SMP Capital Limited v Wachira & another (Suing as the Legal Representative of the Estate of the Late Moses Githaiga Kamunya) (Civil Appeal E007 of 2022) [2023] KEHC 22404 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22404 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E007 OF 2022

FROO OLEL, J

SEPTEMBER 22, 2023

BETWEEN

SMP CAPITAL LIMITED ..... APPELLANT

AND

LUCY WANGARI WACHIRA ..... 1ST RESPONDENT

JOSEPHAT MUCIRI KAMUNYA ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MOSES GITHAIGA KAMUNYA

(BEING AN APPEAL FROM THE RULING/ORDER OF HON. E.W MBURU (SRM.) DELIVERED ON 25th JANUARY 2022 IN NAIVASHA CMCC NO 122 OF 2020)

JUDGMENT

1. This appeal is brought against the ruling and decree of Honourable E.W Mburu dated 25th January 2022, where she declined the appellants application dated 4th February 2021, which was seeking that the suit as against the appellant (who was the 3rd Defendant in the primary suit) be stuck out on the basis that they were mere financiers of the 2nd defendant in the primary suit. they were not vicariously liable for his actions and thus were not a necessary party to the suit.

2. Dissatisfied by this decision, the Appellant filed this Appeal seeking to have the ruling/order set aside and or reviewed and they be awarded costs. The Appeal was founded on the grounds that;

    i. The learned Trial Magistrate erred in her ruling dated 25th January 2022 by dismissing the appellants chamber summons dated 4th February 2021, which sought a prayer for the striking out of the Appellant from the suit as it is a financer and not the owner of the suit motor vehicle.

ii. The learned Trial Magistrate erred in law in her ruling dated 25th January 2022 by dismissing the chamber summons dated 4th February 2021, on grounds that the application to strike out the appellant from the suit was premature

3. The appellant prayed that this appeal be allowed, the decision of the trial magistrate be set aside and the chamber summons dated 4th February 2021 be allowed unconditionally. The appellant also prayed for costs of the application and costs of this appeal.

4. This Appeal was disposed of by way of written submissions.

Appellants Submissions

5. The Appellants counsel filed submissions on 18th January 2023 and stated that the trial court had discretion to strike out the appellants name from the suit as provided for under provisions of order 1 rule 10(2) of the civil procedure rules. They had established by way of evidence placed before court that the appellant was a mere financer assisting the 2nd defendant in the primary suit to buy the said motor vehicle. They did not own the suit motor vehicle and were not vicariously liable for the accident as they were neither the principal nor the insured at the time of the alleged accident.

6. The appellant further submitted that the trial magistrate erred when she stated that the appropriate stage for determining whether or not the bank was liable, should be at trial and that finding was a misdirection as the financer had no recognizable stake in the proceedings and was not a necessary party to the suit considering all the relevant facts and authorities placed before the court. Reliance was placed on Civil Appeal No 44 of 2016 Diamond Trust Bank Kenya limited Vr Richard Mwangi Kamotho & 2 others (2017) eklr, Kiarie Waweru Kiarie Vs Moses Kanyiri & 2 others (2018) eklr and Civil Appeal No 61 of 2013 Equity Bank limited Vs Humphrey Waudi okuku & Another (Suing as personal representatives of the Estate of Douglas ouma Okuku-Deceased

7. The appellant further submitted that there was irrefutable evidence placed before court that the financier interest would be extinguished upon recovery of the sums advanced and the co registration in the title was only a security measure that did not invite risk to the appellant. There was also no need for the financer to be dragged to participate in a suit to determine liability despite that fact that there can be no possible demonstration that their interest goes no further than financing the property.

8. The appellant was thus justified to seek to be struck out from the proceedings. Reliance was placed on Civil Appeal No 232 of 2010 Equity Bank Limited Vs Naftali Anyumba Onyango & 2 others (2014)eKLR, Meme Vs Republic, (2014) 1EA 124, and Kenya Medical laboratory Technicians and Technologies Board & 6 others Vs Attorney General & 4 others (2017) eKLR.

9. The appellant prayed that this appeal be allowed, the decision the magistrate be set-aside and the application dated 4th February 2021 be allowed.

Respondents Submissions

10. The respondents counsel did file their submissions on 7th October 2022 and stated that the only issue for determination in this appeal was whether the appellant was properly sued as a party to this suit. It was shown that the appellant was the lawful and beneficial owner of the subject suit motor vehicle and NTSA records aptly demonstrated the same.

11. Striking out of pleadings was a discretion which had to be exercised only in the clearest of cases and where there was doubt, the court ought to allow the parties to have their day in court. Reliance was placed on Zephir Holdings Limited Vs Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel

Misango Mutisya (2014) eKLR, Co-operative Merchant Bank Limited Vs George Fredrick Wekesa (Civil Appeal No 54 of 1999) & Yaya Towers Limited Vs Trade Bank Limited (In liquidation) Civil Appeal No 35 of 2000.

12. The respondent further submitted that the best way to prove ownership of a motor vehicle was by showing who the registered owner was. Section 8 of the *Traffic Act* (Cap 403) laws of Kenya provided that; "A person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the motor vehicle." The appellants name was shown by documents produced from NTSA to be the co registered owner of the suit motor vehicle and the issue of liability should be determined in the main suit.

13. The 2nd and 3rd defendants (in the primary suit) being the joint registered owners of the suit motor vehicle were joined on the hip and each had a lawful proprietor right with respect of the suit motor vehicle KCH 233D to warrant the matter to proceed to full trial for purposes of determining liability.

14. The respondent's urged this court to find that this appeal lacks merit, is misconceived, incompetent, bad in law and thus should be dismissed with costs.

Analysis and Determination

15. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

16. As held in Selle & Another Vs Associated Motor Boat Co ltd & others (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 E.A.C.A 270

17. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or

not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

18. The same position was also appreciated in Peters –vs- Sunday Post Limited [1958] EA 424:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question....it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be show to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

19. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

20. Guided by the above cases, and having carefully gone through the entire record of appeal, pleadings filed in the primary suit, the ruling appealed against and the submissions filed herein I do find that the only issue for determination in this appeal is whether or not a financer of the suit motor vehicle is a necessary party to the proceedings and if indeed the suit as against him ought to be struck out in limae at this initial stage

21. The appellants application dated 4th February 2021 was premised on provisions of Order 1 Rule 10(2) of the Civil procedure Rules, which provides that;

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, or whose presence before the court maybe necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

22. At the trial court, the appellant amply demonstrated through its supporting affidavit that they were financiers of the 2nd defendant and assisted him to buy the suit motor vehicle. They were not responsible for its day to day running nor was the 1st and 2nd defendant their employee, agent and/or driver and thus were not vicariously liable for the said accident. They were thus improperly enjoined and prayed for the suit as against them to be struck out.

23. The respondents in this appeal in reply did content that the appellant was the co registered owner of the suit motor vehicle and liability could only be determined at trial. In the alternative the appellant could peruse and claim indemnity from the 2nd defendant in the primary suit in the wider interest of justice.

24. In the case of Kiarie Waweru Kiarie Vs Moses Kanyira & 2 others (2018) eKLR the court held that ;

> " The main issue for determination in this present application should be who is a necessary party to a suit. The case of Amon Vs Raphael Tuck & Sons ltd (1956) 1 All ER 273, cited in Pizza Harvest Limited Vs Felix Midigo (2013) eKLR sought of establish who a necessary party is. Devlin, J held at page 286-287; "what makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately..... the court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes, it necessary to make a person a party to an action is so that he should be bound by the results of the action, and the question to be settled, therefrom, must be a question In the action which cannot be effectually and completely settled unless he is a party."

25. In Investments and Mortgages Bank Limited Vs Nancy Thumari & 3 others (2015) eKLR , the court cited the case of Jan Bolden Nielsen Vs Herman Phillipus styne & 2 others (2012) where it was held that, " In my view, a necessary party is a person who ought to have to have been joined as a party and whose absence no effective decree can be passed in a proceedings by the court."

26. It is obvious that even in the absence of the appellant an effective decree can be passed in the proceedings before the trial magistrate. Secondly it was not denied that the appellant was a mere financier of the 2nd defendant in the primary suit, and had no interest whatsoever in the suit motor vehicle and therefore the question of liability could be easily settled as between the respondents and the other 1st and 2nd defendant in the primary suit without unnecessary involving the appellant in a long trial where the questions to be settled did not involve them.

27. The suit thus before the trial magistrate could be effectually completed and settled without the involvement of the appellant. Their evidence to only being financier of the 2nd defendant in the primary

suit was not rebutted in any manner and in this respect the trial magistrate erred in her ruling to hold otherwise.

28. Several citations too have upheld that financiers are not necessary parties in litigation involving motor vehicles financed and where by evidence it is shown that they are not vicariously liable. See Civil Appeal No 232 of 2010 Equity Bank Limited Vs Naftali Anyumba Onyango & 2 others (2014)eKLR, Civil Appeal No 44 of 2016 Diamond Trust Bank Kenya limited Vr Richard Mwangi Kamotho & 2 others (2017) eKLR, Kiarie Waweru Kiarie Vs Moses Kanyiri & 2 others (2018) eKLR and Civil Appeal No 61 of 2013 Equity Bank limited Vs Humphrey Waudi Okuku & Another (Suing as personal representatives of the Estate of Douglas Ouma Okuku-deceased.

Disposition

29. This appeal thus has merit the ruling/order of Honourable E.W Mburu dated 25th January 2022 in Naivasha Civil suit No E122 of 2020 is hereby set aside in its entirety and the same is substituted with an order allowing the appellants application dated 4th February 2021 in terms of prayer (1) and (2) thereof. The suit as against the appellant (3rd defendant in the primary suit) is thus struck out with costs.

30. The costs of the said application and this appeal is hereby assessed at Ksh.120,000/= all inclusive

31. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of September, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant