**Multiple Hauliers (EA) Ltd v Kenya Wildlife Services (Civil Suit 583 of 2010) [2023] KEHC 2082 (KLR) (Civ) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2082 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 583 OF 2010**

**CW MEOLI, J**

**MARCH 16, 2023**

**BETWEEN**

**MULTIPLE HAULIERS (EA) LTD ..... PLAINTIFF**

**AND**

**KENYA WILDLIFE SERVICES ..... DEFENDANT**

## JUDGMENT

1. Multiple Hauliers (E.A) Ltd, (hereafter the Plaintiff) had by a plaint dated 29.11.2010 and amended on 26.10.2012 sued the Kenya Wildlife Services (hereafter the Defendant) for negligence and sought special damages in the sum of Kshs. 10,882,600/-, costs of the suit and interest. The cause of action arose from a road traffic accident that was said to have occurred on 12.09.2010 along Nairobi – Mombasa Road.

2. The Plaintiff averred that at all material times the Defendant was the registered owner of motorcycle registration number KBB 699S (hereafter the motor cycle) which was in the control of and driven by the Defendant's servant, employee and or agent while the Plaintiff was the registered owner of motor vehicle registration number KAS 328N/ZC4932 (hereafter Plaintiff's motor vehicle). That on the 12.09.2010 the Plaintiff's motor vehicle was lawfully being driven along Nairobi – Mombasa Road near Makindu Township area when the Defendant's servant, employee or agent so negligently rode, controlled or managed the motor cycle that he caused it to collided with the Plaintiff's motor vehicle, as a result of which there was an explosion of fuel tank of the suit motor cycle, and a fire that reduced the Plaintiff's motor vehicle to a shell. And that goods on board the trailer of the Plaintiff's vehicle were extensively damaged, occasioning the Plaintiff loss and damage.

3. Initially, an interlocutory judgment had been entered against the Defendant, but the Defendant successfully applied to set it aside and was allowed to defend and filed a defence. However, the matter subsequently proceeded to hearing exparte as the Defendant failed to attend the court on the scheduled

hearing date. The proceedings were later set aside vide a ruling delivered on 30.04.2014 pursuant to a motion filed by the Defendant. The Defendant then amended its defence. The gist of the defence is a denial of the key averments in the plaint regarding inter alia, the ownership of the motorcycle, occurrence of accident, negligence, and ultimately liability. The Defendant averred in the alternative that negligence by the Plaintiff's driver solely caused or substantially contributed to the accident.

4. When the case eventually proceeded before this court, one witness, Teddy Joe Muriuki (PW1) testified for the Plaintiff. He identified himself as an automotive engineer at R.T (E.A) Ltd whose duties included managing car hire services. It was his evidence that pursuant to an agreement between R.T (E.A) Ltd and the Plaintiff the latter hired or leased various types of vehicles from the former; that invoices for services rendered would be issued to and payments received from the Plaintiff. Regarding the matter before the court, PW1 produced documents, mainly copies of invoices, in the list of documents in attached to the application filed on 07.10.2014 and dated the 06.10.2014 as PExh.1 and the supplementary list of documents (containing copies of invoices and cheques) as PExh.2.

5. During cross-examination he stated that the relationship between R.T (E.A) Ltd and the Plaintiff commenced on 01.04.2010 and that prior to the accident R.T (E.A) Ltd leased vehicles to the Plaintiff from 2010 to November of 2011 on a need be basis. That the payments reflected in cheques related to invoices issued after the accident, but he could not tell which vehicle was related to the accident in question. He was hard pressed to show receipts issued in respect of alleged cheques in the favour of R.T. (E.A) Ltd by the Plaintiff. In re-examination he stated that some of the invoices tendered in evidence were for the sale of tippers and prime movers and that the agreement was both for sale and hire of the vehicles. He asserted that under the agreement R.T (E.A) Ltd sold a tipper to the Plaintiff and was fully paid. The Plaintiff then closed its case.

6. The Defendant did not call any evidence in support of its pleadings.

7. Despite the directions made by the court for parties to file their respective submissions, only the Plaintiff complied. The Plaintiff's submissions were centered on the issues of liability and damages. Addressing the court on the first issue, counsel relied on the findings contained in the Investigation Report by Tromac Agencies dated 14.09.2010 to the effect that the rider of motorcycle registration number KBB 699S was to blame for the accident. And that payment of some Kes. 2,000,000/- by the Defendant's insurer, comprised an admission of liability. Counsel therefore urged the court to make a finding that the rider of the motorcycle was 100% liable for negligence and the Defendant vicariously liable for his actions.

8. Concerning quantum of damages, counsel relied on the decision in *Kenya Industrial Industries Limited v Lee Enterprises Limited* [2009] eKLR . He submitted the motor vehicle assessment report admitted into evidence proved that the pre-accident value of the Plaintiff's motor vehicle was Kshs. 5,000,000/- and the salvage could only fetch Kshs. 50,000/- due to the extensive damage caused by the accident. It was argued that the Defendant did not controvert the evidence, and hence the court was invited to find the pre-accident value proved. Regarding fees in respect of the investigation report and the assessment report, it was contended that invoices tendered proved sums pleaded under these expenses. Moreover costs incurred in obtaining the police abstract produced were equally proved as pleaded.

9. Reiterating the evidence of PW1 on loss of user, counsel asserted that the Plaintiff hired an alternative motor vehicle and trailer for a period of nine (9) months and the charges were duly invoiced and paid for by the Plaintiff. Moreover, to mitigate its losses, the Plaintiff purchased a prime mover and replaced the tanker. That the total expenditure incurred in hiring alternative vehicles and replacing the tanker

was proved as pleaded. In conclusion, the court was urged to allow special damages claimed in the sum of Kshs. 10,882,600/- costs and interest.

10. The court has considered the pleadings, evidence as well as the submissions of the Plaintiff. The issues falling for determination are whether the Plaintiff has established negligence against the Defendant on a balance of probabilities and whether it is entitled to the special damages claimed in the amended plaint. Pertinent to the determination of the issues are the pleadings, which form the basis of the parties' respective cases before this court.

11. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

12. The Plaintiff by its amended plaint averred at paragraphs 4 and 5 that:

> "4. On or about 12th day of September, 2010 the Plaintiff's motor vehicle registration number KAS 328N/ZC4932 was lawfully being driven along Nairobi-Mombasa raod near Makindu Township are when the Defendant's servant, employee and agent so negligently rode, controlled and or managed motor cycle registration number KBB 699S that he caused the same to collide with the Plaintiff's motor vehicle registration number KAS 328N/ZC4932 thereby occasioning serious loss and damage to the Plaintiff's motor vehicle on account of a fire that was caused by the explosion of fuel tank of the Defendant's motor cycle reducing the Plaintiff's motor vehicle to a shell. The Defendant's said servant or employee sustained fatal injuries.
>
> Particulars of negligence
>
> i. Riding without due care and attention.
>
> ii. Failing to keep any or any proper lookout or to have any sufficient regard for other traffic that was or might reasonably be expected on the said road and in particular the Plaintiff's motor vehicle.
>
> iii. Failing to stop, to slow, to swerve or in any way so manage or control the said motor vehicle so as to avoid the collusion.
>
> iv. Ramming into the Plaintiff's motor vehicle.
>
> v. Causing the said accident.
>
> vi. Failing to obey highway code

5. In so far as is applicable, the Plaintiff shall rely on the doctrine of *Res Ipsa Loquitor*." (*sic*)

13. The Defendant filed an amended statement of defence denying the key averments in the plaint and liability by stating at paragraph 4 and 5 that:

> " 4. The Defendant denies that there was an accident on the 12.09.2010 or any other date at all involving motorcycle registration number KBB 699S and the Plaintiff's vehicle as alleged or at all and further deny the particulars of negligence pleaded at paragraph 4(i) to(vii) and put the Plaintiff to strict proof thereof.
>
> 5. Without prejudice and in the alternative, the Defendant avers that if there was any accident as alleged (which is vehemently denied) the same was wholly caused by and or substantially contributed to by the negligence of the Plaintiff's driver." (*sic*)

14. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> > " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same *Act* provides for the evidentiary burden of proof and states as follows:
>
> > " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> > " Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same *Act* recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

15. From the pleadings it is apparent that the Plaintiff's action is a material damage claim founded on the tort of negligence. A material damage claim constitutes a special damages claim which must be specifically pleaded and proved. The special damage claim herein is entirely hinged on a finding of

liability in negligence. The Plaintiff called one witness who testified as PW1. He was an employee of R.T. (E.A) Ltd, a company from which the Plaintiff allegedly hired or purchased vehicles, and not an employee of the Plaintiff. His evidence was confined to the Plaintiff's claim for expenditure for hire of alternative transport and or purchase of vehicles. Not having witnessed the accident and by virtue of his relationship with the Plaintiff, PW1 did not and could not testify on the circumstances leading to the accident, how the accident occurred or even the vehicles involved in the accident. Hence there was no eyewitness account regarding negligence pleaded on the part of the Defendant.

16. In *Karugi & Another v. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added).

17. The facts of this case appear to raise questions similar to those raised by the Court of Appeal in *Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited* [2022] KECA 477 (KLR) upon reviewing evidence of the trial: -

> " The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

18. The Court concluded by stating that: -

> " As already stated, there was no eyewitness to the accident as would have shed light as to how it occurred. The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable."

19. The Plaintiff attempted through submissions to rely on the supposed finding of liability contained in the investigation report. That report was not tendered as an exhibit, and even if it was, the said finding constitutes hearsay evidence as regards the manner of occurrence of the accident and negligence of parties involved. Additionally, the claim, also made in submissions that an admission of liability could be construed from alleged payments made to the Plaintiff by the Defendant's insurer is equally ill-fated. The alleged payment was not demonstrated at the trial, and in any event, the insurer is a not a party herein, nor was the relationship alleged between the unnamed insurer and the Defendant demonstrated. Submissions cannot be used as a substitute for real evidence.

20. Under section 107 of the *Evidence Act*, the burden of proof lay with the Plaintiff and if its evidence did not support the facts pleaded, it failed as the party with the burden of proof. See the case of *Wareham t/*

*a A.F. Wareham* (*supra*). The court finds that the Plaintiff has miserably failed to prove the negligence alleged against the Defendant and therefore no liability can attach.

21. Thus, the question of proof of special damages is moot, save to point out that for whatever reason, the Plaintiff having failed to adduce evidence on pleaded particulars of negligence, also failed to call its own witness to testify on the special damage claim. It chose instead, specifically on the latter, to literally throw certain documentation, whose relationship to the Plaintiff's claims was not demonstrated, at the head of the Court through PW1, while leaving some filed documents unproduced. Not to mention that the alleged cheque payments by the Plaintiff to PW1's company were neither receipted nor shown to have been banked. Nor was it shown that the Plaintiff's account was debited in favour of R.T. (E.A.) Ltd in respect of the sums in the said cheques. The Plaintiff's suit must therefore fail and is hereby dismissed with costs to the Defendant.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF MARCH 2023.**

**C.MEOLI**

**JUDGE**

In the presence of:

Mr. Kkokebe/ Mr. Diro for the Plaintiff

Mr. Kagicha for the Defendant