



REPUBLIC OF KENYA



KENYA LAW
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**Muantoh Investments Limited v Njihia (Civil Appeal E072 of 2022)
[2023] KEHC 17947 (KLR) (Civ) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E072 OF 2022

AN ONGERI, J

MAY 24, 2023

BETWEEN

MUANTOH INVESTMENTS LIMITED APPELLANT

AND

ALFRED NJAMI NJIHIA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. K. O. Gweno
(RM) in Milimani SCCC E336 of 2021 delivered on 10/2/2022)*

JUDGMENT

1. This is an appeal from SCCC no. 336 of 2021 in which the claimant was seeking judgment against the Respondent for special damages in the following terms;
 - Loss of vehicle 550,000
 - Special damages 47,550
 - Loss of user 242,500
 - Total 840,050
2. The Appellant who was the Claimant in SCCC no. E336 of 2021 was seeking compensation for damages to its motor vehicle registration xxxx caused by the Respondent's motor vehicle registration no. xxxx when it rammed into the Appellant's said motor vehicle.
3. The accident occurred on 21/4/2021 along Thika Superhighway at a carwash area on the side of Nairobi to Thika.



4. The pre-accident value of motor vehicle registration xxxx was assessed at kshs.600,000 and salvage value of kshs.50,000.
5. The trial court dismissed the Appellants case for failure to prove ownership and the Appellant has appealed against the said judgment and decree with the Respondent filing a cross appeal.
6. The grounds of appeal are as follows:
 - a. The honorable learned Magistrate erred in law when he considered and determined an issue which was not pleaded, to wit, whether the Appellant was the registered owner of motor vehicle xxxx.
 - b. That the honorable learned Magistrate erred in law when he found that the Appellant did not prove ownership of motor vehicle registration number xxxx.
 - c. That the honorable learned Magistrate erred in law and misdirected himself when he placed the evidential burden of proof on the Appellant when the same ought to have been shifted to the Respondent when he found that the Appellant did not prove ownership of motor vehicle xxxx.
 - d. That the learned Magistrate erred in law and misdirected himself when he made contradictory findings on the issue of the ownership of motor vehicle xxxx.
 - e. That the learned Magistrate erred in law when he misapplied the provisions of Section 8 of the [Traffic Act](#) laws of Kenya and departed from binding precedents.
 - f. That the learned Magistrate erred in law when he failed to consider the provisions of Section 32 of the [Small Claims Court Act](#).
 - g. That the learned magistrate erred in law when he dismissed the suit against the weight of the evidence.
7. The parties filed written submissions as follows; the appellants submitted that in the entire statement of defence, the respondent did not aver that the appellant was not the owner of the motor vehicle registration number xxxx. the issue of ownership of the said vehicle was first raised during cross examination of PW1 and later in the submissions which resulted in trial by ambush. It was the appellants argument that the magistrate misdirected himself when he proceeded to extract and determine an issue that was not pleaded. That it is trite law that parties are bound by their pleadings. The appellants placed reliance in the case of [Joseph Mbuta Nziru v Kenya Orient Insurance Company Ltd](#) [2015] eKLR where the court cited with approval the Nigerian case of in [Adetoun Oladeji \(Nig\) Ltd v Nigeria Breweries Plc S.C. 91/2002](#) where it was held as follows-

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
8. The appellant further submitted that the learned magistrate misapplied section 8 of the [Traffic Act](#) by finding that the appellant had not proved ownership of Motor Vehicle No. xxxx. That Section 8 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.”



9. It was further submitted that this provision creates a rebuttable presumption of ownership of a vehicle and in support it cited the case of *Nancy Ayiemba Ngaira v Abdi Ali* C.A No. 107/2008[2010] eKLR Justice J.B Ojwang held as follows-

“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question.”

10. It was therefore the appellants argument that the courts have accepted various forms of documents/ evidence as adequate to prove ownership of a motor vehicle and in this matter the oral evidence of PW1, PW2 as well as documentary evidence proved on a balance of probability that the claimant was the owner of the vehicle. The evidence on record was not controverted and thus sufficient to discharge the burden of proof as to ownership.
11. The appellant submitted further that the magistrate’s finding was contradictory as he held that the appellant did not prove ownership and yet found it was the beneficial owner having found that the appellant was using the vehicle to earn an income.
12. On the cross appeal it was the appellants submission that the company resolution to institute the appeal is on record and in any case director of a company can institute a suit and does not need to file a resolution authorizing institution of a suit.
13. As to whether the respondent was negligent for the accident and on awarding loss of use the appellant submitted that this was an issue of fact and that it is not available for argument as appeals to this court from the Small Claims Court are limited to points of law.
14. On admitting the evidence of PW4 and PW5 the appellant submitted that PW4 Wycliffe Shikuku was a private investigator who was only hired to find out the owners of the offending vehicle after the driver escaped from the scene of the accident. PW5, Daniel Muturi Mbaya was a Motor Loss Assessor with 34 years’ Experience therefore a professional witness. He tendered his report that was admissible in court.
15. The respondent in his submission contended that the ownership of the appellant’s motor vehicle was very critical in arriving at a decision as to whether the trial court would award the loss and damages. It was argued that the appellant pleaded that the subject motor vehicle xxxx belonged to it therefore it was incumbent upon them to prove that fact. That PW1 during cross examination confirmed that she did not produce the log book and therefore the trial court could not make a finding favorable to the appellant in terms of ownership without evidence.
16. On the question of actual, beneficial and possessory ownership the respondents argued that there must be evidence showing that the appellant was benefitting from it. That an agreement resembling a



contract of hire is not enough as actual evidence must be adduced to graduate such actual, beneficial and possessory use to ownership.

17. The respondent contended that the evidence by PW5 cannot be relied on to prove ownership of the suit motor vehicle as its probative value cannot be vouched. That it was not known if he had the qualification or license to assess motor vehicles.
18. The respondent submitted that a contract to carry out taxi business like all other businesses in the country are regulated by relevant public agencies who are tasked with vetting and licensing of such providers. That according to the National Transport and Safety Authority for one to start operating a taxi business the following requirements must be met one must have; a vehicle registration certificate, vehicle inspection certificate, PSV insurance certificate and operating license. PW1 did not produce any of the aforementioned documents to prove a taxi business operation.
19. On the cross appeal it was the respondent's submission that to prove whether the subject vehicle was involved in transport business and awarding loss of use the appellant failed to produce any records of its operations to prove the Kshs. 2,500 per day.
20. The respondent also argued that the evidence of PW5 should not have been admitted as it did not meet the threshold of expert evidence for reasons that he did not establish himself as a specially skilled person in the area of motor assessment and by failing to produce his annual license. The report that was submitted is therefore erroneous and fails to meet the criteria of assessing the true value of the loss incurred.
21. It was the respondent's argument that the trial court heavily relied on the report by PW3 and consequently erred in its conclusion that the loss of the motor vehicle as Kshs. 550,000. It was argued that before expert evidence is admitted the alleged expert must tender evidence such as academic qualifications as proof if the same. That for professional witnesses like PW5 he needed to have complied with section 150 of the *Insurance Act* Cap 487 with a valid and current practicing certificate duly issued by the Insurance Regulatory Authority.
22. That additionally the report contained inconsistencies as PW5 indicated that he erred in assigning the pre-accident value at Kshs. 500,000 while the actual value was Kshs. 600,000.
23. On loss of use the respondent contended that it is trite law that a claim of loss of user are in the form of special damages and therefore they must not only be specifically pleaded but proved. The appellant did not demonstrate what business it conducted there was therefore no basis for the award of Kshs. 242,500.
24. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held;

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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.”

25. The issues for determination are as follows;
- i. Whether the trial court misdirected itself on the finding on the issue of ownership of motor vehicle registration no. xxxx.
 - ii. Whether the Appellant proved its case to the required standard.
 - iii. Whether the Appellant should be awarded special damages.
 - iv. Who pays the costs of the appeal.
26. On the issue as to whether the trial court erred on its finding on ownership, I find that the trial court was right in holding that the Appellant did not prove ownership of the motor vehicle.
27. It was the duty of the Appellant to prove that he had authority to file the suit. In *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd.* Nairobi (Milimani) HCCC No. 391 of 2000 the court held as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

28. I find that although PW1 had authority to file this suit and although the Appellant proved its case, it is not entitled to compensation for want of prove of ownership of the motor vehicle registration no. xxxx.
29. I find that the issue of ownership was raised in cross-examination of PW1 and the Appellant had an opportunity to avail a copy of the logbook or a copy of MV Records from the National Transport and Safety Authority (NTSA).
30. The Appellant is accordingly not entitled to the special damages sought.
31. The appeal is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF MAY, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

