



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION

CIVIL APPEAL NO. 77 OF 2019

PURITY WANGARI KARIUKI.....APPELLANT

VERSUS

SEVENSTAR GROUP LIMITED.....RESPONDENT

(Being an appeal against the judgment in Nairobi Chief Magistrate Civil Case No 6641 "A" Of 2017 delivered on 5/2/2019 by Honorable Grace Mmasi (Mrs.) Senior Principal Magistrate.

JUDGMENT

1. Purity Wangari Kariuki (the appellant) trial sued Seven star Group Limited (the respondent) and costs arising from an accident involving her vehicle registration no. KAX 354J with the respondent's motor vehicle registration no. KCC 600A.
2. The respondent filed its defence and denied the appellant's claim, in particular being, the owner of motor vehicle KCC 600A.
3. The matter was heard whereby the appellant called three witnesses while the respondent called one witness. The learned trial magistrate found the appellant's case not proved and dismissed it and ordered each party to bear her/its own costs.
4. Being aggrieved the appellant appealed against the Judgment through the firm of K. Kibiku and company advocates citing the following grounds:
 - i. The learned Magistrate grossly misdirected herself in treating the evidence and submissions by the plaintiff/appellant superficially and consequently arrived at a wrong conclusion.
 - ii. The learned trial Magistrate erred in law and in fact by admitting and relying on the evidence of the Defendant/respondent's witness when he openly and unabashedly lied and misled the court.
 - iii. The learned trial Magistrate erred in law and in fact by disregarding the evidence of the plaintiff/appellant which was cogent and which was not shaken in cross examination.
 - iv. The learned trial magistrate erred in law and in fact by disregarding documentary evidence tendered in court by the plaintiff/appellant.
 - v. The learned trail magistrate erred in law and in fact by dismissing the appellant's suit which decision was not supported by the evidence on record.
 - vi. The learned trial Magistrate erred in law and in fact by disregarding and failing to appreciate the evidence on record, thus failing to arrive at her decision on liability in a judicious manner.
 - vii. The learned trial magistrate erred in law and in fact by refusing to address the issue of quantum in her Judgement.
 - viii. The learned trial magistrate erred in law and in fact by refusing to find that the appellant had proven her case to the requisite threshold and that Judgment should have been entered in her favour.

5. A summary of the case before the trial court will suffice. The appellant who testified as PW2 explained that she was driving motor vehicle KAX 354J on 19th April 2017 at 10.00 am towards Muhuri road. A white Prado registration no. KCC 600A swerved to his side from its lane and hit her motor vehicle on the driver's door. A report was made at Kabete police station, and officers came to the scene.

6. She was issued with a police abstract. The motor vehicle was assessed and later repaired. She was charged Ksh. 6380/= for the assessment which she paid (P EXB 1-3). The repairs cost kshs. 58,350/= which she also paid (P EXB 4). The motor vehicle was re-inspected by Master Assessors who charged her Kshs. 2,320/= which she paid (P EXB 5 & 6). She signed a satisfaction note for the repair work (P EXB 7).

7. When her vehicle was being repaired she hired alternative transport for ten (10) days at kshs. 2,500/= per day for which she paid kshs. 50,000/= (P EXB 8 and 9). She approached APA insurance who are the respondent's insurers as per the police abstract. The said insurers responded vide the letter P EXB 10. A demand letter was then sent to them by her counsel P EXB 11 & 12. She paid Kshs. 5,000/= for PW1 to attend court.

8. In cross examination and re-examination she said the motor vehicle KAX 354J is registered in her husband's name but she is the beneficial owner. She said the letter P EXB 10 indicated the respondent as the insured. She was claiming Kshs. 42,000/= and/or Kshs 50,000/= for the hire of alternative transport.

9. PW1, **No. 36748 P.C Charles Ondieki** produced the police abstract (P EXB I) in respect of the subject accident. He said the accident was caused by one Lawrence Kinyanjui the driver of the motor vehicle KCC 600A, which is owned by SevenStar Group Limited.

10. In cross examination he said KAX 345J was owned by Francis Kariuki but driven by the appellant while KCC 600A was driven by Lawrence Kinyanjui and owned by the respondent. In re-examination he said a driver could not implicate a party who has no interest in the vehicle and further that the driver must know the employer.

11. PW3 **Patrick Kinyua Muchiri** of Masters Assessors and Engineering confirmed having assessed the vehicle KAX 345J and charged Kshs 6,380/= inclusive of VAT since the cost of damage was Kshs 58,580/=. They did a re-inspection for which they charged Ksh 2,320/=. The reports and receipts were produced as P EXB 3a & b and 5a & b. He further charged Kshs 5,800/= for the day's attendance P EXB 3.

