



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 122 OF 2019

PURITY NJOKI CHEGE.....APPELLANT

VERSUS

OBSORN GETONDO NYABONGO.....RESPONDENT

(Being an appeal from the Ruling and Order of the Resident Magistrate at Kisii delivered by Honourable P.N Wamucii on the 29th Day of October, 2019)

RULING

1. The respondent herein filed a claim before the lower court against the appellant seeking general damages, special damages, interests and costs. In his plaint file before the subordinate court he averred that on 27th November 2017 while driving motor vehicle registration No. KBZ 602 G, he collided with the appellant's motor vehicle KBJ 933W Toyota Hiace because it was being driven negligently. As a result, the respondent's vehicle was extensively damaged. The appellant filed her defence and issued a third party notice to CassimBaliliWafula on grounds that the defendant sold the Motor vehicle registration number KBJ 993W to him on 15th July 2013. The third party filed a statement of defence and further issued a third party notice to the 2nd third party, Isaac OchiengWamaya on similar grounds, that is, that the said vehicle had been sold to the 2nd third party.
2. The appellant further filed an application by way of chamber summons dated 30th July 2019 urging the trial court to make a finding that she is not liable in any way for the accident that took place on 27th November 2017 and that the court do make a finding that she is no longer a necessary party to the suit and that her name be struck out from the suit.
3. The respondent opposed the application and filed its response thereto.
4. The trial magistrate upon considering the application dismissed it holding that the issues between the applicant and the third parties were to be determined at trial.
5. It is this ruling by the trial magistrate that has precipitated this appeal and the appellant has raised the following grounds;
 1. *THAT the learned Magistrate erred in law and fact in allowing herself to be guided by improper considerations, manifest bias, subjective opinions and extraneous matters rather than sound and well established legal principles and merits of the case by dismissing the Applicant's Chamber Summons Application dated 30.07.2019 in spite of the clear provisions of Order 1 Rule 22 of the Civil Procedure Rules, 2010, other relevant laws and the pleadings filed by the Third Party.*
 2. *THAT the learned magistrate erred in law and in fact in proceeding in proceedings (sic) to dismiss the Appellant's Chamber Summons Application dated 30.07.2019 in spite of the overwhelming, un-contradictory evidence, pleadings and material placed before court.*
 3. *THAT the learned magistrate erred in law and in fact in dismissing the appellant's Chamber Summons Application dated 30.07.2019 without proffering any reasons for the dismissal and without considering that the Third Party has made an admission of having purchased the Motor Vehicle Registration Number KBJ 933W from the defendant way back on 15.07.2013.*
 4. *THAT the learned magistrate erred in law and in fact in ignoring and failing to assess and or apply the Legal Principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant when reaching the impugned decision (Ruling).*
 5. *THAT the learned magistrate erred in law and fact in misinterpreting the provisions of section 8 of the Traffic Act yet "the contrary" as contemplated in the said section had been proven.*

6. When the appeal came for hearing I directed that the parties file written submissions and both parties have complied.
7. The appellant submitted that she issued a third party notice and the third party entered appearance and admitted in his pleadings and documents that the vehicle was sold to him. She urged the court to consider that the accident occurred 4 years after she sold the vehicle to the third party. She also argued that pursuant to **Order 1 Rule 22 of the Civil Procedure Rules** the trial magistrate ought to have made a determination that it was not liable for the accident the third party having admitted that the vehicle was sold to him. She cited the case of **Solomon Mwarimbo vs. Kenya Bus Service Ltd (1993) eKLR**. She also argued that the appellant is not a necessary party to the suit and that her name should be struck off pursuant to **Order 1 Rule 14 of the Civil Procedure Rules**.
8. The respondent in his submissions advanced that after the accident he obtained a police abstract wherein the Appellant's motor vehicle was blamed for the accident. He submitted that the Appellant has not filed any document to show that after she allegedly sold the vehicle she transferred the same to the buyer. He cited the cases of **Securicor Kenya Ltd v Kyumba Holdings Civil Appeal No 73 of 2002** and **Joel Muga Opinja v East Africa Sea Food Ltd [2003] eKLR** to advance that there is the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. However where there exists other compelling evidence to prove otherwise, then the court can make a finding of ownership that is different from that contained in the log book and each case must be considered on its own peculiar facts.
9. Having considered both parties' submissions the only issue for consideration is the import of **Order 1 Rule 22 of the Civil Procedure Rules** during third party proceedings. The said provision provides as follows;

*“If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such **liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit**, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.*

10. In **Kanake Peter v David Lemba Mbuli & 2 others [2018] eKLR** the court stated:

*“The Third Party Notice was issued to two (2) persons. The 1st Third Party entered appearance but did not file a defence. In the case of **Solomon Mwarimbo vs. Kenya Bus Service Ltd (1993) eKLR RSC Omollo J** (as he then was) stated that:*

“I have stated that there is no provision in the Rules requiring a third party who has appeared to also file a defence. A defendant who has issued a third-party notice is not, for example, entitled to apply to the court for an ex parte judgment on the basis that a third party who has entered appearance has failed to file a defence. It appears to me that once a third party has entered an appearance and a defendant wishes to pursue the claim against the third party, then the burden shifts to such a defendant to apply to the court, by way of a summons in chambers to give directions and when giving such directions, the court, if satisfied that there is a proper question to be tried as to the liability of the third party, order such question of liability to be tried at or after the trial of the suit. If there is no proper question to be tried regarding the liability of the third party to the defendant, then the court is entitled to enter such judgment as it thinks proper against the third party. All these matters are to be determined at the stage where the court is giving directions and directions can only be given on the application of the defendant.”

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35. *Where a third party makes an appearance under **Order 1 Rule 22 of the Civil Procedure Rules** as was the case of the 1st Third Party, the Defendant was supposed to apply for directions by way of summons. As it is at this point that the directions in the manner the matter may be determined is given. Prior to giving directions the Court must be satisfied that there is a proper question to be tried as to the liability of the Third Party before giving the method to be adopted by the Defendant and the Third Party whether it should be determined in the course of trial of the suit or otherwise.”*

11. I note that the appellant in compliance with **Order 1 Rule 22 of the Civil Procedure Rules** made its application dated 30th July 2019 before the subordinate so that the trial magistrate could give directions. In my view the trial magistrate is then obligated to consider whether there has been established a proper question to be tried as to the liability of the third party and if so satisfied, the trial court direct that it be determined at trial or after trial. In this instant case, although the trial court dismissed the appellant's application it directed that the issue on liability between the appellant and the third parties were to be determined at trial.

12. In this regard therefore, I find that the appellants have failed to establish that the trial magistrate failed to comply with the provisions of **Order 1 Rule 22 of the Civil Procedure Rules**. I am surprised that the appellant's interpretation of the said provision and third party proceedings as a whole is that the issue of liability between itself and the third party can be determined conclusively before trial and that the defendant be deemed as an unnecessary party. The issue of liability between the defendant and third party can only be determined at trial or after trial. I therefore find that the trial magistrate cannot be faulted for failing to strike out the appellant's name from the proceedings.

13. In the end, I find that the appeal lacks merit and is hereby dismissed. The respondent shall have the costs of the appeal.

DATED, SIGNED and DELIVERED at KISII this 8th day of July 2021.

A.K NDUNG'U

JUDGE