



REPUBLIC OF KENYA



**Kangemi Matatu Owners Sacco Society Ltd v Momanyi (Civil Appeal
E183 of 2022) [2023] KEHC 19118 (KLR) (Civ) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19118 (KLR)

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

CIVIL

CIVIL APPEAL E183 OF 2022

AN ONGERI, J

JUNE 27, 2023

BETWEEN

KANGEMI MATATU OWNERS SACCO SOCIETY LTD APPELLANT

AND

CYPRIAN OOGO MOMANYI RESPONDENT

*(Being an appeal from the judgment of Hon. C. A. OKUMU
(RM) in SCCC No. E901 of 2021 delivered on 11/3/2022)*

JUDGMENT

- 1) The Respondent in this case was the claimant in SCCC no E901 of 2021. He filed a statement of claim against the Appellant in respect of damages occasioned to the respondent's motor vehicle registration no KCD 333Z by the appellant's motor vehicle registration no KBW 965S on 5/12/2018 along Kipande Road Nairobi.
- 2) The Appellant filed a response to the Respondent's claim and denied the same.
- 3) The Respondent's case in summary was that the Respondent's motor vehicle was being driven by the Respondent's brother when the accident occurred on 5/12/2018.
- 4) The Respondent's insurance incurred special damages in repairing the respondent's motor vehicle registration KCD 333Z.
- 5) The trial court found the appellant's driver liable for the accident and awarded special damages as follows
 - i. Assessment fee ksh 6,300



- ii. Car hire charge ksh 30,000
 - iii. Ports supply ksh 116,000
 - iv. Repair costs ksh 64,380
 - v. Re-inspection ksh 21,320
 - vi. Investigation fee ksh 24,400
- Total ksh 241,400

- 6) The trial court entered judgment in favour of the respondent against the appellant in the sum of ksh 243,480.
- 7) The appellant has appealed against the said judgment on the following grounds;
- a. That the trial court has awarded judgement in a case which has no claimant instead of dismissing it as is provided for under Regulation 21(3) of the [Small Claims Court Rules](#).
 - b. that the trial court imported a non existent claimant into judgement.
 - c. That the trial court delivered judgement without notifying the appellant
 - d. That the trial court admitted receipts which are not stamped contrary to the [Stamp Duty Act](#)
 - e. The trial court relied on evidence of unauthorized person
 - f. That the trial court held subrogation can be returned to an insured
 - g. That the trial court held vicarious liability can attach without an agent
 - h. That the trial court awarded judgement to a non-existing claimant who did not prove there was an agent under supervision and control of the appellant
 - i. That the trial court delivered judgement after 1 and ½ months instead of immediately or at most within 3 days as is provided in section 34(2) of the [Small Claims Act](#),
 - j. That the lower court issued 3 notices of 1st mention upon filing on December 31, 2021, 5/1/2022 and 24/1/2022 this extending its jurisdiction past the mandatory statutory 60 days.
 - k. That by the time the lower court was pronouncing itself its jurisdiction had already passed.
- 8) The parties filed written submissions in the appeal as follows; the appellant submitted that there was no plaintiff as he did not appear anywhere in the proceedings and he was not present at the hearing of his case. That thought the law gives a court latitude of not dismissing the case for nonappearance of the same claimant the same law demands reasons and none were given. That the lower court should have dismissed the claim a position supported by Justices Nambuye, Sichale & Kantai, JJA, in Civil Appeal No 234 of 2015; [Thomas K Sambu v Paul K Chepkwony](#) at page 4 where the Learned Judges of the Superior Court Held; -

“Rule 3 (1) “if on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court”.

We have considered the decision in the Salem Ahmed Hassan Zaidi case (supra) in the light of the provisions of order 12 Rule 3 (1) (CPR), and are in agreement that order 12 Rule



13(1) is couched in similar terms as Rule 178 as it was then. It therefore follows that the Judge after considering the record before him in the light of order 12 Rule 3(1) which was couched in similar terms as Rule 178 of the rules of the court, as it was then arrived at the correct conclusion that an order of dismissal for non-attendance is in the nature of a final Judgment. We adopt the same position in this appeal and hold that the order of dismissal for nonattendance made by CM Waithaka, J on the 29th day of May, 2011 amounted to a final Judgment”.

