REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 17 OF 2008

KANYA GATBY TRUST.....APPELLANT

VERSUS

JOSEPH WAITHAKA RUO.....1ST RESPONDENT

WYCLIFFE NAJU NDAIBU.....2ND RESPONDENT

(From the judgment of C W Githua Ag. Senior Principal Magistrate

***in CMCC Number 17558 of 2004*)**

J U D G M E N T

By an Amended Plaint dated 24th May, 2005 the Co-operative Insurance Company of Kenya through the Appellant/Plaintiff, in exercise of its rights under the doctrine of subrogation, sued the two Respondents/Defendants herein, claiming special damages amounting to Ksh.262,957/- being repair charges and incidentals arising from a motor vehicle accident involving motor vehicle Registration No. KAE 178J belonging to the Appellant. The trial magistrate, after a full trial dismissed the Plaintiff's claim. That is what provoked this appeal by the said Appellant/Plaintiff.

Both Defendants had filed their amended defences in which they each denied that the alleged accident occurred and denied also that the motor vehicle Registration Number KAJ 988N which had allegedly caused the accident, belonged to or was managed or controlled by either of them. They also denied that either of them was negligent as alleged and put the Plaintiff to strict proof.

During the trial of the suit the Plaintiff did not only himself testify but also called several witnesses who included the following:

The police officer who produced the Police Abstract relating to the accident in question; the driver, PW I, who was driving the Plaintiff's motor vehicle Registration Number KAE 178J when the accident occurred; a qualified motor vehicle assessor PW 2, who had prepared the Accident Damage Assessment report which he produced and which revealed the damage to be the sum of Kshs.254,876/75; a claims analyst from the Corporate Insurance Company which had insured the Plaintiff's accident motor vehicle KAJ 988N and who produced the Repair Bill and Repair Bill Settlements documents. He also produced an insurance investigations Report P. Exhibit 4, showing that Wycliffe Njau Ndariu the 2nd Defendant, was the beneficial owner of the Motor Vehicle KAJ 988N alleged to have caused the accident.

The 1st Defendant Joseph Waithaka Ruo testified in his defence as DW 2. He stated that he did not know the 2nd Defendant, Wycliffe Njau Ndairu who the Insurance Investigator's Report had claimed to be the person who managed, controlled and owned the motor vehicle Registration No. KAJ 988N, alleged to have caused the accident. He however testified that he originally sold the said motor vehicle in 1998, not to the 2nd Defendant but to a company known as Shethia Credit Limited and had completed a transfer form and given it to them.

The 1st Defendant denied the Plaintiff's claim on the basis that having lawfully sold the motor vehicle as stated above, he lost possession, control, management and ownership of the same after the said sale in 1998. He however, not only failed to produce evidence to prove the alleged sale but admitted that he was still registered as the owner of the motor vehicle KAJ 988N, in March, 2002, notwithstanding the claim that he had sold the motor vehicle to the alleged Shethia Credit Limited. He confirmed in his evidence as well, that he had sought indemnity from 2nd Defendant because the Police Abstract showed that the motor vehicle Registration No. KAJ 988N was in the possession, management and control of the 2nd Defendant. He also conceded in his evidence that he was unable to disprove Plaintiff claim against him.

As to the 2nd Defendant and notwithstanding the fact that the Plaintiff's pleadings specifically claimed that he or his driver or agent or servant, was the one who so negligently drove, managed or controlled the motor vehicle KAJ 988N that he caused the motor vehicle to violently collide and/or ram into the Plaintiff's motor vehicle Registration No. KAE 178J, thereby causing the alleged damage and loss assessed at Ksh.262,957/- the 2nd Defendant failed to file any amended Defence. He thus was presumed to be relying on his statement of defence dated the 12th June, 2006.

In his said defence the 2nd Defendant had denied being the registered or beneficial owner of the motor vehicle Registration Number KAJ 988N. He also had denied being the driver, servant or the agent of the owner of the motor vehicle. He further had denied the pleaded negligence allegations and the damage and loss and had sought strict proof thereof. The 2nd Defendant also had alleged contributory negligence on the part of the Plaintiff or Plaintiff's driver or servants or agents.

The record shows that the suit went into a full trial during which the Plaintiff's four witnesses testified. The 1st Defendant as well testified and called one witness. The 2nd witness did not testify nor call any witness.

The Plaintiff in its evidence through its driver confirmed that the driver was driving Plaintiff's Motor Vehicle Registration Number KAE 178J along Juja Road on 2nd March, 2002. At Pangani flyover a matatu stopped in front to board passengers. Then without warning, another motor vehicle Registration KAJ 988N emerged from behind the stationary matatu and tried to overtake the matatu along the witness lane. The latter motor vehicle was registered in the 1st Defendant's Name – Joseph Waithaka Ruo. Plaintiff's driver, PW I, swerved off the road into the pavement to avoid a collision but it was too late. The collision occurred apparently in the presence of Police Officers who immediately inspected the scene of accident and instructed the drivers to report the accident at Pangani Police Station. PW I reported the accident while there is evidence that the driver of motor vehicle Registration. No. KAJ 988N escaped from the scene of accident. PW I obtained a Police Abstract Report which clearly indicated that the driver of the motor vehicle Registration Number KAJ 988N, was the one to blame for the occurrence of the accident. The Police Accident Abstract Report was produced in evidence, and it showed that the driver of KAJ 988N was on a wrong lane, was over-speeding as he swerved to avoid ramming into the stationary vehicle, thus forcing himself to drive on PW I's lane.

It is also in evidence that the Plaintiff's motor vehicle Registration No. KAE 178J was taken to Marshall's East Africa where its damage was assessed by Mech-Auto Technologists and Lexa-Tech Consultants, the latter coming out with an assessment of Kshs.254,877/-, the basis of the claim. It is noted in evidence that the damages claim was first filed against the 1st Defendant alone and the 2nd Defendant was enjoined later on amendment of the plaint when the issue of who owned controlled and managed the motor vehicle KAJ 988N, arose. The Plaintiff had to assign an Investigator who filed a report showing

that although the motor vehicle was still registered in the name of the 1st Defendant, the latter claimed that he had sold the same to some Third Party who was apparently not the person who controlled, managed or was the beneficial owner as at the time the accident occurred. Not to misdirect the claim, the Plaintiff decided to enjoin the person found managing and controlling the motor vehicle at the time of the accident.

The 1st Defendant in his defence evidence during the trial admitted that motor vehicle Registration KAJ 988N, was purchased by him and registered in his name in 1997. That he sold it to one Shethia Credit Limited in 1998 and handed over and signed Transfer Form to enable registration of the transferred ownership. He was unable to produce any evidence of such sale or transfer and admitted having failed to notify the Registrar of Motor Vehicles of such sale and transfer as required by law. He admitted knowing the said Shethia Credit Limited who still was available and admitted failing to enjoin the same to indemnify him of any damage or loss that might be imposed on him because the motor vehicle was indeed found to be in his name despite his sale of the vehicle in 1998. He nevertheless denied liability and felt that the person found to managing and controlling the motor vehicle should be right person to bear liability arising from the accident, although he did not himself in person know the 2nd Defendant. The 1st Defendant also conceded that the motor vehicle could have been owned by one Wysim Traders because they appeared to be registered owners in 2005 although they may not have been so registered in 2002 when the accident occurred. Finally, he also conceded that he had no evidence to disprove the Plaintiff's claim.

In her consideration of the pleadings and evidence, the trial magistrate came to the conclusion that the Plaintiff's claim of negligence against either the 1st and 2nd Defendant's was not proved. He in particular concluded that the Investigator's Report which brought out the fact that the motor vehicle KAJ 988N belonged to the 1st Defendant but was being controlled and managed by the 2nd Defendant and which was the only evidence that linked the negligence in the claim to the 2nd Defendant was hearsay and could not therefore, be a basis of credibility against the 1st Defendant. As to the 2nd Defendant, the trial magistrate found that the same investigators Report was also not sufficient evidence as to who was the person who was managing and/or controlling the motor vehicle during the accident. That the report was furthermore not adequate to prove that the 2nd Defendant's agent or servant, was the one responsible for the negligence that led to occurrence of the accident.

Finally, the trial magistrate also concluded that since the Plaintiff had pleaded that the 2nd Defendant was the beneficial owner and he or his agent or servant was controlling or managing the motor vehicle, then since there was no evidence proving the same, then the 2nd Defendant could not be found liable.

This court as an Appellate Court, would be entitled to re-examine and re-evaluate all the evidence and come to its conclusions. However on matters of fact this court cannot easily differ with the conclusions reached by the trial magistrate court unless the latter was wrong on principle or unless his conclusions on the facts are so illogical that they on record lead to an absurdity. That is to say, the trial magistrate's conclusions must be logical and reasonable. In the circumstances, of the case considering the fact that the he heard and assessed the witnesses before him before coming to his conclusions.

In this case, from the evidence on record there is no doubt that the alleged accident occurred and damage to the Plaintiff motor vehicle was assessed and the loss assessed and the loss assessed to the amount claimed. The vehicles that had a collision were both driven to Pangani Police Station by the instructions of the Police Officers who happened to be present where the accident occurred and who inspected the scene of the accident immediately the accident occurred. The details of the accident were also recorded in the Occurrence Book and a Police Abstract containing the details was put in evidence by the Plaintiff's driver who also very clearly explained how the accident occurred. He confirmed in his evidence as did the Police in the Police Abstract Report that it was the driver of the 2nd Defendant who at the time of the accident drove KAJ 988N who was at fault and negligent by driving in high speed and on the wrong lane which is what caused the accident.

In this court's view and conclusion, the fact that the accident occurred and that it was caused by the negligence of the 2nd Defendant's driver who immediately ran away from the scene of the accident was properly and sufficiently proved on the balance of probabilities.

The second issue to be considered is; who owned, controlled and/or managed the motor vehicle KAJ 988N which is the one that caused the incident.

The 1st Defendant conceded that in 2002 when the accident occurred, the motor vehicle was still registered in his own name. He said he had sold it and signed transfer forms to Shethia Credit Limited in 1998 but realized in 2005 that in 2002 when the accident occurred, the motor vehicle ownership still remained in his name. He could not show any evidence of sale or transfer to Shethia Credit Limited and conceded that as things stood, he was not in a position to avert the Plaintiff's claim against him. He also conceded that when he was served with summons for this claim he checked and found that Shethia Credit Limited existed but he did not for unexplained reasons, seek to enjoin them to indemnify the Plaintiff's claim against him.

In the above circumstances there was sufficient evidence to prove this case against the first Defendant unless he during the trial, shoved the liability to a third party, if any. His evidence indicated that he investigated the situation and found that although he had signed a transfer form in favour of Shethia Credit Limited, the transfer, for reasons which could have been only explained by Shethia Credit Limited, was not effected. It was therefore, necessary and logical for the 1st Defendant to enjoin Shethia Credit Limited to indemnify him. However, he failed to do so, in this court's view and finding, to his detriment.

On the other hand, there was adequate evidence from PW I, the Plaintiff's driver and the Police Abstract, that the motor vehicle KAJ 988N, was at the material time being driven by the 2nd Defendant's driver, who fled after the accident. It does not take great imagination to conclude that when the motor vehicles were taken to Pangani Police Station after the accident, the true owner or person who was controlling and managing the motor vehicle must have followed them there. Indeed the Police tracked down the controller and manager of KAJ 988N to the 2nd Defendant and his driver James Mwaura Kinyanjui whose details were accordingly included in the Police Abstract which became evidence on introduction into evidence.

It is clear from the Abstract, therefore that the driver of KAJ 988N was James Mwaura Kinyanjui who by M/s Invespot Insurance Investigators Report dated 11th May, 2005 was an employee as a driver of Wycliff Njau Ndario, the 2nd Defendant herein. This court notes that the above Report Exhibit 5 was admitted into evidence by the consent of counsel of the 1st and 2nd Defendants who as well did not cross-examine nor challenge the veracity of its contents, including the employment relationship stated above. In this court's view, the fact that the written submissions by the Defendant's Counsel attacked the veracity of the contents of the said Report at that late hour when it had gone in unchallenged and by consent, could not and did not change its status as credible evidence. In the view of the court and with great respect to the counsel, who appeared in the case as well as the trial magistrate who considered the Report later, the contents of the same did not need the maker to testify and put it in. It was already evidence by consent. To call it hearsay at that late stage is to misunderstand the meaning of the word and fail to appreciate the rules of evidence.

The conclusion that springs out of the above conclusion, therefore, is that the trial magistrate erred in considering the investigation Report Invespot Insurance Investigators as hearsay. Had she not done so, she would properly come to the conclusion that there was enough evidence to prove that the driver of KAJ 988N was in control and management of the motor vehicle when it caused the accident that led to the Plaintiff motor vehicle's damage and loss of the sum claimed.

This court also finds that there was enough evidence to find that the driver who caused the accident was an employee and servant of the 2nd Defendant and at the material time being in full control and management of the motor vehicle which was still registered in the name and ownership of the 1st

Defendant and could not, either agents and servants of the 1st Defendant or as Independent owners of the Motor Vehicle, escape liability arising from the 2nd Defendant's direct negligence or that of his driver, agent or servant after the Plaintiff clearly, proved his claim.

It would indeed be a tragedy and against common and legal logic for the 2nd Defendant to escape liability arising from his or his servants/agents negligence merely because he failed to obey the law by failing to register his ownership of the motor vehicle which came into his hands after the 1st Defendant released it from his effective ownership.

It finally does not escape the attention of this court that although the 2nd Defendant filed a defence to the Plaintiff's claim denying almost every part of the claim, he deliberately failed to attend court and testify to back his defence. His defences therefore, remained mere denials and a sham. Mere Pleadings do not make a defence. They must be proved on the balance of probability, especially, as in this case, where the Plaintiff adduced sufficient evidence to persuade the court on balance of probabilities. Indeed, failure to testify can be presumed to mean that the 2nd Defendant feared to explain the circumstances under which he obtained the control and management of the motor vehicle and the full circumstances under which the accident occurred. Our judicial process is not inept of adequate rules of evidence and procedure to establish fairness and justice in every case that comes before it.

In this case, the 1st Defendant conceded failing to comply with the law which compelled him to register the transfer of his vehicle to a third party and notify the Registrar of Motor Vehicles that he was no longer in control and management of the motor vehicle Registration KAJ 988N. The result is that seven years down the line, he is called upon to bear liability arising from his non-compliance. As he himself admitted, there was no way he could disprove the Plaintiff's claim.

On the other hand, the 2nd Defendant was clearly in physical control and management of the motor vehicle which might or might not still belong to the 1st Defendant. Little evidence was placed before the court to extract or separate the 2nd Defendant from the 1st Defendant and the 2nd Defendant might be servants or agents of the 1st Defendant. In this court's wisdom both should in the circumstances be found jointly and severally liable to protect the Plaintiff who proved his claim and was not to blame.

The result is accordingly that this court finds both Defendants liable jointly and severally. Judgment is hereby accordingly entered against the Defendants jointly and severally for the sum of Kshs.262,957/- together with costs and interest from the date of filing of the suit until full settlement. Orders accordingly.

Dated and delivered at Nairobi this 8th day of July, 2015.

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D A ONYANCHA

JUDGE