



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 41 OF 2019

ANTHONY KURIA WANGARI....APPELLANT

VERSUS

GUARDIAN BANK LIMITED....RESPONDENT

(Appeal from the judgment of the Chief Magistrates Court at Thika **V. Kachuodho, RM** dated 25<sup>th</sup> February, 2017 in the Civil Suit No. 642 of 2017)

**JUDGMENT**

1. **ANTHONY KURIA WANGARI (Anthony)** filed a suit before Thika Chief Magistrate against **GUARDIAN BANK LIMITED** (The Bank). Anthony sought by that claim general and special damages for injuries he suffered in an accident involving his motorcycle registration No. KMCV 732V and motor vehicle registration No. KAB 969A. Anthony alleged in his claim that the motor vehicle was owned and registered in the name of the Bank when the accident occurred on 30<sup>th</sup> July, 2014. The driver who then was with the motor vehicle ran away from the accident scene following the accident.

2. The Bank filed a defence on being served with the summons and plaint in which the Bank denied ownership of the motor vehicle and pleaded it was a stranger to the alleged accident. In paragraph 9 of the Bank's defence, it was pleaded thus:-

**“The defendant by way of the Defence avers that as at the date of the alleged accident (which is denied) the Defendant did not exercise any control nor derive any benefit from the use of the said motor vehicle and the same was not driven by the Defendant's driver, agent, servant and/or employee and the defendant did not have possession of the said motor vehicle and hence the doctrine of vicarious liability is not applicable.”**

3. The Bank followed the above line of defence by filing a Notice of Motion application dated 7<sup>th</sup> May, 2018. The Bank sought by that application for two prayers that; the entire suit be struck out against the Bank; and that, in the alternative, the court be pleased to strike out the Bank's name as party in the suit.

4. The trial court on receiving parties submissions by its Ruling dated 25<sup>th</sup> February, 2019 granted the Bank the second prayer, that is, it struck out the Bank as a party in the case.

5. That Ruling aggrieved Anthony who has filed this appeal against the same. I will be guided, in this appeal by what the court stated in the case **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123** thus:-

**“An appeal to this court from a trial by the High Court is by way of retrial and the principles 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 conclusions 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 demeanour of a witness is inconsistent with the evidence in the case generally (ABDUL HAMMED SAIF V ALI MOHAMED SHOLAN (1955), 22 E.A.C.A. 270).”**

6. Anthony as stated before pleaded in his case that the motor vehicle was registered and owned by the Bank. He attached to his list of documents “motor vehicle copy of record’ from the National Transport and Security Authority (NTSA). This indicated that as at 11<sup>th</sup> May, 2016 the motor vehicle was registered in the Bank's name. He also attached a police abstract dated 10<sup>th</sup> May, 2016 which failed to indicate the owner of the motor vehicle but it recorded that the motor vehicle was insured between 4<sup>th</sup> February, 2014 and 3<sup>rd</sup> February, 2015 by

Gateway Insurance Company.

7. The Bank attached to its defence, its witness statement and copy of the logbook, sale agreement dated 27<sup>th</sup> December, 2012 amongst others.
8. Further, the bank's affidavit in support of the application whose Ruling is the subject of this appeal, set out the basis of seeking the striking out of the Bank's name from the court action. The Bank relied on its contention that it sold the motor vehicle and to that end attached a logbook. The Bank also produced a sale agreement 27<sup>th</sup> December, 2021 of the subsequent sale of the vehicle by the person the Bank sold the vehicle to. The Bank further relied on a police abstract of 11<sup>th</sup> December, 2014 which indicated an accident occurred on 30<sup>th</sup> July, 2014 between the vehicle and the motor cycle and further that the motor vehicle was owned by **James Kamau Maina** and that the said **James Kamau Maina** was charged, convicted and fined for the offence of failing to keep records and address of his driver. That police abstract also record the following: "The driver escaped but the owner was charged as the above."
9. Anthony relied on his replying affidavit. Anthony maintained in that affidavit that the Bank having been confirmed to be the owner of the motor vehicle by NTSA the Bank's name could not be struck out. It was Anthony's view that the issue of ownership could only be determined after a full trial.

#### **ANALYSIS AND DETERMINATION**

10. Anthony by his grounds of appeal faulted the trial court for striking out the Bank's name from and thereby struck out the suit from the suit. He stated in those grounds that such striking out failed to appreciate the provisions of the Traffic Act.
11. Parties provided their written submissions and authorities, which I have found very useful.
12. Perhaps the best place to start is by considering **Section 8** of the Traffic Act. This Section is in the following terms:-

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

13. A long line of court's decisions have recognised that the presumption of ownership of a vehicle, under Section 8, is rebuttable. Anthony produced before the trial court a copy of record from NTSA which showed the Bank was the registered owner of the motor vehicle. The Bank as stated before, relied on a photo copy of the log book used before the advent of the new logbooks which came into use on the enactment of NTSA Act, which commenced on 1<sup>st</sup> December, 2012. The old logbooks required an entry be made by handwriting by the parties when there is sale of the vehicle. That logbook is the one the Bank produced as a photocopy.
14. There are several cases both in the High Court and the Court of Appeal where the courts held that the evidence of ownership of motor vehicles by registration or logbook was rebuttable. It will be useful to cite those cases here.
15. In the case *NANCY AYEMBA NGANA VS. ABDI ALI (2010) eKLR* it was held that:-

**"There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.**

**And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership.**

**Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1<sup>st</sup> defendant was one of the owners of the matatu in question..."**

16. Further, in the case of *P.N.M. & ANOTHER (the legal personal Representative of Estate of L.M.M.) VS. TELCOM KENYA LIMITED & 2 OTHERS (2015) eKLR* in the same vein held:-

**"of the accident motor vehicle and whose agent was the 3<sup>rd</sup> defendant in view of the two positions- 1<sup>st</sup> defendant being registered owner whereas the 2<sup>nd</sup> defendant being the beneficial owner thereof. This court finds that albeit the search certificate/copy of records produced by the plaintiff showed that the 1<sup>st</sup> defendant Telkom Kenya Ltd was the registered owner of the accident motor vehicle at the material time, it is clear from the evidence gathered by the police investigating the accident, and the driver's own statement and the vehicle's insurance policy cover with Kennindia Assurance Co. Ltd, that the owner thereof was the 2<sup>nd</sup> defendant who was the beneficial owner as the vehicle was then being used for his benefit not the 1<sup>st</sup> defendant's benefit. The latter had sold the accident motor vehicle and its possession and use thereof passed to the 2<sup>nd</sup> defendant. Section 8 of the Traffic Act Cap 403 of the Laws of Kenya provides that:-**

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

***In this case***, prima facie, the 1<sup>st</sup> defendant was the registered owner of the accident motor vehicle. Nonetheless, the contrary was proved, that the said vehicle had at the material time of the accident been sold and possession and use delivered to the 2<sup>nd</sup> defendant.”

17. It suffices to state that what the decided cases clearly show was considered in the case **BENARD MUIA KILOVOO VS. KENYA FRESH PRODUCE EXPORTERS (2020) eKLR** and was summarised as follows:-

**“41. The Court of Appeal in these binding decisions is clearly stating:-**

**(i) That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.**

**(ii) Where there exists other compelling evidence to proof otherwise then the court can make a finding of ownership that is different from that contained in the logbook.**

***(iii) Each case must however be considered in its own peculiar facts.”***

18. It follows that the provision of **Section 8** of the Traffic Act on the NTSA extract of record is only prima facie evidence. The Bank was required to prove on a balance of probability that as a matter of fact the motor vehicle had been transferred as at the date of the accident. The civil standard of proof was considered in the Canadian case namely **R. VS. LAYTON, (2009) SCC 36 (CanLII), (2009) 2 SCR 540** and was stated as thus:-

**“... with reference to the civil standard of proof. R. D. Wilson, N. J. Garson and C. E. Hinkson’s Civil Jury Instructions (2nd ed. (loose-leaf)), at § 4.7.4, provides the following sample instruction for explaining balance of probabilities to a civil jury:-**

***What does “proof on a balance of probabilities” mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.”***

19. The trial court in striking out the Bank’s name from the suit made a finding that the motor vehicle “changed hands to one *James Kamau Maina* ... at the time this suit cause of action arose on 30/7/2014, the defendant (the Bank) was no longer the beneficial owner and or in possession of the suit vehicle.”

20. That finding by the trial court was in exercise of discretionary power of striking out pleadings. The Court of Appeal in the case **KIVANGA ESTATES LIITED VS. NATIONAL BANK OF KENYA LIMITED (2017) eKLR** stated how an appellant should consider an appeal from application to strike out pleadings or parties and stated:-

**“CO-OPERATIVE MERCHANT BANK LTD. VS GEORGE FREDRICK WEKESA Civil Appeal No. 54 of 1999 the Court summarized the principles as follows:-**

**“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong... Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact... A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”**

21. Having re-examined the evidence produced before the trial court, I can see no error committed by the trial court. The Bank produced a copy of a logbook as proof of sale of the vehicle. Further, it produced a sale agreement evidencing the further sale by the person who purchased the vehicle to *James Kamau Maina*. That sale agreement points to *James Kamau Maina* being the beneficial owner of the motor vehicle as at the date of accident. If that is not enough, the Bank’s production of the police abstract dated 11<sup>th</sup> December, 2014 shows the owner of the motor vehicle was *James Kamau Maina* and because his driver ran away from the scene of the accident *James Kamau Maina* was charged, convicted and fined for the offence of failing to keep records and address of the driver, as at 31<sup>st</sup> July, 2014, contrary to **Section 111(1)(3) of the Traffic Act**. The conviction is proof of guilt and as provided by **Section 47A of the Evidence Act** it is was conclusive evidence of his guilt.

22. Anthony obviously from inception knew *James Kamau Maina* was the owner of the vehicle because amongst the documents attached to his plaint is a letter of demand dated 10<sup>th</sup> June, 2015 addressed to *James Kamau Maina*.

23. Anthony erred to state that the trial court failed by its Ruling to consider that the Bank was vicariously liable. Before vicarious liability could be considered, there had to be nexus between the Bank and the motor vehicle. There was no such nexus.

24. The appeal for the reasons set out above is devoid of merit.

25. The trial court in striking out the Bank's name ordered each party to pay their own costs of the suit. There is no reason to set aside that order. The costs of this appeal shall however follow the event as set out in Section 27 of the Civil Procedure Act. *Justice John M. Mativo* in the case **CECILIA KARURU NGAYU V. BARCLAYS BANK OF KENYA & ANOTHER (2016) eKLR** on award of costs stated as follows:-

**“In REPUBLIC VS ROSEMARY WAIRIMU MUNENE, EX-PARTE APPLICANT VS IHURURU DAIRY FARMERS CO-OPERATIVE SOCIETY LTD this court held as follows:-**

**“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...”**

**I find useful guidance in the following passage from the Halsbury's Laws of England:-**

**“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”** (Emphasis added).

26. In this appeal, the costs shall follow the event, that is, the successfully party, the Bank will be awarded costs.

#### **DISPOSITION**

27. This appeal is hereby dismissed with costs.

**JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Ndege

For Appellant : Mr. Kamindo H/B for Ayieko

For Respondents: Miss Rotich HB for Mr. Kabiru

#### **COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**