



**Consolidated Bank of Kenya Limited v Mwangi & another (Civil Appeal E056 of 2021)
[2022] KEHC 3104 (KLR) (Commercial and Tax) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 3104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E056 OF 2021**

DAS MAJANJA, J

JULY 8, 2022

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED APPELLANT

AND

VERONICAH WANGECHI MWANGI 1ST RESPONDENT

HARRIS GENERAL SUPPLIES LIMITED 2ND RESPONDENT

(This was an appeal from the Ruling and Order of Hon. D. O. Mbeja, PM dated 11th June 2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. E6513 of 2020)

JUDGMENT

1. This is an appeal against the ruling of the Subordinate court declining to strike out the 1st Respondent's suit as against the Appellant following an application made by the Appellant seeking to strike out the suit under Order 2 rule 15(b), (c) and (d) of the *Civil Procedure Rules*.
2. By way of background, the 1st Respondent sued the Appellant and 2nd Respondent for damages for negligence following a road traffic accident that took place on 4th March 2022 involving the 1st Respondent's motor vehicle registration number KBM 631R and motor vehicle registration number KCP 804M owned jointly by the Appellant and 2nd Respondent ("the Motor Vehicle").
3. In its statement of defence dated 18th December 2020, the Appellant denied the allegations of negligence against it. It pleaded that it was improperly joined to the suit as a defendant on the ground that the driver of the Motor Vehicle was never its employee or agent. It stated that its registration as a co-owner was limited to securing payment of the loan advanced to the 1st Defendant.



4. After filing its defence, the Appellant lodged the application dated 15th January 2021 seeking to strike out the suit against it on the grounds set out in its statement of defence. The 1st Respondent opposed the application. After considering the application, affidavits and written submissions, the trial magistrate by the ruling dated 11th June 2021 dismissed the application thus precipitating this appeal.
5. The trial magistrate relied on section 8 of the *Traffic Act* (Chapter 403 of the Laws of Kenya) 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,” and held that a plaintiff, who is in doubt may join two or more defendants in order for the court to decide the question of who is liable and to what extent in order to grant the redress. The trial magistrate cited the case of *Trust Bank Limited v Amalo Co. Ltd* KSM CA Civil Appl. No. 215 of 2000 [2002] eKLR as a basis for holding that parties to a suit are entitled to be heard on the documents presented before the court and on record hence the suit should be heard to give the court an opportunity to assess the probative value and nature of the evidence adduced to enable it can make a determination on liability.
6. The substance of the Appellant’s appeal is set out in the Memorandum of Appeal dated 6th July 2021 setting out five grounds of appeal. The appeal was canvassed by way of written submissions. In its submissions, the Appellant condensed its grounds of appeal into a single question for determination as follows, “Whether the trial Court erred in law and in fact in failing to discharge the Appellant from the suit?”
7. The Appellant submitted that the basis of its case was that it was registered as co-owner of the Motor Vehicle as a financier. In its deposition the Appellant stated that on 21st December 2017, the 2nd Respondent applied for an Asset Finance Facility of KES. 5,264,000.00 from the Appellant to purchase the Motor Vehicle. A condition of the Letter of Offer dated 29th December 2017 was the Motor Vehicle would be registered in the name of the Appellant and the 1st Respondent and a security interest registered in an initial notice in the Movable Properties Security Rights Register. The Appellant produced its Statement of Accounts dated 2nd December 2020 to show that 2nd Respondent was servicing the facility but that it was outstanding at the time of the accident. The Appellant stated that it maintained a registrable security interest over the Motor Vehicle to secure repayment of the facility.
8. The Appellant complains the trial magistrate erred in law and in fact by failing to take into account the disclosed relationship between it and the 1st Respondent. It submits that it was improperly joined as a party, is a mere financier and has no proprietary interest in the Motor Vehicle and that it cannot be held vicariously liable over the alleged negligence of the 1st Respondent or its agent as it was neither a principal nor did it have control or management over the Motor vehicle at the time of the alleged accident. The Appellant therefore submits that no cause of action has been disclosed by the 1st Respondent as against it hence no liability can attach to it in the circumstances.
9. The 1st Respondent supports the decision of the trial magistrate. It does not deny that the Motor Vehicle was registered in the names of the Appellant and 2nd Respondent at the time the accident took place. The 1st Respondent submits that under section 8 of the *Traffic Act*, the Appellant was the registered owner and that it was upon it to prove the contrary at the hearing of the suit in order to avoid any liability. It contends therefore that the trial magistrate was correct in dismissing the application and directing that the matter proceeds for hearing.
10. The law on striking out of pleadings is well settled. The Court of Appeal in *D. T. Dobie & Co Ltd v Muchina and Another* [1982] KLR 1 held that the power to strike out a suit is drastic and should be exercised with great circumspection and only in the clearest of cases where amendment cannot cure



the defect. Madan JA., observed that, “No suit ought to be summarily dismissed unless it appears so helpless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendments.”

