Car and General (Trading) Limited v Nyagaka & another (Civil Appeal E150 of 2023) [2025] KEHC 1960 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1960 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E150 OF 2023

DKN MAGARE, J

FEBRUARY 24, 2025

BETWEEN

CAR AND GENERAL (TRADING) LIMITED ..... APPELLANT

AND

WALTER MARUBE NYAGAKA ..... 1ST RESPONDENT

JOHN NJENGA ..... 2ND RESPONDENT

(Being an appeal against the judgment and decree of Hon. Ocharo, Senior Principal Magistrate in Kisii CMCC NO. E192 of 2020 delivered on 21.11.2023)

JUDGMENT

1. This appeal is against the Judgment and decree Hon. C. Ocharo – (SPM) in Kisii CMCC No. E192 of 2020 delivered on 21.11.2023.
2. The court delivered its judgment in the following terms:
    a. Liability 10% against the 2nd Respondent
    b. 90% against the Appellant
    c. General damages 400,000/=
    d. Special damages 8,250/=
3. It is in respect of liability that the Appellant appealed. However, they filed a whopping 30-paragraph Memorandum of Appeal. It is certainly not edifying for advocates to present three scores of grounds

of appeal, and end up arguing only one issue. This is anathema to the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which posits as doth: -

> Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. The same issue was addressed succinctly by court of appeal in the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR as follows:

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
>
> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The grounds are thus ancillary, repetitive, prolixious and a waste of judicial time. This court will have to deal with whether the magistrate erred in finding the Appellant liable. This is the only issue addressed in submissions before the court below and before this court.

7. The 1st respondent filed suit against the 2nd Respondent claiming damages for pain, suffering and loss of amenities in respect of an accident of 4.3.2020 involving motorcycle registration number KMER 777B and motor vehicle registration number KBK 527D along Keumbu-Nyabisabo road. The 1st Respondent is said to have been a pillion passenger.

8. The 1st Respondent indicated that they are not interested in the appeal as it was between the Appellant and 2nd Respondent. Circumstances of the occurrence of the accident are not in dispute. The question is whether, the Appellant, a registered owner can be liable of actions of the actual owner, who was not joined to the suit.

Evidence

9. The evidence tendered by the 1st Respondent concerning liability was that he was involved in an accident and found himself at Keumbu Hospital and then transferred to Kisii Teaching and Referral Hospital. He blamed the driver of motor vehicle registration number KBK 527D. The said motor vehicle was beside the road but entered the road and the motorcycle knocked itself against the lorry on the right rear side of the lorry. When cross-examined by the Appellant's Advocate, he stated that the rider was carrying construction goods. He was not doing public service business but was paid Kshs. 50/=.

10. PW3 PC Moses Kasera testified and produced a police abstract. He confirmed the occurrence of the accident involving motor vehicle registration number KBK 527D and motorcycle registration number KMER 777B. The motorcycle was carrying 2 pillion passengers and was driven by Stanley.

11. The 2nd Respondent testified by adopting his witness statement stating that the Plaintiff was the author of the accident. He further stated that the motorcycle caused the accident. He did not indicate in what capacity he was giving the evidence, other than being an owner. On cross-examination, he stated that he heard the motorcycle hitting the lorry.

12. The Appellant testified through Joseph Mulwa Mwambi. He indicated that he was in charge of importation. The said motor vehicle had been sold to Thomas Khayega Nyagaka. He produced cash sale receipts. They denied liability for the accident as they had sold the motorcycle before the accident.

13. The court analyzed the evidence and submission and delivered the impugned judgment, hence this appeal.

Submissions

14. The Respondent indicated that they would not file any submissions to the appeal. The Appellant on the other hand submitted that motorcycle Registration No. KMER 777B was registered in the name of the Applicant simply as the importer of the said motor cycle and as such was a mere paper owner and should not be held liable for the accident. The Appellant relied on Section 8 of the *Traffic Act*, Cap 403.

15. The Appellant relied inter alia on Car & General (Trading Limited) vs JNK & 2 others (2023) eKLR to submit that a different person may be in possession of the motor vehicle at a given time though the details of registration may be in somebody else's names.

16. It was the submission of the Appellant that the failure of the 2nd Respondent to have the motor vehicle registered in his name soon after purchase should not have prejudiced the Appellant. Reliance was placed on Muhambi Koja vs Said Mbwana Abdi (2015) eKLR.

