



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEALS DIVISION

CIVIL APPEAL NO 334 OF 2017

CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT

VERSUS

THOMAS NGUI.....1ST RESPONDENT

AHSER OKAL ONYANGO.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon G.M. Mmasi (Mrs), SPM delivered on 9th June 2017 in Chief Magistrate's Court in Nairobi CMCC No 7589 of 2016)

JUDGMENT

INTRODUCTION

1. In her Ruling of 9th June 2017, the Learned Magistrate, Hon G.M. Mmasi, Senior Principal Magistrate, dismissed the Appellant's Chamber Summons application in which it had prayed that it had been improperly enjoined in the proceedings in the lower court and that it ought to be struck out from the 1st Respondent's suit as in the Plaint dated 31st October 2016 (**sic**).
2. On 29th May 2018, Mbogholi Msagha J stayed the proceedings in the lower court pending the hearing and determination of the Appeal herein on the ground that if the lower court proceedings were determined before the issue herein was resolved, then substantial loss and prejudice could be visited on the Appellant herein in the event it was successful in the Appeal herein.
3. Being aggrieved by the said Ruling, the Appellant filed its Memorandum of Appeal dated 30th June 2017 on 3rd July 2017. It relied on six (6) grounds of appeal.

LEGAL ANALYSIS

4. It appeared from the grounds of appeal that the issues that had been placed before this court for determination were as follows:-
 - a. **Whether or not the Learned Magistrate erred in law and fact in failing to appreciate that the Appellant was merely a financier of Motor Vehicle Registration Number KCE 471E (hereinafter referred to as "the subject motor vehicle") and could then not therefore have been vicariously liable for the negligence of the driver of the said subject motor vehicle.**
 - b. **Whether or not the Learned Magistrate erred in law and fact in having found the authorities the Appellant had cited as having been irrelevant in the circumstances of the case herein.**
5. This court therefore found it prudent to address the said issues under the following and distinct heads.

I. RELATIONSHIP BETWEEN APPELLANT AND DRIVER OF SUBJECT MOTOR VEHICLE

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6. Grounds of Appeal Nos (1), (2), (3) and (4) were dealt with together as they were all related.
 7. The gist of the Appellant's case was that the Learned Magistrate erred in law and fact when she found that it was a proper party to the

suit in the lower court yet it was clear from the logbook that it was merely a financier of the 1st Respondent in the purchase of the subject Motor Vehicle and could not therefore have been vicariously liable for the negligence of the driver of the said subject motor vehicle. It averred that she impliedly created a non-existent and unproven agency relationship between it and the driver of the said subject motor vehicle at the material time of the accident.

8. It pointed out that in its Chamber Summons application, it had placed before the Learned Magistrate a letter dated 6th August 2015 being its approval of a Hire Purchase facility to the 2nd Respondent herein and that it was evident from the said letter that it had financed him to purchase the subject motor vehicle to the tune of Kshs 2,967,456/=, which fact, it stated, was not controverted by the 1st Respondent.

9. It placed reliance on the case of Ali Abdi Dere vs Hash Hauliers Limited & Another [2018] eKLR where Mureithi J held that the position of a financier was merely to protect its interests in a motor vehicle it had financed and could not be held vicariously liable for the actions of its driver.

10. It further relied on the case of Justus Kavisi Kilonzo vs Coast Broadway Company Limited [2008] eKLR where Azangalala J (as he then was) held that the fact that a financier had been registered as a co-owner of a motor vehicle did not necessary mean that it was a party to proceedings in court.

11. It also referred this court to the cases of John Nderi Wamugi vs Ruhesh Okumu Otiangala & 2 Others [2015] eKLR where the Court of Appeal held that vicarious liability was not pegged on legal ownership of a motor vehicle but rather on an employer-employee relationship and that of Equity Bank Limited vs Naftal Anyumba Onyango & 2 Others [2014] eKLR where the court held and found that liability could not lie against the financier of a motor vehicle.

12. On its part, the 1st Respondent contended that in the Ruling of the Learned Magistrate, there was no ruling on vicarious liability or agency relations as the Appellant had contended. It stated that it was a fairly simple point why the Appellant failed to serve its co-owner of the subject motor vehicle. He was emphatic that he was ill-placed to comment on the document that it exhibited.

13. He placed reliance on the cases of Mwangi vs Wambugu (1984) KLR Abdulrehman vs ALmaery (1978) eKLR and Robric Limited & Another vs Kobil Petroleum Limited & Another (2018) eKLR where the common thread was that an appellate court will not interfere with the finding of a trial court or its discretion unless it can be shown that the same proceeded on the wrong findings to reach its finding.

