



**Mutuku v Mombasa Cement Ltd (Civil Appeal E211 of 2023)  
[2024] KEHC 9288 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E211 OF 2023  
BM MUSYOKI, J  
JULY 31, 2024**

**BETWEEN**

**DANIEL KIMEU MUTUKU ..... APPELLANT**

**AND**

**MOMBASA CEMENT LTD ..... RESPONDENT**

*(Being an appeal from judgement and decree of Honourable Hon. M. Thibaru Adjudicator/  
RM dated 24-08-2023 in Machakos Small Claims Court case no. E321 of 2023)*

**JUDGMENT**

1. This is an appeal from judgment and decree of the Adjudicator in Machakos Small Claims Court claim number E321 of 2023 dated 24-08-2023 in which the appellant's claim was dismissed. The statement of claim in the said cause was praying for judgment against the respondent for Kshs 325,596.00 following an accident involving motor vehicles registration numbers KCY 088Q belonging to the appellant and KCC 352C belonging to the respondent. The appellant blamed the respondent for the accident. The sum claimed was said to be cost of repairs and tracing charges being the special damages the appellant suffered as a result of the accident.
2. The title of the statement of the claim showed the appellant as the claimant therein. However, when it came to the description of parties, the claimant was shown as First Assurance (K) Limited. The statement of claim was signed by one Godfrey N. Njenga who described himself as the legal officer of the said insurance company. He went on to sign a witness statement. There was a verifying affidavit dated 8-05-2023 by the appellant stating that he had assigned his rights to the said insurance company under the principle of subrogation having been compensated by the insurance company.
3. The adjudicator took issue with the description and the procedure adopted by the appellant. She held the view that the statement should have been signed by the appellant as in subrogation matters, the insurance company should institute the suit in the name of the insured. Nevertheless, she found that



to be a procedural issue or a honest mistake holding that she would have given the appellant another opportunity to regularise his pleadings had he proved negligence.

4. The appellant has raised a total of 9 grounds. It appears to me that the all the grounds except the 2<sup>nd</sup> one have made citations to the law and *the Constitution*. Perhaps this is meant to show that the appeal is on matters of law. The appellant must be alive to the provisions of Section 38(1) of the *Small Claims Court Act* which restricts appeals from the said courts to this court on matters of law. In my view, that is the reasons the appellant has made attempts to cloth this appeal with beauty of *the Constitution* and Sections of the statutes and rules he has cited in his grounds of appeal. I paraphrase the grounds of appeal as follows;
  1. The first ground faults the adjudicator for failing to uphold Article 159(2), (a), (b) and (c) of *the Constitution*.
  2. The second ground claims that the appellant's claim was struck out wrongly as adjudicator failed to consider evidence in the appellant's statement and documents and in particular the police abstract.
  3. The 3<sup>rd</sup> ground faults the adjudicator for failing to consider Section 32(1) of the Act.
  4. The 4<sup>th</sup> ground claims that the adjudicator failed to consider that the appellant had complied with Rule 5(1) of the Small Claims Court Rules.
  5. The 5<sup>th</sup> ground claims that the adjudicator failed to exercise her discretion properly and ignored principles of law and precedent in same cases in particular Rule 23(1) of the Small Claims Court Rules.
  6. The 6<sup>th</sup> grounds complains that the adjudicator ignored all applicable principles of law and precedent and in particular Rule 23(3) of the Small Claims Court Rules.
  7. The 7<sup>th</sup> ground faults the adjudicator for failing to consider Rule 31 of the Small Claims Court Rules.
  8. The 8<sup>th</sup> ground claims that the adjudicator failed to consider Rule 32 of the Small Claims Court Rules.
  9. And finally in the 9<sup>th</sup> ground, the appellant takes issue with the adjudicator for being biased and arguing the case for the respondent and hence violating Article 10(2)(b) of *the Constitution*.
5. I stated above that the appellant has decorated the memorandum of appeal with citation of *the Constitution* and the laws because I do not see any correlation between the cited provisions of the laws and his submissions. When it comes to submissions, the appellant has framed for me four issues for determination viz;
  - i. Whether the appellant adduced sufficient evidence to hold the respondent liable for the accident of 11<sup>th</sup> May 2020;
  - ii. Whether the insurance company had locus to present the statement of claim as filed;
  - iii. Whether the appellant's case has merit; and
  - iv. Whether the respondent is entitled to costs awarded by the trial court.
6. I say with respect that the submissions and pleadings in this appeal have either been a product of innocent poor drafting skills or deliberate attempt to mislead the court and confuse the issues in order to circumvent the bad case the appellant finds himself in. The said issues safe for the second one which



talks of locus of the parties are framed from the 2<sup>nd</sup> ground of appeal which seeks to overturn the judgement of the adjudicator for reasons that she failed to consider that the evidence and documents of the appellant were enough to prove liability against the respondent.

7. I have read the judgment of the adjudicator and it is clear to me that the appellant's case was dismissed for lack of proof of liability. The honourable adjudicator in dismissing the claim held that;

‘In the absence of satisfactory evidence as to the circumstances of the accident, I find that the claimant has not proved their case on the required standards against the respondent.

If it were the issue of the claimant's locus only, I would have struck out the suit to give the claimant another chance to remedy the situation because in my opinion that is an issue of procedure or rather it could have been an honest mistake. However, since they have failed on the issue of negligence, I have no option but to dismiss the suit with costs to the respondent’.

8. Negligence is proved through adduction of evidence both oral and documentary if any. This is a matter of fact and not law. It is clear from the portion of the judgement I have quoted above that the adjudicator was alive to the fact that misdescription of the parties was a procedural issue and she would have had the latitude of allowing the same to pass by giving the appellant another opportunity to file a fresh suit were it not for him failing to prove negligence. It is therefore not right for the appellant to approach this court and fault the adjudicator for failing to apply the spirit of Article 159 of *the Constitution* and the many cited Sections of the Small Claims Act and the Small Claims Court Rules. The adjudicator did not dismiss the appellant suit on a technicality or procedural flaw.
9. The issue of whether or not the insurance company had locus to file the claim is neither here nor there. I say so because, that was not the reason why the appellant's suit was demised. The court was clear that she dismissed the suit for lack of proof of negligence which is an issue of fact.

Prayer 2 of the memorandum of appeal which to me is the main prayers asks for;

‘An order do issue that the entire decision, judgment and order of Hon. M. Thibaru, delivered on 24<sup>th</sup> August, 2023 in the Small Claims Court at Machakos in SCCC/E132/2023 against the appellant be reversed and entirely set aside, and in lieu thereof allow the appellant's claim dated 8<sup>th</sup> May 2023 and the suit of even date be reinstated and proceed for determination on merit.’

10. The above prayer suggests that the appellant's claim was struck out and not decided on merit. That is not the correct position. It is clear that parties were heard and filed submissions and judgment on merits of the case was rendered. Even in his submissions to this court, the appellant has made references to evidence adduced by the parties. The appellant is deliberately in my view making submissions of trickery hoping to get an order which will throw the lower court into confusion and in the process try his luck afresh in that court.
11. Since I have decided that I will not delve into the issue of negligence, then what will happen even if I were to find that the adjudicator was wrong on the issue of misdescription of the parties or that the insurance company employee was right in signing the statement of claim? Obviously, the issue of liability will remain the same as the adjudicator found. The end result will be the same.
12. The appeal is to me an abuse of the court process. It lacks merits and I proceed to dismiss it with costs to the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**B.M. MUSYOKI**



**JUDGE OF THE HIGH COURT.**

Judgement delivered presence of;  
Mr. Muhoro for the appellant; and  
Mr. Chamwada for the respondent.