12. The respondent's witness **Sammy Mwatha Njoroge testified** as DW1. He said he is the respondent's director and produced copy a of records as D EXB 1. He denied ownership of the motor vehicle KCC 600A by the defendant saying the owner was Peter Gitau Kariuki and Equity Bank. He stated that the demand letter (P EXB 11) may have been received in their office, but he never saw it. He explained that NEXT Insurance issues covers for their clients. He denied knowing Lawrence Kinyanjui the driver of KCC 600A.

13. In cross examination he said NEXT Insurance Limited is an agency and a subsidiary of the respondent who never had any vehicles or drivers. He admitted that the respondent has a real estate and a security company and they also operate a petrol station. He added that their guards use public means and boda bodas for transport. He was not able to confirm whether any summons were received by his office or not. He said the APA insurance insured their clients and the letter from APA though copied to him never came to his attention. They had however never written to APA insurance to protest over the contents.

14. The appeal was disposed of by written submissions. The appellant's submissions were filed by K. Kibiku and company advocates and are dated 28th day of June 2021. Counsel has referred to the case of **Barnabas Biwott Thomas Kipkorir Bundotick 2018 eKLR** which explains the duty of a first appeal court.

15. Counsel has submitted that the issue of ownership of a motor ehicles is provided for under section 8 of the Traffic Act which creates a rebuttable presumption that the person in whose name a vehicle is registered is the owner. The said presumption will be rebutted if evidence is led which on a balance of probability proves that the person sued is the defacto/beneficial/possessory owner of the motor vehicle and was thus vicariously liable for the negligence that caused the accident.

16. He relied on the following cases to support his argument.

i) Thurairara Karauri v Agnes Ncheche Civil Appeal No. 192 of 1996 (UR).

ii) Joel Muga Opija v East African Food Ltd Civil Appeal No 309 of 2010 U/R.

iii) Muhambi Koja v Said Mbwana Abdi (2015) eKLR.

iv) Securicor Kenya Ltd v Kyumba Holdings Limited [2005] eKLR

Counsel referred to the evidence of PW1 and PW2 which he contends supports the appellant's evidence that the motor vehicle KCC 600A belongs to the respondent.

17. He submits that the police abstract and P EXB 10 supports that fact. The respondents were served and received summons by their Human resource and administration manager a principal of the respondent Mr. Patrick Liswa. His endorsement on the summons at page 25 of the record of appeal shows his response. He also referred to page 30- 34 of the record of appeal where the insurance company (APA) wrote the respondent an email seeking substantive input on the accident. It is therefore his submission that the appellant led cogent evidence to prove on a balance of probabilities that the respondent was at all material times the beneficial possessory defacto owner of motor vehicle KCC 600A.

18. Counsel further submitted that DW1's evidence on the respondent not owing any motor vehicle is not believable in view of the services it renders. He prayed that the court sets aside the lower court judgment and enter judgment for the appellant for KShs. 118,535/= with interest of costs.

19. The respondent's submissions were filed by S.N Thuku and Associates and are dated 24th June 2021. Counsel while referring to the evidence of the appellant submitted that she never produced any evidence to show her nexus to the damaged motor vehicle and so lacked legal capacity to file the suit. Secondly she did not avail any logbook, sale agreement or power of attorney from her husband to provide her with locus standi to file the suit.

20. Counsel further submitted that PW1 was not sure who between the appellant and her husband Francis Kariuki who was not a party to the suit was the owner of the vehicle allegedly damaged. Further no evidence was adduced to confirm ownership of the said motor vehicle by the respondent. He cited the following cases to support his argument.

i) Joel Muga Opiya (supra)

ii) Thurania Karauri (supra)

iii) Collins Ochung Ondiek v Walter Ochieng Ogunde High Court Civil Appeal No 67 of 2008 (UR).

iv) Ibrahim Wandera v P.N Mashru Ltd V. Civil Appeal No 333 of 2003 (UR).

v) Lake Flowers v. Cila Franklyn Onyango Ngonga (suing as the personal legal representative of the estate of Florence Agwingi Ogam (deceased) and Josephine Mumbi Ngugi (2008) eKLR

iv) Alfred Kioko Mutetei v Timothy Miheso and another Nairobi Civil Case No 232 of 2002.

21. It was his final submission on the above that the appellant failed to adduce evidence in form of records to confirm ownership of the accident motor vehicle by the respondent. On ground 7 counsel submitted that the trial court could not have addressed the issue of quantum since a wrong party had been sued.

Analysis and determination

22. This being a first appeal, this court has a duty to re-evaluate and re-analyse the evidence on record and arrive at its own conclusion. Unlike the trial court this court did not have the opportunity to hear or see the witnesses and an allowance must be given for that. This was stated in the following cases:

i) Selle and another v Associated Motor Boat Co Ltd and another [1968] EA 123

ii) Abok James Odera t/a A.J Odera & Associates v John Patrick Machira & Co. advocates [2013] eKLR

iii) Gitobu Imanyara & 2 others v Attorney General [2013] eKLR.

23. As guided above I have considered the lower court record, grounds of appeal, both submissions and authorities cited. I find the issues for determination to be as follows;

i) Whether or not the appellant had the locus to file the suit.

ii) Whether it was established that the respondent was the owner of the motor vehicle registration no. KCC 600A.

Issue No i)

Whether or not the appellant had the locus to file the suit.

24. In her evidence the appellant who testified as PW2 stated that the motor vehicle KAX 354 J belonged to her husband Francis Kariuki but she was the one using and driving it. At paragraph 3 of the defence by the respondent it is pleaded thus:

“In response to paragraph 3 of the plaint the defendant denies that it was the owner of the motor vehicle registration no KCC 600A and puts the plaintiff to strict proof thereof. The defendant is a stranger to particulars of ownership of motor vehicle registration No KAX 354J.”

25. In his evidence DW1 never mentioned anything about the motor vehicle No. KAX 354J. His evidence was basically on the motor vehicle KCC 600A said to belong to the respondent. I have also read the submissions before the trial court and which are dated 1st November 2018. There is no mention of the issue raised in respect of ownership of the motor vehicle registration No KAX 354J. The said issue is only being raised in this appeal.

26. As sated above, the only near mention of the appellant's motor vehicle is at paragraph 3 of the defence filed. All that the respondent said

was that it was a stranger to the particulars which he never disputed. By being a stranger it meant the respondent knew nothing about the particulars of the said vehicle. The appellant explained her possession of the motor vehicle at the time of accident.

27. A perusal of the police abstract (P EXB 1) shows the appellant as the owner of KAX 345J and the motor vehicle was insured by CIC General Insurance company. The company that carried out the assessment (P EXB 3a & 5b) took the particulars of the appellant. The documents show the policy of insurance details as follows:

“Policy no – 001/070/1/014565/2003/02; Certificate no C 5027532; Insured: Purity Wangari Kariuki.” Besides this being her husband’s vehicle, she was the one driving it and she was the insured. She could not have been the insured if she had no interest in the vehicle. She therefore proved that there was a direct link between her and the motor vehicle registration no KAX 354J. See **Joe Muga Opiya** (supra) and **Muhambi Koja** (supra). She was therefore the beneficial owner and had the locus to file the suit.

Issue No. ii

ii) Whether it was established that the respondent was the owner of the motor vehicle registration no. KCC 600A.

28. Section 8 of the Traffic Act provides:

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

29. In the instant case DW1 produced the NTSA motor vehicle copy of records in respect of motor vehicle registration KCC 600A (D EXB10) showing that the registered owner of the said motor vehicle as at 30th November 2017 was – Equity Bank (Kenya) Limited and Peter Gitau Kariuki. Date of registration was 3rd February 2015. The date of accident was 19th April 2017. A reading of 58 of the Traffic Act would therefore mean that Equity Bank and Peter Gitau Kariuki would be deemed to be the owners unless the contrary was proved.

30. The party who had the burden to prove that the respondent was the registered owner or the beneficial owner of the said vehicle at the time of accident was the appellant. See the case of **Nancy Ayiamba Ngaira v Abdi Ali C.A No. 107/2008[2010] eKLR** where Justice J.B Ojwang (as he then was) observed:

“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 fully 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 has 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; 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 the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question.” (Emphasis mine)

31. In the case of **Joel Mugo Opija [2013] eKLR** the court of appeal held thus:

“ We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of motor vehicles showing who the registered owner is but where the abstract is not challenged and is produced in court without any objection, its contents cannot later be denied.”

32. The issue then is whether the appellant produced any form of evidence to show that even though Equity Bank and Peter Gitau Kariuki were the registered owners, the respondent was the actual owner of the motor vehicle.

33. In the present case, a report of the accident was made at Kabete police station on the same date of occurrence vide OB No 7/19/4/2017 (P EXB 1). The abstract has details of the offending vehicle which are as follows:

“KCC 6000A- Toyota Prado; Insurance –APA Insurance Co. Ltd; Expiry – 12th September 2017; Policy No P/AL/700/0062505; Lawrence Kinyanjui 0723-511568.” DW1 denied knowing the said vehicle plus the driver. However, following the extraction of these details APA insurance was contacted by the appellant.

34. A letter from APA insurance dated 13th August 2017 was produced as P EXB 10. The letter was from its legal officer Roselyne Kihara to the appellant and copied to the respondent. The wording is so clear and confirms that the defendant is their insured in respect of motor vehicle registration no KCC 600A. A demand letter dated 22nd August 2017 from the appellant’s counsel was served and received by APA Insurance on 23rd August 2017 (P EXB 11).

35. There is also on record communication between APA Insurance and counsel for the appellant. These were annexures to the appellant’s (Purity Wangari Kariuki A & B) to the appellant’s replying affidavit to the application to set aside the ex parte Judgment. This still shows that APA Insurance company had insured the motor vehicle registration No. KCC 600A.

36. When DW1 was cross- examined he told the court that the respondent has an agency known as NEXT Insurance which issues cover