14. This court carefully considered the submissions by the parties herein and found itself in agreement with the Appellant herein that its relationship between it and the 2nd Respondent was not one of employer-employee relationship and consequently, the doctrine of vicarious liability was not applicable in the circumstances of the case in dispute between the 1st and 2nd Respondents herein.

15. It also agreed with the Appellant that the Learned Magistrate descended into the arena of the dispute and purported to create a non-existent and unproven employer-employee relationship between it and the 2nd Respondent herein. Her role was limited to determining issues based on the documentation that had been placed before her and not make a definite conclusion at an interlocutory stage. Indeed, from her determination, there was no doubt as to what her conclusion relating to the apportionment of liability would have been after trial.

16. It was not necessary for the Appellant to have relied on confirmation by the 2nd Respondent herein that it was its financier as the Learned Magistrate had averred in her Ruling for the reason that it was only the Appellant who had a legal and evidentiary burden to prove its assertions. Indeed, Section 107 of the Evidence Act, Cap 80 (Laws of Kenya) provides that he who asserts must prove. The 2nd Respondent was under no legal obligation to assist or destroy the Appellant's case.

17. The Learned Magistrate's reasoning questioning why the 2nd Respondent was not served with the said application and that he had not entered appearance in the matter and/or participated was flawed as he was under no obligation to respond to the Appellant's application as the same only concerned the Appellant and the 1st Respondent herein.

18. The failure by the 1st Respondent to controvert and/or rebut the Appellant's contentions that it was merely a financier of the subject Motor Vehicle meant that its evidence remained unchallenged and unless there was a good and sufficient reason, the Learned Magistrate had no option but to accept the facts given as having been true and correct.

19. Going further, under Section 1A of the Civil Procedure Act Cap 21 (Laws of Kenya), the court is enjoined to seek means to expeditiously dispose of matters before it. It would be prejudicial for the Appellant to be dragged through a trial and spend time and money to defend a suit when it was clear from the facts presented in the application that was dismissed that its registrable interest was only limited to it being a financier of the subject motor vehicle to safeguard its commercial interests in an asset.

20. In the circumstances herein this court found and held that Grounds of Appeal Nos (1), (2), (3) and (4) of the Grounds of Appeal were merited and the same are hereby upheld.

II. RELEVANCE OR OTHERWISE OF CASES CITED BY THE APPELLANT

21. Ground of Appeal No (5) was dealt with under this head.

22. The Appellant argued that the Learned Magistrate erred in law and fact in finding that the authorities it had cited in support of its

application were in respect of striking out a defence and were therefore not relevant in the circumstances of its case and thus erred in dismissing its said application.

23. Notably, in its application, it had sought to be struck out from the 1st Respondent's suit in the lower court. The Learned Magistrate stated in her Ruling that the authorities that were cited by the Appellant related to striking out of the defence and were thus distinguished from this case.

24. It did appear to this court that Prayer No (1) of the Appellant's Chamber Summons application dated 12th January 2017 and filed on 16th January 2017 was incapable of being granted. It was a mere statement and read as follows:-

1. THAT the 2nd Defendant/Applicant has been improperly joined to the Plaintiff's suit in the Plaint dated 31st October 2016.

25. It was only Prayer No (2) of the said application that could be granted. It read as follows:-

2. THAT the 2nd Defendant/Applicant be struck out from the Plaintiff's suit in the Plaint dated 31st October 2016.

26. The Learned Magistrate appeared to have overlooked this Prayer No (2) for striking out the Appellant's defence and put emphasis on Prayer No (1) which could not have been granted anyway. This court noted that the cases that the Appellant relied upon addressed the question of when the doctrine of vicarious liability was applicable and the striking out of a financier from the proceedings in court. These were relevant in the arguments of the Appellant's application that was before her.

27. This court was thus persuaded by the Appellant's submissions that the Learned Magistrate erred in finding and holding that the authorities it had cited in support of its application were irrelevant.

28. In the circumstances foregoing, this court found and held that Ground of Appeal No (5) was merited and the same is also hereby upheld.

DISPOSITION

29. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 30th June 2017 and lodged on 3rd July 2017 was merited and the same is hereby allowed. The 1st Respondent will bear the Appellant's costs of the Appeal herein.

30. The effect of this decision is that the Ruling of the Learned Trial Magistrate that was delivered on 9th June 2017 is therefore hereby set aside and/or vacated and in its place, it is substituted with this court's Ruling that the Appellant's Chamber Summons application dated 12th January 2017 and filed on 16th January 2017 be and is hereby allowed in terms of Prayer No (2) therein. Costs of the said application will be costs in the cause.

31. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of May 2020

J. KAMAU

JUDGE