



REPUBLIC OF KENYA



KENYA LAW
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**Gikurwe v Murungi (Civil Appeal 344 of 2011)
[2023] KEHC 26478 (KLR) (Civ) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26478 (KLR)

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

CIVIL

CIVIL APPEAL 344 OF 2011

CW MEOLI, J

DECEMBER 15, 2023

BETWEEN

SIMON WAINAINA GIKURWE APPELLANT

AND

PATRICK M. MURUNGI RESPONDENT

*(Being an appeal from the judgment of R.A. Aganyo (Mrs.) (PM), delivered
on 21st June 2011 in Nairobi Milimani CMCC No. 6817 of 2004)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 21.06.2011 in Nairobi Milimani CMCC no 6817 of 2004. The suit was commenced by a plaint filed on 24.06.2004 by Simon Wainaina Gikurwe the plaintiff in the lower court (hereafter the Appellant) under the doctrine of subrogation against Patrick Murungi Murugu, the defendant in the lower court (hereafter the Respondent). The claim was for special damages and arose from an accident that occurred on 12.04.2003. It was averred that at all material times the Appellant was the registered owner of motor vehicle registration number KAQ XXXC while the Respondent was the registered owner of motor vehicle registration number KAK XXXA.
2. It was further averred that the Appellant had lawfully parked his motor vehicle registration number KAQ XXXC at Carnivore Restaurant Car Park in Nairobi when the Respondent, his driver, servant and or agent so negligently drove, managed and or controlled motor vehicle registration number KAK XXXA that it violently rammed into the Appellant's motor vehicle while stationary resulting in extensive damage, loss and damage to the Appellant and for which his insurer M/S Real Insurance Co. Ltd indemnified him and sought to exercise of their subrogation right for recovery.



3. The Respondent filed a statement of defence denying the key averments in the plaint and liability. Alternatively, and without prejudice to the denials in the statement of defence, the Respondent averred that at the time of the alleged accident he had already sold motor vehicle registration number KAK XXXA on 11.10.2002 to Capital Motors Exhibition Ltd and signed the transfer forms, surrendered the vehicle logbook, and handed over possession of the said vehicle. That at no time did the Respondent have legal or physical ownership of motor vehicle registration number KAK XXXA in material time.
4. The suit proceeded to full hearing during which the respective parties adduced evidence in support of the averments in their pleadings. In its judgment, the trial court dismissed the Appellant's case with costs, prompting this appeal which is based on the following grounds: -
 - “ 1. The learned trial magistrate erred in law and in fact by failing to find that the Appellant had proven his case on a balance of probabilities.
 2. The learned trial magistrate erred in law and in fact by finding that the Appellant had not proven ownership of the vehicle when the issue was not raised during trial.
 3. The learned trial magistrate erred in law and fact by failing to consider the evidence adduced at the hearing and on record and thereby arrived at a wrong decision in regard to liability and ownership of the suit motor vehicle as to render the decision erroneous.
 4. That the learned trial magistrate erred in law and in fact by imposing a heavier burden of proof to the Plaintiff/Appellant than that which is required in civil cases.
 5. That the learned trial magistrate erred in law and in fact by failing to find that the Appellant had shifted the burden of proof as to the ownership of the suit motor vehicle to the Respondent and thus arrived at an erroneous finding on liability.” (Sic)
5. The appeal was canvassed by way of written submissions. Counsel for the Appellant faulted the trial court for considering extraneous issues in arriving at its decision and placing a higher burden of proof on the Appellant than envisaged in respect of civil claims. Citing Section 116 of the *Evidence Act*, counsel contended that the burden of proving ownership of the motor vehicle shifted to the Respondent the moment he alleged to have sold the same. That despite alleging to have sold motor vehicle registration number KAK XXXA, the Respondent did not produce a sale agreement, a duly executed transfer form or enjoin the alleged buyer and or agent who carried out the alleged sale of the vehicle in question. It was further contended that the Respondent admitted during cross-examination, that the memoranda produced at the trial did not amount to a sale agreement.
6. Further to the foregoing, it was pointed out that the Respondent's evidence was inconsistent, suggesting on one hand that he sold the motor vehicle to Capital Motors and on the other hand that the latter sold the vehicle on his behalf. Contrary to the settled principle that parties are bound by their pleadings. While calling to aid the decision in *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M.M Lubia & Another* [1982-88] 1 KAR 777, counsel submitted that trial court took into consideration irrelevant issues in determining the questions before it. He urged the court to find that the Appellant proved his case and was entitled to the damages sought in the plaint. The court was urged to allow the appeal as lodged with costs.



7. Despite being accorded ample opportunity, the Respondent failed and or opted not to file submissions in respect of the instant appeal.
8. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the Appellants submissions. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“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 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.”

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. This appeal turns on the twin issues of liability and awardable damages. Pertinent to the determination of issues before this court are the pleadings, which form the basis of the parties’ respective cases before the trial court. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

10. The overarching question for determination is whether the trial court’s findings on proof of liability were well founded. The trial court after restating the evidence tendered before it addressed itself as follows concerning liability in its judgment; -

“I have considered the evidence as adduced by both sides. I have also considered the parties learned advocates written submissions filed therein.



.....

The fact that the Plaintiff's motor vehicle was knocked while at a car park in Carnivore Restaurant Car Park is not disputed and I find so.

The only issue to determine in these proceedings is liability. Also the fact that the vehicle was repaired under the indemnity principle, by the Plaintiff's insurance company viz Real Insurance Company at a cost of ksh 109,150/- is not in dispute and is proved by the Plaintiff's side. The other expenses like payment of assessor's fee at ksh 6,350 is also established and I find so.

On liability, the evidence of PW5 as well as PW3 who produced an OB extract show that the motor vehicle registration no, KAK XXXA was to be blamed as it reversed and rammmed on the Plaintiff's vehicle registration no KAK XXXA while stationary ownership of the accident motor vehicle is disputed is reported by the Defendant, who said he sold it to another person in October, 2002.

He produced handwritten notes to show that he had taken his vehicle to be sold for him by Capital Motors exhibition Limited. The Defendant however did not call the said Capital Motors Exhibition Limited's representative to tell court whom they sold the vehicle to.

The Plaintiff did not also produce a copy of the records from the motor vehicle registration to show ownership of the accident vehicle as at the time of the accident on 12th April, 2003. I therefore find that the fact of liability is left hanging, for the Defendant refuses ownership and so it was the burden of the Plaintiff to establish ownership on a balance of probabilities.

According to Section 8 of the Traffic Act Cap 403 Laws of Kenya.

"A person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle"

In this case, no material is placed before the court by the Plaintiff to determine this vital fact so as to know whether the Defendant is to be blamed or not. It has been found and decided several times that ownership of a vehicle is only provable by registration. In the motor vehicle registry and that is the law as quoted herein before.

In the absence of a copy of records from the motor vehicle registry I find that the case is not proved on a balance of probabilities that the Defendant, his driver, her servant was to be blame for the accident.

Reasons whereof I dismiss the Plaintiff's case wholly as against the Defendant with costs of the suit to the Defendant." (sic)

11. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the Evidence Act. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:



“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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal no 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

12. Hence, the duty of proving the averments contained in the plaint lay squarely on the Appellant. In *Karugi & Another v Kabiya & 3 Others (1987) KLR 347* the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

13. From the material on record, the occurrence of the accident on 12.04.2003 was not disputed. What was disputed was ownership of motor vehicle KAK XXXA which the Appellant asserted in his pleadings and evidence to have been owned by the Respondent at all material times. During the trial, the Appellant called five (5) witnesses. Concerning ownership of motor vehicle KAK XXXA, a police officer, PC Faith Elizabeth Adhiambo testified as PW3, while the Appellant testified as PW4. Paul Gakumo Karanja, a motor vehicle assessor (PW1) and Sospeter Opondo Aminga, (PW2) testified concerning damage sustained by the vehicle registration number KAQ XXXC, resultant repairs and costs. Peter Mungai Kamau, a witness to the accident testified as PW5.
14. The gist of the evidence of PW3 was that a report was made at Langata Police Station on 12.04.2003 at 0430Hrs concerning an accident that occurred at the parking lot of Carnivore Restaurant, involving motor vehicle KAQ XXXC and KAK XXXA (hereafter the suit motor vehicles) when the driver of the latter vehicle while reversing, hit the Appellant’s vehicle and thereafter drove off.
15. She produced the Occurrence Book (OB) extract as PExh.9 and Police Abstract as PExh.5, the latter containing the registration details of motor vehicle KAK XXXA. Under cross-examination she admitted not having participated in investigating the accident and that she relied on the account of



- the report made in the Occurrence Book (OB) to lay blame on the Respondent for the accident. She confirmed that the record did not contain any information from the Respondent or owner of motor vehicle KAK XXXA. On re-examination she stated that the Respondent did not visit the police station.
16. The Appellant on his part confirmed having received a call from PW5 concerning occurrence of the accident. That he reported the accident to his insurer and completed the requisite claim form produced as PExh.4. He confirmed that his vehicle was repaired by his insurer. During cross-examination, he asserted being the registered owner of motor vehicle KAQ XXXC.
 17. The Respondent on his part testified as DW1. It was his evidence that he was the joint registered owner of motor vehicle KAK XXXA with Karirana Estates Limited before selling it on 11.10.2002 through Capital Exhibitions Limited. Upon the sale, he handed over the vehicle, logbook and signed the transfer form and the purchase price was settled in installments. He tendered acknowledgements in respect of two payments as DExh.1 and DExh.2. It was his evidence that he became aware that the said motor vehicle was involved in an accident upon being served with summons stating that at the time of the accident, he was not the owner of the vehicle and disputing the Appellant's claims to the contrary.
 18. Under cross-examination, he reiterated that the vehicle had been jointly registered in his name and Karirana Estates Limited; that Capital Motors Exhibition Limited bought the said motor vehicle and paid the sum of ksh132,000/- by instalments; that DExh.1 and DExh.2 were not sale agreements and disputed that Capital Motors Exhibition Limited had hired the said vehicle. He further confirmed that he did not produce evidence of payment of the balance sum of the purchase price or transfer documents stating that the onus lay with the Appellant to enjoin Capital Motors Exhibition Limited in the suit.
 19. The evidence of PW5 as the only eyewitness to the accident was not disputed. Like this appeal, the suit before the trial court turned on ownership of motor vehicle registration number KAK XXXA, a matter contested by the Respondent. The burden of producing credible and believable evidence of proof of ownership rested with the Appellant, in satisfying the court that in the absence of rebuttal evidence by the Respondent the evidence could stand. Section 8 of the [Traffic Act](#) 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."
 20. It is settled that a copy of records raises a presumption that the person registered is the vehicle's owner. However, the presumption is rebuttable. In this connection, the Court of Appeal in [Palace Investments Limited v Geoffrey Kariuki Mwenda & another](#) [2015] eKLR, observed that; -

"It is trite law that the ownership of a motor-vehicle is to be proved by the registration of a person as the owner of the motor-vehicle, unless proved otherwise.

Section 8 of the [Traffic Act](#) 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."

This section has been interpreted to mean that the registration of the motor-vehicle is not conclusive proof of ownership. In the case of *Osapil v Kaddy* [2000] 1 EALA 187 the Court of Appeal of Uganda held that a registration card or logbook was only prima-facie evidence of title to a motor vehicle. The person in whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise.

This Court adopted the interpretation above in the case of *Securicor Kenya Ltd v Kyumba Holdings* Civil Appeal no 73 of 2002 (Tunoi, O'Kubasu' Deverell JJA) and held that; "Our holding finds support in the decision in *Osapil v Kaddy* [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda 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”.

21. In *Jared Magwaro Bundi & Another v Primarosa Flowers Limited* [2018] eKLR, the Court of Appeal reviewed previous decisions on beneficiary ownership of a motor vehicles before holding the respondent therein liable, based on possessory ownership and usage of the accident vehicle. In reviewing past decisions on the matter, the Court stated inter alia that: -

“It was therefore held in *Mubambi Koja (supra)* that section 8 of the *Traffic Act* recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner, or a possessory owner. Such an owner, though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.

The position taken by the court in *Jael Muga Opija (supra)* and *Mohamed Koja (supra)* appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case ...”

See also *Nancy Ayiemba Ngaira v Abdi Ali* [2010] eKLR.

22. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR the Supreme Court stated concerning the legal and evidentiary burden in civil claims that:

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

See also *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347

23. Applying the above precedents to the evidence presented before the lower court, the initial onus of proof was on the Appellant to demonstrate that the Respondent was as of 12.04.2003 the registered owner of motor vehicle registration number KAK XXXA, as pleaded. Through PW1, PW2 and PW3 a total of eight (8) exhibits were produced, namely, an Assessment Report dated 16.04.2003 as PExh.1; a Fee Note dated 16.04.2003 as PExh.2; a Re-inspection Report dated 13.05.2003 as PExh.3; Claim Form as PExh.4; Police Abstract as PExh.5; an Invoice dated 14.03.2003 as PExh.6; A copy of Bank Statement extract dated 23.07.2007 as PExh.7; and an Extract of a Bank Statement dated 23.07.2007 as PExh.8.



24. Clearly no copy of Records from the Registrar of Motor Vehicles was produced by the Appellant in support of the averments at paragraph 3 of his Plea wherein he averred that “At all material times the Plaintiff was the registered owner of motor vehicle registration number KAQ XXXC while the Defendant was the registered owner of the motor vehicle registration number KAK XXXA” It is not clear what the source of ownership details of the vehicle KAK XXXA included in PExh.4 by the Appellant was.
25. On his part, the Respondent while admitting earlier ownership of the subject vehicle vehemently denied ownership in the material period, asserting sale to or through Capital Motors Exhibition as, evidenced by two Acknowledgment Notes of Part-payment dated 11.10.2002 and 14.10.2002 (DExh.1 and DExh.2). These documents were neither sale agreements nor transfer of ownership documents in respect of the vehicle in question. Nevertheless, DExh.2 stated that the Respondent “has brought valid and clean transfer forms signed plus pin and certificate of incorporation”.
26. Through the Respondent’s statement of defence, the Appellant had notice that the ownership of the suit motor vehicle was contested and a third party, Capital Motors Exhibition drawn into the fray in that regard. The Appellant opted not to amend his pleadings to enjoin the said party and worse, did not deem it necessary to obtain and tender a copy of records in that regard. The copy of the police abstract being the sole source of ownership tendered was challenged by the Respondent and could not by itself be adequate proof of ownership in the circumstances of this case. See *Joel Muga Opija v East African Sea Food Ltd.* (2013) eKLR and *Ibrahim Wandera v Mashru Ltd* Civil Appeal no 333 of 2003 (Unreported). Besides, the Appellant had expressly pleaded that the Respondent was the registered owner of the subject vehicle at the material time.
27. Here, when called upon, the Respondent discharged his evidentiary burden on the question of ownership of the vehicle in question, raising serious doubts as to the contents of the police abstract and the Appellant’s assertions regarding ownership. Proof of the registered, de facto, beneficial, or possessory owner of motor vehicle registration KAK XXXA lay initially with the Appellant and not the Respondent as the Appellant has argued in submissions on this appeal. He failed to discharge his burden of proof and the trial court correctly observed in that regard that “the fact of liability is left hanging, for the Defendant refuses ownership and so it was the burden of the Plaintiff to establish ownership on a balance of probabilities”.
28. In the result, the trial court cannot be faulted for reaching the inescapable conclusion that the Appellant’s evidence did not support the facts pleaded, and that the Appellant being the party with the burden of proof, should fail. In view of the foregoing, the court finds no merit in the appeal which is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellant: N/A

For the Respondent: N/A

C/A: Emily

