CMC Motors Group Limited v Netsol Kenya Limited & 6 others (Civil Appeal E009 of 2022) [2024] KEHC 1821 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1821 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E009 OF 2022

FR OLEL, J

FEBRUARY 27, 2024

BETWEEN

CMC MOTORS GROUP LIMITED ..... APPELLANT

AND

NETSOL KENYA LIMITED ..... 1ST RESPONDENT

GEORGE TUWEI ..... 2ND RESPONDENT

EUNICE MUTIO MWANZIA ALIAS EUNICE MUTIO ..... 3RD RESPONDENT

DESTINY MUTANU ALIAS DESTINY JOSEPH ..... 4TH RESPONDENT

BONIFACE MUSYOKI KALOKI ALIAS BONOFACE MUSYOKA .... 5TH RESPONDENT

FRANCIS KIOKO MUIA ALIAS FRANCIS KIOKO ..... 6TH RESPONDENT

STACY MWIKALI JOHN ALIAS STACY JOSEPH ..... 7TH RESPONDENT

(Being an Appeal From the Ruling and Orders Of The Hon A.G. Kibiru, Chief Magistrate Issued on 8th December 2021 in Machakos CMCC Nos E193 of 2021, E194 of 2021, E195 of 2021, E196 of 20121 and E237 of 2021.)

JUDGMENT

A. Introduction

1. The Appellant, who was the 1st Defendant in the primary suit did file a Notice of Motion Application dated 16th August 2021 wherein they sought to have the suit filed as against them to be stuck out on the basis that they were wrongly enjoined in the suit as they were not the beneficial owner of motor vehicle KBU xxxF Pick Up Ford Ranger (hereinafter referred to as the 1st suit motor vehicle) nor was their agent/driver and/or employee in control of the suit motor vehicle as at the time of the accident.

They were only a financier who provided deferred payment facility to the 2nd Defendant in order for them to acquire the 1st suit motor vehicle amongst a fleet of other motor vehicle acquired under the same transaction. In addition, the appellants further submitted that they were not vicarious liable for the accident as the 3rd defendant who was driving the said motor vehicle was not its driver, agent and/or employee nor was he working under their instruction's.

2. The Plaintiff, now the 3rd Respondent in this Appeal filed a Replying Affidavit dated 6th September 2021 in opposition to the said Application wherein she stated that the accident arose out of a collision between motor vehicle registration number KBU xxx F (the 1st suit motor vehicle) and motor vehicle registration KBN xxxN (herein after referred to as the 2nd suit motor vehicle) occasioning injuries to her. She obtained a police abstract and copy of records and the latter indicated that the 1st Defendant/Appellant was a co-owner of the 1st suit motor vehicle. The Appellant/applicant had not annexed any sale agreement nor did they annex any other document to show that indeed they had sold the 1st suit motor vehicle to the 1st respondent and therefore it was premature for the court to make a determination on the said issue. The applicant was trying to subvert the court process and the said application was not merited and should be dismissed.

3. The Trial court considered the said application and in its ruling delivered on 8th December 2021 found that although the Appellant deposed that they had sold the 1st suit motor vehicle to the 1st Respondent, who was to pay in instalments, no proof of sale was provided and the letter of deferred payment relied on dated 17.03.2011, addressed to the 1st Respondent only touched on the issue of deferred payment of Kshs.14,286,152/=. It did not mention anywhere that the same was with regard to the 1st suit motor vehicle.

