



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 89A OF 2015

KYOGA HAULIERS LIMITEDPLAINTIFF

VERSUS

MALINDI PARCELS SERVICE.....1ST DEFENDANT

OMAR SATAR EBRAHIM..... 2ND DEFENDANT

JUDGMENT

1. On 15th July, 2015, the plaintiff, Kyoga Hauliers filed a suit through a plaint dated 26th June, 2015. The crux of the matter was a road traffic accident that happened on 6th February, 2015 along Maai Mahiu road involving the plaintiff's motor vehicle registration No. KBS 096V/ZE 0199 and motor vehicle registration No. KAW 483V allegedly owned by the defendants. The plaintiff seeks:-

- (i) Special damages in the sum of Kshs. 3,819,892.00;
- (ii) Loss of income from 20th February, 2015 until Judgment is issued at the rate of USD 10,800 per month; and
- (iii) Costs of the suit and compounding interest on (i) and (ii) above.

2. The 1st defendant filed a statement of defence on 11th September, 2015 wherein it denied being the registered owner of motor vehicle registration No. KAW 483V. It also denied that the 2nd defendant was its servant, employee and/or agent. The said defendant averred to having sold motor vehicle registration No. KAW 483V to the 2nd defendant vide a sale agreement entered between them on 13th January, 2015.

3. An *ex parte* Judgment was entered against the 2nd defendant, Omar Satar Ebrahim on 7th December, 2015 for failure to enter appearance. The plaintiff called Ismail Gulam Yusuf its Operations Manager as its first witness (PW1). He testified that the plaintiff deals with transport from Mombasa to various destinations that lie along the Northern Corridor. He produced the log books for motor vehicle registration No. KBS 096V as plf. exh. 1 and for the trailer registration No. ZE 0199 as plf. exh. 2. He indicated that the former was registered on 9th August, 2012 and the latter on 30th July, 2012 and that they were both bought when they were brand new. They were however grounded as at the time he testified in court, following an accident in February, 2015 along the Mombasa Malaba Highway.

4. PW1 further testified that motor vehicle registration No. KBS 096V was extensively damaged and it was not viable to repair it. He further stated that the whole mechanism for running the motor vehicle was extensively damaged and some parts could not be easily available. It was his evidence that trying to repair it would be like trying to assemble a new motor vehicle. The motor vehicle inspection report that showed that the vehicle had no pre-accident defects was marked as MFI-3.

5. It was the evidence of PW1 that the plaintiff hired Kibmat Loss Assessors (E.A) Ltd., to assess the damage to the motor vehicle and they said that it was not viable for repairs. The plaintiff paid the Kshs. 11,600/= for the assessment as per the fee note cum receipt produced as plf. exh. 4. He stated that the vehicle would make 4 trips per month and they would charge USD 2,700 per trip from their biggest client, Mukwano Group of Kampala. He added that the monthly income was USD 10,800 and sought loss of income from 20th February, 2015 until the date of delivery of the Judgment.

6. PW1 made a further claim for the total loss of the motor vehicle in the sum of Kshs. 3,750,000 and truck towing charges of Kshs. 150,000/=. PW1 testified that a search conducted with the Kenya Revenue Authority on 18th March, 2015 established that motor vehicle registration No. KAW 483V was registered in the name of the 1st defendant. PW1 produced the search certificate as plf. exh. 6. He produced a form with the tabulation of loss of income after the accident, as plf. exh. 5. He also produced a statutory notice dated 2nd April, 2015

addressed to Xplico Insurance Co., which had insured the 2nd defendant as plf. exh. 7. A demand letter dated 26th March, 2015 addressed to the 1st defendant was produced as plf. exh. 8 and a certificate of posting was produced as plf. exh. 9. He stated that the plaintiff also seeks costs and compound interest on special damages and loss of income. PW1 asserted that he sought compound interest due to loss of business and revenue.

7. PW2 was George Henry Mata a principal of Kibmat Loss Assessors (E.A.) Co. Ltd. It was his evidence that he was retained by the 1st defendant to assess motor vehicle registration No. KBS 096V a Beiben truck that was involved in an accident on 6th February, 2015. He indicated that he inspected the motor vehicle on 20th February, 2015. He observed that it had collided with a solid obstruction at the front. He noted that heavy impact had dislodged the cabin, twisting the kinky chassis frame thereby sustaining extensive damage as shown on page 1 of the Motor Vehicle Assessors report. He testified that the estimated cost of repairs came to Kshs. 3,658,292.00. He stated that by using the contents of the log book, the pre-accident value was estimated as Kshs. 3,750,000/= . He indicated that due to the high cost of estimated repairs, they advised that it was uneconomical to repair the vehicle and concluded that it was a constructive total loss. The salvage value was estimated at Kshs. 600,000/= to enable the plaintiff to write it off from its books. They charged Kshs. 11,100/= (sic) for the assessment of the motor vehicle. He produced the motor vehicle assessment report as plf. exh. 10 and a receipt for the sum of Kshs. 3,000/= for court attendance fees as plf. exh. 11.

