Kariuki v Bahati Agro Processors Limited & another (Civil Appeal E287 of 2022) [2025] KEHC 376 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 376 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E287 OF 2022

LP KASSAN, J

JANUARY 23, 2025

BETWEEN

GEORGE NYAMU KARIUKI ..... APPELLANT

AND

BAHATI AGRO PROCESSORS LIMITED ..... 1ST RESPONDENT

SAMUEL KIRUBI MBAGI ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.P. Omollo (Adjudicator) (RM) Small Claims Court delivered on 6th April, 2022 in Nairobi Milimani SCCC No. E527 of 2021)

JUDGMENT

1. This appeal emanates from the judgment delivered on 06.04.2022 in Nairobi Milimani SCCC No. E527 of 2021 (hereafter the lower court claim). The claim in the lower court was brought by First Assurance Co. Ltd in the name of its insured George Nyamu Kariuki, the claimant before the lower court (hereinafter the Appellant) pursuant to its alleged right of subrogation, to recover damages in the sum of Kshs. 356,136/- and interest on the above and costs of the claim as assessed by the Court, from Bahati Agro Processors Limited and Samuel Kirubi Mbagi, the respondents before the lower court (hereinafter the 1st & 2nd Respondent/Respondents) in respect of an accident involving the Appellant's motor vehicle registration number KCG 142Q and the Respondent's motor vehicle registration number KCP 855G which allegedly occurred on 08.10.2018.

2. It was averred that at all material times relevant to the claim, the Appellant was the registered and beneficial owner of motor vehicle registration number KCG 142Q and the Respondents were the registered owner of motor vehicle registration number KCP 855G. That on the date in question, the Appellant was lawfully driving his motor vehicle at Kahawa Wendani Area when the Respondents

driver and or agent so negligently drove motor vehicle registration number KCP 855G that he caused it to ram violently into the Appellant's motor vehicle thereby occasioning it extensive damage.

3. The Respondents filed a response denying the averments in the statement of claim meanwhile stated on a without prejudice basis to their earlier averments in the response that any accident that the Appellant may prove was wholly or substantially contributed to by the negligence of the Appellant.

4. The claim proceeded to hearing during only the Appellant called evidence. In its judgment, the trial Court found that the Appellant had failed to prove liability and or negligence as against the Respondents and proceeded to dismiss the claim for having not been proved on a balance of probabilities.

5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the whole judgment based on the following grounds; -

    1. That the learned Magistrate erred in evaluation of the uncontroverted evidence which was tendered in the suit by finding that the Appellant failed to prove his case on a balance of probabilities and thereby erroneously dismissed the Appellant's suit.

    2. That the learned Magistrate misapprehended and misapplied the clear provisions of Section 32 of the *Small Claims Court Act* and Rule 31 of the Small Claims Court Rules and thereby erroneously dismissed the appellant's suit.

    3. That the learned Magistrate showed extreme prejudice by utterly ignoring the relevant law and evidence and thereby erroneously dismissed the Appellant's suit.

6. The appeal was canvassed by way of written submissions of which this Court has duly considered alongside the memorandum of appeal and the record of appeal. This is a first appeal. That said, Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the Small Claims Court to the High Court by providing that; -

    > "(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
    >
    > (2) An appeal from any decision or order referred to in subsection (1) shall be final."

7. Ordinarily on a first appeal, the appellate Court ought not to interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or if it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 – 1988) 1 KAR 278. Nonetheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and the Court must first satisfy itself that the appeal before it satisfies the prescription in Section 38 of the Act.

8. The Court of Appeal in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, discussed its mandate on a second appeal, that is, on points of law only. Equally, in this appeal, albeit being a first appeal, the *Small Claims Court Act* prescribes that an appeal to this Court from the Small Claims Court be on matters of law only. In the foregoing case, the Court of Appeal made a distinction between matters of law vis-à-vis maters of fact by stating that: -

    > "I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were

referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

9. Black's Law Dictionary defines the two concepts as follows; -

> " Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law."

10. The Court of Appeal in its subsequent decision in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR, in addressing the question whether the memorandum of appeal, though on a second appeal, raised factual issues, recognized that an appellate Court when faced with a situation where a memorandum of appeal raises factual issues it is at liberty to strike out the offending ground(s) while retaining those that are compliant. In this appeal, having reviewed all three (3) grounds of appeal, I am convinced that only Ground (2) of the Appellant's memorandum of appeal is compliant with the strictures of Section 38(1) of the *Small Claims Court Act* whereas Grounds (1) & (2) tacitly invite the Court to revisit factual and evidentiary matters and are accordingly struck out.

11. That said, Ground (2) of the instant appeal challenges the lower Court's failure to apply itself to the provisions of Section 32 of the *Small Claims Court Act* and Rule 31 of the Small Claims Court Rules. The former provision provides that: -

> " (1) The Court shall not be bound wholly by the Rules of evidence.
>
> (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
>
> (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
>
> (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
>
> (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
>
> (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
>
> (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration."

12. Whereas the latter provides: -

> " In the conduct of any proceedings before it, the Court shall not be bound by the strict rules of procedure or evidence."

13. The trial Court after considering the respective parties' pleadings and material relied on in support of the pleadings thereof, stated in its judgment that; -

> " Liability
>
> The claimant called the police officer who confirmed the occurrence of the accident and produced police abstract. The driver of the claimant's motor vehicle was not called to give evidence of how the accident occurred.
>
> Section 107 of the *Evidence Act* provides that 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.
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> The claimant failed to call a crucial witness who would prove negligence in the matter. A police abstract can only corroborate the evidence tendered by a driver and in itself not proof of negligence. I find that liability on the part of the Respondent has not been proved" (sic)

14. On this appeal, while calling to aid the decision Julia U. Stamm v Tiwi Beach Hotel Ltd. [1996] KECA 215 (KLR), the Appellant has argued that the fact that the Claimant did not personally testify at the trial is of no serious consequence to the outcome of his case whereas the testimony of the Police Officer clearly demonstrated how the collision which gave rise to the claim in the lower Court occurred and that the said evidence was equally not controverted by the Respondents. In retort to the above, the Respondents argue that the framing of Section 32 of the Act and Rule 31 of the Rules requires that the Court invokes its discretion in determining what rules of procedure may be binding and the provisions do not in any way suspend the *Evidence Act*. That the trial Court while exercising its discretion considered the provisions of Section 107 of the *Evidence Act* and the evidence that had been tendered to determine that the chief witness on liability had not testified therefore it was not obligated to consider the corroborative evidence of the Police Officer, a consequence of which it was constrained to dismiss the Appellant's claim. It was further assailed that the Appellant's assertion that the trial Magistrate misapprehended the provisions of Section 32 of the Act is misguided. The decisions in Sally Kibii & Another v Francis Ogaro [2012] eKLR and Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi [2009] eKLR where cited in the forestated regard.

15. With the above in mind, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated concerning the burden 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....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."

16. The same Court in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, addressed itself as follows in this regard: -

> " 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."

17. Here, it is undisputed that the Appellant's claim as against the Respondent's was one founded on the tort of negligence going by the parties' respective pleadings notwithstanding the fact that First Assurance Co. Ltd filing suit in the name of its insured pursuant to its alleged right of subrogation. Ultimately, proving negligence as against the Respondents unlocked the Applicant's claim. This Court has repletely observed that the mere occurrence of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The Court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing by stated that: -

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

18. By the above, it is trite that burden and onus of proof was on the Appellant to establish the particulars of negligence as against the Respondents whereas the trial Court was not in error when it premised its decision on the forestated well settled principle. That said, the question that begs with respect to the instant appeal is whether in the circumstances Section 32 of the Act and Rule 31 of the Rules are applicable waivers to the said settled principle. In the Court's understanding of the said provisions the same only applies to the technical strictures of the *Evidence Act* and not the settled principles as addressed by the Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR wherein the Court observed that; -

> " 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:
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> "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'mairanyi & 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 recognizes 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."

See Also Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR,

19. It was obligatory of the Appellant to call evidence to shore up the particulars of negligence pleaded as against the Respondent and not to leave it to the trial Court to draw an inference of the same from the evidence of the Police Officer and or Police Abstract. It would have been arduous and unprecedent of the trial Court to disregard well settled principles of evidence in favour of the provisions of Section 32 of the Act and Rule 31 of the Rules, as urged on by the Appellant herein. Further, the forestated provisions cannot be construed to be a waiver on the Appellant's evidentiary burden of proof in civil matters or on rules of evidence whereas it still rings true that for the Appellant to have succeeded in his claim he ought to have called or adduced evidence in support of the pleadings.

20. Consequently, the Appellant having failed to establish his case on a balance of probabilities as against the Respondents, this Court cannot fault the trial Court for arriving at the decision it did. Under Section 107 of the *Evidence Act*, the burden of proof lay with the Appellant and if his evidence did not support the facts pleaded, he failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra). Therefore, the appeal herein lacks merit and ought to be dismissed with costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

No appearance for the Appellant

Kirui for Respondent

Guyo - Court Assistant