IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 192 OF 2007

BETWEEN

IGNATIUS MAKAU MUTISYA.....APPELLANT

AND

REUBEN MUSYOKI MULI……...……RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Machakos (Sitati, J) dated 22nd day of June 2007* in *H.C.C.C. NO. 8 OF 2004)

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JUDGMENT OF THE COURT

Ignatius Makau Mutisya (the appellant) was the plaintiff in Machakos HCCC No. 8 of 2004, while **Reuben Musyoki Muli** (the respondent) was the defendant. The case was a running down matter in which the appellant sought the following orders *inter alia*:-

a. ***A declaration that the plaintiff is not the owner of motor vehicle Reg. No. KTK 369.***

b. ***A declaration that his defendant is the owner of motor vehicle Reg. No. KTK 369***

and

c. ***An order directing the Registrar of Motor Vehicles to enter the name of the defendant as the owner of the motor vehicle registration No. KTK 369 with effect from the date of its purchase from the plaintiff.***

What comes out clearly from these prayers is that the dispute revolved and still revolves around the ownership of motor vehicle registration No. KTK 369. The reason as to why neither of these parties wants to readily accept ownership of a motor vehicle which under normal circumstances many would aspire to own, is as follows.

The appellant and the respondent entered into an agreement of sale for the motor vehicle in question sometime between the years 1995 and 1996. The said motor vehicle having been purchased by the appellant from Machakos District Co-operative Union sometime in 1994.

From what we could glean from the record, the appellant upon purchase of the lorry which he said was grounded repaired the same and brought it back onto "its wheels" as it were. He then proceeded to sell it at a tidy sum of Kshs. 1,300,000/=. Upon receipt of the money, he handed over the lorry to the respondent, together with a duly signed transfer form and presumably its log book, to enable the respondent transfer it to his name.

Apparently, no such transfer was done and the records pertaining to ownership at the Registrar of Motor Vehicles were never altered to reflect the current ownership of the motor vehicle in question. The appellant forgot the whole transaction until sometime in the years 2001 and 2003 when he was served with court summons in respect of suits filed following an accident involving the lorry in question.

One such case was Machakos HCCC No. 8 of 2004, which gives rise to this appeal. The matter was heard by the High Court (Sitati, J) following which she made the following finding which is germane to this appeal.

> ***"… in my considered view therefore, no transfer of the lorry had taken place as at the time when the accidents giving rise to Machakos CMCC No. 1284 of 2001 and Machakos CMCC No. 5473 of 2003 took place. Further, I find and hold that no title had passed to the defendant. The plaintiff was still the registered owner of the lorry as at those times when the accidents occurred. In the result, I do find and hold that the plaintiff has failed to prove his allegations against the defendant. The burden of proving his allegations are squarely on the plaintiff's shoulders, for he who alleges must prove. The plaintiff has failed to do so on a balance of probabilities."***

This finding is what provoked the appeal now before us in which the appellant has proffered a total of 12 grounds.

The appeal proceeded by way of written submissions by consent of both counsel. In her submissions dated 27th May 2015, Miss Muteti, learned counsel for the appellant compacted the said grounds into six broad grounds as hereunder:-

1) That the Judge erred in law and fact in failing to appreciate that having concluded that the respondent had possession after the date of the sale of the vehicle, she could not thereafter dismiss the

appellants suit in its entirety.

2)That the Judge erred in law and fact in finding that the title/ownership of the motor vehicle KTK 369 could pass to therespondent only after a transfer/registration of the same, irrespective of a valid agreement granting possession, and thereby failing to appreciate the existence of the legal and or equitable concept of beneficial ownership in possession.

3) That the Judge erred in law and fact in holding that the appellant was the registered owner of the vehicle and that a rebuttable presumption to that effect existed despite evidence to the contrary and

without any evidence on controversion by the respondent.

4) That the Judge erred in law by failing to address all the main issues raised in the suit namely whether the plaintiff had sold the vehicle to the defendant and was not in possession of the motor vehicle.

5) That the learned Judge erred in her interpretation of the provisions of Section 8 of the Traffic Act.

6) That the Judge erred in law and fact in failing to appreciate that the appellant had proved his case on a balance of probabilities having adduced evidence to support his case and in the

absence of any contradictory evidence from the respondent.

As rightly submitted by Miss Muteti, the fulcrum on which this appeal rests, is on the issue of ownership of the said motor vehicle. Is ownership of a motor vehicle only proved by registration with the Registrar of Motor Vehicles?

It was learned counsel's submission that the learned Judge had misinterpreted the intent and purport of **section 8 of the Traffic Act** which provides:-

> ***"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."***

It was her submission, that given the undisputed fact that by the time the accident in question occurred, the lorry was in possession of the respondent, the learned Judge had fallen into error in her finding that the appellant was still the legal owner of the lorry and was therefore liable for whatever damage or loss that had been caused by the said lorry. She also faulted the learned Judge's interpretation of **Section 9(1) of the Traffic Act** which requires that upon transfer of any motor vehicle, the new owner must be registered as the owner of the motor vehicle within 14 days of such transfer.

According to the learned Judge, the responsibility of ensuring that the appropriate transfer is registered lies with the transferor and not with the transferee, a finding that learned counsel for the appellant, takes issue with. She called into aid this Court's decision in **Securicor Kenya Ltd vs Kyumba Holdings Ltd [2005] eKLR**. She urged us to allow this appeal and set aside the impugned judgment.

On his part, Mr. Masika, learned counsel for the respondent filed his submissions on 9th June 2015. He opposes the appeal. He adopted an interesting stand in this appeal. His submission was that ownership of a motor vehicle can only be proved through the production of a log book, or certificate of search from the Registrar of Motor Vehicles showing who the registered owner is. According to learned counsel, the lorry in question actually still belonged to Machakos District Co-operative Union Limited, and it was the Co-operative Union which should have filed the suit against both the appellant and the respondent. He relied on the case of **Thuranira Karauri vs Agnes Ncheche [1995 – 1998] IEA 57** where the Court of Appeal held,

> ***"As for the defendant's ownership, it is incumbent on the plaintiff to place before the Judge, a Certificate of Search signed by the***
>
> ***Registrar showing the registered owner of the lorry."***

He submitted therefore, that ownership of the lorry could only pass after the transfer was registered in the respondent's name.

He further submitted that the appellant had failed to discharge the burden of proof as he had failed to adduce evidence of transfer of the said lorry from the Co-operative Union to himself and from himself to the respondent. He conceded however, that the learned Judge had erred in her finding that the lorry in question was registered in the appellant's name as there was no evidence whatsoever to that effect. His submission however, was that the said misdirection did not impinge on the rest of the judgment.

He urged us to dismiss this appeal.

We have considered the grounds of appeal, the submissions of both counsel and, indeed, the entire record.

We have also considered the cited cases and the law applicable. Having done so, our view is that only two issues fall for our determination. These are, whether ownership of a motor vehicle can only be proved by way of registration of the owner with the Registrar of Motor Vehicles; and secondly, whether or not the appellant discharged the burden of proof. These two issues are actually intertwined and one cannot be divorced from the other.

On the issue of the burden of proof, we need to examine whether the appellant discharged his burden of proof on a balance of probability to prove that he was actually not the owner of the motor vehicle in question as at the time the cause of action, the subject of this appeal arose. We can borrow from the wise words of Denning J. in **Miller –vs- Minister Of Pensions [1947]2 All ER 372.** discussing the burden of proof where he

said:-

> ***"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 or 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."***

Of relevance also are **sections 107** and **108** of **Evidence Act (Cap 80 Laws of Kenya**) which assign burden of proof in a case. Those two sections provide-

"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.

> ***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."***

It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise. **section 8** of the **Traffic Act** provides that;

> ***"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle." (emphasis supplied).***

This section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of **Osapil vs Kaddy [2000] 1 EALA 187** the Court of Appeal of Uganda held that a registration card or logbook was only *prima-facie* evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

This Court adopted the interpretation above in the case of **Securicor Kenya Ltd vs Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O'Kubasu' Deverell JJ.A)**

and held that**;**

> ***"Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise."***

Also recently, this Court in the case of **Joel Muga Opinja v. East Africa Sea Food Ltd [2013] eKLR** restated this position as follows:-

> ***"We agree that the best way to prove ownership would be to produce to the Court a document from Registrar of Motor Vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied"***

All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of **Francis Nzioka Ngao vs Silas Thiani Nkunga**,**Civil Appeal No.92 of 1998,**

"whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case."

In this case, there is undisputed evidence to the effect that the appellant had actually purchased the motor vehicle from Machakos District Co-operative union Ltd, repaired it, and then sold it to the respondent. It was also in evidence that when the appellant sold the lorry to the respondent, instead of ensuring that it had been transferred, he just signed the transfer forms and gave them to the respondent to complete the said transfer. For that, the appellant was faulted by the learned Judge who stated that the appellant never intended to transfer the lorry from himself. Without saying much about that statement, we note that in the ordinary state of things, a seller of a motor vehicle hands over the motor vehicle to the buyer together with the duly executed transfer forms, and leaves it to the buyer to follow up the matter with the Registrar of Motor Vehicles. No adverse inference therefore should be made against the appellant for the sole reason that he did not follow up the respondent to ensure that the transfer had been effected.

Although no sale agreement was exhibited in Court, the fact that the appellant had sold the lorry to the respondent, and that the lorry had been in the respondent's possession for several years prior to the accident is not disputed. Indeed, learned counsel for the respondent's submission was that since the lorry was still in the Machackos Union Co-operative's name, the appellant should not even have filed this suit. That in our view is an acknowledgement by the respondent that the appellant was indeed not the owner of the lorry and should not therefore have been held liable for the accident in question.

Having considered this evidence, we are satisfied that the appellant proved before the trial court that he had already sold the lorry to the respondent long before the said accident. He, in our view rebutted the presumption that he was still the owner of the lorry, and not the respondent. Moreover, there was actually no evidence from the Registrar of Motor Vehicles placed before the Court to prove *prima facie* that the appellant was the registered owner of the lorry in question.

Our finding is that the special, insurable and actual owner of the lorry in question as at the time the accident happened was the respondent. The Appellant successfully rebutted the prima facie evidence on ownership as stipulated under section 8 of the Traffic Act. We are also satisfied that the appellant discharged the burden of proof as required in law. Our independent conclusion is that the learned judge erred in finding that the appellant was liable for the accident in question.

This appeal therefore succeeds. We allow the same and set aside the judgment of the High Court in its entirety with costs both here and in the High Court being awarded to the appellant.

Dated and delivered at Nairobi this 19th day of June, 2015.

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR