Occidental Insurance Company Limited v Ibrahim & another (Civil Appeal E044 of 2024) [2025] KEHC 1497 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E044 OF 2024

JK NG'ARNG'AR, J

FEBRUARY 4, 2025

BETWEEN

OCCIDENTAL INSURANCE COMPANY LIMITED ..... APPELLANT

AND

IS-HAK SHEIKH IBRAHIM ..... 1ST RESPONDENT

MASH AUTO GARAGE ..... 2ND RESPONDENT

(Being an appeal against the Judgment and decree of Hon. Gatambia Ndungu (RM) delivered on 29th January 2024 in Mombasa Small Claims No. E371 of 2023, Is-Hak Sheikh Ibrahim v Occidental Insurance Co. Limited & Mash Auto Garage)

JUDGMENT

1. The background of the appeal is that the Claimant/1st Respondent (Is-Hak Sheikh Ibrahim) filed a Statement of Claim dated 25th July 2023 and averred that he was the registered owner of motor vehicle registration number KCV 971X Toyota Vitz. That the Appellant (Occidental Insurance Co. Limited) was the insurer of the motor vehicle and that at all material times to the suit, the 2nd Respondent (Mash Auto Garage) had custody of the motor vehicle when it was burnt down under circumstances unclear to the Claimant/1st Respondent. The Claimant/1st Respondent stated that he was involved in a road traffic accident on or about 18th September 2020 and the motor vehicle was damaged. That the accident was reported to the insurer who directed that the motor vehicle be taken to the 2nd Respondent's garage for repairs where the vehicle was burnt down beyond salvage.

2. The Claimant/1st Respondent (Is-Hak Sheikh Ibrahim) prayed for reliefs jointly and severally against the Appellant and 2nd Respondents (Occidental Insurance Co. Limited and Mash Auto Garage) for judgment for the insured sum of Kshs. 600,000 being compensation for total loss of the motor vehicle registration number KCV 971X, costs of the suit and interest at court rates.

3. This suit was heard in the trial court and judgment delivered on 29th January 2024 where the court found that on a balance of probabilities that the Claimant/1st Respondent (Is-Hak Sheikh Ibrahim) was able to prove his case against the Appellant and 2nd Respondents (Occidental Insurance Co. Limited and Mash Auto Garage). It was also the finding and verdict of the trial court that the Appellant and 2nd Respondents (Occidental Insurance Co. Limited and Mash Auto Garage) upon being found jointly and severally liable for the total loss of the Claimant/1st Respondent's motor vehicle insured in the sum of Kshs. 600,000 had judgment entered against them for a similar amount. The Claimant/1st Respondent was also awarded costs and interest from the date of the judgment till payment in full.

4. Being dissatisfied, the Appellant appealed the judgment and decree through an Amended Memorandum of Appeal dated 26th February 2024 on grounds that the learned resident magistrate erred in law in holding the Appellant and the 2nd Respondent jointly and severally liable to the 1st Respondent (hereinafter referred to as the Claimant) when the causes of action against them are not the same. That the learned resident magistrate erred in law and in fact in failing to hold that the accident vehicle assessment report dated 2nd November 2020 produced by the Claimant in his evidence clearly showed that the estimated pre-accident value of the Claimant's vehicle was Kshs. 600,000 and the salvage value thereof was Kshs. 350,000 and therefore under the Appellant's policy of insurance, its liability to indemnify the Claimant was Kshs. 250,000 (and not Kshs. 600,000) and the 2nd Respondent's liability for the tort committed by it was Kshs. 350,000 being the salvage value lost by the Claimant in the fire at its garage. That alternatively, in view of the co-Defendant's Notice issued by the Appellant to the 2nd Respondent and having held that the 2nd Respondent was liable to the 1st Respondent for the loss of his motor vehicle in the fire at its garage, the learned resident magistrate erred in law and in fact in nevertheless not entering judgment for the Appellant against the 2nd Respondent for Kshs. 350,000 together with interest thereon and costs.

5. The Appellant prayed this appeal be allowed with costs and the learned resident magistrate's judgment be set aside and substituted with a judgment in favour of the Claimant against the Appellant for Kshs. 250,000 and the 2nd Respondent for Kshs. 350,000 and an order for interest and costs be made as to 41.66% against the Appellant and as to 58.333% against the 2nd Respondent or alternatively judgment be entered for the Appellant against the 2nd Respondent for Kshs. 350,000 together with interest thereon and costs.

6. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 31st May 2024 contended that the issue of liability before the trial magistrate was that of breach of contract of insurance on the 1st Respondent and breach of duty of care on the part of the 2nd Respondent. That the Claimant had separate causes of action against each one of them, one for damage of the motor vehicle arising out of the road traffic accident and the other for damage to the Claimant's motor vehicle lying at the 2nd Respondent's garage. The Appellant stated that the 1st Respondent sued them by the fact that there was a comprehensive insurance cover for the motor vehicle. That the 1st Respondent's motor vehicle was involved in a road traffic accident for which the Appellant sought repairs from the 2nd Respondent. That the Appellant sued the 2nd Respondent because the 1st Respondent's motor vehicle was in the 2nd Respondent's garage. That during the hearing of the 2nd Respondent's case, no evidence was presented to court to show that the fire incident at its garage was caused by the Appellant. That the trial magistrate therefore erred in holding that the Appellant and the 2nd Respondent were jointly and severally liable.

7. The Appellant further submitted that the trial magistrate erred in entering judgment for the 1st Respondent for the sum of Kshs. 600,000 being the pre-accident value without subjecting it to the

salvage value assessed Kshs. 350,000. The Appellant relied on the holding in the case of *Bungoma Line Sacco Society Limited v Super Bargains Hardware (K) Limited* (2021) eKLR and *Silas Mutua Mberia v Muthoni Njue Veronica* (2021) eKLR. The Appellant prayed that this court enters judgment in favour of the 1st Respondent against the Appellant for the sum of Kshs. 250,000 and against the 2nd Respondent in the sum of Kshs. 350,000, and that the order interest and costs be made as to 41.667% against them and 58.333% against the 2nd Respondent.

8. The 1st Respondent in their submissions dated 25th October 2024 argued that there was a contract of insurance where the Appellant had insured the 1st Respondent's motor vehicle comprehensively for the amount of Kshs. 600,000 and the Appellant was obligated by contract to pay the 1st Respondent the sum of Kshs. 600,000 in the event the motor vehicle was damaged or suffered loss in unforeseen circumstance. That the trial court having evaluated the evidence was therefore correct in making a finding that the Appellant and the 2nd Respondent were liable jointly and severally to pay the 1st Respondent for the value of the motor vehicle. That the 2nd Respondent also bore responsibility as the motor vehicle was burnt while in their garage. That the argument for apportionment of liability as submitted by the Appellant is against the 2nd Respondent which does not affect the 1st Respondent. The 1st Respondent prayed that they are awarded costs of the appeal.

9. The 2nd Respondent filed submissions dated 4th November 2024 and stated that they were utterly aggrieved with the decision of the court in finding that the 1st Respondent proved his case against it when there was no privity of contract between them and the 1st Respondent. That it was not in doubt that there was a valid comprehensive insurance contract between the Appellant and the 1st Respondent and therefore a policy cover with the obligation of indemnity. That the genesis of the claim was when the 1st Respondent got involved in a road traffic accident that occurred on 18th September 2020 and his insured motor vehicle registration number KCV 971X was damaged and the Appellant was therefore obligated as per the comprehensive insurance cover to pay for the damages and/or loss incurred after the accident but the Appellant failed to fulfil his obligations. The 2nd Respondent submitted that from the 1st Respondent assessment report, the assessor remarked that the motor vehicle was already a write off and therefore severely damaged before the fire accident. That the trial magistrate therefore erred in holding that the Appellant and the 2nd Respondent were jointly and severally liable.

10. The 2nd Respondent submitted that the trial court failed to consider the 1st Respondent's assessor's report hence arriving at an erroneous award of Kshs. 600,000 which led to unjustly enriching the 1st Respondent while being prejudicial to the 2nd Respondent. That the 1st Respondent's assessor's report by Rally Motors Assessors dated 2nd November 2020 stated that the pre-accident value of the 1st Respondent's motor vehicle was Kshs. 600,000 and that the salvage value was at the sum of Kshs. 350,000. The 2nd Respondent relied on the holding in the case of *John Muchiri & Another v Hillary Kariuki Waceke* (2021) eKLR which cited with authority the case of *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR. The 2nd Respondent therefore prayed that the Appellant is held wholly liable to compensate the 1st Respondent.

11. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v. Associated Motor Boat Co.* (1968) EA 123 as follows: -

> " ... 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 ..."

12. I have considered the Record of Appeal dated 17th September 2024 and submissions by the parties. The issues for determination are: -

    a. Whether the Appellant and 2nd Respondent ought to have been held jointly and severally liable

    b. What amount in compensation was the 1st Respondent entitled to

13. The 1st Respondent, the registered owner of motor vehicle registration number KCV 971X Toyota Vitz was involved in a road traffic accident on or about 18th September 2020and the motor vehicle was damaged. Upon reporting to the Appellant, his insurer, the 1st Respondent was instructed to take the vehicle to the 2nd Respondent's garage for repairs where the vehicle was gutted with fire.

14. The 1st Respondent claimed for relief jointly and severally against the Appellant and the 2nd Defendant for the insured sum of Kshs. 600,000 being compensation for total loss of the motor vehicle. The suit went on trial and judgment delivered where the Appellant and 2nd Respondent were found jointly and severally liable in the sum of Kshs. 600,000 together with costs and interest.