8. PW3, Vasimaki M. Mape testified that he had worked as a Driver for the plaintiff for 2½ years and previously he had worked as a Turn Boy for the said company for 3 years. He recounted how on 6th February, 2015 he was traveling in motor vehicle registration No. KBS 096V/ZE 0199 which was being driven by Kambale Nzalamingi from Nakuru heading towards Nairobi direction. He stated that at Maai Mahiu they found a vehicle which had broken down and the Turn Boy of the said vehicle was controlling traffic. It was his evidence that when it was their turn to drive past the broken down vehicle, a canter motor vehicle was driven at a high speed towards Nakuru direction as it overtook vehicles that were in the queue. He stated that the Driver of their vehicle tried to avoid the oncoming vehicle but it hit their cabin on the Driver's side. PW3 testified that the cabin became dismantled from the chassis and he was thrown at a distance while still in the cabin. He lost consciousness and came to, at Maai Mahiu Maternity Clinic. He indicated that the Driver of their motor vehicle was thrown off the cabin to a ditch on their side of the road. On cross-examination, he stated that motor vehicle registration No. KAW 483V was being driven downhill thus it was at a high speed, while the vehicle he was in was being driven uphill.

9. PW4 was Cpl Thomas Obonyo of Lari Police Station. He stated that he was performing traffic duties in the said Police Station and was familiar with the facts surrounding the case. He stated that the Investigating Officer was transferred to Vihiga.

10. He indicated that he had the occurrence book and police abstract for an accident that happened at 3:00 p.m., on 6th February, 2015 along Nairobi - Maai Mahiu road along escarpment area in respect to motor vehicle registration Nos. KBS 096V/ZE 0199 driven by Kambale Nzalamingi from Naivasha to Nairobi direction and KAW 483V that was being driven by Mohamed Said Yusuf heading to Maai Mahiu from Nairobi direction. PW4 testified that the latter Driver overtook other vehicles and collided with motor vehicle registration No. KBS 096V/ZE 0199. He indicated that the Driver of motor vehicle registration No. KAW 483V died on the spot. He stated that the original police abstract was issued on 11th February, 2015 and it shows that the Driver of motor vehicle registration No. KAW 483V was at fault. PW4 produced the police abstract as plf. exh. 12.

11. The 1st defendant called DW1 Fauz Ahmed Faraj as its witness. He testified that he was one of the Directors of Malindi Parcels Limited (1st defendant) which used to own motor vehicle registration No. KAW 483V until 13th January, 2015 when it was sold to Mr. Omar Satar Ebrahim (2nd defendant). DW1 stated that they prepared a sale agreement and the 1st defendant was paid the value of the motor vehicle. He indicated that he signed the transfer documents for the said motor vehicle and he gave the 2nd defendant the log book which bore the name Malindi Parcels Services. DW1 produced the sale agreement as def. exh. 1 and the transfer of ownership document as def. exh. 2.

12. DW1 further stated that the 2nd defendant gave him a copy of an insurance cover bearing his name with a commencement date of 14th January, 2015 and expiry date of 14th February, 2015 (sic). He produced it as def. exh. 3, DW1 produced copies of the 2nd defendant's PIN certificate as def. exh. 4, a temporary permit and passport for the 2nd defendant as def. exhs. 5(a) and 5(b), respectively. He produced a copy of the log book as def. exh. 6.

13. DW1 denied that the 1st defendant was in possession of motor vehicle registration No. KAW 483V as at 6th February, 2015. He denied knowing Mohamed Said Yusuf (the deceased Driver). He prayed for the suit against the 1st defendant to be dismissed and for the plaintiff to pursue its claim against the 2nd defendant.

SUBMISSIONS

14. The plaintiff's Counsel filed her written submissions on 23rd August, 2017. On liability it was submitted that the occurrence of the accident was not contested and that the 1st defendant's vehicle registration No. KAW 483V caused the accident by negligently being driven and controlled as per the evidence of PW3 and the contents of the police abstract form.

15. On ownership of the motor vehicle, it was submitted that Section 8 of the Traffic Act provides that a person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. Counsel stated that sufficient evidence would have to be tendered to show that the vehicle no longer belongs to the registered owner and in the absence of such evidence, the person registered as such is conclusively the owner.

16. The plaintiff's Counsel relied on the search certificate produced as plf. exh. 6 which depicts the 1st defendant as the owner of motor vehicle registration No. KAW 483V. She submitted that the said certificate and the copy of the motor vehicle log book produced as def. exh. 6 sufficiently established that the motor vehicle belongs to the 1st defendant.

17. It was the plaintiff's contention that ownership of the vehicle had not passed to the 2nd defendant as apart from the initial payment of Kshs. 500,000/= and part payment of the balance through a post dated cheque, the balance of the purchase price had not been completed by the 2nd defendant hence the non-transfer of the vehicle to him. Counsel argued that ownership had not passed to the 2nd defendant.
18. On the issue of damages, it was submitted that PW2 a Loss Assessor estimated the pre-accident value of motor vehicle registration No. KBS 096V as Kshs. 3,750,000/= and the costs of repair as Kshs. 3,658,292.00 and indicated that it would be uneconomical to repair the said motor vehicle. The said Assessor therefore concluded his report by stating that the motor vehicle should be considered a constructive total loss.
19. On loss of income, Counsel for the plaintiff submitted that the schedule of income produced as plf. exh. 5 shows that motor vehicle registration No. KBS 096V used to fetch a monthly income of USD 10,800.
20. The plaintiff's Counsel relied on the case of **Ignatius Makau Mutisya vs Reuben Musyoki Muli** [2015] eKLR on the burden of proof required in civil cases.
21. The 1st defendant's Counsel filed his submissions on 31st August, 2017. The submissions are to the effect that the pleadings and evidence adduced established that the 2nd defendant purchased motor vehicle registration No. KAW 483V from the 1st defendant on 13th January, 2015 or thereabouts and the 1st defendant handed over the log book and the transfer forms duly executed by it for registration in the names of the 2nd defendant. It was submitted that having failed to enter appearance and defence to the suit, Judgment was entered against the 2nd defendant and from the evidence adduced which was uncontroverted, the proper party to bear responsibility was the 2nd defendant.
22. On the submission that parties are bound by their own pleadings, reference was made to paragraph 3 of the plaint which states that the 2nd defendant was in possession of the suit motor vehicle pursuant to a sale agreement dated 13th January, 2015 which was produced as def. exh. 1. Counsel stated that it was further pleaded in paragraph 5 of the plaint that the 2nd defendant's agent, servant, employee and/or driver drove the suit motor vehicle belonging to the 2nd defendant negligently/recklessly and/or carelessly permitted it to lose control and collide with the plaintiff's vehicle.
23. It was stated that the foregoing was a glaring admission that the plaintiff acknowledged the fact that the 2nd defendant was indeed the beneficial owner and in physical possession of the suit motor vehicle as at the time of the accident. The court was urged to find that motor vehicle registration No. KAW 483V as at the time of the accident belonged to the 2nd defendant and that his servant and/or his agent was in full control when the accident happened.
24. Counsel relied on the evidence of DW1 to the effect that the 1st defendant was not in actual control or ownership of the said motor vehicle at the time of the accident, having sold and handed over possession of the vehicle to the 2nd defendant.
25. Reference was made to the evidence of DW1 that he trusted that the 2nd defendant would transfer the motor vehicle to his name. It was submitted that the police abstract showed that motor vehicle KAW 483V was insured by the 2nd defendant through Xplico Insurance Co. Ltd. With regard to the evidence of PW1, it was submitted that the plaintiff issued the 2nd defendant's insurer Xplico Insurance Co. Ltd with a statutory notice and sent a demand letter to the 1st defendant. The latter replied to the plaintiff stating that it was not the owner of the said motor vehicle.
26. On the provisions of Section 8 of the Traffic Act, it was submitted that a person whose name appears on the log book is deemed to be the registered owner of a motor vehicle, but the same is subject to rebuttal through evidence. He cited the case of **Ignatius Makau Mutisya vs Reuben Musyoki Muli** (supra) where it was held that a court can make a finding of ownership that is different from that contained in a log book where there exists other compelling evidence to prove otherwise. It was stated that the 1st defendant had discharged its burden of proof by producing def. exhs. 1 to 5 and that there was no evidence to link the 1st and 2nd defendants on an employer-employee relationship which would lead the former to be held vicariously liable for the misdeeds of the latter.
27. Counsel contended that no negligence was attributable to the 1st defendant and that the plaint in paragraph 5 points to the agent, servant, employee and/or driver of motor vehicle registration No. KAW 483V having been negligent/recklessness and/or careless thereby causing the alleged accident. It was stated that the plaintiff failed to discharge its burden of proof on a balance of probabilities to prove that the 1st defendant was negligent.
28. On the prayer for special damages, Counsel for the 1st defendant submitted that there was no evidence of towing charges having been paid for and that the claim for loss of user was not proved through proper documentation as no valid receipts and/or particulars were produced in evidence. He relied on the case of **Equity Bank Ltd vs Gerald Wang'ombe Thuni** [2015] eKLR, which addressed the burden of proof as provided in Sections 107 to 109 of the Evidence Act.
29. On the claim for payment for the police abstract and motor vehicle search, it was submitted that no receipts for Kshs. 200/= and Kshs. 2,500/= respectively, were produced. Counsel prayed for the claims to be rejected for want of proof. A similar submission was made with regard to the claim for assessment fee paid to Kibmat Loss Assessors for failure by the plaintiff to produce written instructions to PW2 requiring him to undertake assessment of the damage caused to motor vehicle registration No. KBS 096V.
30. The 1st defendant's Counsel also took issue with the failure by the plaintiff to call the then Driver of motor vehicle registration No. KAW 484V as a witness to give a first hand account of how the accident happened.

ANALYSIS AND DETERMINATION

31. The plaintiff filed its list of issues on 13th February, 2017. These are as follows:-

- (i) Who is liable for the subject accident;
- (ii) Who is the owner of motor vehicle registration No. KAW 483V Mitsubishi van?
- (iii) Are the defendants liable to pay special damages of Kshs. 3,819,892.00; and
- (iv) Are the defendants liable to pay for the loss of income?

30. The 1st defendant filed the following list of issues on 28th February, 2017:-

- (i) Who is the owner of motor vehicle registration No. KAW 488V (sic)?
- (ii) Which of the defendants is liable for the subject accident if at all?
- (iii) Did the plaintiff contributorily (sic) liable for the accident?
- (iv) What damage, if any, has the plaintiff sustained and who is liable for this?
- (vi) Has the plaintiff suffered any loss of income? If so, who is liable to pay this?
- (vii) Costs and interest?

32. It is uncontested that an accident did occur on 6th February, 2015 along the Maai Mahiu road involving motor vehicle registration Nos. KAW 483V and KBS 096V/ZE 0199. Evidence was adduced by PW3 Vasimaki M. Mape the Turn Boy of motor vehicle registration No. KBS 096V/ZE 0199 that the accident was caused by the Driver of motor vehicle registration No. KAW 483V. As recounted by the said witness, the Driver of the said vehicle overtook a queue of motor vehicles and drove onto the path of the Driver of motor vehicle registration No. KBS 096V/ZE 0199 thereby causing a collision which led to the death of the Driver of the former motor vehicle. Although the Driver of the latter motor vehicle was not called to give evidence, Mrs. Ali, Learned Counsel for the plaintiff gave a plausible explanation to the effect that the said Driver left the employment of the plaintiff and went back to the Democratic Republic of Congo.

33. The police abstract is indicative of the fact that the Driver of motor vehicle registration No. KAW 483V was to blame for the accident and the foregoing was echoed by PW4, No. 67411 Cpl. Thomas Obonyo who said that the police abstract showed that the Driver of motor vehicle registration No. KAW 483V was at fault. The evidence that the accident was caused by the Driver of the said motor vehicle as not controverted. In paragraph 5 of the plaint the plaintiff takes cognizance of the fact that the accident was caused by the agent, servant, employee, and/or servant of the 2nd defendant.

34. The evidence adduced by DW1, Fauz Ahmed Faraj a Director of the 1st defendant was that they used to own motor vehicle registration No. KAW 483V until 13th January, 2015 when they sold it to the 2nd defendant through a sale agreement which was signed by him and the 1st defendant. The 1st defendant was paid Kshs. 500,000/= and the balance was to be paid in 6 monthly installments. The 2nd defendant however only honoured one of the 6 payments. It was the evidence of DW1 that he signed a motor vehicle transfer form, he produced a copy of the same as def. exh. 2. It was also his evidence that the 2nd defendant also gave him a copy of an insurance cover bearing his name. The said document was produced as def. exh. 3. A copy of the log book for motor vehicle registration No. KAW 483V which was produced as def. exh. 6 shows that the said motor vehicle was registered in the name of the 1st defendant. A certificate of a search carried out with the Kenya Revenue Authority and produced as plf. exh. 6 also shows that the said vehicle was registered in the 1st defendant's name.

35. This court was urged by Counsel for the plaintiff to pay heed to the provisions of Section 8 of the Traffic Act and hold that the 1st defendant is the owner of motor vehicle registration No. KAW 483V. The 1st defendant's Counsel on the other hand implored this court to find that the owner of the said motor vehicle is the 2nd defendant and that the accident in issue was caused by his authorized driver, servant and/or agent. DW1 produced documentary evidence to show that it had sold motor vehicle registration No. KAW 483V to the 2nd defendant and as at the time of the accident, the said vehicle was in possession of the 2nd defendant and/or his servant or agent. A copy of the motor vehicle insurance cover produced in support of the 1st defendant's evidence was in tandem with what was recorded in the police abstract that the vehicle was insured by Xplico Insurance Co. Ltd under policy No. 080/002320/15/01/200TPO. The insurance cover was to run from 14th January, 2015 to 13th February, 2015. The 2nd defendant was the insured. The particulars of the policy number recorded on the police abstract are similar to those reflected in the copy of the insurance cover produced by DW1. The foregoing and the transfer documents are therefore conclusive evidence of the fact that ownership of the motor vehicle had changed from the 1st defendant to the 2nd defendant.

36. When addressing the provisions of Section 8 of the Traffic Act, Cap 403 Laws of Kenya, Ojwang J (as he then was) in the case of **Nancy Ayemba Ngaira vs Abdi Ali** [2010] eKLR stated thus:-

“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of 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 defacto 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; 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 1st defendant was one of the owners of the matatu in question. (emphasis added).

37. As was submitted by Mr. Ondego for the 1st defendant, in this case, it is apparent that the 2nd defendant was seized of beneficial ownership of the motor vehicle registration No. KAW 483V. It is therefore this court's finding that the 1st defendant can therefore not be held liable for any acts or omissions done by the 2nd defendant or by his servants and/or agents. It did not in any way contribute to the accident the subject of this suit.

38. The Court of Appeal in the case of **Securicor Kenya Ltd vs Kyumba Holdings Ltd**. [2005] eKLR stated as follows:-

“We think that the appellant had by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in *Osapil vs Kaddy* [2001] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or log book was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.” (emphasis added).

39. In the present case, 1st defendant through evidence rebutted the issue that it was the registered owner of motor vehicle registration No. KAW 483V and by so doing discharged its burden of proof with regard to ownership of the said vehicle.

40. On special damages, the plaintiff proved through the evidence of PW2 who produced plf. exh. 10 that motor vehicle registration No. KBS 096V was extensively damaged. He considered the said motor vehicle to be a constructive total loss and gave the estimated pre-accident value of the vehicle as Kshs. 3,750,000. It is the finding of this court that the above special damage claim was proved and it is hereby awarded. It matters not if the instructions the plaintiff gave to PW2 to assess the damage caused to the said motor vehicle were given verbally or in writing. An award in the sum of Kshs. 11,600.00 for the motor vehicle Assessor's fees is also made as per the receipt produced as plf. exh. 4. No receipts were produced for the costs incurred in obtaining the police abstract from Lari Police Station and the search certificate from the Kenya Revenue Authority. The claims for payment of expenses incurred to obtain the foregoing documents is disallowed.

41. On the loss of income suffered by the plaintiff, PW1 produced a schedule to show a breakdown of the income that was being made on a monthly basis by the use of motor vehicle registration No. KBS 096V in transporting goods from Mombasa to Kampala. The foregoing being a special damage claim had to be specifically pleaded and proved. The plaintiff failed to produce any documentation to prove the actual fees that the plaintiff was charging in transportation of goods whereas it had in its possession the raw figures from payments made through past transactions to support its case. In light of failure to produce documentation that was within its reach, the plaintiff's claim for loss of income is hereby disallowed.

42. It is therefore my finding that the claim for special damages has been proved in the total sum of Kshs. 3,761,600, which I hereby award in favour of the plaintiff as against the 2nd defendant. Interest is also awarded to the plaintiff at court rates. Costs of the suit are awarded to the plaintiff.

It is so ordered.

DATED and SIGNED at MOMBASA on this 6th day of June, 2018.

NJOKI MWANGI

JUDGE

DELIVERED, DATED and SIGNED at MOMBASA on this 7th day of June, 2018.

P. J. OTIENO

JUDGE

In the presence of:-

.....for the plaintiff

.....for the 1st defendant

.....for the 2nd defendant

..... Court Assistant