4. Dissatisfied by this ruling, the Appellant did file their Memorandum of Appeal which was premised on the grounds that;

    a. The Honourable Magistrate erred in law and in fact in making a finding that the agreement annexed did not mention the suit motor vehicle despite existence of overwhelming and undisputed evidence that the 2nd Defendant bought the suit Motor vehicle as brand new from the 1st Defendant being a Ford Ranger Pick Up and agreed to procure joint registration merely as security for payment.

    b. The Honourable Magistrate erred in law in making a finding that there existed no agreement for sale of the suit motor vehicle was annexed, while failing to appreciate the existence of the clear overwhelming evidence that there existed an agreement annexed which clearly confirmed that the 1st Defendant agreed to purchase the suit motor vehicle on deferred payment arrangement with the following salient features;

        i. An agreement existed that the 2nd Defendant would procure joint registration of the suit motor vehicle in the names of the 1st and 2nd Defendants merely as security for payment of the purchase priced deferred.

        ii. The agreement between the parties was clear that the obligations to settle the sum under the agreement was agreed to be absolute and continue notwithstanding any accident or loss of the motor vehicle possession of the 2nd Defendant.

    c. The Honourable Magistrate erred in law and in fact in failing to appreciate and make a clear finding that the Appellant as per the evidence availed was not in control of the suit Motor Vehicle at the material time of the accident and the 3rd Defendant was never an agent of the Appellant in any manner and vicarious liability could not attach against the Appellant.

d. The Honourable Court erred in law and in fact in failing to find that on the clear evidence availed before the court displaced the presumption that the Appellant was the registered owner of the suit motor vehicle capable of controlling the same in a manner to answer to claim of negligence brought against it.

e. The Honourable court erred in law and in fact in failing to make a finding that the 2nd and 3rd Defendant having not filed any Replying Affidavit challenging the clear assertions made against them by the Appellant had discharged the burden of proof on the balance of probabilities that it was not in control of the Motor vehicle as at the time of the accident subject of the suit as they were merely financiers.

B. The Parties Submissions

Appellants submissions

5. The Appellant filed submissions dated 24th August 2023, where they submitted that the requirement by the Trial court for proof of a sale agreement was a misinterpretation of the deferred payment arrangement between the parties, and its import was to facilitate purchase of the 4 new Ford Ranger pick-ups by the 1st respondent herein. The said deferred payment agreement was a clear act of purchase and the Appellant could not again be said to have the right of possession of the very vehicles subject of deferred payment once the same were delivered to the 1st Respondent.

6. As at the time of entering into the deferred payment agreement with the 1st respondent, the motor vehicles referred to therein, were new and unregistered. In support of this contention, the appellant referred the court to look at the copy of records annexed which showed that the suit motor vehicle was first registered on 8th January 2013 and the 1st suit motor vehicle issued with the registration number KBU xxxF, which Registration number they contend could not have contemplated/known at the time of making the agreement. The trial court was faulted for failing to thus properly analyze these facts and therefore failed to arrive at the right conclusion that indeed one of the motor vehicles subjects to the deferred payment agreement included the 1st suit motor vehicle. Reliance was placed on the cases of *William Kabogo Gitau v George Thuo and others* [2010] 1 KLR 526 to buttress the point that on a balance of probability, the facts as pleaded by the appellant were correct.

7. Section 8 of the *Traffic Act* Cap 403, was clear with respect to presumption of ownership, which could be rebutted and it was their contention that they had brought out clear evidence to show that indeed, they had no beneficial interest in the 1st suit motor vehicle. It should be noted too, that the 1st respondent did not at any time dispute the business relationship which existed between the said parties. Unfortunately, this was ignored by the trial court and the said court proceeded to make wrong assumptions not borne out the facts on record. Further liability arising out of an accident, could only attach to a party, if proven that they were vicariously liable for the negligence caused. In this case, the same was not proved Reliance was placed on the cases of, *Jane Wairumu Turanta v Githae John Vickery &2 others* [2013] eKLR, *Beatrice Adhiambo Ngiela & another v Mehul Kishorchand Shah & another* [2012] eJKR, *Ali Abdi Dere v Hash Hauliers Limited & Another* [2018] eKLR.

8. Finally, the appellant urged this court to also find that the 1st respondent was served with their application seeking to be stuck out of the primary suit. The 1st respondent did not file a response thereto to rebut the clear assertions made that the Appellant was a mere financier of the suit motor vehicles and not the beneficial owner's thereof. That clearly meant that they had discharged the burden of proof on a balance of probabilities, that they did not own the said motor vehicle and further that, their agent/ servant and/or employee was not in control of the said motor vehicle as at the time of the accident.

Reliance was placed on *Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 others* [2017] eKLR and *Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & Another* [2013] eKLR.

9. The appellant urged this court to find that indeed they had placed credible evidence before the trial court to prove that indeed they were only a financier and did not have beneficial or possessory control, care of the 1st suit motor vehicle as at the time of the accident and therefore ought to be discharged therefrom.

The Respondents Submissions

10. The 3rd to 7th Respondent filed submissions dated 11th October 2023 wherein it was submitted that a motor vehicle search was conducted before filing of the suit and a demand letter was issued to the Appellant who did not respond to the same, therefore necessitating filing of the suit, wherein they were included. The Respondents submitted that no sale agreement, delivery note or proof of payment had been produced to support the Appellant's allegations. Section 8 of the *Traffic Act*, Cap 403 was clear 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." The only document annexed by the Appellant was a letter of deferred payment, which could not pass title to the 1st Respondent.

11. It was further submitted that the court should take judicial notice of the fact that the appellant was in the business of motor vehicle dealership and was not a financial institution and as such they could not claim to wield, such capacity. The respondent was of the view that the only inference which could be made out, with regard to the deferred payment plan was that it was an arrangement for deferred payment of Kshs 14,286,152/= for purchase of four (4) new Ford Ranger Pick -ups on satisfaction of conditions stated thereunder. There was no proof that those conditions were met nor was there proof that the 2nd respondent herein was the Managing Director of the 1st respondent and/or did have capacity to so contract.

12. The 3rd to 7th Respondents further submitted that if indeed it was true that, the Appellant was a mere financier as alleged, why had they not effected transfer of the suit motor vehicle to the 1st respondent from the period between, 2013 to 2021 (eight (8) years later), since the alleged agreement was entered into. It was their contention that the said application was filed as an afterthought and that the Appellant had been properly sued as the registered owner of the suit motor vehicle. The issues raised by the Appellant were best left to be determined at trial. The appeal therefore as filed had no Merit and the Respondents prayed that it be dismissed with costs.

C. Determination

13. I have considered the pleadings, evidence presented and submissions of both parties to this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

14. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs* (2001) 3 SCC 179.

15. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph* AIR 1969 Keral 316

16. The Appellant contends that it was just a financier and thus not vicariously liable for the accident as the 1st suit motor vehicle was not in their possession, nor was it being driven by their agent/servant and/ or employee. The respondents on the other hand averred that the evidence presented failed to prove that indeed the Appellant sold the suit motor vehicle to the 1st respondent and thus all issues should proceed for full trial.

17. In the case of *Ali Lali Khalifa And 8 Others v Pollman's Tours And Safaris Ltd*, & *Diamond Trust Bank (K) Limited v Salim Khalid Said*[2003] eKLR, the court considered the nature and effect of a financier and hirer status under a Hire Purchase Agreement and held as follows:

> " The legal position is this: if it can be demonstrated that a registered owner of a motor vehicle hired out to a third party or the said vehicle was used in the circumstances which did not allow for the doctrine of vicarious liability on the part of the registered owner, to apply, then the latter is not liable.In *Ormrod v Crosville Motor Services Ltd.* (1954) 2 All ER 752, at page 755 Lord Denning said:
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> "The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."
>
> In the circumstances of the present case the following facts have been proved to exist (a) The second defendant was a mere financier of the first defendant for the purposes of the acquisition of the motor vehicle Reg. No. KAE xxxH by the first defendant, and the second defendant's interest in said vehicle was merely recorded in the Registration Book or in the records held by the Registrar of Motor Vehicles for the purposes of securing its interests under the Hire Purchase Agreement. That interest is in the balance of the loan or advances to the first defendant.... interest is the balance of the loan or advances to the first Defendant. (b) At the time of the accident the said vehicle KAE xxxH had been sold to the third Defendant by the first Defendant and the third defendant was thus operating matatu business (c) The second defendant had neither interest in the first defendant's business nor in the third defendant's matatu business. (d) The accident the subject matter of this suit, arose at the time when the said vehicle was being driven wholly for the purpose of the business of the Third defendant." Emphasis added.

18. Similarly, in the case of *Justus Kavisi Kilonzo v Coast Broadway Company Limited & another* [2008] eKLR , it was held that;

> " Despite the registration of the 2nd defendant as co-owner of the said motor vehicle, as a financier of the 1st defendant, the 2nd defendant is not a necessary party to these proceedings. To use the language of Etyang J (now retired), in Mombasa HCC Number 106 of 2002: *Ali Lali Khalifa & Others –v- Pollman's Tours & Safaris & 2 Others* (UR), the 2nd defendant

has demonstrated that it hired out the said motor vehicle to the 1st defendant and the said vehicle was used by the 1st defendant in circumstances which do not allow for the doctrine of vicarious liability to apply to the 2nd defendant."

19. To get to the bottom of who was the owner of the 1st suit motor vehicle, it is important to find what the law says on registered owner of a motor vehicle. Section 8 of the *Traffic Act* which 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.'

20. Section 2 of the same *Act* provides that;

> " owner", in relation to a vehicle which is the subject of a hire-purchase agreement or hiring agreement, includes the person in possession of the vehicle under that agreement;

21. In the decision of *Samuel Mukunya Kamunge v John Mwangi Kamuru* Civil Appeal No 34 of 2002. It was held that;

> " It is true that a certificate of search from the Registrar of motor vehicle would have shown who was the registered owner of the motor vehicle according to the records held at the registrar of motor vehicle, that however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the *Traffic Act* provides that the contrary can be proved. This is in recognition of the fact that often time's vehicle changes hands but the records are not Amended. I find that the trial Magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor vehicle."

22. The court of Appeal also in the case of *Jared Magwaro Bundi & Another v Primarose Flowers limited* (2018) eKLR , held that;

> " It was therefore held in *Muhambi Koja* (supra) that section 8 of the *Traffic Act* recognizes registration book or the registrar's extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered to a de facto owner, a beneficial owner or a possessory owner. Such a owner though not registered for the practical purpose maybe more relevant than in whose name the vehicle is registered."
>
> The position taken by this court in *Joel Muga opija* (supra) and *Muhambi Koja* (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance that the technical chains of form, the latter which does not ordinarily look at the justice of a case."

23. Finally, the same finding was also arrived at by the court of Appeal in the case of *Osumo Apima Nyaundi v Charles Isaboke Onyancha Kibondori & 3 others* where they stated that;

> " the ownership of a vehicle passes on the sale and the delivery and the registration book of the vehicle is only evidence of title. This court has held that section 9(1) and 14 of the *Traffic Act* provide penal sanctions but do not decide the issue of ownership of a vehicle..... ownership of a vehicle (which is a chattel) is upon sale governed by the *Sale of Goods Act*."

24. The crux of this appeal lies on interpretation of terms of agreement titled "Deffered Payment Arrangement Of Kshs 14,286,152.00 For The Purchase Of 4x New Ford Ranger D/c P/ups From Ford Mazda Division Of Cmc Motors Group Ltd", which agreement is dated 17th August 2011 and signed by the 2nd respondent being the 1st respondent authorized officer and/or Managing Director on 19th August 2011 and whether it constituted a sale agreement/hire purchaser agreement as between the said parties.

25. *Chitty on Contracts*, 24th edition, volume 1 at page 21, paragraph 41 states that -

> "In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test: if the parties have to all outward appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree."

26. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In *Arnold v Britton* [2015] UKSC 36, Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.

27. Professor A Burrows QC in the 2019 case of *Federal Republic of Nigeria v JP Morgan Chase Bank NA*' summarized the modern approach to contract interpretation in the following terms: "The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain." See; *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm), paragraph 32, approved by the Court of Appeal in *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] EWCA Civ 1641, paragraphs 29, 73 and 74.

28. Having considered and read the entire contract entered into between the parties, it is clear that the parties did enter into a hire purchase agreement, financier/purchaser agreement, where the Appellant offered to sell to the 1st respondent FOUR (4) 4x4 New Ford Ranger D/c P/ups From Its Ford/ mazda Division Of Cmc Motors Gorup Ltd and the Maximum deferred payment amount including other costs would be Kshs 13,547,213.00/=. The 1st respondent was also to pay a deposit of Kshs 1,970,504.00/= on or before delivery of the said motor vehicles. The other terms covered therein included interest rate payable, security for the said motor vehicles, comprehensive insurance and the right of the Appellant to repossess the said motor vehicles should the 1st Respondent default in repayment terms.

29. The contract for all intent and purpose was a hire purchase agreement/ Asset fiancé agreement and/or as christened a deferred payment arrangement agreement. Its import was that the motor vehicles were partially paid for by the purchaser – 1st Respondent and he was given a credit period by the Appellant to pay the deferred amount of Kshs.13,547,213.00/= for a maximum period of eleven (11) months.

30. In light of the above, could the Appellant be said to be beneficial owner thereof?. Section 8 of the *Traffic Act*, Cap 403 has been litigated upon and the jurisprudence that emerges is that there could be actual, possessory and beneficial ownership of a motor vehicle, and as held inthe court of Appeal in the case of *Osumo Apima Nyaundi v charles Isaboke Onyancha Kibondori & 3 others* ;

> " the ownership of a vehicle passes on the sale and the delivery of the motor vehicle, and the registration book of the vehicle is only evidence of title

31. The trial Magistrate when he considered the evidence presented did find that, the deferred payment agreement was not a sale agreement and it did not specify that one of the motor vehicles sold therein was the 1st suit motor vehicle registration Number KBU xxxF Ford Pick Up. While it is true that the said document is not a sale agreement, it is content and import did clearly show the intention of the parties which was to have the Appellant accommodate the 1st respondent and give it financial latitude to pay for the bought motor vehicles by Monthly installments. The said contract adequately did prove on a balance of probability that the 1st respondent bought Four Pick – Up, Ford Ranger, from the Appellant and this fact was not denied by the 1st respondent in the proceedings herein and before the trial court.

32. The fact that the said deferred agreement does not specifically refer to the 1st suit motor vehicle too, can also be adequately explained by the fact that the said agreement was entered into in August 2011, but registration of the said motor vehicle was done on 08th January 2013. This explanation as submitted by the appellant is plausible and explains the reason as to why the deferred payment agreement did not mention the registration number of the suit motor vehicle and the other three motor vehicles bought therein.

33. The Appellant also submitted at length on the issue of vicarious liability, but I do note that there was no evidence which was adduced before the trial court on who was driving the 1st suit motor vehicle on the accident date. The trial court rightly did not make a finding on this matter and I do therefore find that there is no basis for this court to make a determination on the same.

D. Disposition.

34. The upshot in this appeal, upon a critical analysis of the evidence presented is that, the trial Magistrate did error in his analysis of the deferred payment agreement and failed to critically analyze its content. This was a misdirection which must be corrected.

35. I do therefore set aside the Ruling/Order of Hon A.G Kibiru (C.M) dated 8th December 2021 issued in Machakos CMCC No E193 Of 2021, And To Apply Mutatis Mutandi To Machakos CMCC NO E194 of 2021, E195 of 2021, E196 of 2021 and E237 of 2021 and substitute the same by allowing the Appellants application dated 16th August 2021 filed in the said suits in terms of prayer (1) thereof.

36. Each party shall bear their own costs of this Appeal and the said Application dated 16th August 2021.

37. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 27TH DAY OF FEBRUARY, 2024.

In the presence of;

Ms Oburo for Appellant

No appearance for Respondent

Sam - Court Assistant