REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL CASE NO.111 OF 2006

(Appeal from the judgment of Hon. S.M.S. Soita (PM) dated and Delivered

on 10th May 2006, in the original Kisii CM Civil Case No.483 of 2005)

YUNES NYAMBEKI NYAKWARA.....................................APPELLANT

VERSUS

SHEM THOMASON MACHOKA............................... 1ST DEFENDANT

MATHEW NYAKUNDI MIRERA..................................2ND DEFENDANT

NATHU KHAN & CO. LTD...3RD DEFENDANT

JUDGMENT

1. This judgment is the result of the appeal filed by **YUNES NYAMBEKI NYAKWARA**, the Appellant herein, against the judgment/decree of Soita Esq.SPM (*as he then was*) dated 10th May 2006 in Civil Case No.483 of 2005 at Kisii.

When this appeal came up for hearing on 11th February 2015, this court gave directions to the effect that the appeal be determined by way of written submissions.

2. This being a first appeal, this court is duty bound to re-evaluate the evidence on record with a view to arriving at its own independent findings while bearing in mind that it neither saw nor heard the witnesses testify. (See case of **Selle & Another –vs- Associated Motor Boat Co. Ltd [1968] EA 123**).

3. I have re-evaluated the evidence and it is at this juncture proper to outline a brief background of this case before considering the merits of the appeal.

Briefly, in this case, the Plaintiff/Appellant herein sued the 3 defendants/Respondents before the subordinate seeking orders as follows:

> "a) **The 3rd Defendant or her agents be restrained from selling her motor vehicle registration No.KTT 273 till this suit is fully heard and disposed of OR in the alternative the M/V Reg. No.KTT 273 be released to the plaintiff to avoid further storage charges.**
>
> **b) The 1st and 2nd Defendants be compelled to repay the loan mortgage they owe the 3rd defendant to shift liability from the plaintiff since the contract between the defendants does**

not involve the plaintiff.

c) General damages for non-user of the plaintiff's motor vehicle for last seven (7) years.

d) Costs of this suit and any remedy this honourable may deem fit to grant."

4. The Appellant's case was that she is the registered owner of motor vehicle registration number KTT 273 Isuzu lorry which was on 19th May 2005 taken away/seized by the 3rd Respondent with whom she allegedly had no dealings.

5. The Appellant claimed that sometime in the year 1997 she gave the 2nd Respondent her log book for the said vehicle and identity card for the purposes of securing an insurance cover only for the said 2nd defendant to use the said motor vehicle log book as a security for the 1st respondent to secure a loan from the 3rd respondent.

Apparently, the 2nd Respondent only returned the identity card to the Appellant but did not return the log book. The Appellant claimed that the 2nd Respondent never returned the log book to her and she only came to learn that it had been used to secure a loan in the year 2005 on 23rd May when the vehicle was taken away by the 3rd Respondent due to a default in loan repayments by the 1st Respondent. The Appellant states that she asked the 2nd Respondent to return the log book to her to no avail and she therefore reported the matter to the church pastor and village elders.

6. The Appellant called 2 witnesses her son (PW2) and her husband (PW3) to support her claim that she never gave out her log book to be used as a security for a loan. The evidence showed that the 2nd Respondent was the Appellant's nephew. The 1st Respondent testified that he was a guarantor to the 2nd respondent who is his brother in-law in respect to a loan he had secured from Universal Bank to purchase a lorry registration No.KAG from the 3rd Respondent and that since the 2nd Defendant was not able to raise the requisite deposit to enable him secure the purchase, he had to supply additional security to the seller the (3rd Respondent) and this is the point when he used the Appellant's log book as security.

7. The 2nd Respondent defaulted in the loan repayments thereby leading to the bank repossessing the vehicle he had purchased from the 3rd Respondent with the ripple effect that the 3rd Respondent also took away the additional security he had given being motor vehicle registration No.KTT 273 belonging to the Appellant. The 2nd Respondent, in his evidence before the lower court denied ever using the Appellant's motor vehicle log book as collateral for a loan.

8. Upon considering all the evidence presented before it, the trial court placed the blame on the entire debacle at the doorstep of the 2nd Respondent who obtained a loan from the 3rd Respondent using the Appellant's log book as a security and that the 1st Respondent was found blameless as he was merely, an independent guarantor for the said loan while the 3rd Respondent was the financier.

9. The Appellant's case against the 1st and 3rd Respondents was accordingly dismissed on 10th May 2006 an the court entered judgment for the Appellant against the 2nd Respondent in the sum of Kshs.150,000/= general damages.

10. It is this judgment that prompted the Appellant to file this instant appeal on **16th May 2000** in which she has put forth the following grounds of appeal:

1) "The Learned Trial Magistrate erred in law and fact in taking into consideration extraneous issues leading a miscarriage of justice.

2) The Learned Trial Magistrate erred in law and fact in dismissing the Appellant's case

against the weight of evidence.

3) The Learned Trial Magistrate erred in law by failing to analyze the totality of evidence presented before court.

4) The Learned Trial Magistrate erred in law an fact by failing to find that the totality of the evidence corroborated the Appellant's pleadings on record.

5) The Learned Trial Magistrate missed an important element of evidence that both the Appellant and Respondents disowned an exhibit namely purported letter of consent dated 21st August 1997 forming the core of the case.

6) The Learned Trial Magistrate ignored the fact that evidence adduced indicated that the Appellant never went to Nakuru, and further never transacted any business with the Respondents.

7) There was sufficient evidence to indicate that a fraud was perpetrated against the Appellant contrary to the finding of the court.

8) The quantum of damages awarded to the Appellant was inordinately low given the circumstances of the case.

9) The judgment was against the weight of evidence and travesty of justice."

11. When the appeal came up for hearing on **12th November 2014** parties agreed to canvass it by way of written submissions.

Appellant's Submissions

12. In the Appellant's submissions filed in court on **8th May 2015**, she argued that the lower court considered extraneous matters thereby leading to a miscarriage of justice. The Appellant stated that trial court ought not to have considered or used the contents of an affidavit in respect to an application that had been abandoned following an amendment of the Plaint.

13. The Appellant also submitted that the trial court erred in dismissing the Appellant's case against the weight of the evidence adduced to the effect that the Appellant's motor vehicle was seized to satisfy a debt when the Appellant had not executed a chattels mortgage in favour of the 3rd Respondent.

14. The Appellant contended that the trial magistrate did not consider the totality of the evidence presented before the court, that according to the Appellant, showed that the 3rd Respondent was not entitled or justified to impound or hold the Appellant's motor vehicle. The Appellant argued that since the 1st and 2nd Respondents disowned or denied offering motor vehicle registration number KTT 273 as a collateral, the 1st and 2nd Respondents in effect corroborated the Appellant's case to the effect that the seizure of the said motor vehicle by the 3rd Respondent was without any lawful basis.

15. According to the Appellant, since an alleged letter of authority by the Appellant dated 21st August 1997 offering log book as security was disowned by the Appellant, there was sufficient evidence of fraud perpetrated against the Appellant contrary to the findings of the court.

Lastly, the Appellant also argued that the award made to her in quantum of damages was inordinately low as the sum of Kshs.150,000/= awarded was not in tandem with the evidence which according to the Appellant, was to the effect that she suffered loss of user of her vehicle to the tune of Kshs.5,000/= per day which sum ought to have been multiplied by a period of 6 months thereby making an award of Kshs.1.8 million as the just award that ought to have been made.

16. The Appellant therefore prayed that the lower court award of Kshs.150,000/= be set aside and the same be substituted with an award of Kshs.1,800,000/= to be paid by all the Respondents jointly and severally.

3rd Respondent's Submissions

17. The 3rd Respondent filed its submissions on 8th July 2015 in which it argued that the Appellant's appeal was fatally defective as the record of appeal was incomplete since it did not include the decree from which the appeal lies.

18. Secondly, the 3rd Respondent submitted that the Appellant was deceased having died more than a year ago and hence, the appeal had abated and the court should proceed to mark it so.

The 3rd Respondent contended that the Appellant did not specifically prove her claim of loss of use at Kshs.5000/= contrary to the law regarding specific proof of special damages and therefore the Appellant was not entitled to the claim of loss of user.

19. The 3rd Respondent submitted that the trial court was justified in arriving at the decision it made after considering all the evidence presented before it as it had the first hand chance to consider the demeanour and by extension the candour and truthfulness of the witnesses who testified before it.

The 3rd Respondent prayed for the dismissal of the appeal.

Analysis and Determination

20. Upon perusing the entire lower court record, the grounds of appeal and submissions of both the Appellant and the 3rd Respondent, I discern the following to be the issues:

> **a) Whether the Appellant proved her case against all the Respondents to the required standards.**
>
> **b) Whether the award of Kshs.150,000/= general damages was inordinately low.**
>
> **c) Whether lack of the decree in the record of appeal rendered the appeal fatally defective.**
>
> **d) Whether the Appellant's claim for damages for loss of user had been proved**.

21. On the first issue of whether or not the Appellant proved her case against all the Respondents on a balance of probabilities, I find that the evidence tendered before the trial court was very clear on how the Appellant's log book fell into the hands of the 3rd Respondent. The Appellant's own testimony was that she gave the log book to the 2nd Respondent, who was her nephew ostensibly, for the purposes of using the same to obtain an insurance cover. The said insurance cover was however, not produced in court as an exhibit.

22. The Appellant then claimed that the 2nd Respondent failed, refused and/or neglected to return the log book to her for several years, that is, from 1997 when she gave it out to 2005 when the motor vehicle was impounded.

The Appellant did not take any concrete action to get back her log book from the 2nd Respondent such as reporting the issue to the police or to the registrar of motor vehicles despite knowing that the said log book could be misused to her detriment, if it fell in the wrong hands.

23. I find the Appellant's explanation that she reported the 2nd Respondent's refusal to return log book to a church pastor quite dissatisfactory and escapist to say the least.

24. A log book is an important and accountable document without which the Appellant could not effectively utilize her motor vehicle which is a lorry as she needed the log book in order to annually renew her licences and insurance covers. In my humble view a prudent business man/woman would not part with her log book for such a long period of time without any concrete action or reasonable explanation unless she was aware that the said log book had been used by the 2nd Respondent as security for a loan facility as was the case in this appeal.

25. In this regard, I find that the trial court was justified in dismissing the Appellant's claim against the 1st and 3rd Respondent by absolving them of any blame since the 1st Respondent was merely a guarantor to the 2nd Respondent while the 3rd Respondent merely sold a truck to the 2nd Respondent on the strength of the Appellant's log book which was given to him as an additional security.

26. I find that the 3rd Respondent was justified to seize the Appellant's said motor vehicle registration number KTT 273 when the 2nd Respondent defaulted in his loan repayments.

The trial court was right to place the blame of the entire debacle squarely, on the shoulders of the 2nd Respondent who was the main actor in the series of events that preceded the use of the log book as a security for a loan facility.

27. The Appellant merely disowned the letter of authority dated 21st August 1997 and alleged that it was sufficient proof of fraud, yet she did not plead or prove the particulars of the fraud. I find that if indeed there was any fraud, then the same was committed by the 2nd Respondent to whom the Appellant gave the log book.

28. In a nutshell, I find the Appellant's story that she gave the 2nd Respondent her log book for the purposes of obtaining an insurance cover and the 2nd Respondent chose to divert the said log book to another use quite incredible.

The sum total of all the circumstances surrounding the case can only lead any reasonable person to make the irresistible conclusion that the Appellant was all along aware that the 2nd Respondent had used the log book to secure a loan.

29. The trial magistrate who had an opportunity t see the Appellant testify formed the opinion that she was not a candid witness when he said in the judgment:

> **"The Plaintiff however was not very candid as I have intimated earlier. She knew what she entered into but had not fully appreciated the risks."**

Inordinately low award

30. On the issue that the award of Kshs.150,000/= general damages made by the trial court was low, I find that it is trite law that the award of general damages is at the discretion of the court and on appeal, such an award is to be interfered with unless it is so inordinately high or low as to represent an entirely erroneous estimate (see **Jivanji –vs- Sanyo Electrical Company Ltd [2003] KLR 425)**.

For an award of damages to be altered, it must be shown that the trial court either misapprehended the evidence in some material respect thereby arriving at a figure inordinately high or low. In the instant case, the Appellant has not shown that the trial court proceeded on a wrong principle or misapprehended the evidence thereby arriving at an erroneous conclusion.

31. The Appellant claimed that she suffered a loss of user of Kshs.5000/= per day which she alleged that her lorry used to generate daily before it was impounded by the 3rd Respondent. The Appellant did not provide specific proof of such a specified amount as is required by the law.

32. I therefore find that there is no basis whatsoever for the Appellant to claim that her loss was to the tune of Kshs.1,800,000/= for a period of 6 months as the claim was not specifically proved. Furthermore, the Appellant's own testimony was that her motor vehicle was stationary and had been stationary for many years before it was impounded by the 3rd Respondent.

33. When being cross-examined by Mr. Rabera advocate for the 3rd Respondent, the Appellant stated:

> **"Before repossession, the motor vehicle was stationary because of licence."**

Clearly, the Appellant could not have been getting a daily earning of Kshs.5000/= from a motor vehicle that was stationary. In my view, the claim of Kshs.5000/= per day for loss of user was not merited and was further proof of dishonesty on the Appellant's part.

34. Having found that the motor vehicle was grounded and in a state of waste from 1998 to the year 2005 when it was impounded, the magistrate still awarded the Appellant Kshs.150,000/= general damages for the inconvenience and loss suffered.

I find the above award to be more than adequate compensation for any loss suffered by the Appellant.

Incomplete record of appeal

35. On the 3rd Respondent's submission that the record of appeal was incomplete for lack of a decree, I find that **Article 159(3) (d)** of the **Constitution** and **Section 3 and 3A of the Civil Procedure Rules** enjoins the court to administer substantive justice without undue regard to procedural technicalities.

Needless to say, a decree is a critical component of the record that must be included as a primary document in such appeal. The importance of a decree stems from the fact that it is the document which clearly contains the formal expression of the exact orders/pronouncements/decisions of the lower court which the Appellant is appealing against. Without a decree therefore, it would be an act of guess work on the part of the appellate court in determining the exact orders appealed against.

36. However, as I stated earlier, the court is guided by the principle of what best serves the interest of justice by weighing the scales to establish whether justice is better served by disallowing the appeal on the basis of lack of a decree or determining it on its merits.

37. I take the view that even though the Appellant did not extract the lower court's decree and include it as part of the record of appeal, this court is still able to peruse the judgment and note the final orders made and no prejudice has been occasioned to the Respondent due to the omission of the decree from the record. I take the view that rules of procedure were intended to serve as handmaidens of justice, not to defeat it.

38. This court, in obeisance of the constitution, has inherent jurisdiction to waive the strict application of the rule requiring the inclusion of the decree as it may hinder the dispensation of substantive justice.

39. In **Iron & Steelwares Ltd –vs- Martyrs & Co. [1956] XXII pg.175** Worley, President of the then Court of Appeal for Eastern Africa Expressed the view that Civil Procedure Rules are handmaidens of justice and stated:

> **"We think that the High Court in its inherent jurisdiction to control its own procedure has a discretion to waive the strict application of order XVI Rule 2 and has a duty to ensure that each party is given a fair opportunity to state its case and to answer the case made against it…"**

Appeal abated

40. The 3rd Respondent submitted that the appeal had abated following the death of the Appellant more than a year ago. On this point, the 3rd Respondent did not produce any evidence in court to prove that the Appellant had died. At best, the allegation that the Appellant was deceased was an unsubstantiated statement made from the bar at the tail end of the appeal at the submissions stage. The court is minded to reject this line of argument taking into account the inappropriateness of the time and place that it has been presented to the court.

41. In any event, the death of a party to a suit does not automatically result in the abatement of the suit since the law allows for the substitution of the deceased party by his legal representative.

42. The Appellant did not satisfy the burden of proof. The Appellant failed to specifically prove the special damages of loss of use.

In **Kampala City Council –vs- Nakaite [1972] EA** Court of Appeal held:

> **"It is settled law that special damages need not only be specifically pleaded but must also be strictly proved."**

43. The burden of proof in civil cases is on a balance of probability. Denning J, in **Miller –vs- Minister of Pensions [1947]** discussing that burden of proof had this to say:

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think, it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.**
>
> **Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

44. Section 107 and **108** of the **Evidence Act Cap.80** provides who bears the burden of proof in a case. Those two sections state:

> ***"107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

45. From the evidence tendered before the trial court, the Appellant did not prove that she earned Kshs.5000/= from the use of her motor vehicle. Having admitted that she voluntarily gave out her log book to the 2nd Respondent who was her nephew, she was not able to prove that the use of her motor vehicle by the 2nd Respondent as a collateral for a loan, was not with her approval. There were several gaps in the Appellant's case that led the trial magistrate to hold that she was not a candid claimant and he had this to say.

> **"The Plaintiff, however, was not very candid as I have intimated earlier. She knew what she had entered into but had not fully appreciated the risks. In her pleading, she claimed a sum of Kshs.5000/= per day as loss of user. No evidence was brought forth to establish that the motor vehicle was generating such amounts. In any event, it was the testimony of the plaintiff herself in cross-examination that the motor vehicle has (sic)**

been stationery from the time the log book was taken away, at any rate, from the following year. If that is so, then she did not start suffering loss of user on 19th May, 2005. The vehicle was in a state of waste from about 1998 if her evidence is believable.”

46. I similarly find that the claim for loss of user was not proved to the required standard or at all. The upshot of my judgment is that I find that the appeal is without merit and I hereby dismiss it with costs to the 3rd Respondent.

Dated, signed and delivered in open court this 10th day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Soire for the Appellant

- N/A for the 1st -3rd Respondents

- Omwoyo: court clerk