



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 335 OF 2014

PATRICK OSOO ODHIAMBO.....APPELLANT

- V E R S U S -

RICHARD NORMAN MUDIBORESPONDENT

JUDGEMENT

1) On 1st July 2014, Hon. Obulutsa learned Ag. Chief Magistrate, gave judgement in the sum of ksh.221,664/= in favour of Richard Norman Mudibo, the Respondent herein against Patrick Osoo Odhiambo, the appellant herein. The appellant being aggrieved by the aforesaid decision preferred this appeal. On appeal, the appellant put forward the following grounds in his memorandum:

- 1. The learned magistrate erred in both law and in fact by holding that the Respondent had successfully proved that he was the beneficial owner of motor vehicle registration number KAS 815H in of lack of any evidence to that effect.***
- 2. The learned magistrate erred in both law and in fact by relying on the Respondent's uncorroborated evidence to hold that the appellant's motor vehicle registration number KAJ 389B was involved in an accident on 20th June 2005 with motor vehicle registration number KAS 815H.***
- 3. The learned magistrate erred both in law and in fact by finding that the Respondent was properly suited to file the primary suit on behalf of the insurance company under the insurance doctrine of subrogation while he was never the insured.***
- 4. The learned magistrate erred both in law and in fact by ignoring/disregarding binding decisions of superior courts (High Court and Court of Appeal) on the proper application of the insurance doctrine of subrogation under which the primary suit had been instituted.***
- 5. The learned magistrate erred in both law and in fact by shifting the burden of proof from the Respondent and placing it on the appellant.***
- 6. The learned magistrate erred both in law and in fact in holding that the Respondent had proved that the special damages claimed were incurred as a result of the appellant's culpability/liability.***
- 7. The learned magistrate erred both in law and in fact by finding that the Respondent had successfully proved his claim in the primary suit on a balance of probability in spite of the evidence on record.***

2) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions plus the authorities cited. It is the evidence of Richard Norman Mudibo, the Respondent (PW1) that on 20.6.2005, at around 8.30pm he was driving motor vehicle registration no. KAS 815H along Uhuru Highway, Kenyatta Avenue roundabout, when his motor vehicle was suddenly hit from the rear by motor vehicle registration no. KAJ 389B. According to PW1, the impact of the collision made his motor vehicle to spin before hitting some block on the roadside thus making the vehicle come to a halt. Johnson Mwangi (PW2) testified before the trial court and produced the OB and the police abstract form on behalf of a police officer who had investigated but who could not attend court to testify. The Respondent stated that he reported the accident on the same day to Central police station leaving his friend, a Mr. Maingi at the scene. PW1 said he later took his motor vehicle to Mash Auto garage to be repaired. The expenses for repair were met by the Respondent's insurer. It is the evidence of PW1 that the suit filed before the trial court was filed by the Insurance company under the doctrine of subrogation.

3) Patrick Osoo Odhiambo (DW1) the appellant, told the trial court in his defence that his motor registration no. KAJ 389B was never involved in any accident with motor vehicle registration KAS 815H or any other motor vehicle on 20.06.2005 at all. Ann Wanzilla (DW2) the appellants' wife who was alleged to have been the driver of motor vehicle KAJ 389B on the material date denied having been involved in the said accident or any accident involving another motor vehicle thus corroborating the evidence of DW1. The evidence of the appellant is to the effect that in the month of June 2005, his motor vehicle registration no. KAJ 389B was at Mash Auto Garage in Industrial area undergoing repairs following some damage it had sustained when DW2 hit a light pole along Outering Road around that time. The learned Ag. Chief Magistrate considered the competing evidence and came to the conclusion that the Respondent had proved his case on a balance of probabilities. The trial magistrate further concluded that the Respondent's motor vehicle was hit by that of the appellant. It was also held that there was sufficient documentary evidence to establish damages.

4) It is the submission of the appellant that the learned Ag. Chief Magistrate erred by holding that the Respondent had successfully proved that he was the beneficial owner of motor vehicle registration KAS 815H without any evidence to that effect. The appellant submitted that at the time of the accident motor vehicle registration KAS 815H was registered in the name of George Mwaura while the insured of the motor vehicle was Nation Media Group Ltd and not the Respondent. It is also argued that there was no documentation ever produced as evidence to show that the Respondent was the employee of the Nation media Group Ltd nor that he had authority to transact in any capacity on behalf of the Nation Media Group Ltd and particularly in respect of motor vehicle registration no. KAS 815H. The Respondent is of the argument that on a balance of probabilities he proved to be the beneficial owner of motor vehicle registration no. KAS 815H. He also argued that he proved that he was driving the motor vehicle at the material time and that the insurance company compensated him and not the Nation Media Group Ltd or the registered owner.

5) I have examined the documents presented before the trial court and it is clear that the registered owner of the motor vehicle is the Nation Media Group Ltd. The insured is also recorded to be the Nation Media Group Ltd. The insurer can only file a compensatory suit using the doctrine of subrogation through its insured which in this case is the Nation Media Group Ltd. There was no credible evidence to prove that the Respondent had beneficial interest over motor vehicle registration no. KAS 815H. There was also no cogent evidence that the Respondent was the insured.

6) The second ground of appeal is to the effect that there was no cogent evidence to prove that the appellant's motor vehicle registration no. KAJ 389B was involved in the accident which occurred on 20.6.2005 with motor vehicle registration no. KAS 815H. It is the submission of the Respondent that the appellant's wife was placed at the scene of the accident. I have on my part re-evaluated the evidence. It is evident from the evidence of the Respondent that for some unexplained reason, the Respondent did not summon his friend, a Mr. Maingi to testify. The police abstract form did not also contain the name of Mr. Maingi who was the only independent eye witness to support the evidence of the Respondent. This court can infer that most probably the aforementioned witness had crucial evidence, which may be adverse to

the case of the Respondent. On a balance of probabilities I am not satisfied there was strong evidence to prove that motor vehicle registration KAJ 389B was involved in the accident.

7) On the basis of the above grounds, I find the appeal to be meritorious. Consequently the appeal is allowed. The judgement and or decree of the trial court is set aside and is substituted with an order dismissing the suit. Cost of the appeal and the suit is awarded to the appellant.

Dated, Signed and Delivered in open court this 2nd day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent