Surestep Systems & Solutions Ltd v Kihumba & another (Civil Appeal E310 of 2023) [2024] KEHC 7605 (KLR) (Civ) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7605 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E310 OF 2023

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

SURESTEP SYSTEMS & SOLUTIONS LTD ..... APPELLANT

AND

STEPHEN KIHUMBA ..... 1ST RESPONDENT

JONSU ROAD & BRIDGES COMPANY LTD ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. Aduke J.P.A. (SRM) in Milimani CMCC No. 4521 of 2019, delivered on 22{{^nd}} March, 2019)

JUDGMENT

1. This is an appeal from the decision of Aduke JPA Senior Resident Magistrate given on 22/3/2023 in Milimani CMCC 4521 of 2019. The Appellant was the plaintiff.
2. They set out 7 grounds which are prolixious, repetitive and unseemly. They raise only 2 issues: -
    a. Whether Respondents were liable owners and driver of the Motor Vehicle Registration No. KBT 630H
    b. Reliefs
3. The Appellant filed suit on 24/6/2018 against the 2nd Respondent as the owner in possession but unregistered owner and the 1st Respondent was the driver of Motor Vehicle Registration No. KBT 630H, which he was carefully driving along Kamiti road when the accident occurred at Lumumba Drive junction due to the Respondent negligence.

4. Particulars of negligence were set out. The Appellant also relied on the doctrine of res ipsa liquitor. They sought a sum of Ksh.224,950/- being repair costs for motor vehicle registration No. KCG 698 Y and tracing fees. They filed a witness statement of Gideon Chacha indicating that he was brought in the suit on basis of the doctrine of subrogation on behalf of Kenya Alliance Insurance Limited.

5. The Respondent filed defence on 10/9/2019 and stated that they are strangers. They denied knowledge of the accident. In a rather bizarre pleading they stated that if the accident occurred it was caused by Motor Vehicle Registration No. KCG 694 Y. It is my understanding that such defences are evasive and should in a proper day be struck out. Either the accident occurred or not. In The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the Appellant's defence. This was that if the Respondent had extended any overdraft facilities without stating the amount involved, to the Appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

6. Whereas a party can set alternative claims, they are not allowed to approbate and reprobate. By saying they are strangers, they cannot at the same time raise a defence of contributory negligence. This is not the same as denying ownership generally.

7. On 12/3/2020 the matter was for hearing the Respondent sought to file a statement and documents. On 27/10/2020 they sought to adjourn as they were waiting for the investigations report. The court reluctantly gave an adjournment. It really does not matter whether the court willingly gave or reluctantly at the end of the day the matter was adjourned. A date was taken for mention date. Subsequently the plaintiff also indicated that they were not ready.

8. The matter proceeded on 26/4/2022. PC John Omollo testified and produced a police abstract. The police abstract was produced in that suit indicating that the owner of the said motor vehicle registration number KBT 630 H was Stephen Kihumba the 1st Respondent. He blamed Motor Vehicle Registration No. KBT 630H for hitting the Motor Vehicle Registration no. KCG 694 Y.

9. PW2, Philip Mwita produced the assessment report dated 1/3/2018 as Exhibit 3 on behalf of Eric N Kima. He testified that the vehicle was repaired.

10. PW4, Kelvin Gitonga, a recovery officer at Kenya Alliance insurance company adopted his statement and produced exhibit 10 – 11. The court reserved judgment for 11/1/2023. It resulted in this appeal.

Analysis

11. The judgment does not appear to relate to the case. It is a judgment coupled together and dealt with issues that were neither pleaded nor left for court to determine.

12. For example, I do not know what the CR12 will help in determining ownership of a vehicle. The police abstract showed who the owner was. There was no serious or any rebuttal of that evidence. Secondly the Appellant had pleaded particulars of negligence which remained unrebutted. I cannot fathom how the registrar of companies can determine who owns the vehicle.

13. This is sad because, the driver was sued. Even where ownership is not proved for the vehicle, surely the driver cannot miss. And if they have a joint defence, the court has no business separating two people who have agreed to be hanged together.

14. I have read many judgments by this court and I doubt that this is her normal way of writing. It is off the mark.

15. The Respondents filed a defence jointly. They did not issue notice against co-defendant. The court has no business separating the two. The 1st Respondent was said to be the driver. No amount of search will reveal the drivership. The same is factual and fleeting. He gave details to the police. The court was plainly wrong in dismissing the suit.

16. Section 8 of the *traffic act* is irrelevant for purposes of this suit. It was not raised by the parties. Order 2 rule 4(1) of the Civil procedure Rules provides as follows: -

    (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality-

        (a) which he alleges makes any claim or defence of the opposite party not maintainable;

        (b) which, if not specifically pleaded, might take the opposite party by surprise; or

        (c) which raises issues of fact not arising out of the preceding pleading.

17. The Respondents were under duty to specifically deny ownership and cross examine on the same.

18. Further, the duty to proof negligence was on the Appellant. In Blyth v Birmingham Water Works Co {1856}:

> " Negligence is the omission to do something which a reasonable man, grieved upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man could not do."

19. In Re H C minors {1996} AC 563 at 586 – Lord Nicholls explained himself as follows:

> " The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation ....."

20. Circumstances of the case are crucial in determining the natural cause of events. In the case of Berkley Steward v Waiyaki Vol 1 KAR 1118 {1986 – 1989} it was held:

> " Under Section 119 of the *Evidence Act*, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case."

21. In the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused ...
>
> What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

22. The burden of proving contributory negligence on the part of the plaintiff is on the defendant. in Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 the court stated hereunder: -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence".

23. A finding on contributory negligence must be based on facts. The court will be slow to interfere with such finding unless it is based on no evidence or the court below was simply wrong. In Jones V Livox Quarries Ltd [1952] 2 QB608 the Court of Appeal stated that; -

> " An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial court. In such circumstances the appellant Court may reassess the apportionment if it is satisfied that the assessment made by the Judge was plainly incorrect"

24. In this case the Respondent tendered no evidence. Consequently there can be no basis for contributory negligence. In the case of MacDrugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence"

25. In Grace v Australian Knitting Mills Ltd [1938] AC 85 the court stated: -

> " It is clear that the decision in Donoghurt case treats negligence, where there is a duty to take care, as a specific tort in itself and not simply as, an element in some more complex relationship or some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of action able negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however essential in English Law that the duty should be established: The mere fact that a man is injured by another's act gives in itself no cause of action. If the act is deliberate, the party injured will have to claim in Law even though the injury is interment, so long as the other party is merely exercising a legal right if the act involves lack of due care, again no case of actionable negligence, will arise witness the duty to careful exists.

26. In the case of Alfred Chivatsi Chai & another v Mercy Zawadi Nyambu [2019] eKLR, Nyakundi R J, stated as follows: -

> " By reason of the said duty of care, the same standard of care underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well that of others. When it comes to contributory negligence and res ipsa loquitor the test can be followed.
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> In the case of Benner v Chemical Construction Ltd [1971] 3 ALL ER 822 where the Court of Appeal said in a Judgment by David C. J –
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> "In my view it is not necessary for the doctrine to be pleaded, if the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, that it is for the defendants to explain and show how the accident could have happened without negligence."
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> Further in Lodigelly Iron Coal Co. Ltd v Mcmillan [1934] A.C.
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> "The court held it in strict legal analyses negligence means more than heedless or careless conduct whether in omission or commission. It properly connotes the aspect concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

27. In the case of *Obala v Okello & 2 others (Civil Appeal E022 of 2022)* [2022] KEHC 15762 (KLR) (22 November 2022) (Judgment), Justice Aburrili stated as follows: -

> " It is also worth noting that it was the appellant who introduced the aspect of a third party in the proceedings and therefore, under those circumstances, it was incumbent upon the appellant, if her case was that a third party was to blame for the accident, to enjoin the said third party as she had already alluded to in her own pleadings."

I find that the appellant was under an obligation, if she felt that someone else was responsible for or contributed to her predicament in the case, to enjoin that someone else as a third party, following the procedure laid out in the law, so that she can claim from him any loss or award that she may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.

39. In the case of Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR, it was held that: -

> "In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under order 1 rule 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant and has given directions under order 1 rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out."

28. The decision regarding section 8 of the *traffic act* is per incurum. The said section provides as follows: -

> " The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

29. The section does not cover a driver. Secondly, it is predicated on a negative, the contrary being shown. The court of Appeal (Tunoi, O'kubasu & Deverell, JJ.A) settled that issue in the case of Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR: -

> " We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in Osapil Vs. Kaddy [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise."

30. The Appellant testified to the extent of blame. They were not cross-examined. They proved negligence. The police officer stated that the trailer was to blame for hitting the motor vehicle registration No. KCG 698Y Xtrail.

31. The particulars of contributory negligence do not arise from a duty owed to the Respondent but a duly owed by the Appellant to themselves. The Respondent did not tender evidence in rebuttal. Consequently, the particulars remained bare. The pleading and submissions cannot take place of evidence.

1. It was stated by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

2. In *Ogando v Watu Credit Limited & another (Civil Suit E098 of 2022)* [2024] KEHC 3074 (KLR) (14 March 2024) (Judgment), I posited as hereunder: -

> " On submissions the position I hold is that parties cannot rely on submissions to do that which should have been done by pleadings and evidence, in the case of Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, justice G V Odunga as then he was stated as doth: -
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> "It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions.

3. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretize and focus on each side's case to win the court's decision that way. Submissions are not evidence on which a case is decided."

4. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgment. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

5. in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case that affect its outcome. Final submissions are not evidence. Final submissions may be heard or

even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

32. I dismiss particulars of contributory negligence as unproved.

33. Consequently, I find the Respondents were 100% liable for the accident.

34. On special damages, they must be specified and proved. In the case of David Bagine Vs Martin Bundi [1997] Eklr, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

32. In the case of Swalleh C. Kariuki & another v Violet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

35. A sum of Ksh.224,950/- was pleaded. However, the court failed to assess damages. Even where a suit is dismissed the court is under duty to assess damages. This avoids a scenario where the court will have to remit the case back or go to the rigours of assessing. More importantly, by not assessing, it takes away the advantage the court had in forming an opinion on the evidence. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -

It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

36. Nevertheless, this court has an advantage of looking at the same documents as the court below. The testimonies will not change the documents, unless the documents were discredited as bogus. This is

lost when the court does not assess damages. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

37. The court will thus assess the evidence tendered to ascertain the amount of special damages proved. Invoice No. 013 was indicated as paid on 17/3/2018. The sum of Ksh.200,000/= was proved.

38. An investigation report reference TRC/KNA/16/11/7803/2018 was produced for Investec Insurance International Investigators. A fee note of Ksh.24,950 was produced with a tax invoice of Ksh.17,400 for the professional fees. A sum of Ksh. 24,950 was proved. This amount was shown as paid. Consequently, I find that special damages of Ksh. 224,950 was proved. The same is thus awarded.

39. The Appellant shall have costs of the suit in the court below. However, the Appellant shall bear their own costs in the lower court.

Determination

40. The upshot of the foregoing is that I make the following orders: -

    a. The appeal is allowed. The judgment and decree in Nairobi CMCC 4521 of 2019 is set aside and in lieu thereof I enter judgment for the Appellant against the Respondents for:-

    a. 100% liability against the Respondents jointly and securely.

    b. A sum of Ksh.224,950/-

    c. Costs in the lower court to the Appellant.

    d. Each party to bear their own costs in the appeal.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ngugi for the Appellant

No appearance for the Respondents

Court Assistant - Jedidah