11. It is not in dispute that Motor Vehicle was registered in the joint names of the Appellant and the 2nd Respondent in order to protect the Appellant’s financial interest. This is confirmed by the documents produced and more particularly the Notice of Registration of Initial Notice under the Moveable Property Security Rights Act, 2017 dated 9th March 2018. The registration of a security interest under the said statute binds third parties. The learned magistrate took the view that it was necessary to hear the matter in order to determine, “probative value and nature of the evidence adduced.” In the application before the court the documentary evidence was produced on oath and was in fact, uncontested in so far as the Appellant’s security interest was registered and a matter of public record. A hearing on the issue whether or not the Appellant has a security interest in the Motor Vehicle would not serve any purpose as the documents are beyond dispute.
12. Having established beyond peradventure that the Appellant’s interest in the Motor Vehicle is to secure its financial interest, the next question is whether the Appellant is liable as contended by the Respondent. The learned trial magistrate did not address this issue the decision despite extensive submissions on the matter by the Appellant.
13. Ownership of a motor vehicle does not, of itself, establish liability for an accident. The plaintiff must prove that the owner is vicariously liable for the acts of the driver of the motor vehicle by showing that the driver is an employee or agent (see *Jane Wairimu Turanta v Githae John Vickery and Equity Bank Limited & Munene Don* ML HCCC No. 483 of 2012 [2012] eKLR). As whether the owner who has a financial interest in a motor vehicle has control over the driver, which is at the heart of this appeal, our courts have held that a financier’s only interest in the security is to secure the repayment from the owner and it is not in control of the motor vehicle for that reason. In *Ali Abdi Dere v Hash Hauliers Limited & Another* MKS HCCC No. 16 of 2014 [2018] eKLR the court held that the position of a financier was merely to protect its interest in the motor vehicle it had financed and could not be held vicariously liable for the actions of its driver while in *Justus Kavisi Kilonzo v Coast Broadway Company Limited* MSA HCCC No. 169 of 2007 [2008] eKLR the court was of the view that a financier who had been registered as a co-owner of a motor vehicle did not mean that it was a necessary party to proceedings. The same position was taken by the Court of Appeal in *Mohammed Hassan Musa and Another v Peter Mailanyi and Another* NYR CA Civil Appeal No. 243 of 1998 [2000] eKLR stated as follows:

There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realise the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd, which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached. [Emphasis mine]
14. Turning back to this appeal, it is well established that the appellate jurisdiction of the court is circumscribed by the principle that the court will not interfere with a discretionary decision of the Subordinate court simply because it would have come to a different conclusion in the decision appealed from. The Court will only interfere the trial magistrate misdirected himself in law, misapprehended the facts, took account matters which he should not have taken into account, failed to take into account matter he should have taken into account and where the decision, though discretionary, is plainly wrong (see *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* [1985] EA and *Mbogo v Shah* [1968] EA 93).



15. From the totality of the material before the court, the trial magistrate failed to take into account the effect of the Appellant's proved financial interest in the Motor Vehicle and its effect on its liability for the acts of the 1st Respondent's driver. While the court should exercise restraint in striking out a suit under Order 15 rule 2 of the *Civil Procedure Rules*, this was a case where the Appellant's financial interest was beyond dispute. I find and hold that no purpose would be served by dragging the Appellant to a full trial. In the circumstances, I find and hold that the trial magistrate erred in exercise of discretion in declining to strike out the appeal.
16. For the reasons I have set out above, I allow the appeal on the following terms:
- (a) The ruling and order dated 11th June 2022 be and is hereby set aside and substituted with an order that the Appellant's application dated 15th January 2020 is allowed and the 1st Respondent's suit against the Appellant is dismissed.
 - (b) The 1st Respondent shall bear the costs of the application and suit before the Subordinate Court.
 - (c) The 1st Respondent shall bear the Appellant's costs of this appeal which are assessed at KES. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY 2022.

D. S. MAJANJA

JUDGE

Mr Nyanchoka instructed by Muruguri, Muigai, Waweru and Company Advocates for the Appellant.

Mr Ng'ang'a instructed by S. Ng'ang'a Ndung'u and Company Advocates for the 1st Respondent.

