



REPUBLIC OF KENYA



**KENYA LAW**  
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**Badar Hardware Limited & another v Waweru & 3 others (Civil Suit  
23 of 2022) [2023] KEHC 27227 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27227 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 23 OF 2022  
DKN MAGARE, J  
DECEMBER 20, 2023**

**BETWEEN**

**BADAR HARDWARE LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JIMMMY KIMEI MUTHOKA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARY MWIHAKI WAWERU ..... 1<sup>ST</sup> RESPONDENT**

**JANE NJERI WAWERU ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH GATHITHU MWANGI (SUING AS THE LEGAL  
REPRESENTATIVES OF THE ESTATE OF THE LATE PETER GATHITU  
MWANGI) ..... 3<sup>RD</sup> RESPONDENT**

**MAGUNA ANDU WHOLESALERS (K) LTD ..... 4<sup>TH</sup> RESPONDENT**

*(Appeal from the Judgment and decree of the Honourable Maureen  
Nabibya delivered on 16/12/2021 in Mombasa CMCC 1615 of 2012)*

**JUDGMENT**

1. This is an Appeal from the Judgment and decree of the Honourable Maureen Nabibya delivered on 16/12/2021 in Mombasa CMCC 1615 of 2012.
2. The Memorandum of Appeal as 2 grounds that is;
  - i. The court erred in holding that the Plaintiff proved their case on negligence.
3. The Court misapprehended the evidence on negligence. This is therefore a single issue appeal on liability. The Appellant were the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the lower court. There is no Appeal on quantum.



## **Pleadings**

4. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed suit as the administrators of the estate of Peter Gathitu Mwangi (Deceased) and were successful in the lower court.
5. On 6/5/2023, the Appellant filed an Amended Memorandum of Appeal dated 6/5/2023 in which they sought apportionment of liability since there was interlocutory judgment against the 3<sup>rd</sup> Respondent.

## **Pleadings**

6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein after referred as the estate of the Deceased filed suit on 31/7/2012 against the 4<sup>th</sup> Respondent who was the 2<sup>nd</sup> Defendant and the Appellants. For ease of reference, I shall use the titles in the lower court.
7. The 2<sup>nd</sup> Defendant was the owner of ZD 5457 Trailer, while the third defendant was the owner of KBH 590X /ZD 5457. The 4<sup>th</sup> Defendant was the owner of KBH 590X.
8. Unfortunately, the plaint attributed ownership of ZD 5457 to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The plaint was Amended on 18/1/2016 and on 18/4/2018. The latest further amended plaint is the operative one. In the further Amended plaint, dated 3/4/2017, the 2<sup>nd</sup> Defendant is the owner of ZD 5457 while the 3<sup>rd</sup> Defendant is the owner of KBH 590X/ ZD 5475. The 4<sup>th</sup> Defendant was the owner of Motor vehicle registration No. KBH 590X/ ZD 5475.
9. The Deceased was lawfully driving Motor Vehicle registration No. KBP 615 Q Nissan Pick up near Masails Manyatta area when the accident occurred involving motor vehicle registration KBH 590X/ ZD 547555. M/Benz Tipper. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were sued as the owners of motor vehicle Registration No. KBH 590X 5475. There is no dispute on quantum. The court will thus not deal with the same.

## **Duty of the first Appellate Court**

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
11. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:  

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
12. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -  

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular



circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

13. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
14. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
15. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

### **Proceedings**

16. The 1<sup>st</sup> Respondent testified on 3/4/2017 before Hon. Lewa, Resident Magistrate as then she was. The witness was the widow of the deceased. The 4<sup>th</sup> Defendants is said to have been charged or causing death by dangerous driving. She gave evidence related to quantum.
17. The Deceased was 32 years old earning Kshs. 22,103 as at January 2012. When cross examined by Mr. Mbuthia, she was stated that there was an amendment charging the last digits. Mr. Mulama cross examined on the salary which she indicated was Kshs. 16,360. Mr. Mbuthia for the 2<sup>nd</sup> Defendant indicted that the case was not touching on them. The case against the 2<sup>nd</sup> defendant was withdrawn on 16/6/2017.
18. The 2<sup>nd</sup> Defendant, Maguna Andu Wholesalers (K) Ltd had the case withdrawn. However, they are named as the 4<sup>th</sup> Respondent herein. The 1<sup>st</sup> Defendant, Talib Abubakar is nowhere in this scheme of things.
19. It appeared that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent were not are that the suit against the 2<sup>nd</sup> Defendant was withdrawn in their absence. It may have been highly irregular in view of Order 25 Rule 1, However, the plaintiff and 2<sup>nd</sup> Defendant were present and proceeded on 15/5/2019, the 2<sup>nd</sup> witnesses, Sgt. Joyce Eva testified, as the base Commander of Mackinon Post testified. She testified that the driver of KBH 590X, lost control and collided with KBP 615Q driver by the deceased.
20. The deceased died on the spot and Geoffrey Siwa sustained serious injuries. The driver of motor vehicle registration No. KBH 590X/ ZB 5457 that is the 4<sup>th</sup> Defendant was blamed for the accident. On cross examination he stated it is the driver who was to blame for the accident.
21. The plaintiffs case closed on 20/6/19 and Defence hearing. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants closed their case. There was no appeal against the 1<sup>st</sup> defendant. The only appeal is against the plaintiffs and the 2<sup>nd</sup> defendant. As a preliminary observation, the 4<sup>th</sup> Respondent was not party to the suit, as the case against them was withdrawn.
22. The only other Defendants are the Appellants and Talib Abubakar. Though there was an indication that the 1<sup>st</sup> Respondent be served, they did not participate in the proceedings. I am unable to



understand who the third Respondent is. The third Respondent in the Appeal is the father of the deceased. There is no suit against him. There are particulars of negligence attributed to the deceased in paragraph 9 of the amended defence. There were no other particulars of negligence attributed to any other party.

### **Appellants submissions**

23. The appellant filed submission dated 18/5/2023. They addressed the duty of the Court as dealt with in the case of *Gitobu Imanyara & 2 Others =vs= Attorney General (2016) eKLR*. They submitted that exonerating the 4<sup>th</sup> Respondent was a misdirection. This is not a correct case against the 4<sup>th</sup> Respondent was withdrawn and the 1<sup>st</sup> Defendant is not party to this appeal.
24. They also relied on the case of *Daniel Toroitich versus Mwangi Stephen Muriithi (2021) eKLR* and *Edward Mzanili Katana =vs= CMC Motors Group ltd and another (2006) eKLR*, where they submitted that the court did not address itself on how the conduct of the plaintiff led to the death. They urged me to find 50:50. They also pray for cost of the Appeal.

### **Analysis**

25. This Appeal must sure fail. There was no evidence tendered on the Respondents liability. The 4<sup>th</sup> Respondent's suit was withdrawn. Though in formal proof, parties against who there is interlocutory judgement should bear some liability, I find difficulty in this case.
26. The fourth respondent was not party to the suit in the lower court. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were all sued as owners of the same vehicle motor vehicle registration KBH 390X/ ZC 5457. They 4<sup>th</sup> Respondent ceased being a party after amendment to change the vehicles registration number.
27. The court cannot apportion liability between owners of the same vehicle. The court found that on the evidence on record which I find credible that the 2<sup>nd</sup> appellant was the cause of the accident. The question is who between the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant and 4<sup>th</sup> defendant were employers of the 3<sup>rd</sup> defendant. There was interlocutory judgment against one of the pleaded owners. however, there was no appeal raise against them.
28. Secondly, the appeal is raised against a person was not party to the suit in the Lower Court. The courts cannot apportion liability with non-parties. In *Stapley –v- Gypsum Mines Limited (2) (1953) A.C 663* at P. 681 Lord Reid reasoned that:

“To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it..... The question must be determined by applying common sense to the fact of each particular case. One may find that a matte of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally.”



29. The question that arises is how to apportion liability between the Appellants and non parties? Not only to the suit nut against whom no Appeal has been filed? In *Abbay Abubakar Haji Patuma Ali Abdulla Vs Freight Agencies Ltd* [1984] eKLR, the court of Appeal stated as doth: -

“The trial Judge rightly applied to the facts before him the relevant law enunciated by Spry, V P in *Lakhamshi v Attorney General*, (1971) EA 118, 120 for such cases which -

“It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

30. In *Mbiti v Maingi & another* (Civil Appeal E77 of 2022) [2023] KEHC 20833 (KLR) (10 July 2023) (Judgment), I stated as doth:

“The attribution of negligence to a non party, like the rider was completely unhelpful in the case *EN v Hussein Dairy Limited & 3 others* [2020] eKLR, the Court stated as doth:

“I agree with the Appellant’s submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of *Pauline Wangare Mburu v Benedict Raymond Kutondo NKU HCCC No. 210 of 2003* [2005] eKLR where the court observed as follows. The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 V to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability.”

31. The above remains good law. Finally, a party who was a proper party against whom there was interlocutory judgment, is not a party in this appeal. The Appeal falls on the same trap. In respect of the 3<sup>rd</sup> respondent, he was the father of the deceased. There is nothing special attributable to him.
32. In any case to find the deceased liable there must be cogent evidence rebutting the evidence tendered by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Appellants must know that by not testifying, their goose was cooked and eaten.



33. This is thus a fairly straight forward matter. A party wishing that another be found liable in contributory negligence, they must plead the same. This is proved for in Order 2 Rule 10 of the Civil Procedure Rules. Order 2 Rule 10 of the Civil Procedure Rules provides as follows:
1. Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
    - a. particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
    - b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
  - (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.
  - (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party—
    - (a) where he alleges knowledge, particulars of the facts on which he relies; and
    - (b) where he alleges notice, particulars of the notice.
  - (4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.
34. Secondly a party wishing that the court apportion liability on the basis of pleaded contributory negligence, such a party must tender evidence. Even where there is formal proof, a party must tender evidence to prove negligence. In this case, there is no pleading against any of the defendants who were here had interlocutory judgment entered against them. Given that the Defendant closed their case without calling a witness, the defence becomes bare. It is of no use to the plead. Defence is not evidence.
35. The decision appealed from starts pages 255 – 260 and again page 269 - 274. The court noted the amendment on 3/4/2017 from change the trailer registration number.
36. The court summarised the case well at page 256. The court found as a fact that there is no clarity as to how the 1<sup>st</sup> Defendant was responsible for the accident. She also found that there was no proof of liability of the deceased.
37. The suit against the 1<sup>st</sup> Defendant was rightly dismissed. The 3<sup>rd</sup> Defendant and the first Defendant are said to be owners of the same vehicle evidence was led against the 4<sup>th</sup> defendant who was said to be an employee of the 3<sup>rd</sup> defendant.



38. There was no mention on how the 1<sup>st</sup> defendant was involved. To make matters even clearer, the co-defendants never a tribute any negligence against the 1<sup>st</sup> defendant. Without such, the court is bound to deal with pleadings on the file. Parties are bound by the pleadings. In any case there is no appeal filed so far against the 1<sup>st</sup> defendant. No effort had been made to serve the 1<sup>st</sup> defendant with the Appeal herein.
39. The only evidence on record was that of PW2 on how the accident occurred. That evidence is un rebutted. However, weak evidence is, it must be rebutted failure to tender defence evidence records the defence otiose. It is not useful in determining liability. The long and short of the foregoing is that there was no error on part of the court. The appeal herein lacks merit. It is consequently dismissed with costs to the estate of the deceased.
40. Having failed to testify, the Plaintiff's case remained un rebutted, howsoever weak the case was.
41. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:
- “As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
42. In this case of there is interlocutory judgment entered on 17/6/2013 against Abubakar. He appears to have been an owner of a vehicle also owned by the 3<sup>rd</sup> defendant. There is no evidence whatsoever led either in examination in chief or cross examination against the 1<sup>st</sup> Respondents. More fundamentally no Appeal was filed against him. The court is thus unable to apportion liability with non- parties.
43. The consequence of the foregoing is that the appeal lacks merit. Before I depart, I will deal with the small issue of the record of appeal. There is no requirement for filing a record of appeal though it is good order to do so. However, it must be in strict compliance with the requirements order 43 Rule 13(4), which provides as doth: -
- “ (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party, that is to say—
- a. the memorandum of appeal;
  - b. The pleadings.
  - c. the notes of the trial magistrate made at the hearing;
  - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;



- f. The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that—
- i. a translation into English shall be provided of any document not in that language;
  - ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

44. In this matter, the appellant compiled an unseemly record of appeal. The bulk of the documents are: -
- a. Letters to court
  - b. Applications filed in the Appeal file
  - c. Spent Applicants in the lower court
45. Ruling in the appeal file on interlocutory applications. These documents are completely unnecessary.
46. The Court is supposed to have on its record the following: -
- a. The Decree appealed from, which includes the judgment or ruling appealed from
  - b. Pleadings in the lower court.
  - c. Exhibits duly admitted.
  - d. Certified proceedings.
  - e. Witness statements that were adopted.
  - f. Submissions filed in the court below but not authorities referred to.
47. The danger of preparing such a huge and unseemly record may make the court not see crucial documents. Some crucial documents submission should never be accompanied by record authorities.

#### **Determination**

48. I therefore make the following orders: -
- i. The appeal lacks merit and is accordingly dismissed in limine with cost of Kshs. 165,700/= payable within 30 days in default execution do issue.
  - ii. The file is closed.

**DELIVERED, DATED and SIGNED at MOMBASA on this 20<sup>th</sup> day of December, 2023.**

**KIZITO MAGARE**

**JUDGE**



**In the presence of:**

Mr. Hamisi Salim for the Appellant

Onyinkwa for Respondent absent

Court Assistant - Brian