- 9) The appellant further submitted that by the time that the matter was going for hearing 60 days had already lapsed and the jurisdiction of the court had been ousted. The claim at the lower court was filed 3 times, on December 3, 2021, January 5, 2022 and January 24, 2022 and was heard on January 31, 2022. This was contrary to Section 34(1) of the *Small Claims Act* provides that; -

“ All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day-to-day basis until final 13 No. 2 of 2016 Small Claims Court [Rev. 2021] determination of the matter which shall be within sixty days from the date of filing the claim”

- 10) The appellant indicated that the matter in the lower court was to be decided on February 10, 2022 but the Honourable Magistrate was indisposed and parties were informed that Judgment would be on Notice, whoever no Notice was ever issued and Judgment was delivered in their absence. That further the trial court delivered judgment after 1 and ½ months instead of immediately or at most within 3 days as is provided in Section 34(2) of the *Small Claims Act*.
- 11) The appellant argued that the respondents advocate withdrew the case against the 2nd respondent which doomed the claim to fail because vicarious liability could not attach. There was also no authority from the insurance company agreeing to this claim. That the doctrine of subrogation does not apply herein even though CW2 tried to explain how the insurance company re-transferred his right back to the insured so that he could sue for it to be compensated.
- 12) The appellant argued that the claimant did not produce a log book or a search from NTSA therefore failed to prove ownership of KCD 333Z. CW2 attempted to hoodwink the court into believing that an incomplete Insurance policy is proof of ownership of a car. The claimant also produced receipts not stamped contrary to section 88 (1) and (2) as with Section 19 of the *Stamp Duty Act*.
- 13) The respondent in his submission argued that the trial courts judgement was regular and should be upheld. The primary suit was filed on December 3, 2021 and was heard on January 31, 2022. As such, judgment was to be delivered not later than 10 February 2022. However, the same was first scheduled for judgment on February 10, 2022 but was eventually delivered on March 11, 2022. Admittedly, the primary claim was determined after the lapse of 60 days from the date of filing. However, this was not fatal to the primary suit. This is because, parties proceeded to full trial, adduced all their respective evidence and filed submissions before February 10, 2022 which was still within the 60 days stipulated under section 34 (1) of the *Small Claims Court Act*. As such, the court had all the relevant material to write its judgment. The court also intended to deliver its judgement on February 10, 2022 but could not as the trial magistrate was bereaved causing the same to be deferred to March 11, 2023.
- 14) That the allegation that the judgement was delivered without notice is false as the judgement date of March 11, 2023 was updated on the e filing system which his advocates noted. That even if the judgement was delivered without notice the same alone is not a ground for setting aside unless the appellant proves irreparable prejudice as a result.



- 15) On locus standi the respondent argued that in paragraph 7 of his statement of claim he averred that the primary claim was brought in the name of the respondent but for the benefit of his insurer, Heritage Insurance Company Limited which is enabled by the doctrine of subrogation. That in this case there was a valid insurance policy between the respondent and Heritage Insurance at the time of the accident. The respondent reported the same to the insurance company upon which the insurance company repaired the motor vehicle KCD 333Z.
- 16) On vicarious liability the appellant argued that it is undisputed that the appellant was the registered owner of motor vehicle KBW 965S and from the police abstract by CW3 it was clear that its driver one Jared Mumanzi was to blame for the accident. However, since he could not be located for purposes of effecting service the respondent withdrew his claim against him.
- 17) The respondent submitted that it adduced admissible and sufficient evidence to prove its special damages claim. That there is no law that makes it mandatory for the claimant himself to testify, in fact pursuant to section 125 of the *Evidence Act* any person can be a competent witness unless the court considers them too young, too old or too sickly to rationally answer any question asked during examination, or that they cannot be legally compelled to testify.
- 18) On adducing receipts with no stamp duty stamp the respondent argued that on reading section 19(1) and 88 (1) & (2) it is the duty of the receiver of the money to affix a revenue stamp not the party who pays the money. That in the case herein Heritage Insurance Company Does not have a duty to affix revenue stamps on receipts but the respective receivers of the payments and therefore it would have been unfair to punish it for the omissions of the receivers. That in any event the appellant did not object to the production of the said receipts during the hearing of the primary suit.
- 19) 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 its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
- 20) In the case of *Selle v Associated Motor Boat Co* [1968] EA 123 the court stated as follows;

“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.

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 demeanor of a witness is inconsistent with the evidence in the case generally.”
- 21) The issues for determination in this appeal are as follows;
 - i. Whether there was a claimant in the suit.
 - ii. Whether vicarious liability can attach to an agent.



- iii. Whether the respondent's receipts were properly admitted in evidence.
 - iv. Whether the jurisdiction of the court had lapsed at the time of delivering the judgment.
 - v. Whether the doctrine of subrogation can move back to the insured once it is settled.
- 22) On the issue as to whether there was a claimant, I find that although the claimant did not testify in the SCC, there is evidence that the driver of the motor vehicle was a brother of the respondent and he was driving the motor vehicle when the accident occurred. The suit was filed in the name of the claimant and the brother of the Respondent who was driving the motor vehicle at the time of the accident was competent witness.
- 23) Section 125(1) of the Evidence Act provides that:
- “All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”
- 24) I therefore find that the suit had a claimant. There is no legal requirement that the claimant must testify.
- 25) On the issue as to whether vicarious liability can attach to an agent, I find that although the respondent withdrew its case against the 2nd defendant, there is evidence that the motor vehicle belongs to the appellant and therefore he was properly sued. In the case of Paul Mutbui Mwavu v Whitestone (K) Ltd [2015] eKLR (Okwengu, Makhandia & Sichale, JJA) held as follows:
- “(21) Moreover, even assuming that the issue of vicarious liability was an issue for determination, in the Nuthu case, this Court applied *Morgans v Launchbury & Others* [1972] 2 ALL E R 607 in which it was stated:-
- In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner...”
- (22) In the same Nuthu case the Court restated the law on vicarious liability adopting the statement of Newbold P in *Muwonge v AG of Uganda* [1967] E A 17 as follows:
- The law, is so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable.”
- 26) It has not been denied that the 2nd Defendant was acting in the course of duty. I therefore find that the Appellant is liable for the negligence of the driver even though the suit against the driver was withdrawn.
- 27) On the issue as to whether the respondent's receipts were properly admitted, the appellant submitted that the receipts were not stamped in accordance with the Stamp Duty Act Section 88 (1) & (2) as read



with Section 19, I agree with the Respondent that the appellant ought to have objected to production of the said receipts at the trial.

- 28) On the issue as to whether the jurisdiction of the court was ousted by lapse of time, again I find that the suit was heard within the stipulated time.
- 29) There is undisputed evidence that the primary suit was filed on December 3, 2021 and was heard on January 31, 2022. It is also not in dispute that the delay in delivery of the judgment was not the fault of the Respondent and further, the same is not fatal to the Respondent's claim.
- 30) Finally, on the issue as to whether the doctrine of subrogation applies in this case, the *Black's Law Dictionary*, 11th Edition at page 1726, defines the word subrogation as;

“the substitution of one party for another, whose debt the party pays, entitling the paying party to rights, remedies or securities that would otherwise belong to the debtor.”

It also defines the doctrine of subrogation as follows;

“the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”

- 31) I find that the insurance has a right to step into the shoe of the insured and to claim the money incurred in repairing the motor vehicle.
- 32) The appeal herein lacks in merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF JUNE, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

