**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL SUIT NO. 16 OF 2014**

**ALI ABDI DERE.....PLAINTIFF**

**VERSUS**

**HASH HAULIERS LIMITED.....1ST DEFENDANT**

**NATIONAL INDUSTRIAL CREDIT BANK.....2ND DEFENDANT**

**RULING**

***The Application***

By a Notice of Motion dated 26th November, 2014, the 2nd defendant seeks the following specific orders:

1. THAT the suit against the 2nd Defendant be struck out with costs.

2. THAT the costs of the Application and this suit be borne by the Plaintiff.

The grounds upon which the Notice of Motion was based were set out in the Application as follows:

*1. THAT the 2nd Defendant is **improperly joined as a party to the suit.***

*2. That the 2nd Defendant was **merely a financier** and it does not have any interest in Motor Vehicle Registration No. KBN 734A.*

*3. THAT the 2nd Defendant **is not vicariously liable** as it was neither the Principal nor the insured of the vehicle aforesaid when the alleged accident occurred.*

4. *That **no cause of action has been disclosed against the 2nd Defendant** and hence no liability attaches.*

***Supporting Affidavit***

The application was supported by the Affidavit of Kelvin Mbaabu, Senior Legal Officer of the 2nd Defendant bank sworn on 26th November, 2014 significantly deponing as follows:

"2. *That the Bank on the request of Hash Hauliers Limited, the 2nd Defendant herein advanced a loan for the purchase of Motor Vehicle Registration No. KBN 734A vide a Hire Purchase Agreement NO/ HPR 4-500-000228. (Annexed herewith and marked KM-1 is a copy of the Hire Purchase Agreement).*

*3. That pursuant to the said Hire Purchase Agreement the said motor vehicle was registered in the joint names of NIC Bank Ltd., the financier and Hash Hauliers Limited, the hirer.*

*4. The joint registration was done solely for the purpose of safeguarding the interest of the 2nd defendant as the financier of the said motor vehicle.*

*5. That the Bank was neither the principal nor the insured of the motor vehicle Registration No. KBN 734 at any time.*

*6. That the 1st defendant herein was at all times to seize possession, care and control of the said motor vehicle and the 2nd defendant did not at any time have care, control and management of the said motor vehicle.*

*7. That the hirer herein, Hash Hauliers Limited, was not a servant or agent of the 2nd Defendant at any one time.*

8. *That the 1st defendant finished paying the loan financing the said motor vehicle and the 2nd defendant did not retain any interest in the said motor vehicle (Annexed herewith and marked KM-2 is a copy of the statement).*"

***Replying Affidavit***

In his Replying Affidavit sworn on 30th November, 2015, the Plaintiff/Respondent deponed to the following facts:

"*2. That the present suit arises from a road accident which occurred on or about the 2nd day of April 2011 along the Garissa-Mwingi road involving motor vehicle registration number KBN 734A and myself whereby I sustained severe injuries;*

*3. That I subsequently obtained a Police Abstract in respect to the said accident which is filed in my list of documents already before this court;*

***(hereby annexed and marked "AAD1" is a true copy of that police abstract)***

*4. That even though the Police Abstract in regard to the road accident which is the subject matter of the present suit cited the 1st Defendant as the owner of the motor vehicle registration number KBN 734A, the records from the Registrar of motor vehicle had further information;*

*5. That the joinder of the 2nd Defendant in this suit was on account of the records obtained by my erstwhile advocates, M/S Njoroge Wachira & Co. advocates, from the Registrar of Motor Vehicles on the 15th June 2011 which records clearly showed that both the defendants in this suit were registered as owners of the motor vehicle registration number KBN 734A;*

***(hereby attached and marked "AAD2 and "AAD3" are true copies of the copy of records and customer transaction voucher evidencing payment for the copy of records)***

*6. That for that reason, it was prudent to join both defendants as my right to relief raised a common question of fact, that is to say, they both are the registered owners of the motor vehicle registration number KBN 734A thus liable for my pain and suffering."*

***2nd Defendant's Submissions dated 3rd February, 2016***

The 2nd Respondent urged the Notice of Motion upon the grounds set out therein as above with the aid of case-law authorities Nairobi HCCC No. 4772 of 1980, ***Richard Obiero Mwai v. E. Guerci & Co. Ltd and Diamond Trust of Kenya Ltd.; Ali Lai Khalifa & 8 Ors. v. Pollman's Tours and Safaris & 2 Ors.*** Mombasa HCCC No. 106 of 2002; ***Justus Kavisi Kilonzo v. Coast Broadway Company Ltd. and Diamond trust (K) Ltd.*** Mombasa HCCC 169 of 2007; and ***Jane Wairimu Turanta v. Githae John Vickery and Equity Bank Limited & Munene Don***, Nairobi HCCC No. 483 of 2012, which are discussed below.

***Plaintiff/Respondent's Submission dated 12th February, 2016***

In his Submissions, the Plaintiff/Respondent opposed the application and urged that the 2nd respondent was not a mere ***financier*** as follows:

*We further submit that a hire purchase agreement is not a financing agreement as claimed by the 1st Defendant more so, bearing in mind that Section 8 (1) (e) of Hire Purchase Act, Cap 507, provides that "in every hire-purchase agreement there shall be implied – a condition that the legal ownership of, and title to, the goods shall automatically be vested on the hirer upon payment by him of the hire – purchase price in full";*

*Fundamentally, as at the time the Plaintiff's cause of action arose, the Hire Purchase agreement between the Defendants was still in force and the agreement unequivocally describes the 2nd Defendant as the owner of the motor vehicle that caused the accident.*

*There is a major difference between a Hire Purchase Agreement and a "Financing Agreement". This difference concerns the customer's relationship to the asset. That is to say, in the case of financing agreement for example, in respect of a car, a customer receives money from the bank which is often an unsecured loan which the customer then uses to purchase a car. The car belongs to the customer as soon as he/she has purchased it. Suffice to say that the customer must repay the loan amount plus interest to the bank.*

*On the other hand, in the case of a Hire Purchase Agreement a customer is effectively leasing the car monthly. The car does not belong to the customer until the last installment is paid up. The bank can repossess the car at any point in time should the customer be in default by failing to up with the schedule of payments.*

*That being the case, it is our humble submission that the 1st Defendant was a hirer and the 2nd Defendant has laid no basis for this*

*Honourable Court to limit the ownership of the motor vehicle registration number KBN 734A but was for all intents and purposes, also the actual owner.*

*It is common knowledge that the property the subject of the Hire Purchase Agreement ordinarily remains in the names of the vendor until the hire-purchase installments are fully paid and the Court of Appel in the case of* ***Leornard Mungania v. Jessikay Enterprises & Another (2009) eKLR*** *stated to in overturning a decision whereby a lower court had dismissed the appellant's case on account of a defence of the nature now raised by the 2nd Defendant/Applicant in its application. We rely on the cited decision by the Court of Appeal to urge Your Lordship to dismiss the 2nd Defendant's application with costs.*

*In conclusion therefore, we submit that both the defendants sued in this case are jointly and severally liable for the plaintiff's injuries, loss and damages and it is the interests of justice that the 2nd Defendant's application be dismissed with costs as the 2nd Defendant has not made out a case for its exclusion from the proceedings of the present suit but it has instead reaffirmed the Plaintiff's reasons for enjoying it in this suit by confirming to this Court its liability in respect of the accident subject matter of the present suit.*

**Issues for determination**

The issue for determination in this application is simply whether a financier in the acquisition of a motor vehicle could be held liable for the negligent operation or use of the motor vehicle by the agent of the person who acquires a motor vehicle through such financing, and whether the 2nd defendant was such a financier.

**Determination**

***The principles of law applicable***

In granting an application for striking out a suit in similar circumstances, in Nairobi HCCC No. 4772 of 1980, ***Richard Obiero Mwai v. E. Guerci & Co. Ltd and Diamond Trust of Kenya Ltd.,*** Bosire, J. (as he then was) said:

*"The application must be of necessity be granted for two main reasons. Firstly, that the plaint does not contain any averments as to how the liability of the 2nd defendant arises. Secondly, if as it has been contended and argued on behalf of the 2nd Defendant/Applicant, its position is merely as a financier, then it did not owe any duty of care to the plaintiff/respondent as would have given rise to liability to the plaintiff."*

Similarly, Etyang, J. in ***Ali Lai Khalifa & 8 Ors. v. Pollman's Tours and Safaris & 2 Ors.*** Mombasa HCCC No. 106 of 2002, considered the nature and effect of a financier and hirer status under a Hire Purchase Agreement and held as follows:

*"The legal position is this: if it can be demonstrated that a registered owner of a motor vehicle hired out to a third party or the said vehicle was used in the circumstances which did not allow for the doctrine of vicarious liability on the part of the registered owner, to apply, then the latter is not liable.*

*In* ***Ormrod v. Crosville Motor Services Ltd.*** *(1954) 2 All ER 752, at page 755 Lord Denning said:*

*"The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else.* ***If it is being used wholly or partly by the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."***

*In the circumstances of the present case the following facts have been proved to exist (a) The second defendant was a mere financier of the first defendant for the purposes of the acquisition of the motor vehicle Reg. No. KAE XXXX by the first defendant, and the second defendant's interest in said vehicle was merely recorded in the Registration Book or in the records held by the Registrar of Motor Vehicles for the purposes of securing its interests under the Hire Purchase Agreement. That interest is in the balance of the loan or advances to the first defendant…."*

The position in ***Ali Lali Khalifa*** was followed by Azangalala, J. (as he then was) in ***Justus Kavisi Kilonzo v. Coast Broadway Company Ltd. and Diamond trust (K) Ltd.*** Mombasa HCCC 169 of 2007 as follows:

*"I take the following view of the matter. The basis of the defendant's statement of defence, the co-ownership is admitted. But the same is explained in paragraph 2 of thereof. In that paragraph, the 2nd defendant avers that it is registered as co-owner of the said vehicle only as financier thereof under a Hire Purchase Agreement dated 29.8.2004. Otherwise, the possession, control direction and management of the said vehicle was at all material times with 1st defendant, its servants and or employees. The Plaintiff has not filed a reply to that defence to rebut the 2nd defendant's averment regarding its status vis a vis the said vehicle. It must therefore be taken that the said averment is factually correct. That position is also not denied by the plaintiff in his replying affidavit filed in opposition to the application. I have also noted that the 1st defendant has not denied the 2nd defendant's said status.*

*In the premises, I am of the view that despite the registration of the 2nd defendant as co-owner of the said motor vehicle, as a financier of the defendant, the 2nd defendant is not a necessary party to these proceedings. To use the language of Etyang J. (now*

*retired), Mombasa HCC Number 106 of 2002:* ***Alic Lali Khalifa & Others v. Pollman's Tours & Safaris & 2 Others****, the 2nd defendant has demonstrated that it hired out the said motor vehicle to the 1st defendant and the said vehicle was used by the 1st defendant in circumstances which do not allow for the doctrine of vicarious liability to apply to the 2nd defendant.*

*I am alive to the fact that striking out any pleadings should be the last resort of any court and should be resorted to only in plain and obvious cases. In my view however, this is a plain and obvious case when save for the mere registration of the 2nd defendant as a co-owner of the said motor vehicle, the 2nd defendant cannot be liable to the plaintiff vicariously. The upshot is that the 2nd defendant's application dated 18/12/07 is allowed as prayed and the plaint struck out as against the 2nd defendant and the plaintiff's suit is dismissed as against it."*

Adverting to the issue of vicarious liability of a co-owner of a motor vehicle, Ougo, J. in ***Jane Wairimu Turanta v. Githae John Vickery and Equity Bank Limited & Munene Don***, Nairobi HCCC No. 483 of 2012 held as follows:

*"The respondent raised the issue of vicariously liable since the logbook was jointly owned by the Bank and Munene Don. The doctrine of vicarious liability was expounded in the case of* ***Morgan vs 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 owner's request express or implied or in his instruction and was doing so in performance of the tasks or duty thereby delegated to him by the owner. Moreover, the fact that the applicant was the owner of the vehicle by way of the log book being in its name.*

*Such ownership was not sufficient to create vicarious liability for the negligence of anyone happened to drive it.*

*It is common ground now that the Munene Don was not the servant of the applicant within the normally accepted meaning of vicarious liability from the facts Munene Don and the Bank would not ordinarily be vicariously liable for the tort of Munene Don since it was not an agent. The case of HCM Anyanzwa & 2 Others vs Lugi De Casper & Anor (1980) KLR 10 stated that* ***"vicarious liability depends not on ownership but on the delegation of tasks or duty."***

In the case law authority relied on by the Plaintiff, ***Leonard Mungania v Jessikay Enterprises & Another*** (2009) eKLR, Makhandia, J. (as he then was) dealt with a different but related case as to the import of the non-registration under the Traffic Act of a buyer as a proprietor of a motor vehicle following a sale of motor vehicle, in circumstances where the court found that the buyer had not finished paying the installments on the purchase price for the vehicle, and held as follows:

*"What is the law as regards title to and ownership of motor vehicles. Section 8 of the Traffic Act 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…." The appellant proved by producing documents from the registrar of motor vehicles that as at 20th April 2015 when the accident occurred, the 1st respondent was still the registered owner of the subject motor vehicle. Accordingly, and in terms of section 8 aforesaid, it was deemed to be the owner of the motor vehicle. The 1st Respondent in a bid to disown the ownership of the vehicle produced in evidence sale and hire purchase agreement dated 16th July 2014 showing that the said motor vehicle was in fact sold to a third party who took immediate possession thereof as per the delivery note dated the same date. Further, the 1st respondent through a letter dated 20th August 2005 informed the registrar of Motor Vehicles of the sale. To conclusively cement its case the 1st respondent produced a copy of a duly signed transfer form thereby demonstrating categorically, that ownership of the said vehicle had changed hands by 20th April 2005. By production of those documents, it is the 1st respondent's contention that it had been able to prove the contrary as envisaged by section 8 supra. However, I am unable to agree with this contention. From the sale and hire purchase agreement, it is evident that there was a balance of the purchase price of Ksh.480,000/= to be repaid to the 1st respondent by the purchaser over a period of 10 months commencing 1st September 2004. 10 months from 1st September 2004 would effectively end on 1st June 2005. The accident occurred on 20th April 2005 before the purchaser had completed payment of the full purchase price. How could the purchaser have effected the transfer of the vehicle into his name when there was an outstanding balance of the purchase price payable to the 1st respondent? I doubt that that was possible. I am fortified in this holding by condition 3 of the Sale and Hire Purchase Agreement which is to the effect that* ***"The vendor to handover the registration book (logbook) and transfer after payment in full of the purchase price and any interest costs payable."*** *(emphasis mine)*

*That condition amply testifies to the fact that the purchaser could only have transferred the vehicle into his name once the full purchase price had been. As at the time of the accident and assuming that the purchaser had been regular in the payments of the monthly instalments of Kshs.48,000/= per month with effect from 1st September 2004, he still had 2 more instalments to go. I would imagine that that was the reason why the motor vehicle was still perhaps registered in the name of the 1st respondent. I have a ringing suspicion that all the documents tendered in evidence showing that the 1st respondent had surrendered the motor vehicle to the purchaser, were generated by the 1st respondent purposely to defeat the appellant's claim. In any event, being a hire purchase agreement, it is common knowledge that the property the subject of the Hire Purchase agreement ordinarily remains in the names of the vendor until the hire purchase instalments are fully paid. This would seem to be the case here. Accordingly, as at the time of the accident the vehicle in law still belonged to the 1st respondent. In my view therefore the property in the vehicle had not passed on to the purported purchaser. In support of this conclusion I would revert to section 9 of the Traffic Act again. In a nutshell it provides that if a vehicle is transferred from a registered owner, it shall not be used on the road for more than 14 days after the transfer unless the new owner is registered as the owner thereof. From the evidence on record and which the 1st respondent wishes this court to believe had the vehicle been sold on 16th July 2004 the same could have been on the road at the very latest 30th July 2004. Yet the vehicle was on the road as late as at the time of the accident clearly in breach of the law."*

Obviously, the High Court (not the Court of Appeal as erroneously stated by the Plaintiff) in ***Leonard Mungania v Jessikay Enterprises & Another***, supra, a decision only of persuasive value, did not consider whether a financier of a motor vehicle who is jointly registered as a co-owner of a motor vehicle to protect his interest in the payment of the installments of the hire purchase agreement has a duty of care, and or is

liable, to a person who is injured in a accident involving the motor vehicle over which he has no control and driven by a person who is an agent of the hirer who operates the vehicle for his own purposes and not purposes of the financier. Moreover, the decision must be understood in the context of its own facts where the Court doubted the *bona fides* of the registered owner's claim because of the judge's "*ringing suspicion that all the documents tendered in evidence showing that the 1st respondent had surrendered the motor vehicle to the purchaser, were generated by the 1st respondent purposely to defeat the appellant's claim.*".

For my part, I take - and respectfully agree with the decisions cited above taking - the view that a person in the position only of a financier to the acquisition of a motor vehicle and who is registered as a joint owner of the motor vehicle for the purpose of protecting his interest in the full payment of the funds that he has invested in the financing arrangement, without any interest in the operation of the motor vehicle by the purchaser of the motor vehicle, and therefore not vicariously liable for the use of the vehicle by the purchaser's agent/driver is not a necessary party to a suit for the recovery of damages in negligence arising from alleged negligent use of the motor vehicle.

***Facts of this case***

The applicable facts to the 2nd Defendant's application for striking out of the suit against it are as follows:

1. There was a hire purchase agreement dated 4/11/2010 between the 2nd defendant as and the 1st defendant in respect of motor vehicle KBN 734A.

2. As at **15th June, 2011**, the date of a search by the plaintiff the records of the registrar of motor vehicles showed the 2nd defendant as joint owners with the 1st defendant of the vehicle KBN 734A.

**3.** The 1st defendant is shown to have completed instalment payment for the vehicle on **26th October, 2011.**

4. The road traffic accident giving rise to the plaintiff's claim is alleged to have occurred on **2/4/2011.**

Significantly, the Plaint does not make any claim against the 2nd defendant for any negligence directly or by vicarious liability. The 2nd defendant's liability is only sought on the basis of its being a joint registered owner with the 1st defendant as shown in paragraphs 4 and 5 of the Plaint as follows:

***"4. The 1st and 2nd Defendant are jointly registered owners of motor vehicle registration NO. KBN734A.***

***5. On 2nd April 2011 at about 3:30pm, as the plaintiff was …….. the 1st defendant through their agent / and or servant or employee in a motor vehicle registration number KBN 734A while driving along Garissa – Mwingi road drove the aforesaid vehicle negligently and failed to manage and/or control the aforesaid motor vehicle that it lost control, swerved dangerously and knocked the plaintiff…. Thereby occasioning him severe injuries."***

No duty of care and negligence is alleged against the 2nd Defendant. The driver of the motor vehicle is not shown to have been the agent of the 2nd Defendant as to give rise to vicarious liability. I find that there is no cause of action against the 2nd defendant, and the suit against it is struck out with costs to the 2nd defendant, the plaintiff having refused to withdraw the suit on invitation by the 2nd defendant.

**Conclusion**

On the basis of the foregoing analysis, I find that the position of the 2nd Defendant herein was merely one of a financier whose interest was limited to recovery of the monies lent to the 1st defendant for purposes of acquiring the motor vehicle subject of the suit herein and which interest was secured by a joint registration of the 1st defendant and the 2nd defendant as owner so the motor vehicle.

With respect, the decision of Makhandia, J. (as he then was) in ***Leonard Mungania v Jessikay Enterprises & Another***, applies to a different question as to when a person seeks to avoid liability as owner of the vehicle in a situation where the presumption of ownership under section 8 of the Traffic Act is not rebutted. Quite properly, the person registered as proprietor on the log book must consistently with the said presumption be held to be responsible where liability depends on the ownership of the vehicle. In the present case, liability depends on the applicability of the doctrine of vicarious liability on a *financier* rather than on an owner of the motor vehicle.

This is the essence of the exception to the owner's responsibility for a motor vehicle that he has put or allowed to be put on the road in ***Ormrod v. Crosville Motor Services Ltd.*** (1954) 2 All ER 753; to escape liability, the owner must not have an interest or concern in the purposes for which the vehicle is used.

**Orders**

Accordingly, for the reasons set out, the 2nd defendant's Notice of Motion dated 26/11/14 is granted with costs to the 2nd defendant to be paid by the plaintiff.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 9TH DAY OF OCTOBER 2018.**

**G.V. ODUNGA**

**JUDGE**

**Appearances: -**

M/S Mahmoud & Gitau Advocates for the Plaintiff.

M/S Musyimi & Co. Advocates for the Defendant.