REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 61 OF 2013

EQUITY BANK LIMITED.....APPELLANT

VERSUS

HUMPHREY WAUDI OKUKU & VINCENT BRIAN OKUKU

(Suing as the personal representatives of the

estate of DOUGLAS OUMA OKUKU-Deceased).....RESPONDENTS

(Being an appeal from the ruling and order of Honourable P. Nditika (Mr.) (Principal Magistrate) delivered on 30th January, 2013 in CMCC NO. 2212 OF 2012)

JUDGEMENT

1. The respondents, being personal representatives of the estate of Douglas Ouma Okuku *("the deceased")* instituted *CMCC NO. 2212 OF 2012* against the appellant and two (2) other persons who are not parties to the appeal by way of the plaint dated 30th April, 2012 seeking for general damages under both the Fatal Accidents Act and the Law Reform Act as well as special damages together with costs of the suit and interest thereon.

2. The appellant who was the 2nd defendant in the above-referenced suit was sued together with the 1st defendant in that instance in their capacity as joint owners of the motor vehicle registration number KBB 349M Isuzu Bus *("the subject vehicle")*, which motor vehicle was at all material times being drive by the 3rd defendant.

3. The respondents pleaded that on or about the 11th of May, 2009 the deceased was lawfully walking along Thika Road at the GSU Round-about at approximately 8.40p.m. when the 3rd defendant negligently and/or recklessly drove the subject vehicle, causing it to lose control and knock down the deceased, causing him to sustain fatal injuries. The respondents further pleaded the particulars of negligence and claimed vicarious liability on the part of the 1st defendant and the appellant.

4. The record shows that an interlocutory judgment was entered against the 1st and 3rd defendants for failure to enter appearance and/or file their statements of defence.

5. The appellant, having been served with summons to enter appearance and the pleadings, entered appearance and filed its statement of defence on 1st August, 2012. In its defence, the appellant pleaded *inter alia*, that the respondents' suit is bad in law since it does not disclose a cause of action against it, further denying that it was at all material times a joint registered and/or beneficial owner of the subject vehicle.

6. The appellant went further to plead that its role as regards the subject vehicle was simply that of a financier and which role would extinguish upon recovery of the finances and transfer of the title to the registered and/or beneficial owner. In addition, it was pleaded by the appellant that in any event, the deceased contributed to the accident through his negligence, the particulars of which were set out in paragraph 7 of the plaint.

7. Subsequently, the appellant filed the Notice of Motion dated 27th November, 2012 seeking to have the suit against it struck out, reiterating the averments made in its statement of defence.

8. The application was opposed by way of the replying affidavit sworn by *Humphrey Waudi Okuku*, one of the respondents herein.

9. The application was disposed of through written submissions. Ultimately, the trial court dismissed the application vide its ruling delivered on 30th January, 2013.

10 The aforesaid ruling is now the subject of the appeal. The appellant's memorandum of appeal dated 7th February, 2013 raises seven (7) grounds, namely:

> ***(i) THAT the learned trial magistrate erred in law and in fact by dismissing the application dated 27th November, 2012.***
>
> ***(ii) THAT the learned trial magistrate erred in law and misdirected himself in holding that the suit against the appellant was proper.***
>
> ***(iii) THAT the learned trial magistrate erred in law and in fact by failing to strike out the suit against the appellant.***
>
> ***(iv) THAT the learned trial magistrate erred in law and in fact by failing to grasp and put into consideration the appellant's documents produced as exhibits tendered in evidence and thus arrived at an erroneous finding.***
>
> ***(v) THAT the learned trial magistrate erred in law and fact by not properly considering the appellant's submissions and authorities and hence did not write a considered ruling.***
>
> ***(vi) THAT the learned trial magistrate erred in law and in fact by failing to hold that the appellant could not be held as a tortfeasor and therefore the suit against it was non-suited.***
>
> ***(vii) THAT the learned trial magistrate erred in law and in fact by failing to uphold precedents and the doctrine of stare decisis.***

11. This court directed that the appeal be canvassed by way of written submissions; the record shows that only the appellant filed its submissions, essentially arguing that it is not a necessary party to the suit but was merely a financier of the 1st defendant in the trial suit and in respect to the subject vehicle.

12. The appellant further submitted that the 3rd defendant in the trial suit, who was the driver of the subject vehicle at all material times, was neither its agent or employee; adding that any instructions given to him were derived from the 1st defendant and not the appellant, who in any case had no control over the day-to-day activities and use of the subject vehicle.

13. The appellant urged this court to consider the rendition in the case of *Equity Bank Limited v Naftal Anyumba Onyango & 2 others [2014] eKLR* where the High Court held that the driver of the motor vehicle in that instance was not an agent or employee of the Bank and thus no vicarious liability could be attached to the said Bank, the court further holding that the registration of the Bank's name in the logbook was purely for purposes of securing the loan facility. The appellant also cited two (2) other authorities that have equally addressed this issue.

14. I have carefully considered the grounds of appeal and submissions filed by the appellant alongside the cited authorities. I have additionally re-evaluated and re-considered the evidence placed before the trial court as well as considered the impugned ruling. It is my observation that the grounds of appeal touch on the issues of whether the appellant could be deemed vicariously liable for the acts of the 3rd defendant in this instance, thereby making the suit against it proper, and consequently, whether the trial court's decision not to strike out the suit against the appellant was in itself well-reasoned. In that case, I will address the seven (7) grounds of appeal contemporaneously.

15. I will begin with reference to the case of ***Investments and Mortgages Bank Limited v Nancy Thumari & 3 others [2015] eKLR*** relied upon by the appellant where the court appreciated that whether or not to strike out pleadings is a matter of judicial discretion. Further to this, the guiding principles for consideration in striking out of pleadings is well catered for under ***Order 2, Rule 15(1)*** of the ***Civil Procedure Rules*** as follows:

> ***"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
>
> ***(a) it discloses no reasonable cause of action or defence in law; or***
>
> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) it is otherwise an abuse of the process of the court."***

16. In the present instance, the appellant's main position is that the suit does not disclose a reasonable cause of action against it since it was not vicariously liable for the accident which goes to show that it is not a necessary party to the proceedings. In its submissions to the application filed before the trial court, the appellant averred that while it did not dispute co-ownership of the subject vehicle together with the 1st defendant, it was merely registered on the basis of being a financier for the purchase of the said vehicle. The appellant went ahead to submit that it had no interest in the subject vehicle save for the recovery of the loan amount advanced to the 1st defendant. Various judicial authorities that have discussed the position of a financier in liability cases were cited.

17. The appellant also argued before the trial court that the mere fact of registration did not automatically give rise to vicarious liability since in any event, the driver of the subject vehicle was neither its employee nor its agent. In support of its arguments, the appellant cited various authorities that established that where the owner of a motor vehicle hires it out or lends it to a third party to be used for purposes in which the owner holds no interest, then the owner escapes liability.

18. On their part, the respondents contended that the mere fact that the appellant together with the 1st defendant were at all material times co-owners of the subject vehicle goes to show that they were in control over the use and management of the said vehicle, thus making them both vicariously liable, by virtue of the agreement entered into between them. The respondents further submitted that the appellant did not demonstrate that it was merely a financier and that it did not derive any benefit from the use of the subject vehicle. Consequently, it was the respondents' stand that by virtue of being one of the registered owners, the appellant was a necessary party to the suit.

19. The learned trial magistrate, in arriving at his decision, reasoned that going by the evidence on record, it was clear that the 1st defendant and appellant co-owned the subject vehicle and therefore had a clear interest in the same, further reasoning that at the time the cause of action arose, the loan repayment was yet to have been cleared. According to the learned trial magistrate, since the issue of liability is yet to be determined, it was his view that the presence of the appellant was necessary at that point, adding that pleadings should only be struck out in clear and obvious cases.

20. From the foregoing, I have gathered that the appellant is in no way disputing co-ownership of the subject vehicle; rather, what is being disputed is liability and its participation in the suit. I have re-evaluated the documents presented by the appellant: there is a copy of the loan application form by the 1st defendant and a letter of offer from the appellant to the said defendant, stipulating the terms and conditions of the loan facility. It is apparent under *clause 3* of the letter of offer that the purpose of the facility was to purchase a motor vehicle, though the particulars of the same were not set out. Moving on, *clause 6* is indicative that the facility would be secured by the joint registration of the proposed motor vehicle and that this would be the position until payment in full of the loan amount as set out in *clause 9*. The letter indicated under clause 7 that among the conditions for the sanctioning of the facility was the execution of the hire purchase agreement.

21. From my understanding of the above, the appellant's sole concern and interest was the recovery of the loan amount and its joint registration of ownership with the 1st defendant was intended to act as security for the same. Going by the wording of the agreement, there is nothing to indicate an intention by the appellant to have a direct interest in the motor vehicle's running or business since it was concerned with the repayment of the loan amount. In that case, I am persuaded that the appellant was involved merely as a financier to assist the 1st defendant in acquiring the motor vehicle which it would appear is the subject vehicle subsequently involved in the accident.

22. I have re-looked at the various authorities relied upon by the appellant before the trial court and noted that the status of a financier was discussed in circumstances quite similar to the current one. In those instances, the respective High Courts essentially appreciated that vicarious liability cannot extend to a financier who has no control or management over the motor vehicles in question. In the end, those courts arrived at a similar finding that the pleadings against such financiers, being unnecessary parties, should be struck out.

23. Furthermore, I wish to make reference to the case of ***Jane Wairimu Turanta v Githae John Vickery & 2 others [2013] eKLR*** cited by the appellant where the High Court in allowing an application seeking to have the suit struck out, held the following on the subject of vicarious liability:

> ***"The doctrine of vicarious liability was expounded in the case of Morgan v Launchbury (1972) 2 All ER 606 which stated that to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner… The case of HCM Anyanzwa & 2 others v Lugi De Casper & Another (1981) KLR 10 stated that "vicarious liability depends not on ownership but on the delegation of tasks or duty"***

24. It therefore follows from the above that mere ownership is not enough to give rise to vicarious liability; a party would be required to show that the cause of action resulted from a person acting upon instructions or request of a party. Without delving into the merits of the suit, I noted that there was nothing to show that the driver of the subject vehicle was acting on the instructions of the appellant.

25. Having said so, I have studied the learned trial magistrate's ruling and noted that no reference was made to the authorities cited by the appellant despite their resemblance to the case which was before him. Equally, I noted that the said magistrate did not address the appellant's position as a financier notwithstanding the fact that this issue was raised and addressed in the appellant's submissions. Whereas I concur with the learned trial magistrate to the extent that pleadings ought not to be struck out save in obvious circumstances, I disagree with his ultimate finding in respect to the suit against the appellant. I am of the considered view that the appellant's involvement was that of a mere financier despite having been registered as a co-owner of the subject vehicle and that it really had no control over the management and use of the said vehicle; if anything, a reading of the letter of offer shows that the 1st defendant was responsible for ensuring the proper use of the vehicle and any risks that arose would befall him during the duration of the agreement. It is my inference therefore, that the driver of the subject vehicle was at all material times acting as an agent/employee of the 1st defendant and not the appellant.

26. Moreover, the appellant maintained that it was not a necessary party to the suit. In seeking to understand what is meant by the term, I cite with approval the definition offered in ***Investments and Mortgages Bank limited v Nancy Thumari & 3 others [2015] eKLR*** where the High Court sitting on appeal set aside a decision refusing to strike out the appellant's name from the suit. The Court borrowed its definition of a necessary party from ***Jan Bolden Nielsen vs Herman Phillipus Steyn & 2 others (2012) eKLR*** wherein it was held thus:

> ***"In my view, a necessary party is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the court."***

27. Going by my analysis hereinabove coupled with the above definition, I am doubtful that the appellant's participation in the proceedings will have an impact in the outcome thereof, having already determined that there is no nexus whatsoever between itself and the driver of the subject vehicle. In the circumstances, I am well convinced that the appellant was not a necessary party to the suit and hence, the learned trial magistrate ought to have considered all relevant facts and authorities placed before him and allowed the application by dismissing the suit against it. In any event, the appellant had cited before the trial court the case of ***Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] eKLR*** which set out the considerations in deciding whether a party should be enjoined in proceedings as hereunder:

"…it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party

2. He must be a proper party.

3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.

4. The ultimate order or decree cannot be enforced without his presence in the matter.

5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit."

28. Further to the above, ***Order 1, Rule 10 (2)*** of the ***Civil Procedure Rules*** grants discretionary power to the courts to either order a necessary party to be enjoined or order that the name of a party who has been wrongly added to the suit to be struck out. In any case, I am convinced that the issue of liability can adequately be determined without the presence of the appellant as a party since there is nothing to show that its involvement is a matter of necessity to the suit.

29. Accordingly, I find merit in the appeal and the same is allowed and the following orders made consequently:

a) The ruling delivered on 30th January, 2013 is hereby set aside in its entirety.

b) The respondents' suit as against the appellant is hereby struck out.

c) The appellant shall have the costs of the suit and appeal.

Dated, signed and delivered at NAIROBI this 3rd day of October, 2019.

……..

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondents