



**Rayan Logistics Limited & another v Aletia & another (Civil Appeal E104 of 2022) [2024] KEHC 10119 (KLR) (13 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10119 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E104 OF 2022  
GL NZIOKA, J  
AUGUST 13, 2024**

**BETWEEN**

**RAYAN LOGISTICS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ADAN MAHMUD ALIAS ADEN MAHAMUD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SUSAN AMLANGO ALETIA ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMED HUSSEIN ALI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the decision of Honourable Y. M. Barasa (SRM) delivered on 8th December 2022, vide Naivasha CMCC No. 341 of 2016)*

**JUDGMENT**

1. By a plaint dated 15<sup>th</sup> April 2016 the plaintiff (herein “1<sup>st</sup> respondent”) sued the defendants (herein “the appellants” and the “2<sup>nd</sup> respondent”) seeking for judgment against them for:
  - a. Kshs. 680,332
  - b. Interest at court rates on (a) above at court rates from the time of filing the suit until payment in full.
  - c. Costs of this suit plus 16% VAT thereon.
  - d. Interest on (c) above from the date of judgment until payment in full.
2. The plaintiff’s/1<sup>st</sup> respondent’s case is that on 22<sup>nd</sup> May 2013 her motor vehicle registration No. KBM 449Y was being driven along the Nakuru – Naivasha road and on reaching Delamere area, it collided with motor vehicle KAB 829Z driven by the 3<sup>rd</sup> defendant/2<sup>nd</sup> respondent and beneficially owned and/or insured by the appellants.



3. The 1<sup>st</sup> respondent blamed the 2<sup>nd</sup> respondent for driving his motor vehicle negligently and/or carelessly by disregarding the provisions of the Highway Code, failing to have a proper look out for other road users, driving at an excessive speed, failing to keep a safe distance between his vehicle and the 1<sup>st</sup> respondent's vehicle, failing to heed to the hooting from other vehicles and/or give way to motor vehicle registration No. KBM 449Y.
4. Further that the 3<sup>rd</sup> respondent failed to slow down, stop, swerve or in any manner control his motor vehicle and rammed into motor vehicle registration KBM 449Y, forcing it to go into a ditch.
5. The 1<sup>st</sup> respondent averred that as a result of the accident the motor vehicle was extensively damaged resulting in financial and material loss. That, the plaintiff was fully compensated by her insurance company; Heritage Insurance Company Limited as such the claim is brought on its behalf under the doctrine of subrogation.
6. The plaintiff/1<sup>st</sup> respondent relied on the doctrine of res ipsa loquitor and sued the appellants under the doctrine of vicarious liability.
7. However, the appellants filed a defence dated 27<sup>th</sup> September, 2016 and denied the plaintiff's/1<sup>st</sup> respondent's claim. The appellants denied being the registered, beneficial and/or insured of motor vehicle registration No. KAB 829Z, that they were the employers of or had authorized the 2<sup>nd</sup> respondent to drive the subject vehicle, and /or that an accident had occurred. The particulars of negligence as outlined in the plaint were denied too.
8. However, on a without prejudice basis, the appellants averred that if the accident occurred which it denied, it was caused or substantially contributed to by the negligence of the plaintiff/1<sup>st</sup> respondent, her agent, driver and/or employee who drove her vehicle at an excessive speed, on the wrong side of the road, and failed to swerve, manage or manoeuvre his motor vehicle so as to avoid the accident.
9. The appellants further denied the claim for special damages as set out in the plaint and/or that the doctrine of subrogation applies herein
10. The case proceeded to hearing. The 1<sup>st</sup> respondent's case was supported by her own evidence where she testified that she had insured her subject motor vehicle with Heritage Insurance Company Limited. That, on 22<sup>nd</sup> May, 2013, her said motor vehicle was hit by the appellants lorry registration No. KAB 829Z and damaged at the rear door and left hand side front light.
11. That the accident was reported at Naivasha Police Station and the driver of the lorry was held to blame. That subsequently, the insurance company repaired the motor vehicle at a cost of around Kshs. 680,000.
12. The plaintiff's case was further supported by PW1 Regina Ileri a legal officer at Heritage Insurance Company Limited. She adopted her witness statement as evidence in chief and testified that Heritage Insurance Company Limited issued the motor vehicle registration No. KBM 449Y under policy number 101377001100029A.
13. That, following the accident herein, the plaintiff/1<sup>st</sup> respondent lodged a claim dated 24<sup>th</sup> May 2013 supported by a police abstract dated 23<sup>rd</sup> May 2013, That the driver of the motor vehicle registration KAB 829Z on 22<sup>nd</sup> May, 2013 was blamed for the accident.
14. That the insurance company engaged Spotlight Investigators to establish whether the accident occurred and they did and filed an investigation report. It was the witness evidence that the insurance company paid a sum of Kshs. 30,295 for the report. Further, the 1<sup>st</sup> respondent's vehicle was repaired at Ace Auto Centre at a cost of Kshs. 611,566 which was paid by the insurer.