17. It was also submitted for the Appellant that the Appellant had on a balance of probabilities proved that the motor vehicle had been sold to the 2nd Respondent prior to the date of the accident and it was

the transfer that had not been registered. Reliance was placed inter alia on Jared Magwaro Bundi & Another Primarosa Flowers (2018) eKLR.

Analysis

18. 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 firsthand. The court is guided by the decision in case of Mbogo and Another vs. Shah [1968] EA 93 where the former Court of Appeal for Eastern Africa 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."

19. The duty of the first appellate Court was enunciated 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 judges 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."

20. 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. In In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> "Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

21. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> "It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

22. Therefore while exercising judicial discretion as an appellate court, this court will exercise caution while reviewing the evidence as presented in the lower court and it is not enough that if I were the lower

court, I would have reached a different conclusion. 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..."

23. The issue for determination is whether the Appellant is liable for the accident. This was a claim of negligence arising out of a road accident. Negligence is defined in the case of Blyth v Birmingham Water Works Co {1856} s doth:

> " Negligence is the omission to do something which a reasonable man, grieved upon those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man could not do."

24. The standard for negligence is, as in any other civil case, on a balance of probability. The of standard of proof was well postulated in the case of in re H C minors {1996} AC 563 at 586 – Lord Nicholls explained himself as follows:

> " The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation ..."

25. There was no doubt in the mind of the court that the motorcycle was to blame for the accident. That may be so. The question before the court was not apportionment of liability. The defence was that the vehicle was sold in 2018 before the occurrence of the accident. The pertinent finding of the court is worthy setting out verbatim as follows:-

> Liability can obviously not attach to a person not a party. The third party submits that it was just a paper owner. This may be true but it was the third party's duty to bring in the actual owner in order to be absolved of any responsibility since the contractual rights and liabilities is between itself and the person to whom it allegedly sold the motorcycle to. It is not settled law that whoever wishes the court to apportion liability must enjoin the party or else bear the liability alone.
>
> In light of the finding as to how the accident occurred, the third party being the registered owner of the motorcycle in issue must bear responsibility. The driver of the motor vehicle though he lays blame squarely on the rider and the pillion passenger, he cannot have ignored the other machines on the road. He has not explained what he did to mitigate the occurence of the accident. He ought to have seen the oncoming motorcycle if indeed he was on the lookout as is expected of a driver.

26. This was however not the point. The holding of the 2nd Respondent liable to the extent of 10% was gratuitous. There was no evidence of negligence whatsoever tendered against the 2nd Respondent. However, they did not appeal. This is thus water under the bridge.

27. The next question is the defence by the Appellant. The court found that it ought to have joined the person to whom it sold the vehicle. It was held liable simply because it was a registered owner. The question of a registered owner had been addressed by the Court of Appeal before and settled. Therefore, before the court held them liable it should have settled the question of whether they were the owners.

28. The court of Appeal [Tunoi, O'kubasu & Deverell, JJ.A)] in Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR posited as follows regarding registered owners:

> However, what is known is that the motor vehicle was eventually converted into a matatu and was being used as such at the time of the accident. It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial Judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle is the appellant. That section reads as follows:- "The person whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle." We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in OSAPIL VS. 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.

29. The registration of the motorcycle was debunked. It was apparent that the motorcycle was being used in some form of transport in the heartland of Kisii. Their defence was not that the purchaser was to blame but that it was a stranger to the accident. They produced a sale as of 21.11.2018, a list of employees as of 30.3.2020, and a compulsory registration for dealers dated 7.9.2020. The notice is irrelevant to the case having been sold in 2018. I am, however, satisfied that the Appellant had no interest in the subject motorcycle.

30. It is true that the court cannot apportion liability with parties not a party to a suit. It is equally true that it cannot enter judgment against strangers. If a wrong party is joined to the suit, the court must find so. It is not enough to place a duty on strangers. Order 1 Rule 15(1) and (4) provides as follows:

> 1. Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
>
> (a) that he is entitled to contribution or indemnity; or
>
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third-party notice) to that

effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit

2. N/A

3. N/A

4. Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions "third party notice" and "third party" shall respectively apply to and include every notice so issued and every person served with such notice.

31. In this case the subject matter was liability for the accident. There was nothing to be determined between the purchaser of the motorcycle and the Appellant. It was thus unnecessary to join a third party in this particular case to escape liability. I note with approval a passage in a decision in EN v Hussein Dairy Limited & 3 others [2020] eKLR, where P J O Otieno J, stated as follows:-

16) This excerpt is the residence of the answer to my first issue for determination. It cannot be denied that in deed that was the accurate capture of what Dw1 had said in his examination in chief. However, that is the furthest a court could go. It was not open to the court to consider how negligent a party not before it could be. The law confines a court to determining only the rights of the partied before it and upon the evidence availed by and against such parties. In fact, I doubt whether it was admissible to receive evidence against anon-party and consider same without affording him a right to be heard. I take the view that the legal thing for the 2nd respondent to have done was to seek the joinder of the owner and driver of the bus, either as a third party of co-defendant before seeking to push a burden in the case against them.

17) 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.

32. Before holding the parties to the suit liable, the court must be satisfied on the evidence available that it is the correct party. To hold otherwise will be to open a Pandora's box, where the defendant will simply join a fictitious thirty party to the suit and have them held liable. In this case, the 2nd Respondent joined the registered owner of the motorcycle. The said party, who is now the Appellant, stated and tendered evidence that he is not the owner of the vehicle. The Court of Appeal had guided on what was to happen. The 2nd Respondent ignored the evidence. The court is correct to the extent that nonparties cannot be blamed. So are parties who have nothing to do with the tort of negligence pleaded. In Mbiti v

Maingi & another (Civil Appeal E77 of 2022) [2023] KEHC 20833 (KLR) (10 July 2023) (Judgment), I noted as follows:

> In David Mwangi Kamunyu v Rachael Njambi Ruguru [2022] eKLR, the court, Justice Rtd, Mary Kasango stated as doth: -"Having failed to join the motor cycle rider as a third party and because no negligence can be attributed to the respondent who was a passenger and because the respondent adduced eye witness evidence the appellants ground on the finding of liability must and does fail. This indeed is in accordance of the jurisprudence espoused in the case Stella Muthoni v Japhet Mutegi [2016] eKLR where the court held:-
>
> > "In Ntulele Estate Tranporters Ltd & another v Patrick Omutanyi Mukolwe [2014] eKLR the court faced with a similar situation held:-'Secondly, having failed to join the estate of the motorcyclist as a party to the proceedings, I do not think any blame could be attributed to a party who had not been joined in the proceedings. In the case of Benson Charles Ochieng & Anor v Patricia Otieno HCCA 69 OF 2010 (UR) the court held:-
> >
> > 38. The trial court could not have apportioned liability between the appellants and a person who was not a party to this suit. This court is unable to agree with the Appellant's argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings.
> >
> > 39. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party in the proceedings. In the present appeal, it is the Appellants who were to face the consequences for failure to join the motorcyclist to the suit. Having failed to join that party, the argument as to the contribution of negligence fails.

33. The net effect is that the wrong third party joined the proceedings. This is the same as having never joined. Not all is lost, however, since the civil procedure provides for remedies of indemnity within 2 years of the judgment.

34. The Appellant was not to blame for not joining the rider and owner of motorcycle registration number KMER 777B. The details were in the police record. The documents related to the sale also clearly demonstrated that the Appellant was not liable for the accident. It must be noted that we are not yet in the no-fault system. In Stephen Kanjabi Wariari v Dennis Mutwiri Muriuki & another [2022] eKLR, the court held that:

> 13. Further, as the Court of Appeal held in East Produce (K) Limited v Christopher Astiado Osiro in Civil Appeal No. 43 of 2001;
>
> > "It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held 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." [See Mount Elgon Hardware v Millers C.A. No. 19 of 1996 and Mwaura Mwalo v Akamba Public Road Services Ltd HCC No 5 of 1989].

However, as I have already stated, there is as yet no liability without fault and a plaintiff must prove negligence against the defendant where the claim is based on negligence. The plaintiff in my view, must place sufficient material before court to discharge the burden placed on such a party.

35. The appeal succeeds.

Determination

36. In the upshot, I make the following orders:-

    a. The appeal is allowed.

    b. The Judgment and Decree of the lower court dated 21.11.2023 is set aside and substituted with an order dismissing the suit against the Appellant.

    c. For the avoidance of doubt, Judgment against the 1st Respondent is not disturbed.

    d. The Appellant shall have costs of this appeal payable by the 1st Respondent at Kshs. 55,000/-.

    e. Security pending appeal be released to the depositor.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF FEBRUARY, 2025. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ndungu for the Appellant

No appearance for the 1st Respondent

Kipyegon for the 2nd Respondent

Court Assistant – Michael