NCBA Bank Kenya PLC (Formerly National Industrial Credit Bank Kenya Plc) v Chama & another (Civil Appeal E023 of 2023) [2024] KEHC 13058 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13058 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E023 OF 2023

AC BETT, J

OCTOBER 25, 2024

BETWEEN

NCBA BANK KENYA PLC ..... APPELLANT

FORMERLY NATIONAL INDUSTRIAL CREDIT BANK KENYA PLC

AND

CHARLES MUNDIA CHAMA ..... 1ST RESPONDENT

ERNEST KANDU ISIAHO ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of R. N. Akee (SRM) in Kakamega CMCC. No. 190 of 2018 delivered on 6{{^th}} July 2022)

JUDGMENT

Background

1. By a plaint dated 4th April 2018, the 1st Respondent sued the Appellant and the 2nd Respondent jointly for special damages of Kshs. 60,690/= plus general damages and diminished earning capacity (sic). The 1st Respondent's case was that on 31st December 2017, he was lawfully riding his motor cycle at Mukumu area along Kakamega – Kisumu Road when motor vehicle registration number KCL 446C Suzuki Mauli Omni bus was so negligently and recklessly managed by its driver that he caused the same to lose control and encroach onto his oncoming motor cycle resulting in a collision whereby he sustained serious injuries. The 1st Respondent's assertion was that the said motor vehicle (hereinafter referred to as the subject motor vehicle) was registered in the names of the Appellant and the 2nd Respondent as owners and its driver was their agent or servant.

2. The Appellant filed a defence in which it asserted that it only financed the 2nd Respondent to purchase the subject motor vehicle by way of a hire purchase agreement and only registered itself as joint owner of the same pending final payment of the purchase price. It therefore contended that its rights and

liabilities were limited to those of a financier and it could therefore not be held liable for the acts and omissions of the 2nd Respondent. It further denied that the subject motor vehicle was being driven with its express consent and direct authority. It further gave notice that at the earliest opportunity it would file an application to strike out its name as a party to the proceedings; which it did unsuccessfully.

3. The 2nd Respondent did not appear and the 1st Respondent secured an interlocutory judgment against him on 18th August 2021. The matter then proceeded to hearing after which the trial court found the Appellant and the 2nd Respondent jointly liable and entered judgment against them for general damages in the sum of Kshs. 1,000,000/= and special damages of Kshs. 60,690/=.

4. The Appellant was aggrieved by the decision of the trial court and filed a ten-point memorandum of appeal which in a nutshell, fault the trial court for finding that it was liable for the accident despite all evidence pointing to it being merely a financier and not the owner of the subject motor vehicle.

5. The appeal was canvassed by way of written submissions.

6. The Appellant submits that it was merely a joint registered owner of the subject motor vehicle to secure its interest as a financier and not a beneficial owner thereof and that it did not have any direct control of actual possession of the subject motor vehicle. It is the Appellant's case that no reasonable cause of action was disclosed by the 1st Respondent against it.

7. The Appellant further submits that liability could not attach to it as the subject motor vehicle was not in its possession and or control at the time of the accident and that the relationship between the Appellant Bank and the 2nd Respondent was that of a Bank-Customer relationship limited to financing the purchase of the subject motor vehicle. It contends that the subject motor vehicle was not being driven on its behalf or for its benefit at the material time of the accident nor was the driver driving it on its behalf as its employee or agent.

8. The Appellant relies on the following cases; Equity Bank Limited v. Naftal Anyumba Onyango & 2 others [2014] eKLR and Consolidated Bank of Kenya Limited v. Mwangi & another [2022] KEHC 3104 (KLR) in support of the assertion that as a financier, it could not be held liable vicariously or otherwise for the damages suffered by the 1st Respondent due to an accident involving the subject motor vehicle.

9. The Appellant submits that the court ought to award it the costs of the appeal.

10. In its conclusion, the Appellant submits that the holding of the trial Magistrate flies on the face of established doctrine of excluding negligence liability against financiers or lenders as he ignored the doctrine of stare decisis thus rendering the entire judgment erroneous. The Appellant further submits that even if the appeal is allowed, the 1st Respondent can still execute the judgment against the 2nd Respondent and shall not suffer any prejudice.

1st Respondent's Submissions

11. The 1st Respondent submits that the duty of this court being a first appellate court is to re-evaluate the evidence on record afresh and appreciate that the trial court applied the correct principles of law to arrive at the impugned judgment.

12. He further submits that based on the law, facts and evidence tendered by the parties, the Appellant had an interest in the motor vehicle. He cites Section 8 of the *Traffic Act* and Section 107 and 108 of the *Evidence Act*. He insists that the taking of a joint insurance at the time of the purchase by the Appellant is a manifestation that the Appellant was aware that the motor vehicle was in the control of a competent driver for such insured liability to attach. The 1st Respondent argues that the Appellant assumed risk by

taking a third party insurance and cannot claim that the driver in control of the subject motor vehicle was not their agent at the time of the accident. He relies on the case of Lucena -vs- Crawford (1806) 2 BOS PNR 269 at 302 and Anctol -vs- Manufacture Life Insurance Company [1899] AC 604.

13. The 1st Respondent's submissions are that he proved his case on a balance of probabilities to the required degree as expounded in the case of Miller -vs- Minister of Pensions [1947] 2 ALL ER 372 cited with approval in D.T. Dobie & Company (K) Ltd -vs- Wanyonyi Wafula Chebukati [2014] eKLR.

Issues for Determination

14. The Appellant framed the issues for determination as follows:-

    a) Whether liability could lie against the Appellant as financier and or lender in a financed purchase of a motor vehicle.

    b) Whether registration of the Appellant as a co-owner of the subject motor vehicle to secure financial interest invites risk or liability.

    c) Whether there was any agency relationship between the 2nd Respondent and/or driver of the subject motor vehicle and the Appellant.

    d) Who should bear the costs of the Appeal and costs of the suit in the trial court.

Analysis and Determination

15. The evidence before the trial court was not contested. It is not in dispute that the accident occurred as stated or that the 1st Respondent was injured as a result thereof. The germane issue was whether the Appellant being a financier of the subject motor vehicle should be held vicariously liable for the accident.

16. Section 8 of the *Traffic Act* states as follows:-

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

17. It is clear that pursuant to Section 8 of the *Traffic Act*, the registration records obtained from the Registrar of Motor vehicles is not conclusive proof of ownership of a vehicle. This is because the *Traffic Act* envisages other aspects of ownership of a motor vehicle. In the case of Jared Magwaro Bundi & Another -vs- Primarosa Flowers Limited [2018] KEHC 7792 (KLR), the Court of Appeal held as follows:-

> " ... Section 8 of the *Traffic Act* recognizes registration book or the Registrar's extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered."

18. Flowing from the holding of the Court of Appeal in the aforesaid case, whereas the law presumes that the owner of a motor vehicle is the one appearing in the registration documents or log book, a party can adduce evidence to rebut the presumption of ownership by proving that the vehicle belongs to a de facto, beneficial or possessory owner.

19. The evidence adduced by the Appellant which was not controverted by the 1st Respondent, was that the 2nd Respondent was the actual owner of the subject motor vehicle. He had bought by way of hire purchase the motor vehicle albeit with the aid of financing from the Appellant who was registered as joint owner purely to safeguard its interest as a financier. The evidence was adduced by production of the following documents:-

(i) A Chattels Mortgage Agreement

(ii) Letter of offer dated 7th March 2017

(iii) Account statement

(iv) Standing Order form

(v) Release letter/letter of understanding

(vi) Anti-theft Certificate

In the premises, the Appellant proved on a balance of probabilities that it was neither a beneficial owner nor possessory owner of the subject motor vehicle. Further there was no evidence that it was ever in any actual possession or direct control of the motor vehicle.

20. Upon evaluation of the evidence and the law, I find that the Appellant was a lender or financier of the subject motor vehicle and therefore liability could not attach to it over the accident. In making the said determination, I am guided by the case of Equity Bank Limited -vs- Naftali Anyumba Onyango & 2 others [2014] eKLR where Justice R. N. Sitati stated:-

> " 37. Secondly on the issue of liability of the appellant as the financier I do find that the same cannot lie as against them. My reasoning is that the appellant did not have control over the borrower on how to manage the motor vehicle. His interest was only on the repayment of the loan by the 3rd respondent. He never benefited from the business by the 3rd respondent neither did he manage the same. As earlier stated the only persons liable for the said accident were the 3rd respondent and the 2nd respondent. No evidence was placed before the trial court by the 1st respondent that the appellant herein managed the suit motor vehicle on a daily basis nor that the appellant received any benefit (other than the loan repayment) from the use of the said motor vehicle on a daily basis. The appellant's involvement regarding the motor vehicle herein was purely that of 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 3rd respondent.
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> 38. Lastly, I do find and hold that co-registration between appellant and 3rd respondent was a security measure between the appellant and the 3rd respondent herein. The appellant's interest remained that of financier which could not invite any risk or otherwise. There was no relationship either in employment, agency or servant between the appellant herein and the driver who drove the motor vehicle which allegedly caused the said accident.
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> Conclusion
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> 39. I therefore make a finding that the judgment entered by the learned trial magistrate was erroneous and the same is set aside. In lieu thereof, I enter

judgment on liability at 100% as against the 2nd and 3rd respondents. I find that the appeal herein has merit and the same is allowed with costs to the appellant."

21. On whether there was any agency relationship between the 2nd Respondent and or the driver of the subject vehicle and the Appellant, it is evident that the Appellant, being a mere financier who had no other interest in the subject vehicle, was not connected in any way, to the 2nd Respondent and/or driver of the subject motor vehicle. In the case of Consolidated Bank of Kenya Limited -vs- Veronicah Wangechi Mwangi & Another [2022] KEHC 3104 (KLR), the Court allowed an appeal on the grounds that the Bank was not in control of the motor vehicle involved in the road traffic accident and stated that:-

> "As to whether the owner who has a financial interest in a motor vehicle has control over the driver, which is at the heart of this appeal, our courts have held that a financier's only interest in the security is to secure the repayment from the owner and it is not in control of the motor vehicle for that reason."

22. Flowing from the holding in the aforestated decision, the court finds that the 2nd Respondent and/or driver of the subject motor vehicle were not agents of the Appellant.

23. The 1st Respondent has argued that the fact that the insurance cover with respect to the subject motor vehicle was issued in the joint names of the Appellant and the 2nd Respondent should be deduced to mean that the Appellant was aware that the subject motor vehicle was in the control of a competent driver. The said argument is not tenable for the reason that the Appellant, being a financier has an economic stake in the motor vehicle and therefore an insurable interest. The joint insurance cover is to protect the Appellant's interest in the motor vehicle in the event it is destroyed, damaged, lost or stolen before full payment is made and is in no way an acknowledgement of the Appellant's proprietory, possessory or beneficial interest in the vehicle. This position is confirmed by the letter dated 28th March 2017 signed and stamped on behalf of UAP Insurance Company Limited and in Page 45 of the Record of Appeal where the Appellant was being notified that its interest had been noted in the insurance policy and that any claim payable under the Policy would be made payable to the Appellant. Further, the Chattels Mortgage stipulates that the Mortgagor (read 2nd Respondent) would during the currency of the mortgage, insure the Goods (read subject motor vehicle). Clearly, the comprehensive insurance cover was taken at the behest of the Appellant to secure its interest and not that of the 2nd Respondent or third parties. It is instructive to note that one of the conditions in the Appellant's letter of offer was for the 2nd Respondent to take out a third party cover as an addition to the comprehensive cover if the 2nd Respondent intended to use the subject vehicle as a PSV vehicle. The authorities cited by the 1st Respondent which define "insurable interest" therefore have no relevance to this appeal.

24. On the issue of costs, it is trite knowledge that costs follow the event unless for special reasons, the court sees the need to exercise its discretion otherwise. This is well articulated in Section 27 of the *Civil Procedure Act* which states as follows:-

27. Costs

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for

the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

25. Costs are often awarded, not to penalize the losing party but to reimburse the successful litigant for the expenses incurred in the litigation. It is therefore meet and just, unless in exceptional circumstances that the successful litigant be awarded costs. See the case of Cecilia Karuru Ngayu -vs- Barclays Bank of Kenya & Another [2016] eKLR where Justice John Mativo relied on the case of Republic -vs- Rosemary Munene Ex parte Applicant -vs- Ihururu Dairy Farmers Co-operative Society Limited where the Court said:-

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

26. For the reasons stated above, the appeal herein is allowed in its entirety. The judgment and decree of the lower court is hereby set aside. Instead, Judgment on liability is entered against the 2nd Respondent solely. The 2nd Respondent shall also bear the costs of the suit in the trial court. The costs of this appeal shall be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Ooko for the Appellant

No appearance for the Respondents

Court Assistant: Polycap