15. Furthermore, the insurer hired an investigator to trace the owner of the motor vehicle which investigations and established that the 1<sup>st</sup> appellant was the beneficial owner and the 2<sup>nd</sup> appellant was a director of the 1<sup>st</sup> appellant which matched the details in the police abstract. That, the Insurance company paid Kshs. 38,240 for the tracing services.
16. She averred that in total the insurer expended Kshs. 680,332 and that the 1<sup>st</sup> respondent has sued under the doctrine of subrogation.
17. PW3 No.96714 PC Joseph Makau attached to traffic department of Naivasha Police Station produced the police abstract that indicated that the driver KAB 829Z was to blame for the accident and that owners of that vehicle are the appellants.
18. The defence case was supported by the evidence of the 2<sup>nd</sup> appellant and a director of the 1<sup>st</sup> appellant. He adopted his witness statement as his evidence in chief and stated that he learnt of the case herein after the 1<sup>st</sup> respondent attached the 1<sup>st</sup> appellant's property.
19. That upon perusing the plaint he realized the appellants were sued as the beneficial owners of motor vehicle registration KAB 829Z. He denied that the appellants have ever owned and/or been the beneficial owner of the subject vehicle and/or that the 2<sup>nd</sup> respondent has ever been their employee.
20. That he applied for records from the Registrar of Motor Vehicle and was informed that no such records exist. Further, he has never been charged in any traffic case with regard to the suit vehicle.
21. At the conclusion of the trial, the the trial court by a judgment delivered on 8<sup>th</sup> December, 2022, in favour of the plaintiff/1<sup>st</sup> respondent as against defendants/appellants and 2<sup>nd</sup> respondent jointly and severally follows: -
  - a. The defendants are held 100% liable for the accident
  - b. The defendants to pay the plaintiff Kshs 680,332 plus interest at court rates from the date of filing the suit.
  - c. The plaintiff is awarded costs of the suit plus interest.
22. However, the appellants are aggrieved by the decision of the trial court and appeals against it on the following grounds as verbatim reproduced: -
  - a. The learned trial Magistrate erred in law and fact in finding that the motor vehicle registration number KAB 829Z belongs to the 1<sup>st</sup> and 2<sup>nd</sup> appellant herein without an iota of evidence having been produced to back this assertion.
  - b. The learned Magistrate misdirected himself and based his findings as to ownership and use of motor vehicle registration number KAB 829Z on wrong considerations.
  - c. The learned Magistrate erred in law and fact in finding that the motor vehicle registration Number KBM 449Y was insured by Heritage Insurance Company Limited, in the absence of any insurance policy or a certificate of insurance.
  - d. The learned Magistrate erred in law and fact in finding that the respondent had the locus standi to institute the suit under the doctrine of subrogation, in the absence of establishment of insurer-insured relationship.



- e. The learned Magistrate erred law and fact in finding that the Appellant's were 100% liable for the accident, in the absence of the testimony of a single eye witness and in the absence of evidence linking the Appellants to the accident.
  - f. The learned Magistrate erred law and fact in granting the Respondent special damages of Kshs 680,332 plus interest, despite the respondent having not produced a single receipt as exhibit. special damages though pleaded, was not proved.
  - g. The learned Magistrate erred law and fact in granting the respondent the costs of the suit, in absence of any evidence of a demand letter or service of a demand letter before institution of the suit.
  - h. The learned Magistrate failed to appreciate the submissions of the appellants by finding in favour of the respondent herein.
  - i. In all the circumstances of the case, the findings of the learned Magistrate are insupportable in Law or on the basis of the evidence adduced.
23. As a result, the appellants prays for the following orders ; -
- a. The appeal be allowed.
  - b. The judgment in favour of the respondent be set aside.
  - c. The appellants be awarded costs of this appeal and costs of the suit at the Senior Resident Magistrate's Co6ygd+murt.
24. The appeal was disposed of vide filing of submissions. The appellants tendered submissions dated; 4<sup>th</sup> July, 2023 and argued that 1<sup>st</sup> respondent lacked the locus standi to institute a claim under the doctrine of subrogation as she did not produce the Insurance policy document as proof of an insurance contract between the insurer and herself, neither did she produce an insurance sticker. Further, the police abstract did not indicate that her vehicle was insured by Heritage Insurance Company Limited.
25. Furthermore, the learned trial Magistrate erred in finding that the 1<sup>st</sup> respondent had locus standi based on the police abstract produced which showed that the motor vehicle KAB 829Z allegedly belonged to the appellants and was insured by Takaful Insurance.
26. That the subrogation relationship to be established was between the 1<sup>st</sup> respondent and Heritage Insurance and not that of the appellants. The appellants relied on the case of; Egypt Air Corporation vs Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 where the court? COA OR HC stated that, the doctrine of subrogation is founded on a binding and operative contract of indemnity that derives life from the original contract, and where there is no contract of indemnity there is principle of subrogation cannot legally operate.
27. The appellants submitted that the 1<sup>st</sup> respondent bore the burden to prove liability for the accident, that the appellants were the owners of motor vehicle registration No. KAB 829Z, but failed to do so and/or produce a copy of the logbook or the certificate of official search.
28. That in the case of; Thuraira Karauri vs Agnes Ncheche [1997] eKLR the Court of Appeal rejected the submission by the plaintiff that the police abstract contained information that the lorry belonged to the defendant and stated that the defendant having denied ownership of the vehicle it was incumbent upon the plaintiff to place before the judge a certificate of search signed by the Registrar of motor vehicles.



29. Furthermore, the investigation report by Counterstrike Limited produced by the 1<sup>st</sup> respondent revealed that motor vehicle KAB 829Z was owned by Elisha Daniel Godana and Esso Motor Sales and Services, which evidence was reiterated by (PW1) Regina Ireri. Therefore, taking into account lack of corroborative evidence and conflicting information on the ownership of the motor vehicle registration No. KAB 829Z, the 1<sup>st</sup> respondent failed to prove ownership on a balance of probability.
30. That in addition, the police abstract produced by the 1<sup>st</sup> respondent laid blame on the 2<sup>nd</sup> respondent without giving any reason thereof considering there was no eye witness to the accident. The case of; Sally Kibii & another vs Francis Ogaro [2012] eKLR was cited where the High Court stated that absence of an eye witness diminishes the appellant's chance to prove a case of negligence
31. The appellants further submitted that having denied knowing the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent had the burden to link the appellants to the 2<sup>nd</sup> respondent and/or the subject vehicle. That there being no other evidence apportioning blame on the appellants the trial court erred in finding them 100% liable and that the suit should have failed.
32. That in the case of; Commercial Transporters Limited vs Registered Trustees of the Catholic Archdioceses of Mombasa [2015] eKLR the High Court held that where there is no concrete evidence to determine blame between two drivers, both of them should be held liable.
33. Lastly, the appellants submitted that the 1<sup>st</sup> respondent failed to prove damages claimed. That she did not produce a single receipt to support her claim to the effect that Spotlight Assessors or Ace Auto Centre Ltd were paid. That a party claiming special damages is required to demonstrate they actually made the payments before compensation can be paid and is not enough for a party to produce an invoice. The case of; Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs Janevams Limited [2015] eKLR was relied on where the Court of Appeal stated that pro-forma invoice is not a receipt and is not a sufficient proof of special damages.
34. The respondents did not file any submissions despite being accorded several opportunities to do so and the court dispensed with their submissions.
35. Be that as it may, in considering the appeal, I note the role of first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.
36. The Court of Appeal thus observed: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



37. In evaluating the material placed before the I find that, the first issue to determine is whether the 1<sup>st</sup> respondent proved that, the appellants were the registered and/or beneficial owners of motor vehicle registration KAB 829Z.
38. The 1<sup>st</sup> respondent at paragraph 4 of the plaint averred that, the appellants were the beneficial owners or insured of motor vehicle registration number KAB 829Z, which was being driven by the 2<sup>nd</sup> respondent.
39. The appellants in response, denied at paragraph 4 of their statement of defence being the beneficial owners or insured of subject motor vehicle and put the 1<sup>st</sup> respondent on strict proof thereof. The appellants equally denied that, the 2<sup>nd</sup> respondent was its driver.
40. However, to prove that the appellants owned the subject vehicle 1<sup>st</sup> respondent relied on the evidence of PW1 Regina Ireri a legal officer at Heritage Insurance Company Limited. I have analysed the evidence of this witness and note that, the witness clearly stated that a search conducted at the Registrar of Motor vehicle on the subject motor vehicle revealed that, the owners of the motor vehicle in question were Elisha Godana and Esso Motors. That, the said search results did not reveal that, the appellants were the registered owners of the motor vehicle.
41. The witness further stated that, the appellants were sued because investigations revealed that, the motor vehicle was sold to them. However, the 1<sup>st</sup> respondent did not produce any evidence in proof of the alleged sale.
42. The 1<sup>st</sup> respondent further relied on the police abstract to prove that the appellants were the beneficial or insured of the said motor vehicle. I have looked at the said abstract and it indicates the appellants the owners of the subject motor. The question, where did the police officers get those particulars from? Further are the said particulars sufficient proof of the ownership of the subject motor vehicle?
43. The appellants on their part though the evidence of (DW1) Adan Mohamud, the director of the 1<sup>st</sup> appellant testified that, the appellants do not own motor vehicle KAB 829Z and that, they do not know the 2<sup>nd</sup> respondent. He denied in cross-examination that the name Aden Mohamud indicated in the police abstract was his. He also denied having had business with Esso Motors.
44. Pursuant to the aforesaid, I find that the law is settled, that, he who alleges proves. The provisions of section 107 of the *Evidence Act* (cap 80) of the laws of Kenya states that: -
- (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.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
45. It was therefore incumbent upon the 1<sup>st</sup> respondent to prove that the appellants were beneficial and/or insured of the subject motor vehicle.
46. The law on ownership of a motor vehicle is well stipulated under section 8 of the *Traffic Act* (Cap 403) 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.”



47. As such the proprietorship particulars in logbook is sufficient proof of ownership of motor vehicle unless there is other compelling evidence to the contrary as was held by the Court of Appeal in Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR where the court stated that:

“This Court adopted the interpretation above in the case of Securicor Kenya Ltd vs Kyumba Holdings Civil Appeal No. 73 of 2002 (unoi, O’Kubasu’ Deverell JJA) 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 held 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.”

48. Further, in the case of: Muhambi Kojia v Said Mbwana Abdi [2015] eKLR the Court of Appeal took time to examine proof of ownership of a motor vehicle and stated that: -

“We agree. To begin with, in the absence of evidence to the contrary, the registration certificate or log book of a motor vehicle or an extract of the record issued by the Registrar of Motor Vehicles constitute the best evidence to prove ownership of a motor vehicle. But situations, in the normal course of business and human interactions, may arise where the person named in those records may have passed the property in the vehicle to some other person in whom the ownership presently vests. For instance, Section 9 of the *Traffic Act* recognizes this situation and requires that when a motor vehicle or trailer is transferred by the registered owner it can only be used on the road for a period not exceeding fourteen (14) days after the date of such transfer, unless the new owner is registered as the owner thereof. The registered owner must, within seven days from the date of the transfer inform the Registrar in a prescribed form. (He is also required to furnish) the name and address of the new owner and deliver the original registration book to the new owner.

It is the new owner who takes over from this point on and after inserting particulars of the change of ownership, forwards the registration book with the prescribed fees to the Registrar, whereupon the vehicle will be registered in the name of the new owner Where,



however, there is proof and the Registrar is satisfied that the above steps cannot be taken on account of the registered owner having died or left Kenya or cannot be traced or has simply refused to comply with these requirements, the vehicle may nonetheless be registered in the name of the new owner upon payment of the prescribed fees.

Two scenarios are presented under this provision. There are two steps to be satisfied within fourteen days before the vehicle can be registered in the name of the new owner. As this process is in motion the new owner, though not registered, can use the vehicle on the road for a period of fourteen (14) days. If the vehicle was to be involved in an accident in this intervening period, the registration book will be in the name of the seller yet the motor vehicle will have been transferred and ownership vested in the new owner only pending registration. That new owner will be liable if evidence of transfer is led. Any evidence other than the log book will be proof to the contrary. That evidence can take many forms. The police abstract report which is usually completed after investigations are conducted by the police and which is admissible in evidence by virtue of Section 38 of the Evidence Act, is one such proof.

In *Lake Flowers v Cila Francklyn Onyango Ngonga & Another*, Nakuru Civil Appeal No.2010 of 2006(UR) the Court found that the appellant had failed to rebut the evidence on the police abstract showing it to be the owner of the motor vehicle involved in the accident. The other form of evidence that had been used to prove title to a motor vehicle were tender documents that proved that the appellant in whose name the vehicle was registered had ceased to be its owner upon selling it through a tender process to a third party whose details he supplied to the court. See *Securicor Kenya Limited v Kiyumba Holdings Limited Nbi* Civil Appeal No.73 of 2002 (UR). The third instance is where there is proof that the registered owner has lost such ownership through an auction sale to the highest bidder. See *Earnest Orwa Mwai, v Abdul Hashid & another*, KSM Civil Appeal No.39 of 1995 (UR). In *Nelson Yabesh Bichanga v Mary Omari KSM Civil Appeal No.43 of 2006* (UR) it is the sale agreement that was used in rebuttal. There are certainly more than these examples but we are satisfied that these four will suffice for the purpose of this appeal.

The proviso to Section 9 (2) is the second scenario. Unlike the first scenario which is restricted to fourteen days within which the motor vehicle must be registered, the second scenario is where the previous owner has transferred the vehicle to a new owner but has either refused to comply with the requirements necessary to register it, or has died or left Kenya or cannot be traced. Only after the Registrar is satisfied as to any one or more of these conditions and upon payment of fees will the new owner be registered. In the meantime, before the Registrar is satisfied, although not named in the log book, the new owner, will for all intents and purposes be deemed to be the owner, and in case of an accident, will be held liable.”

49. The Court of Appeal went to hold that a police abstract can be used as proof of ownership to rebut the logbook and stated thus:

“In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of its ownership to the person named in the abstract report or in that other form of evidence.” (Emphasis added)



50. Pursuant to the afore, a police abstract can be adequate evidence in proof of ownership. However, before the police abstract is accepted, it must be demonstrated that the persons named in the log book have since divested themselves of the ownership of the subject vehicle.
51. Therefore, it is the considered opinion of this court that, reliance on the particulars in the police abstract is an exception to the rule that, the log book is the primary evidence of proof of the ownership of a particular motor vehicle. As such the party that relies on the details in the police abstract to prove ownership of a motor vehicle, must explain why that party cannot rely on the evidence of records from the Registrar of motor vehicle.
52. Consequently, a party to a suit cannot just fail to adduce evidence of who are the registered and/or beneficial owners of the vehicle as per the particulars of the log book or records from the registrar of motor vehicles and simply rely on the particulars in the police abstract from the start. If that, were to be the case, it would render the statutory provisions of section 8 of *Traffic Act* redundant, and open up an arena for abuse.
53. Indeed, it is noteworthy that, when the police abstract is filed, the police officers filing it is either relying on any insurance or other documentary evidence displayed on the windscreen of the motor vehicle and/or word of mouth from a third party. The details may or may not be correct and the insurance cover may have expired.
54. Be that as it may, each case must be treated on its own facts. In the instance case, evidence revealed that, a search at the Registrar of motor vehicle revealed the owners of the motor vehicle KAB 829Z were one Elisha Godana and Esso Motors. These parties were not sued nor treated as the 1<sup>st</sup> respondent's witnesses to exonerate themselves from ownership of the subject vehicle.
55. In fact, the 1<sup>st</sup> respondent who is the owner of motor vehicle KBM 449Y testified she did not even have the search records for the subject motor vehicle KAB 829Z and that she relied on the police abstract and simply saw the name of the appellants and 2<sup>nd</sup> respondent in the abstract. Similarly, No. 96714 PC Maaka testified that he relied on the police abstract to identify the owners of the subject vehicle.
56. Subsequently the trial court in holding the appellants 100% reliable stated as follows: -
- “On the 3<sup>rd</sup> issue even though a copy of records was not produced, the police abstract indicates that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were the owners of m/v registration no. KAB 82Z at the time of the accident.
- In the case of Joel Muga Opinja vs EA sea foods ltd (2013) eKLR it was held that where a police abstract is produced in court the contents cannot be denied.
- On that basis, I do find the police abstract is proof enough that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are owners of m/v registration no. KAB 829Z.”
57. However, although the trial court held the view that, there was no objection to the production of the police abstract and was proof of ownership of the subject vehicle, with due respect to that finding, the appellants had denied knowledge of the subject motor vehicle and the 1<sup>st</sup> respondent was well aware of that fact and had been put on strict proof thereof.
58. Similarly, the 1<sup>st</sup> respondent was aware that, the search results revealed different persons as owners of the subject motor vehicle. Further still, the investigation report produced by the 1<sup>st</sup> respondent stated clearly that, the investigator was informed by Esso Motors Sales and Services that “they sold the third



party vehicle through hire purchase agreement to one Elisha Daniel Godana on 28<sup>th</sup> October 1991 and hence joint ownership”.

59. That indeed that investigator set off to trace the said Godana at Marsabit. However, the report does not indicate whether Godana was traced or not. Instead the investigator moved on to investigate the owners of the vehicle as per the details in the police abstract and abandon investigation of persons named as registered owners.
60. As a consequence, the investigator failed to connect appellants to the ownership of the vehicle as he lost the link between the registered owners and the appellants and similarly, the link between the 2<sup>nd</sup> respondent and the appellants.
61. In fact, all that the report state is that the 2<sup>nd</sup> respondent admitted that he was the driver of the subject motor vehicle at the time of the accident and he had left the appellants employment, three months after the accident and was in a new employment but his whereabouts or residence could not be traced. However, that evidence is hearsay.
62. It is the view of this court that, had the 1<sup>st</sup> respondent pursued Godana and Esso Motors as the registered owners of the subject motor vehicles, then the registered owners would have shouldered the responsibility to bring in the appellants as beneficial owners and/or on third party notice. To have exonerated the known registered owners from liability, and pursued the appellants herein as beneficial owners, the 1<sup>st</sup> respondent cast its net, too far away.
63. In addition to the material before the court, it suffices to note that the 1<sup>st</sup> appellant is a limited liability company and capable of suing and being sued as held in the case of Salmom vs Salmon & Co (1897) AC 22 as such the basis upon which the 2<sup>nd</sup> appellant was sued as a director of the company sued is not understandable.
64. Further, there is no indication in the 1<sup>st</sup> respondent’s pleadings that the appellants were being sued under the principle of vicarious liability.
65. In the given circumstances, it is the finding of this court that, the 1<sup>st</sup> respondent’s case was not proved on the balance of probability and hold that, liability attributed to the appellants was not well established. As such the trial court’s finding on liability and all the consequential orders thereto are set aside.
66. The appeal succeeds in its entirety.
67. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 13<sup>TH</sup> DAY OF AUGUST 2024.**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Okiro for the appellant

Mr. Mwanza H/B for Mr. Karanja for the respondent

Ms. Ogutu: court assistant

