REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 247 OF 2005

TEENWISE MEDIA LIMITED …….APPELLANT

VERSUS

KENATCO TAXIS LIMITED ……...…..1ST RESPONDENT

JOSEPH NJUGUNA MWANGI……2ND RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of the Senior Resident Magistrate's Court in Nairobi CMCC NO. 1042 of 2004 at Milimani Law Courts delivered by Ms Esther Maina (as she then was) on 22nd March 2005. The Memorandum of Appeal filed on 19th April 2005 and dated the same day sets out five (5) grounds of appeal challenging the judgment and decree of the subordinate court as above namely:

1. That the Learned magistrate erred in fact and in law in failing to appreciate the submissions made on behalf of the plaintiff on both liability and quantum.

2. The learned magistrate erred in fact and in law in disregarding the evidence tendered by the plaintiff's witnesses and especially the assessor's evidence.

3. The learned magistrate erred in fact and in law in arriving at a decision to disregard the salvage value of the plaintiff's vehicle by not considering the spirit on which the agreement was made between itself and the purchaser thereof, hence making a finding that the evidence tendered by the plaintiff was inconsistent .

4. The learned magistrate erred in law and fact in making a finding that the plaintiff has no locus standi to institute suit.

5. The learned magistrate erred in law and fact in entering judgment touching on matters not pleaded by the defendant.

The appellant prayed that:

a) The order to dismiss the plaintiff's suit be set aside and the appeal be allowed.

b) An award on liability and quantum be made in favour of the appellant against the respondents.

c) In the alternative case be remanded to the lower court for proper determination.

d) That costs of appeal and of the lower court be granted to the appellant.

e) Any other order that this court may deem fit to grant.

2. The brief history of this matter is that by a plaint dated 4th February 2004 and filed on 6th February 2004, the appellant herein TEENWISE MEDIA LTD who was the plaintiff in the subordinate court sued the defendants/respondents KENATCO TAXIS LTD and JOSEPH NJUGUNA MWANGI claiming for shs 229,850 special damages being the loss suffered as a result of damages occasioned to motor vehicle registration Number KAG 580P when or about 9th May 2003 the 1st defendant's motor vehicle registration No. KAJ 966S collided with the plaintiff's motor vehicle KAG 580P thereby extensively damaging the latter car.

3. The appellant alleged that the accident and damages were as a result of the negligence of the 2nd defendant driver of the 1st defendant in that he:

a) Drove without due care and attention.

b) Drove on the wrong side of the road.

c) Drove at a speed that was exceedingly fast and excessive in the circumstances.

d) Driving without due regard to other road users and contrary to the Traffic Act and the Highway Code.

e) Drove carelessly.

f) Failed to slow down, swerve or in any other way manage motor vehicle registration number KAJ 966S so as to avoid the collision with the plaintiff's motor vehicle KAG 580P.

4. The appellant pleaded that the 1st defendant was vicariously liable for the negligence of the second defendant. The particulars of loss and damage were pleaded as follows.

- *Repair costs shs 219,750.00*
- *Towing charges shs 5,000.00*
- *Assessor's fee shs 5,000.00*
- *Police abstract shs 100.00*

Total 229,850.00

5. The respondent upon being served with summons to enter appearance entered an appearance on 2nd March 2004 vide a Memorandum of Appearance dated 26th February 2004 and filed a defence dated 8th March 2004 on 10th March 2004. Later, the appellant with leave of court amended its plaint on 19th April 2004 and filed it on 18th May 2004 increasing the amount of special damages by including a prayer that the value of its motor vehicle which was damaged as a result of the material accident was a write- off and was shs 380,000 less shs 120,00 salvage value leaving shs 260,000. The total special damages were pleaded as shs 270,100.

6. The defendants vide an amended defence dated 22nd June 2004 and filed in court on 24th June 2004 denied the particulars of negligence attributed to them and contended that the accident was occasioned by the negligence of the driver of motor vehicle registration No. KAG 580P in that:

a) He drove at an excessive speed in the circumstances.

b) He failed to brake on time or at all.

c) He failed to stop, slow down, swerve and or in any other manner to control the said motor vehicle so as to avoid the said accident.

d) Failed to exercise reasonable care and attention.

7. The respondents also denied particulars of loss and the amount claimed. In addition the respondents pleaded that the claim for pre accident value and salvage value was an afterthought created by the appellant, not based on any expert opinion and that it should have been given an opportunity to assess the said motor vehicle prior to the action. The respondents prayed that the appellant's suit be dismissed with costs.

8. The appellant filed reply to defence as amended on 29th June 2004 joining issues with the respondents and maintaining the averments in the amended plaint.

9. The case was heard by E.N. Maina (Miss) Principal Magistrate and in her judgment delivered on 22nd March 2005 she dismissed the appellant's suit on the grounds that the appellant did not prove its case against the respondents. She raised issues with the date of accident which was pleaded as 9th May 2003 yet the police abstract showed 7th May 2003, that it was doubtful as to whether the appellant owned the subject motor vehicle KAG 580P; that the assessor testified that the motor vehicle was never declared a write-off; and that there was no evidence of sale of the salvage since the execution of the sale agreement left a lot to be desired. It is that judgment of the trial magistrate dismissing the appellant's suit with costs that provoked this appeal.

10. This being a first appeal , this court is obliged under Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya to reassess, reconsider and reexamine the evidence and extracts on record and arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses as they testified and therefore giving due allowance to that. (See **Sielle V Associated Motor Boat Company Ltd [1968] EA 123.**

11. Appraising the evidence adduced in the lower court, the appellant called PW1 Adam Nyakundi a director of the plaintiff company who testified that on 9th May 2003 he was driving to the office at around 8.00pm in the city centre from Nairobi West . He drove motor vehicle KAG 580P and the road was busy. Immediately after the Haile Selasie Roundabout on Uhuru Highway, motor vehicle KAJ 966S belonging to KENATCO hit a pavement and veered from the right and hit motor vehicle KAG 580P on the right side. PW1 used the passenger door to get out. Traffic police went to the scene and assisted him. The said offending motor vehicle stopped and turned to the direction that PW1 was coming from. PW1 was slightly injured and was taken to Nairobi West hospital where he was stitched and discharged. The car was towed to Parklands police station by one of the plaintiff's other directors and the police. The following day the plaintiff company paid shs 500/- to a towing company and recorded the statement with the police. That the police blamed the defendant's vehicle/driver for the accident. PW1 produced the receipt and police abstracts as exhibits. The plaintiff company was then referred to the defendant's insurance company AMACO who advised that ***'survey'*** be done. The plaintiff got Safety Survey who carried out the survey and gave a report which they submitted to AMACO, after the 1st defendant's insurers declined to admit liability to the plaintiff/appellants. As it was too expensive to repair the motor vehicle, the plaintiffs/appellants herein sold the salvage at kshs 120,000. That the assessor had estimated the cost of repairs at shs 219,750, while its pre accident value was shs 380,000. That they sold the salvage to the garage. The plaintiff therefore sought for shs 260,000 pre accident less salvage value, towing charges, assessor's fees, police abstract charges s and costs and interest. PW1 blamed the 2nd defendant for being negligent. He stated that they did not disclose to the 1st defendant when they sold the car and that they sold the said salvage after one year of the date of accident after exhausting all avenues with KENATCO and Fairsure, their agents.

12. In cross examination, PW1 stated that at the time of the accident the motor vehicle KAG 580P was

registered in the names of the three directors of the appellant company. He also stated that he did not know who the registered owner of the motor vehicle KAG 580P was at the time of accident but that at the time of sale in 2004, the motor vehicle belonged to Teenwise Media. That he was driving at 60 kilometer per hour and only realized the accident upon being hit by the offending motor vehicle. Further, that at the 1st defendant's offices, he dealt with a Mr Macharia the manager of drivers at night. He denied ever dealing with AMACO but that they dealt with Fairsure who denied liability from the onset. He stated that the assessment of the damaged motor vehicle was done by Safety Surveyors, who advised that it was not economical to repair the motor vehicle although the assessors did not say expressly that the motor vehicle was a write-off. He admitted that the assessors recommended repairs and that the decision to declare the vehicle a write-off was made by the plaintiff company. He stated that the plaintiff never tendered the said motor vehicle for sale and neither did they see the need to invite the 1st defendant to tender. Neither did they inform the insurers of the motor vehicle. PW1 testified that they sold the vehicle to Bill Auto because of the amount they offered to buy the vehicle at and that he was present when the agreement for sale was signed. PW1 also admitted that the witnessing of the sale agreement was not done on the same day. That the vendor's side was signed by Ann Ngigi on 5th December 2003 while Juma Kimotho signed for the purchaser and witnessed by Ngaruiya Githegi on 23rd April 2004 and Jacklyne Opande on 27th April 2004. That the latter two signed on the day the final settlement was being paid out.

13. On being questioned on the discrepancies on the dates given, PW1 stated that the plaintiff owed the garage some money for repairs and that the garage paid them the difference but he again owed up that he had not brought the invoices for the said repairs. He denied that the plaintiff sold the motor vehicle to Bill Auto simply because the plaintiff owed the garage money and stated that they could not repair the motor vehicle until they had the money and that they only finalized the sale on 23rd April 2004. Further, that as at the time of instituting suit in the lower court, negotiations were still ongoing.

14. On being questioned on whether there was a resolution by the company to sell the motor vehicle, PW1 answered in the affirmative although he stated that he did not have the said resolution in court. He denied that the plaintiff still had the custody of the motor vehicle. He also stated that the motor vehicle was repaired but he did not know at how much. On being shown exhibits 4 and 5 letters dated 3rd November 2003 addressed to Joseph Mwangi and to KENATCO taxis, PW1 stated that the claimants were **Ngaruiya, Nyakundi and Muturi company** which was the same as **Teenwise**. He maintained that the pre accident value was shs 380,000.

15. In re-examination PW1 stated that they changed the name of the company but continued with the same business. Further, that he did not have time to avoid the collision since there were other motor vehicles and PW1 was in the innermost lane. That the motor vehicle was being used for delivery of the company magazines. That at the time a decision was made to sell the motor vehicle, the vehicle was wasting away and that their transactions with Bill Auto was above board and that payment was by installments, the motor vehicle was not in their custody and that they had been paid in full.

16. The plaintiff also called PW2 Gideon Munene Muchina a motor vehicle assessor with Safety Surveyors Limited since 2000, employed as a motor vehicle assessor/investigator. That in mid May 2003 they received a call from Anne Ngigi and he later learnt that she worked with the plaintiff. PW2 proceeded to the garage with Peter Nganga and assessed the motor vehicle KAG 580P. That they physically assessed the motor vehicle and obtained prices from the shops then negotiated labour costs and prepared the report which they co-signed and sent to their client. The report dated 15th May 2003 was produced with a receipt for the labour charges shs 5,900 inclusive VAT. In his view, a new Toyota would cost shs 2.2. Million but that 380,000 was a fair pre accident value. That repairs would have cost shs 219,750 after getting quotations from three shops.

17. In cross examination, PW2 stated that he was a holder of a Diploma in Automotive Engineering with 8 years experience having worked with AA of Kenya before joining Safety Surveyors. PW2 maintained that he received instructions from Ann Ngigi whom he did not know before. Further, that he had not dealt with Bill Auto Garage before. That he negotiated for labour charges and denied

insinuations that he negotiated because he had an interest or that he had over quoted on the price of spares. That the report of assessment was an opinion based on the prices of spares and the market. He stated that they got quotations from Shambas Spares on Baricho Road, Masaku Auto Prestige and General Japanese Suppliers Dar esalaam Road which quotations were different so they took the lowest. He noted that the motor vehicle had about 8 pre accident defects and that the motor vehicle was consistent with its age and mileage, being a 1986 vehicle imported into Kenya in 1996 hence in 2003 it was 3 years old. He stated that it was for the owner thereof to decide whether to repair the motor vehicle or to do away with it. That either of the two options could have applied. He stated that the engine was not affected and that only the front hand side of the vehicle was affected. He stated that Anne Ngigi gave them the name of Ngaruiya Nyakundi and Muturi as the company that owned the motor vehicle but that he did not see the engine number and neither did he see the logbook.

18. In re examination PW2 stated that as at the accident time, the motor vehicle was 17 years old and that most clients write off motor vehicles at 50% of the sum assured .

19. At the close of the appellant's case the respondents did not call their intended one witness and so they closed their case. Both parties' advocates filed written submissions, with the appellant's counsel submitting that the plaintiff had proved their case on a balance of probabilities whereas the respondent's counsel submitted urging the court to dismiss the appellant's suit with costs for reasons that:-

a) There was no proof of special damages to the standard required by law.

b) The plaintiff had no locus standi to make the claim or sue.

c) There was uncertainty on the date of cause of action.

d) PW2's evidence was tendered after he had sat in court throughout hence it carried very little weight and should be expunged.

e) That there was no proof of liability and quantum, since a speed of 60 kilometer per hour was beyond the acceptable limit of 50 kilometer per hour at the accident scene hence PW1 should have been held 15% liable for contributing to the accident.

20. In her judgment, the trial magistrate after analyzing the evidence as adduced on record and considering the parties' submissions, she found that the plaintiff had not proved its case on a balance of probabilities. The first reason was that the suit was incompetent for reasons that at paragraph 3 of the amended plaint it had been pleased that the 1st defendant was under receivership with its offices being managed by one N.K. Kositany yet no leave to sue the Company was established as required under Section 228 of the Companies Act.

21. Further, that on the merits, the suit could not stand for reasons that:

i) There was a discrepancy as to the date of accident. The plaint averred 9th May 2003 whereas the police abstract gave 7th May 2003.

ii) That there was admission as to ownership of the two accident motor vehicles. However, that from evidence of PW1 it was doubtful as to whether the plaintiff owned KAG 580P since he stated that there was another company before the plaintiff who owned the motor vehicle and that at the time the motor vehicle was registered in the names of the directors of that other company; that PW1 was unable to articulate the nexus between that company and the plaintiff hence raising doubts as to whether the plaintiff actually had the locus standi to bring the suit.

iii) That on the issue of special damages, the assessor testified that he never declared the motor vehicle a write off and that he only assessed the cost of repairs and the pre-accident value and left it at that. That the evidence adduced in that regard was inconsistent and

unreliable.

iv) That execution of the sale agreement left a lot to be desired and that there appears to have been no sale at all.

22. The trial magistrate therefore dismissed the appellant's suit with costs to the defendants/respondents. The parties' advocates in this appeal agreed to dispose of the appeal by way of written submissions. The appellant's submissions were filed on 10th June 2015, supported by several authorities. The appellant's counsel submitted on four legal principles namely:

a) That the issues for determination in a suit flow from the pleadings;

b) Unless there is an amendment, parties are bound by their pleadings;

c) A trial court can only pronounce judgment on issues arising from the pleadings or such issues as parties have framed for the court's determination; and

d) A court has no jurisdiction to pronounce judgment on extraneous issues that cannot be crystallized from the pleadings and/or the evidence adduced.

23. Submitting on the above legal principles, the appellant through its counsel asserted that the issue of whether or not leave to institute proceedings against the defendant in receivership was not an issue that flowed from the proceedings and that neither was it an issue that was raised by the respondents or indeed framed by the parties for determination by the court. According to the appellant, the court engaged in a frolic of its own to make a determination on a matter that was not before it for determination and in effect proceeded to dismiss the appellant's suit. The plaintiff's counsel relied on **Bullen & Leake 12 Edition page 3 o**n the Nature and Function of Pleadings where it is stated that:

"The system of pleadings operates to define and delimit with clarity and precision the real mattes in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two fold purpose of informing each party what is the case of the opposite party which he will have to meet before at the trial, and at the same time informing the court what are the issues between the parties which will govern interlocutory proceedings before the trial and which we the court will have to determine at the trial."

24. The appellant's counsel maintained that parties are bound and confined to their pleadings and that they shall not rely on matters that have not been raised in their pleadings. In their view, the issue of locus standi to institute suit was not challenged by the respondent and that the issue of ownership of the motor vehicles was also expressly admitted by the respondent. Reliance was placed on **Gitahi & Another V Maboko Distributors Ltd & Another [2005] 1 EALR page 65** where the Court of Appeal stated that:

"a trial court of law has to decide a case before it on the evidence before it and on the law "…..a court of law would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for the court's determination by the parties. It is also a principle of law that parties are generally confirmed to their pleadings unless pleadings were amended during the hearing of a case. The principle was succinctly pronounced in the case of Galaxy Paints Company Ltd V Falcon Guards Ltd[2000] 2 EA 385."

25. The appellants' counsel also cited the **Galaxy Paints Ltd Vs Falcon Guards Ltd (supra)** where the Court of Appeal was clear that:

"It is trite law and the provisions of Order XIV of the Civil Procedure Rules are clear that

issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with provisions of the Civil Procedure Rules the trial court, by dint of the provisions of Order XX rule 4 of the aforesaid Rules may only pronounce judgment. On the issues arising from the pleadings or such issues as the parties have framed for the courts determination".

26. In the appellant' view, the court has no jurisdiction to pronounce judgment on matters that are not pleaded by the parties. He relied on **Nairobi City Council V Thabiti Enterprises [1995-1998] EA LR 231 at 238** where Akiwumi J stated that:

"I must now turn to another issue raised in this appeal, which having regard to my foregoing determination, I really do not consider except that counsel made submissions on it at some length. This is whether the learned judge had any jurisdiction to determine the compensation value of the suit land without the pleadings in the suit having been amended to make this an issue in this suit notwithstanding the apparent acquiescence of the parties to this procedure. In this regard, Mr Ngatia for the appellant cited a number of cases in support of his proposition that a judge does not have jurisdiction to determine a matter which has not been pleaded unless the pleadings are suitably amended."

27. The above position was also stated in **Sand V Kenya Co-operative Creameries [1992] LLR 314** where the court held that a judge has no power or jurisdiction to decide an issue not raised before him and emphasized that the only way to raise issues before a judge is through the pleadings. The finding in the above case was endorsed in **Nairobi City Council V Thabiti Enterprises** (supra) case.

28. In the appellant's view, the trial magistrate not only wrongly assumed jurisdiction to determine an issue that was not pleaded or raised before her, she also misdirected herself in law by making a novel legal finding unsupported by the evidence before her that the appellant had not obtained leave of court to enable them institute the suit against the respondent in receivership. That the journey that the trial magistrate embarked on was not defined and delimited by the pleadings and the evidence that was adduced before her. That the issue of locus standi to institute suit by the appellant against the respondents receiver was not raised in the pleadings or evidence as to whether the receiver was appointed by the court or by a creditor under an instrument of debenture in that whereas leave of court would be required in the case where the receiver is court appointed, no such leave would be required in respect of a company placed under receivership by a creditor under an instrument or debenture as was held in **Lochab Brothers V Kenya Furfural Company Ltd [1983] KLR page 257.** Further, that had that issue been raised in the pleadings the appellant would have adequately met it and the learned magistrate therefore erred in basing her judgment on the said issue.

29. Further the appellants contended that the issue of ownership of the motor vehicle KAG 580 P had been expressly admitted by the respondents and parties are bound by their pleadings hence it was not open for the trial magistrate to make findings contrary to the pleadings and the evidence that was adduced before her as she lacked such jurisdiction to contradict the pleadings of both parties. It was therefore contended that the trial magistrate grossly misdirected herself on the law and as the evidence adduced before her and arrived at the wrong decision hence this appeal against her judgment should be allowed.

30. The court notes that the respondent was at all times material to this appeal served with hearing notices to attend court and affidavits of service but the respondent did not appear and neither did they file their written submissions as directed by Honourable Mabeya J on 8th May 2015. This court has therefore had to consider the appeal herein based on the lower court record, the appellant's submissions and authorities supplied.

31. I have carefully considered the appeal herein, the lower court record and the detailed able submissions by the appellant's counsel. I am in total agreement with the appellant that the issues that flow for determination by this court all flow from the legal principles identified by the appellant's

counsel which are basically two namely:

> *1. Whether the trial magistrate had jurisdiction to determine the suit based on issues which were not pleaded; and or not framed by the court for determination; and*
>
> *2. whether the suit as instituted against the 1st respondent was competent owing to the pleading that it was under receivership and that the trial magistrate had no jurisdiction to determine that issue since it was not in controversy and or that it was snot canvassed by the parties.*

32. The court observes that in dismissing the appellant's suit, the trial magistrate was clear that the appellant's suit was incompetent for:

> *i) Failure to seek and obtain leave to sue a company which was in receivership; that the*
>
> *ii) Appellant had no locus standi to sue as there was contradictory and unreliable evidence as to its being the owner of the motor vehicle KAG 580P;*
>
> *iii) There was discrepancy as to the date of accident;*
>
> *iv) The assessor's evidence was clear that he never declared the motor vehicle a write off hence the claim could not stand; and*
>
> *v) The evidence on the sale of the salvage was not reliable as the sale agreement was doubtful.*

33. The appellant has attacked those findings and holding by the trial magistrate contending that the trial magistrate had no jurisdiction to decide on any of the issues which were not in contention or matters which were not pleaded or matters which were admitted in the pleadings or even raised by the pleadings or issues which were framed for determination. Further, that by so determining on the issues as stated above she went on her own frolic which was a gross misdirection. Counsel referred to sufficient case law in support of his client's propositions which I have explored in this judgment.

34. I shall first determine the issue of whether the trial magistrate had jurisdiction to determine issues which were either; not pleaded, admitted, or not framed for determination. To answer that question, which has many other ancillary questions as seen from the above analysis, a look at the pleadings is the commencement point, both in its original as well as in the amended form. Paragraphs 3 and 5 of both original and amended plaints stated:

> *3: The 1st defendant is under receivership with its offices being managed by the N.K. Kositany.*
>
> *5: At all material times the 1st defendant was the registered owner of motor vehicle registration No. KAJ 966S while the plaintiff was the driver of motor vehicle registration No, KAG 580P.*

35. In their defence and amended defence, the defendants/respondents joint defence at paragraph 1 and 2 stated:

> *1. The defendants admits the contents of paragraphs 1 to 4 of the plaint they being descriptive of the parties herein save that their address for service for purposes of this suit only shall be care of ……..…..."*
>
> *2. The defendants admits the contents of paragraph 5 and 6 of the plaint"*

36. Indeed, paragraph 1-4 of the plaint was a description of the parties and their respective addresses of service. Paragraph 3 described the respondent as being in receivership whereas paragraph 5 described

ownership of the parties respective motor vehicles that were allegedly involved in the material collusion accident.

37. In his evidence in court, PW1 who was the driver of the motor vehicle KAG 580P stated in cross examination as follows:-

> *"……..…There are two other directors Ann Ngigi and David Ngaruiya company was incorporated not certain when that was. Teenwise took over Ngaruiya, Nyakundi and Muturi in 2003. I am not sure if this was before or after the accident. Ngaruiya Nyakundi and Muturi was dissolved. Ann Ngigi was a director in Ngaruiya, Nyakundi and Muturi.*
>
> *<u>At time of accident, the registered owner of KAG 580P were the three directors</u>. <u>I do not know who the registered owner was at the time of this accident</u>. At the time we sold motor vehicle it belonged to Teenwise Media. The agreement was on 23rd April 2004……"*

38. From the above extract of the evidence by PW1 in cross examination, it occurred that albeit the appellant pleaded that it owned the motor vehicle KAG 580P, the evidence of PW1 raised serious doubts as to whether the appellant; the former directors of Ngaruiya , Nyakundi and Muturi company or the Ngaruiya , Nyakundi and Muturi company were the owners of the said motor vehicle. The police abstract did not disclose who the owners of the respective motor vehicles were. The law is clear that he who alleges must prove. In this case, albeit it is contended that the fact of the plaintiff/appellant owning the motor vehicle KAG 580P was admitted by the defendant/respondents, it is nonetheless clear from the appellant's own evidence that there was no clear evidence of ownership of the said motor vehicle whether by way of registration or by possession or usage, which issue raised doubts in the mind of the trial magistrate.

39. In my view, the fact of the appellant being the owner of motor vehicle KAG 580 P was a matter within the knowledge of the appellant claimant. It was therefore upon it to prove that fact and not give other evidence that raised doubts as to whether it owned the vehicle or not. Further, the defendants having admitted that pleading, the plaintiff should have been aware of that admission and not give evidence that contradicted the admission by the defendants/respondents. In **CA 258 of 2006 – Barclays Bank of Kenya Ltd V Patriotic Guards Ltd [2015] e KLR** the Court of Appeal held that:

> " ……." ***although generally parties are bound by their pleadings, where an issue is raised in the course of the hearing and the same is canvassed by both parties, the court would be in order to make a determination on such a matter and even give orders based on such an issue(See Odd Jobs V Mubia [1974] EA 476 CA)."***

40. In this case, albeit the issue of the plaintiff's ownership of the accident motor vehicle was not contended in the pleadings, as I have stated earlier, it arose during cross examination of PW1 and in the respondent's submissions in the lower court dated 11th March 2005 filed on the same day, they raised it as issue No. 2 to the effect that the appellant by the evidence of PW1, it emerged, was not the owner of the said motor vehicle and that there was no evidence to show at what point in time the appellant became the owner of the motor vehicle since PW1 stated that he did not know who the owner of the motor vehicle was at the material time of the accident.

41. In my view, therefore, the trial magistrate did not error in making a finding on the issue of whether or not the plaintiff/applicant had locus standi to sue as the owner of the motor vehicle allegedly damaged by the 1st defendant/ respondent's motor vehicle through a collision.

42. On whether the suit as instituted against the 1st respondent was competent owing to the pleading that it was under receivership and that the trial magistrate had no jurisdiction to determine that issue since it was not in controversy and or that it was snot canvassed by the parties, the appellant submitted in this appeal that the trial magistrate in so finding denied it an opportunity to address the court on that issue and that if it had such opportunity, it would have proved that the 1st respondent though in liquidation, did not require leave of court to be sued especially where the receivership was

by a creditor, as opposed to a situation where the receivership was by an order of the court. The plaintiff having pleaded that the 1st respondent was under receivership, that was its case to demonstrate to court that the 1st respondent was placed under receivership by a creditor under a debenture and therefore it did not require leave of court to sue it. It did not. Further, if that were the case, nothing prevented the appellant to seek, on appeal herein, to adduce additional evidence as provided for under Section 78 (1)(d)of the Civil Procedure Act and Order 42 Rules 27 and 28 of the Civil procedure Rules,2010 which evidence would have persuaded this court to either remand this suit for trial or try it finally since the court is not bound or restricted to upholding or setting aside the trial magistrate's judgment.

43. This court does agree with the authority of **Lochab Bothers V Kenya Furfural Company Ltd** (supra) that a receiver appointed out of court under debenture instrument is an agent of all or any part of the property and assets thereby charged or agreed to be charged. However, the above decision can be distinguished from the instant case where the appellant did not attempt to seek to adduce such evidence of an existing debenture instrument under which the 1st respondent's receiver could possibly have been appointed in which event such receiver is not allowed to originate any proceedings in their own name on behalf of the company in which they are receivers. On the other hand, Section 228 of the Companies Act Cap 486 of Laws of Kenya (now repealed) provided that:

> ***" When a winding up order has been made or an interim liquidator has been appointed under Section 235, No action or proceeding shall be proceeded with or commenced against the company except by leave of court and subject to such terms as the court may impose."***

44. The above legal provision was buttressed by the decision of the Court of Appeal **in Sololo Outlets & 3 Others V National Social Security Fund Board of Trustees [1994] KLR 473** wherein the court stated that:-

> ***"Under Section 228 of the Companies Act, leave has to be obtained before a suit is filed against a company which is in liquidation."***

45. The above statutory and case law are clear that one requires leave of court to be granted to institute suit against a company which is in liquidation or under receivership or statutory management. As earlier stated, it is the appellant that pleaded the fact of the 1st respondent being under receivership and being managed by the receiver manager a Mr N.K. Kositany. However, in its evidence in court, the appellant did not attempt to distinguish whether the receivership was by a creditor under a debenture instrument or by appointment by a court. Section 108 of the Evidence Act provides that:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence if facts.***

46. Further, Section 109 of the same Act stipulates that:

> *"**the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

47. In **Okeno V Republic [1972] EA 32** the Court of appeal held that:

> ***" An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. <u>The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own conclusions. Only then can it decide whether the magistrate's findings can be supported</u>. In doing so, it should make allowance for the fact that the trial court had an advantage of***

hearing and seeing the witnesses."(Emphasis added).

48. The above words from a criminal appellate court were the ones echoed in **Sielle & Other V Associated Motor Boat Company Ltd & others**, **Civil Application 31/1967**. Therefore, on the basis of the legal principles set out in Sections 107-109 of the Evidence Act and from the cases of **Sielle & Another Vs Associated Motor Boat Company & Okeno V Republic** (supra), and having reassessed the evidence as adduced in the lower court, I am entitled to make my own independent findings and conclusions on the issues raised by the appellant that indeed, the appellant failed to support its case on a balance of probabilities.

49. On the point that the trial magistrate went on his own frolic to determine issues that were never canvassed or pleaded by the parties; and that the trial magistrate misdirected herself on matters which were admitted especially on the issue of ownership of motor vehicle KAG 580P, the Court of Appeal case of **Barclays Bank of Kenya Ltd V Patriotic Guards Ltd [2015] e KLR** is instructive. In the above appeal, the court considered, among others, the appellant's complained inter alia, that the trial judge should not have suo moto raised the issue of the appellant's non compliance with Regulation 79 of Table A of the Companies Act as the issue had neither been raised in the pleading nor had it been canvassed during the hearing. The Court of Appeal in determining that ground/issue held that as the 1st appellate court it was not restricted to upholding or rejecting the trial court's findings and proceeded to examine all the evidence along with the grounds of appeal raised and submissions of counsel to arrive at its own independent decision. The Court of Appeal found the agreement between the parties null and void and consequently unenforceable by either party. And it further found that the appellant appeared to take leverage on the fact that the respondent acknowledged the debt and even started paying the loan. The Court of Appeal further pronounced itself as follows:

> ***"In our view, the said admission cannot be used against him. He may not have appreciated the legal implications involved, or he just felt as a conscionable human being that he ought to pay. He cannot however be penalized for that as his well intentioned action did not sanitize the illegality in the form of the contract…….***
>
> ***There being no valid enforceable contract between the parties, no claim based on that contract would succeed. The only order the court could have made was the declaration sought by the plaintiff to the effect that the contract in question was void and thus unenforceable."***
>
> ***"……..Although generally parties are bound by their pleadings, where an issue is raised in the course of the hearing and the same is canvassed by both parties, the court would be in order to make a determination on such matter and even give orders based on such an issue(See Odd Jobs Mubia [1974] EA 476 CA) . It is also trite law that a point of law can be raised at any stage even on appeal even though not raised before the court of first instance. The court can also on its own motion raise a point of law at any point and make a determination based on the same even where such point has not been canvassed by the parties. The learned judge did not therefore do anything outrageous by raising the issue of non compliance of Regulation 79 of the Table A of the Companies Act and acting on it."***

50. It is on the basis of the above very recent authority from the Court of Appeal, and which decision is binding on this court that I must determine, as I hereby do, that the trial magistrate was correct in making her finding first, on matters of law which were pleaded but no evidence was led on the same, particularly relating to the capacity of the 1st respondent to be sued without leave of court and second, on matters which though not pleaded, but from the evidence it emerged that the evidence by the appellant's witness concerning the ownership of the motor vehicle was not only insufficient but perfectly contradictory.

51. The above authority of **Barclays Bank of Kenya Ltd V Patriotic Guard Ltd** though made by the same Court of Appeal is superior to the earlier decisions relied on by the appellant as it is the latest decision on the same issues raised in the earlier decisions that although generally parties are bound by their pleadings and that courts ought only to decide on pleaded and canvassed issues, nonetheless, where

an issue is raised in the course of the hearing and the same is canvassed by both parties, the court would be in order to make a determination on such a matter and even give orders based on such an issue.

52. In addition, the Court of Appeal in the above **Barclays Bank of Kenya Ltd V Patriotic Guard Ltd** case was also clear that a point of law can be raised at any stage even on appeal even though not raised before the court of first instance. Further, that trial the court can also on its own motion raise a point of law at any point of the proceedings and make a determination based on that issue even where such point has not been canvassed by the parties.

53. I accept the principle espoused in the above Court of Appeal decision that a party cannot take leverage on the fact that the adverse party acknowledged or admitted certain pleaded facts; as such admission cannot be used against the party admitting ; for he may not have appreciated the legal implications involved, or he just felt as a conscionable human being/Legal entity, of the facts as pleaded being true. Therefore, such a party cannot be penalized for that as his well intentioned action did not sanitize the illegality in the admitted facts. In other words, where there is an illegality, admission of facts cannot sanitize an illegality for what is void in law cannot be voidable by an admission.

54. Accordingly, I find that the trial magistrate did not do anything outrageous and neither did she grossly misapprehend the law when she raised the issues of locus standi of the plaintiff and or competence of the suit as against the 1st respondent which was admittedly in receivership. I further find that the trial magistrate did not err in not relying on the admission in the defendant's written statement of defence to find that the plaintiff/appellant owned the accident motor vehicle since the evidence adduced on ownership thereof was exceedingly contradictory thereby raising sufficient doubts as to the appellant's ownership thereof.

55. It is on the above basis that I uphold the decision of the trial magistrate that indeed the appellant did not prove its case against the respondents on a balance of probabilities and a rehearing thereof would in my view serve no useful purpose especially in the absence of any new evidence that the plaintiff /appellant has the locus standi or legal /or equitable interest in the suit motor vehicle or that the 1st defendant/respondent is now possessed of the capacity n to sue and or be sued with or without leave of court in view of the disclosure that it was at the material time in receivership.

56. In the event that Iam found to be wrong in my above decision on the two issues, on whether or not the respondents were liable for the accident and the purported loss and damage as claimed by the applicants, the court wholly agrees with the trial magistrate's finding that indeed the evidence adduced regarding the state of the motor vehicle was too contradictory and incapable of belief. For example, the plaintiff/applicant at first pleaded for the cost of repairs. In the amended plaint, it sought for the pre accident value less salvage value. It then led evidence that the motor vehicle was a write off. However, its witness PW2 denied that he never declared the motor vehicle a write off and neither did he say it was uneconomical to repair the motor vehicle. He is the expert motor vehicle assessor. Having disowned the theory of a written off vehicle, it follows that there was no independent expert evidence left to support the averment that the motor vehicle KAG 580P was a write off and therefore the claim for pre accident value less salvage did not arise. In addition, this court does not find any plausible reason why it should interfere with the factual findings of the trial magistrate that the execution of the sale agreement of the salvage left a lot to be desired. For example, the seller's representative Ann Ngigi signed the agreement for sale on 5th December 2003 whereas the witnesses signed on 23rd April 2004 and 21st April 2004 respectively and the PW1 was hard pressed to explain those circumstances. PW1 stated that the motor vehicle was sold on 28th February 2004 in examination in chief and in cross examination he stated that the motor vehicle was sold on 23rd April 2004. He also stated that Ngaruiya Githegi signed for Teenwise when the agreement is clear that Ann Ngigi is the one who signed in the place of vendor and Ngaruiya only witnessed. Indeed, the evidence by PW1 was so inconsistent that the trial magistrate found it difficult to rely on it and neither do I. Accordingly, I accept the trial magistrate's findings that the plaintiff/appellant did not prove on a balance of probabilities that it was entitled to the damages claimed, even if the respondents were to be found liable for the

material accident.

57. For all the foregoing, I would restate my stand that this appeal is devoid of any merit and proceed to dismiss it. I uphold the trial magistrate's findings and decision.

58. Costs are in the discretion of the court and in any event, in favour of a successful party. However, I note that there were a myriad of legal issues touching on the capacity of the appellant to sue and of the 1st respondent to be sued. That being the case, I find no reason why the trial magistrate made an order for costs in favour of the respondents and I would on that ground set that order aside and order that each party bear their own costs of the suit in the subordinate court. On the costs of this appeal as dismissed, I find that as the respondents did not participate in this appeal, I order the appeal herein dismissed with no order as to costs.

Dated, signed and delivered in open court at Nairobi this 12th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss Mwaniki h/b for Masese for the Appellant

N/A for the Respondents

Court Assistant: Adline