15. On whether the Appellant and 2nd Respondent ought to have been held jointly and severally, the Appellant on the one hand held the position that the trial magistrate erred in doing so as the issue of liability was breach of contract on the part of the 1st Respondent and breach of duty of care on the part of the 2nd Respondent. That the 1st Respondent's cause of action against the Appellant was for damage of motor vehicle arising out of the road traffic accident while the cause of action against the 2nd Respondent was for damage of the motor vehicle lying at the garage. That only in tort can severally liable defendants become jointly and severally liable where their tortious acts combine to cause the same damage.

16. The 2nd Respondent on the other hand submitted that the learned magistrate erred in holding both the Appellant and the 2nd Respondent jointly and severally liable when in fact there was no contract between the 1st Respondent and the 2nd Respondent hence the 1st Respondent had failed to prove its case against the 2nd Respondent on a balance of probability.

17. Order 1 Rule 24 of the *Civil Procedure Rules* 2010 provided for a defendant claiming against a co-defendant as follows: -

    1. Where a defendant desires to claim against another person who is already a party to the suit: -

        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 action which is 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 as some 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 the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.

    2. No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.

18. This court has perused documents on record and established that the Appellant filed a co-defendant's notice of indemnity dated 25th September 2023 which stated as follows: -

> Take notice that the Claimant having brought this claim against Occidental Insurance Co. Limited as the First Respondent and you as the Second Respondent claiming judgment prayed for in the Statement of Claim dated 25th July 2023, if the First Respondent is held liable to the Claimant for compensation for total loss of his motor vehicle registration number KCV 971X as claimed, the First Respondent will claim against you a full and complete indemnity in respect of such compensation and in respect of all costs and other expenses incurred by the First Respondent by reason of the matter stated in the third and fourth particulars of breach of contract alleged against the Second Respondent and/or under the general law.'

19. The claim that the Appellant had against the 2nd Respondent was related to the 1st Respondent's claim. The 2nd Respondent stated that there was no contract between the 1st Respondent and the 2nd Respondent but with the evidence on record, it is not in dispute that the 1st Respondent took the motor vehicle to the 2nd Respondent's premises for repairs with instructions of the Appellant. The fact that the vehicle was burnt while in the custody of the 2nd Respondent's premises means that the Appellant was entitled to seek indemnity from the 2nd Respondent.

20. The court in *Republic v PS charge of Internal Security ex parte Joshua Mutua Paul* (2013) eKLR held as follows: -

> " Clearly, therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several, the Plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the torfeasor according to their individual liability... Either he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-defendants in the event that the Plaintiff only opts to recover from one of them"

21. Further, in the case of *Kenya Airways Limited v Mwaniki Gichohi & Another*, H.C. (Milimani Commercial Courts) Civil Case No. 423 of 2002, the court held: -

> " ...The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree..."

22. This court therefore finds that the trial court was right in holding the Appellant and the 2nd Respondent jointly and severally liable for the damage to the 1st Respondent's motor vehicle.

23. On what amount in compensation the 1st Respondent was entitled to, the Appellant submitted that the trial court erred in entering judgment for the sum of Kshs. 600,000 being the pre-accident value without subjecting it to salvage value assessed at Kshs. 350,000. The Appellant then prayed that this court enters judgment in favour of the 1st Respondent against the Appellant for the sum of Kshs. 350,000 and that interests and costs be made at the ratio of 41.667% against them and 58.333% against the 2nd Respondent.

24. The 2nd Respondent submitted that from the 1st Respondent's assessment report, the motor vehicle was already a write off and therefore severely damaged before the fire. The 2nd Respondent also argued that the 1st Respondent's assessment report stated that the pre-accident value of the motor vehicle was Kshs. 600,000 and the salvage value was Kshs. 350,000.

25. The case of *Kenya Broadcasting Corporation v Paul Mburu Muthumbi* (2008) eKLR cited with authority the case of *Khanna v Samuel* (1973) EA 225 as follows: -

> " In the *Khanna case*, it was held that "the damage to the car should be reduced by the extra amount for which the wreck had been sold". In the instant case, the Plaintiff's position is that the car was a write-off and that it only fetched Kshs. 245,000/= which the Plaintiff has infact subtracted from the pre-accident value of the car. The Plaintiff in my view is thus entitled to the difference between the pre-accident value and the salvage value."

26. In this case, the pre-accident value was Kshs. 600,000 while the salvage value was assessed at Kshs. 350,000. The 1st Respondent was therefore entitled to the difference between the pre-accident value and the salvage value which was in the sum of Kshs. 250,000.

27. In the upshot, the appeal is partly merited and allowed as follows: -

    a. The Appellant and the 2nd Respondent are held jointly and severally liable to indemnify the 1st Respondent.

    b. The 1st Respondent is entitled to the sum total of Kshs. 250,000

    c. The 1st Respondent is also entitled to costs of the suit and interest thereon at court rates.

    d. Each party to bear their own costs.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4TH DAY OF FEBRUARY, 2025.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellant

..... Advocate for the 1st Respondent

..... Advocate for the 2nd Respondent

Court Assistant – Shitemi