Maina v Karago (Commercial Appeal E100 of 2023) [2025] KEHC 144 (KLR) (Commercial and Tax) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 144 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E100 OF 2023

RC RUTTO, J

JANUARY 17, 2025

BETWEEN

ETHAN MAINA ..... APPELLANT

AND

MACHARIA KARAGO ..... RESPONDENT

(An appeal from the judgment and decree of the Small Claims Court at Nairobi (J. W. Munene, RM/Adjudicator) delivered on 26th April 2023 in SCCC No. E3932 of 2022)

JUDGMENT

1. This is an appeal from the Small Claims Court. The facts of the claim are contained in a statement of claim dated December 7, 2022 in SCCC No. E3932 of 2022, where the claimant sought compensation for loss or damage to property totaling to Kshs 303,510/- resulting out of a road traffic accident that occurred on 7th December 2019 by doctrine of subrogation.

2. On that material date, the respondent was driving his motor vehicle along ring road Kariokor Nairobi County when the appellant's driver drove his vehicle so negligently that it collided with the respondent's motor vehicle. As a result of that collision, the respondent's motor vehicle was extensively damaged and written off. The respondent blamed the appellant's driver for causing the accident.

3. The respondent avers that the vehicle's damage was assessed by his insurer Fidelity Shield Insurance Company Limited who then compensated him for the total loss of the motor vehicle by paying him Kshs. 385,000/- less salvage value of Kshs.150,000/-. Based on that, the respondent sought judgment in the sum of Kshs.303,510/-. tabulated as follows: motor vehicle value Kshs 235,000/-; investigation fees Kshs.28,330/-; assessors fees Kshs.6,380/-; courtesy car Kshs.30,000/-; towing charges Kshs 7,500/-; police abstract Kshs.200/-.

4. In its judgment dated 12th May 2023, the adjudicator found that the respondent had proved his case on a balance of probabilities. He found the appellant 100% vicariously liable for the accident. Consequently, the appellant was ordered to pay the respondent the sum of Kshs. 303,310/-. together with the costs of the suit. The court held:

    1. "Whether the accident occurred

        The accident occurred on 7/12/2019 between the claimant motor vehicle registration no. KAQ 821X and the 2nd respondent's motor vehicle no. KAV 552B along Ring Road, Kariakor. The suit was withdrawn as against the 1st respondent who is the registered owner but had sold motor vehicle registration no. KAV 552B to the 2nd respondent on 30th May, 2018.

        As a result of the accident the claimant's motor vehicle was damaged; the basis of this claim.

    2. Liability

        The respondent's driver is accused of suddenly changing lanes and colliding in motor vehicle registration no. KAQ 821X from the right side. This is as per the claimant's written statement dated 7/12/2022. The 2nd respondent who is the beneficial owner of motor vehicle registration KAQ 821X did not call his driver to rebut time (sic) version of events. The police blamed the respondent's motor vehicle for the accident and this court finds the 2nd respondent 100% vicariously liable for the accident.

    3. Quantum

        Special damages of Kshs.303,310/= have been proved. There is no receipt for Kshs. 200/= for police abstract and the assessors fee is Kshs. 24,430/= not Kshs. 28,330/=."

5. It is those findings that triggered the present appeal. The appellant filed his memorandum of appeal dated 26th June 2023 that raised a prolix 17 grounds disputing the findings of the trial court. I have taken the liberty to summarize those grounds as follows: the trial c0urt lacked jurisdiction to hear and determine the matter by dint of section 34 (1) of the *Small Claims Court Act* as at 5th February 2023; that consequently, the judgment was a nullity; the trial court did not consider the appellant's submissions and authorities cited thereunder; the respondent failed to discharge his burden of proof to the required standard; the trial court was in error in concluding that the police abstract was conclusive proof of liability; the trial court improperly analyzed the evidence on record; the absence of a valuation report failed to establish the value of the suit vehicle; the trial court erroneously awarded loss of user for a vehicle that was written off; the trial court was in err in awarding investigation fees and assessor fees in the absence of proof; the trial court failed to admit his third party notice for consideration; and the trial court arrived at an erroneous decision against the weight of the evidence adduced.

6. In view of the above, the appellant urged this court to allow the appeal, set aside the findings of the trial court and substitute the same with an order dismissing the suit. The appellant further prayed for costs of the suit at trial and in this appeal.

7. The appeal was heard on the basis of the parties' written and oral submissions. The appellant relied on his written submissions dated 22nd March 2024. He condensed his appeal into four main grounds namely; (i) whether the respondent proved his allegations of negligence and/or recklessness? (ii) Whether the respondent is entitled to compensation as prayed for? (iii) Who shall bear the costs of

compensation? (iv) Whether the trial court had jurisdiction to deliver the impugned judgment after lapse of 60 days and (v) Who bears the costs?

8. On whether the respondent proved negligence, the appellant submitted in the negative as the respondent failed to adduce a motor vehicle assessment report, sketch maps, photographs of the damaged vehicle and accident scene and the inspection report. He argued that a police abstract was not conclusive proof of liability or negligence. It was therefore incumbent on the respondent to establish how the accident occurred as to warrant a determination in his favor. The appellant questioned the credibility of the allegations that the motor vehicle was written off since it was traceable in the NTSA search portal contrary to section 6 (9) of the *Traffic Act*. He cited several decisions in support of these arguments.

9. On the issue of compensation, the appellant cited that in the absence of a motor vehicle assessment report, the extent of damage of motor vehicle registration number KAQ 821X could not be established on a balance of probabilities. Furthermore, no inspection report was tendered to draw an inference that there were no pre-accident defects. That there were no documents adduced to demonstrate how the pre accident value and salvage value was arrived at. The voucher relied upon was not conclusive evidence.

10. On the courtesy car fee of Kshs. 30,000/=, the appellant classified the same as loss of user that fell short of the standard of proof. In addition, no evidence was adduced to demonstrate that the respondent met the cost of Kshs. 200.00 towards obtaining a police abstract. The appellant buttressed his submissions by citing several decisions of the court, and urged this court to reverse the award on compensation with an order dismissing the claim for want of proof.

11. On the issue of who bears the costs of compensation in settling the amount sought by the respondent, the appellant propositioned that should the court find that he was liable, then the same ought to be met by its insurer Geminia Insurance Company as the appellant held a comprehensive cover at the time of the accident. He further submitted that he ought to be granted leave to file third party proceedings and issue a third-party notice. Ultimately, it was his insurer that ought to satisfy the decree. Several decisions were advanced for this court's consideration.

12. On the issue whether the trial court was vested with jurisdiction to determine the dispute. It was submitted that the court lacked jurisdiction upon expiry of time that took place on 5th February 2023. As such, the judgment was rendered a nullity and without any force of the law contrary to section 34 (1) of the *Small Claims Court Act*. He cited the case Kartar Singh Dhupar & Company Limited v Arm Cement PLC [2023] eKLR to support of this argument.

13. On costs the appellant urged the court to be guided by the dictates of the Court of Appeal in Lakhamshi v Attorney General (1971) EA 118and order that each party bears its own costs.

14. The respondent filed his written submissions dated 19th April 2024. He submitted that the appeal was incompetent for failing to comply with the dictates of section 38 (1) of the *Small Claims Court Act*. In his comprehension of the grounds raised in the appeal, the respondent submitted that none of the issues raised were confined to matters of law.

15. Turning to the merits of the appeal, the respondent submitted that on the strength of the provisions set out in sections 3 and 32 of the *Small Claims Court Act*, the court was within its mandate to rely on the evidence adduced before it. Consequently, the findings of the trial magistrate were proper as he relied on the evidence before him rightfully. In any event, his evidence was unchallengeable and uncontroverted.

16. Regarding the sums awarded, the respondent justified the award as the same was based on the calculations set out in paragraph 5 of the statement of claim. On loss of user, the respondent submitted that the same was legitimized as the he obtained car hire services between 13th December 2019 and 23rd December 2019 for the sum of Kshs.3,000/- daily for 10 days. Furthermore, he was entitled to towing refund fees of Kshs.7,500/-. He also adduced evidence to support the award of assessment fees from the assessor's invoice dated 16th December 2019, the claim fee voucher and EFT dated 16th January 2020 all for a sum of Kshs. 6,380/-. On the investigation report, the respondent relied on the invoice dated 31st August 2022 and the ETR of even date for the sum of Kshs. 24,430/-. He cited several decisions supporting his argument.

17. The respondent also addressed the court on the issue of the third-party notice. He submitted that the procedure attempted to be advanced by the appellant was not known in law. That a party could not issue a third-party notice to its insurer in that manner. In any event, as was held by the trial court, the procedure was prematurely invoked. That the application of section 10 (2) (a) of the Insurance (Motor Vehicle Third Party Risk) Act was improper since it did not apply to material damage claims. The respondent prayed that the appeal be dismissed with costs.

18. I have considered the memorandum of appeal, examined the record of appeal and analyzed the parties' comprehensive written submissions and the law. To begin with, the duty of this court as the appellate court is well prescribed under Section 38 of the *Small Claims Court Act* (the Act) which limits the jurisdiction of this court to matters of law only. Section 38 of the Act provides that:

    38.

        (1) A person aggrieved by the decision or an order Appeals. 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."

19. Upon evaluating the grounds enunciated in the memorandum of appeal and the parties' arguments, the issues of law arising for determination are (i) whether the judgment is valid by dint of section 34 of the *Small Claims Court Act*; (ii) whether the respondent proved its case on a balance of probability (iii) whether the award of damages was justified?

20. Turning on to the first issue for determination, the appellant submitted that by effluxion of time, the trial court lacked jurisdiction to hear and determine the subject matter. Consequently, the judgment entered by the trial court was a nullity. Section 34 (1) of the *Small Claims Court Act*, the provision of the law in which this argument in hinged upon, provides:

> " 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 determination of the matter which shall be within sixty days from the date of filing the claim."

21. The suit was filed on 7th December 2022 and judgment delivered on 26th April 2023. Arithmetically, it is not in doubt that the suit was determined beyond the 60-day statutory period. In the circumstances, therefore what is the effect of rendering a decision beyond the 60- day statutory period? In the case of Biosystems Consultants vs. Nyali Links Arcade [2023] KEHC 21068 (KLR) it was held as follows:

> " The purpose of the *Small Claims Court Act* was to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result was that balancing the two may result at times to overshooting the 60 days. The 60 days did not have

penal consequences for good reason. They were aspirational. That was part of having access to justice over amounts that needed not be in the normal system. Allowing the application would open floodgates that would eventually defeat the purpose of the Act.

The non- compliance went to the court's performance and was answerable internally. It could not affect parties who were in court and ready to be heard. Defendants used various gimmicks to have matters adjourned and thereafter turned around to say, 60 days were over. The parties had wasted a full month arguing in the court and with preliminary objections that were much ado about nothing."

22. This court takes the same approach. I would therefore not hesitate to find that the lapse of time does not vitiate the judgment of the lower court and its validity. The appeal on that ground must in the circumstances fail.

23. On the second issue, whether the respondent proved its case on a balance of probability, I note that it is not in dispute that an accident occurred on 7th December 2019 between the respondent motor vehicle registration number KAQ 821X and the appellant motor vehicle registration number KAV 552B being driven by the appellant's driver, one John Asenya Mutogo. Both parties blame each other for causing the accident and the contentious issue is who is to blame for the accident.

24. As evident, from the record the only evidence on how the accident occurred is that of PW1 the respondent who was present at the scene of accident. His evidence was that on 7th December 2019, he was driving his motor vehicle along ring road Kariokor Nairobi County when the appellant's driver so negligently changed lanes that he suddenly collided with the respondent's motor vehicle. As a result of that collision, the respondent's motor vehicle was extensive damage as a result of which the car was written off. He blamed the appellant driver for driving at an excessive high speed, failing to have due regard to the respondent's presence on the road and failing to apply brakes or slow down to avoid the accident. Further the accident was reported at Pangani Police Station where the vehicle was towed. Traffic officer visited the accident scene and blamed the driver of the appellant for causing the accident.

25. Notably, the appellant's driver did not testify at trial. The appellant was certainly not at the accident scene and could not therefore give an account of what transpired. The evidence of DW1 is therefore unreliable and cannot establish the facts giving rise to the accident.

26. The principles guiding an appellate court on whether to interfere with the trial court's finding on liability were well settled by the case of Khambi & Another vs. Mahithi & Another [1968] EA 70 where the court held:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

27. In this instance, the adjudicator found that the appellant was wholly blamable for the accident on the basis that his driver suddenly changed lanes and collided with the motor vehicle registration no KAQ 821 X from the right side. The basis of this finding was the respondent statement which was further corroborated by the police abstract which blamed the appellant's driver for causing the accident. The adjudicator also noted that the appellant did not call any witness to rebut this statement.

28. It is trite that a court is duty bound to establish that by dint of section 107 and 108 of the *Evidence Act*, a fact has been proved by the person making the allegations. In this instant the only available evidence

is that of the PW1 who witnessed the occurrence of the accident. Upon examining this evidence, it presents a logical sequence of events explaining how the accident occurred and is convincing in the absence of any other evidence to the contrary or at all. I therefore find that the trial court did not err in finding the appellant's driver liable for the accident.

29. On assessment of damages, I am also reminded that I should not interfere with an award of damages unless it is demonstrated that the trial court acted on wrong principles or award a sum that was inordinately high or law as to make an erroneous estimate on the amount of damages a claimant is entitled to. The Court of Appeal in Flint vs. Lovell [1935] KB 354 CA held:

> " The court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount on damages, it will generally be necessary that the court should be convinced that either the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small, as to make it in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

30. On the assessment of the motor vehicle, the respondent averred in his statement of claim that the motor vehicle was written off. The pre accident value was Kshs.385,000/-. Since the vehicle was written off, the respondent was paid the sum of Kshs.235,000/- as the sum of Kshs. 150,000/- as salvage value was deducted from that sum. To prove this, claim the respondent relied on the EFT payment receipt and claim payment voucher all showing the sum of Kshs. 235,000.00. The claims officer also produced a total loss voucher in which the respondent was agreeable to retain the salvage value of the motor vehicle assessed at Kshs. 150,000/-.

31. This court notes the appellant submission that in the absence of a motor vehicle assessment report, the extent of damage of motor vehicle registration number KAQ 821X could not be established on a balance of probabilities. While this may be true, I note that the respondent relied on payment and discharge vouchers to demonstrate that an assessment was done and compensation made. These documents are consequential and typically flow from the assessment report.

32. It would nevertheless have been prudent for the assessment report to be produced as it forms the basis upon which the claim was founded. The respondent having sought as a special damage the assessors fee, there was no reason why the report was not adduced. However, under the circumstances, the car was written off as a result of the accident attributed to the appellant's driver. The need for the assessment report would have been more if it were not a case of total loss of the vehicle to address the appellant's concern that there was a possibility for the respondent having taken advantage of the accident to undertake repairs that may have been subsisting prior to the accident.

33. This claim having been brought under the doctrine of subrogation, which allows the insured to pursue a claim on behalf of the insured, in the name of the insured, upon the insured compensating the insured for the loss suffered, of importance was to show that indeed the insured was compensated for the loss incurred. In this instance, I do find that the claim vouchers and EFT produced by the respondent sufficient proof to that the claim was paid.

34. Taking this into account, I find that the trial court did not err in awarding the sum of Kshs. 235,000.00 being the value of the motor vehicle and Kshs. 6,380.00 being the value of assessor fees. Consequently, I will not interfere with those findings.

35. On the claim for investigation fees, I find that the same is merited. The respondent adduced the investigation report dated 31st August 2022, the ETR receipt and invoice both dated 31st August 2022.

The investigators expended the sum of Kshs. 28,330/-. I also find the claim for towing charges of Kshs. 7,500.00 as merited and the same is upheld. On the claim for the police abstract, this court agrees with the findings of the trial court and is accordingly dismissed.

36. Finally, the respondent also sought for loss of user identified as courtesy car in the sum of Kshs. 30,000.00. in Eliud Maniafu Sabuni vs. Kenya Commercial Bank [2002] eKLR Justice Ringera, J. stated as follows:

> "However, I do agree with the submission that once the plaintiff has been compensated for the value of the vehicle he cannot then claim for damages for loss of user thereof subsequently. That would clearly be double compensation. That, however is not, in my understanding, the same thing as to say that a claim for value of the article destroyed and for loss of user thereof cannot be entertained in the same accident."

37. Guided by the above authority I do find that, the respondent would be entitled to loss of user up until he is notified of the value of the motor vehicle. In this case, the car hire commenced seven days after the accident and for a period of 10 days. The decision to write off the vehicle completely was made thereafter paving way for the compensation. In the circumstance this appears reasonable time and I see no reason to interfere with this award.

38. Finally, the appellant urged this court to make a finding that compensation ought to be met by its insurer, whom he sought to introduce as a third party in the claim. The facts on record are that on January 19, 2023, the court denied the appellant leave to enjoin a third party, that is Geminia Insurance Company Limited, the appellant's insurer, to the proceedings as the application was premature by dint of section 10 (2) of CAP 405. That decision was neither appealed, set aside or reversed. I therefore find that I cannot make any orders in favor of the appellant who ought to have taken the necessary steps challenging those orders but failed to do so.

39. Taking the above into account, I find no reason to interfere with the findings of the adjudicator. The present appeal is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2025

RHODA RUTTO

JUDGE

For Appellant:

For Respondent:

Court Assistant: