



**SMP Capital Limited v Ogutu (Civil Appeal E985 of 2023)  
[2025] KEHC 2324 (KLR) (Civ) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2324 (KLR)

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

**CIVIL**

**CIVIL APPEAL E985 OF 2023**

**TW OUYA, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**SMP CAPITAL LIMITED ..... APPELLANT**

**AND**

**DIANA ADHIAMBO OGUTU ..... RESPONDENT**

*(Being an appeal against the decision contained in the Ruling of Honourable Irene Ruguru Ngotho dated 8th of September 2023 in CHIEF MAGISTRATES' COURT AT NAIROBI CMCC NO. E1126 OF 2022 DIANA ADHIAMBO OGUTU VERSUS SMP CAPITAL LIMITED & VICTOR ODIWUOR)*

**JUDGMENT**

**Background**

1. This appeal emanates from the Ruling by Hon. Ruguru Ngotho in CMCC No. E1126 delivered 8<sup>th</sup> of September 2023. The suit was initiated in the lower court by Diana Adhiambo Ogutu respondent herein against SMP Capital Limited arising out of a road traffic accident on 17<sup>th</sup> October 2021 along Juja Road between motor vehicle KBV 421S driven by the Defendant in the primary suit and owned by the Appellant herein and another; and the Respondent who was a pillion passenger. The respondent allegedly sustained serious injuries for which the 2<sup>nd</sup> respondent in the primary suit was held blamed.
2. The appellant herein upon being sued jointly with the second defendant filed a preliminary objection vide chamber summons to have them struck out of the suit citing that they had been improperly sued as a party in this suit. The application was heard and dismissed by the trial court.
3. The Appellant being aggrieved by the above finding appeals to the high court against the named decision on the following grounds:



- a. That the learned magistrate erred in law in her ruling dated the 8<sup>th</sup> September 2023 by dismissing the Appellant's chamber Summons dated 29<sup>th</sup> of June 2022, which sought a prayer for the striking out of the Appellant from the suit as it is a financier and not the owner of a motor vehicle.
  - b. That the learned magistrate erred in law and in fact in her ruling dated the 8<sup>th</sup> of September 2023 by dismissing the chamber summons dated 29<sup>th</sup> of June 2022, on grounds that since the financier's name was registered in the log book, then he should be included in the suit till determination
4. The Appellants pray for orders that:
- i. The aforesaid decision to be set aside with costs.
  - ii. The Appellant's chamber summons dated 29<sup>th</sup> of June 2022, be allowed unconditionally and as drawn.
  - iii. The appellant be awarded costs of the Application in Nairobi CMCC No 1126 of 2022 Diana Adhiambo Ogutu versus SMP Capital Limited & Victor Odiwuor.

### **Submissions**

5. The appeal was canvassed by way of written submissions by counsel for the appellant while the respondent did not file any submissions. In his submissions, counsel for the appellant raises three issues; That the learned magistrate misdirected herself by relying on section 5.8 of the Traffic Act in her decision making which was not relevant to the application, that the court had discretion under order 1 rule10(2) of the civil procedure rules to order that names of any party improperly joined be struck out and the names of any person whose presence may be necessary in the suit to be added and; That the Appellant having been a financier was not a necessary party to the suit and should not have been enjoined.

### **Analysis**

6. This court has considered the entire record of appeal together with the appellant's submissions and noted there is only one issue for determination that is whether the appellant as a financier to the purchase of the subject motor vehicle should be enjoined as a necessary party to the suit.
7. The subject application was premised on the legal issue of misjoinder of parties with a prayer by the applicant to be struck out of the suit by virtue of being wrongly enjoined. This court has a duty to consider and re-evaluate the entire evidence as adduced in the trial court in line with the finding in *Selle & Another v Associated Motor Boat Co Ltd & Others* (1968) EA 123 that an appellate court is bound to reconsider and evaluate the evidence and to draw its own conclusion. In *Coghlan vs Cumberland* (1989)1Ch.704 the court held that on determining a matter of fact, the court has a duty to rehear the case and to reconsider the materials with such other materials as the court may have decided to admit.
8. The instant application was supported by grounds and an affidavit together with annexures sworn on 29<sup>th</sup> June 2024 by one Mehul Shah for the appellant company. The affidavit demonstrated that the appellant is licensed to conduct hire purchase business and on that basis, entered an arrangement and loaned Kshs. 1,300,000 to one Thomas Andiba Amani for the purchase of the motor vehicle KBV 421S which is the subject of this appeal. Secondly, the Appellant demonstrated that pursuant to the loan arrangement, the subject motor vehicle was registered jointly in the names of the appellant and Thomas Andiba Amani the loanee.



9. The legal provision governing motor vehicle accident claims is premised in section 5.8 of the Traffic Act which 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”

10. The proviso reads “unless the contrary is proved” clearly giving room for exceptional circumstances subject to proof by the alleging party. The appellant having raised a preliminary objection, had the burden of demonstrating why he should not be enjoined in a suit for liability for injuries arising out of accident by the subject motor vehicle. The trial court ought to have considered the existence of exceptional circumstances as raised by the appellant and come to a determination as to whether it was justified. My analysis of the application is that the motor vehicle was registered in both names of the Appellant and Thomas Andiba Amani whom the Appellant had lent a loan of kshs.1,300, 000 for purposes of purchasing the subject motor vehicle.

11. At this juncture it is apt for this court to consider two issues that arise out of a financier-loanee relationship. One is the understanding of the rationale behind having a motor vehicle which is the subject of a loan being co-registered in the names of the loanee and the financier. The rationale behind co-registration of a collateral was well enunciated in the case of Juhudi Kilimo Company limited V Amwayi & Another (suing as the legal representatives of the Estate of Grace Khasandi) & another (2024) eKLR, Ougo J, expressed herself on the issue that:

it is evident that the role of the appellant in this case, was purely that of a financier concerned with repayment of the funds lent to the 2<sup>nd</sup> respondent and it safeguarded its interest by ensuring the joint registration with the 2<sup>nd</sup> respondent as owners of the said motor vehicle.’

12. Similarly, in Wanyama V Mwaura & 2 others (2024) Eklr, the court stated that;

...the question of joint registration does not connote a complete transfer of interests to the lender but simply interests to the extent that the lender has a right to recover the loan amount in the event one defaults.’

For the reasons above, it would be imprudent of the trial court to decline to strike an applicant from a suit with clear evidence of a financier status.

13. In the case of Diamond Trust Bank limited v Richard Mwangi Kamotho(2017) eKLR the court observed inter alia that:

“....The mis-directions though seemingly partly motivated by the lower court’s desire to secure justice for the 1<sup>st</sup> respondent cannot be excused; a court of law cannot, by ignoring the law purport to achieve justice for one party through an injustice to another party...”

14. The second issue is whether the Appellant by virtue of being a financier and by virtue of having its name registered as co-owner becomes a necessary party in this suit. In the case of Equity Bank Limited vs. Humphrey Okuku & Another (suing as the personal representatives of the Estate of Douglas Ouma Okuku – Deceased) (2019) eKLR, the court ruled as follows regarding the question of the liability of a financier:

“I am of the considered view that the Appellant’s involvement was that of a mere financier despite having been registered as a co-owner of the subject vehicle and that it really had no control over the management and use of the said vehicle: if anything, a reading of the letter



of offer shows that the first defendant was responsible for ensuring the proper use of the vehicle and any risks that arose would befall him during the duration of the agreement. It is my inference therefore that the driver of the subject vehicle was at all material times acting as an agent/employee of the 1<sup>st</sup> defendant and not the appellant. Moreover, the appellant maintained that it was not necessarily a party to the suit. In seeking to understand what is meant by the term, I cite with approval the definition offered in *Investments and Mortgages Bank Limited vs Nancy Thumari & 3 others* (2015) eKLR where the High Court sitting on appeal set aside a decision refusing to strike out the appellant's name from the suit. The court borrowed its definition of a necessary party from *Jan Bolden Nielsen vs Herman Phillipus Styne & 2 others* (2012) wherein it held thus: "In my view, a necessary party is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the court." going by my analysis hereinabove coupled with the above definition, I am doubtful that the Appellant's participation in the proceedings will have an impact in the outcome thereof, having already determined that there is no nexus whatsoever between itself and the driver of the subject vehicle. In these circumstances, I am well convinced that the Appellant was not a necessary party to the suit and hence the learned trial magistrate ought to have considered all relevant facts and authorities placed before him and allowed the application by dismissing the suit against it.

15. From the above analysis this court discerns that the appellant in the instant appeal was not a necessary party in the suit and that the court would have easily determined the matter in his absence. Secondly, the appellant has clearly demonstrated the names and particulars of the co-registered loanee against whom liability should have been placed. Thirdly, the appellant had no responsibility for the proper use and management of the subject motor vehicle and the risks arising therefrom. At the material time, the vehicle was driven by Victor Oduor(2<sup>nd</sup> Defendant in the primary suit) an agent of Thomas Andiba Amani (loanee and owner) of the subject motor vehicle.
16. The civil procedure rules under Order 1, rule 9 on misjoinder and non-joinder of parties provides that:

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."
17. The trial court however had the discretion under the civil procedure rules to strike out the appellant's name from the suit and to add the names of the Thomas Andiba Amani as the appropriate party in the suit. Order 1 rule 10(2) provides that:

"(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

### **Determination**

18. For the above reasons this court finds that the appellant's name was added in the registration of the subject motor vehicle in order to secure its interest as a financier which would expire at the payment of the loan. It did not transfer to the appellant liability arising from the use and control of the motor



vehicle and the risks arising therefrom. The appellant should not therefore have been enjoined in this suit its name ought to have been struck out of the suit.

19. It is hereby ordered that: This appeal succeeds with costs to the appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF February 2025**

**ROA**

**HON. T. W. OUYA**

**JUDGE**

For the Appellant: Mr. Odipo

For Respondent: Ms Oginda

Court Assistant: Martin Korir

