



**Gichuki alias Susan Gichuki v Kaume alias Kinoti Kitts Kaume & 2 others (Civil Appeal E081 of 2023) [2025] KEHC 7908 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7908 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E081 OF 2023  
JK NG'ARNG'AR, J  
JUNE 5, 2025**

**BETWEEN**

**SUSAN WANGUI GICHUKI ALIAS SUSAN GICHUKI ..... APPELLANT**

**AND**

**KITT BARACKSON KINOTI KAUME ALIAS KINOTI KITT'S  
KAUME ..... 1<sup>ST</sup> RESPONDENT**

**ALLIANCE LEASING LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**GEORFFREY MUGAMBI KIMATHI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of the learned magistrate Hon. D. M. Ireri (PM) delivered on 8th September 2023 at Baricho in Baricho SPMCC No. 118 of 2021)*

**JUDGMENT**

1. This appeal is on quantum wherein in the trial court the Appellant and sued the Respondent claiming special damages, general damages for pain, suffering and loss of amenities, costs of the suit and interests in all the above damages and any other or further relief that this honourable court may deem just to grant. This arose from a road traffic accident that occurred on 24<sup>th</sup> March 2021 at around 3.30pm wherein it was alleged the Appellant was a passenger in motor vehicle registration No. KBR 753M along Karatina – Sagana road at Kibingoti area when the 3<sup>rd</sup> defendant so carelessly and negligently drove, managed and/or controlled motor vehicle registration No. KCZ 081J that he caused it to lose control and violently collided with the vehicle she was a passenger in as a result of which she sustained severe personal injuries
2. In response to the plaint dated 9<sup>th</sup> August 2021, the Respondents blamed the Appellant for contributing to the accident, that she suffered any injuries and incurred expenses as pleaded. On 14<sup>th</sup> April 2024 the parties' counsels recorded consent in the following terms: Judgment on liability be



entered in favour of the plaintiff against the defendants in the ratio of 85:15. Special damages be allowed as prayed. Plaintiff's documents as per the list dated 9.8.2021 be admitted in evidence without calling the makers. Police officer's court attendance of Kshs.7,000/- be in the cause. Parties to file submissions on quantum.

3. The consent was adopted by the court as its judgment but then Appellant filed an application dated 26<sup>th</sup> June 2023 in which she sought these orders: That the order made on 14.04.2023 closing the Appellant's case be set aside and she be allowed to reopen it, she be granted leave to amend her plaint, the amended plaint to be deemed duly filed upon payment of the requisite filing fees and she be granted leave to lead further evidence.
4. In his replying affidavit, Stacy Jayo stated she was an advocate of the High Court of Kenya and in conduct with this case and that the application was outright abuse of the court process, had been brought in bad faith and an afterthought meant to patch up plaintiff's case and further delay the conclusion of the case. That the second medical opinion meant to be introduced at that stage could have been available had the plaintiff exercised due diligence. The plaintiff had admitted nursing her injuries at the time of the hearing and closing of her case and she instructed her advocate to record a consent and close her case based on the injuries she had pleaded in the plaint.
5. That the parties consented on liability based on the pleadings and supporting documents by the plaintiff. She had also relied on the medical report by Dr. Okere reflected the true nature of the injuries she had sustained as a result of the accident herein. That she had not produced any evidence confirming the said aggravated injuries and the report by Dr. Wokabi did not make reference to any additional/ further treatment the plaintiff underwent after being examined by Dr. Okere. Further, the parties had already filed and served their submissions with the matter coming for mention to confirm filing of those submissions and if the application was going to be allowed, the same was going to be prejudicial to both 1<sup>st</sup> and 3<sup>rd</sup> defendants/respondents who would have no opportunity to counter her evidence.
6. In its ruling dated 8<sup>th</sup> September 2023, the trial court dismissed the application with costs to the respondent for the same lacked merit. The trial court referred to the above consent recorded by the parties' counsels on 14.4.2023 which was binding on the parties and cannot be set aside or varied by another consent or upon prove of one or either of the recognized grounds for setting aside a consent order laid down in *M & E Consulting Engineers Limited vs Lake Basin Development Authority & Another* [2015] eKLR. The ruling went on to state that the consent was entered into after the parties had confirmed that they had complied and filed all necessary documents in support of their respective cases.
7. That at the time the Appellant had on record the medical report by Dr. Okere which captured her injuries with the said doctor having relied on several mentioned reference materials. That it had not been stated that the said Dr. Okere was incompetent to prepare the medical report which was part of the consent recorded by the parties. There was also nothing in the supporting affidavit to show whether the consent was arrived at by means of fraud or collusion or by an agreement which was contrary to the policy of the court or without sufficient material facts. Therefore, the Appellant had failed to satisfy the conditions of setting aside the consent order hence the trial court refused to go into the merit or prayers sought in the application.
8. The Appellant is aggrieved by the decision of the trial magistrate and has preferred the present appeal on 4 grounds:
  - a. That the learned magistrate misdirected himself in law in law and in fact by basing its decision on an unpleaded issue.



- b. That the learned magistrate misdirected himself in law in law and in fact by failing to consider it he was minded to base his decision on the unpleaded issue that there was sufficient basis to vary the consent order.
- c. That the learned magistrate misdirected himself in law in law and in fact by failing to give due regard to substantive justice.
- d. That the learned magistrate misdirected himself in law in law and in fact by failing to consider the Appellant's submissions.

### **Appellant's submissions**

- 9. The appellant submitted that none of the parties raised the issue of setting aside the consent as an issue for determination hence it was wrong for the trial magistrate to base his decision on an issue not pleaded or raised by the parties. That she had placed sufficient material before the trial court to warrant the setting aside the consent and so the trial magistrate failed to appreciate that the consent in question was reached without sufficient material facts or in misapprehension or ignorance of such facts. Further, that at the time of recording the consent they were not aware of the severity of Appellant's injuries as they had relied on Dr. Okere's medical report which was not a true reflection of the injuries she had sustained.
- 10. The Appellant had indicated her occupation as a housewife hence unsafe to conclude she possessed medical knowledge as to the classification and gravity of her injuries and could not have known the fact in question for her to exercise due diligence. That courts have overlooked fault in as long as it does not occasion material prejudice to the innocent party for which she relied in the case of Phillip Keipto Chemwolo & Another vs Augustine Kubende [1986] eKLR. She went on to submit that had the learned magistrate considered the principle of proportionality or at least weighed the prejudice to be occasioned, he would have found that the Appellant would suffer great injustice.
- 11. That once her case was reopened and amendment allowed, the pleadings will be opened and the Respondents would be at liberty to amend their pleadings and file any necessary documents in support of their amendments and would also have a chance to cross examine the Appellant and her witnesses. If the application was denied, the same would greatly prejudice her for she will lack an opportunity to inform the court of the true nature of the injuries she sustained and judgment based on the initial injuries would occasion a miscarriage of justice.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents submissions**

- 12. The submitted that the main issue for determination is whether the Appellant has met the threshold for setting aside a consent order and whether the trial magistrate erred in dismissing plaintiff's application. They added that a consent judgment or order has the same effect as a contract and can only be set aside for reasons that would justify the rescission of a contract. They relied in the case of S M N vs Z M S & 3 Others [2017] eKLR and court had cited the grounds upon which it can be set aside. They relied on other cases therein as they further submitted that the trial magistrate ruled that the Appellant and her counsel had not placed any evidence before the court to demonstrate that the consent entered between the parties on 14.4.2023 and adopted by the court was obtained illegally or through fraud.
- 13. That they were denying the additional complaints which were unexpected as the Appellant proceeded with the consent while fully aware that re-examination might be required. There was also no indication that these complaints emerged after the consent order was made for the Appellant also had ample time to present all relevant documents before the consent order. The introduction of the medical



report dated 14.6.2023 proved her failure to exercise due diligence. There was no compelling reason to reopen plaintiff's case based on Dr. Wokabi's report and allowing her to reopen her case would greatly prejudice them for it would disturb the finality of the consent order and also additional delay for them. that the appellant had failed to provide sufficient grounds to set aside the consent order and reopen her case as they asked the Court to dismiss her appeal.

14. Having considered the pleadings in the subordinate court, rival submissions before me and the authorities cited, I am of the view that the following issues rise for determination:
  - a. Whether the trial court erred in dismissing the application for amendment.
  - b. Whether the Appellant sought to reopen the case.
  - c. Whether the Respondents will suffer any prejudice.

### **Analysis & Determination**

15. As to whether the trial court erred in dismissing the application for amendment of the plaint. Section 100 of the *Civil Procedure Act* provides for the general power to amend in the following terms: "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."
16. Order 8 Rule 5 of the Civil Procedure Rules also makes provision for general power to amend being; "(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."
17. These provisions have been interpreted and it is now settled that amendment of pleadings should be allowed at any stage of the case before judgment provided the amendment does not occasion injustice to the opposing party. In the case of *Harrison C Kariuki vs Blueshield Insurance Company Ltd* [2006] eKLR the court referred to the Court of Appeal decision in *Central Kenya Ltd vs Trust Bank Ltd* [2000] EALR 365 and held that: "The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no injustice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main thing is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined."
18. From the law and foregoing authority, it is evident that the court has unfettered discretion to allow an amendment on the grounds set out in the various authorities. The Appellant's case was as above, that she was a passenger on board motor vehicle KBR 753M which was violently knocked by Respondents vehicle registration No. KCZ 081J being driven by the 3<sup>rd</sup> Respondent. As a result, she sustained injuries as evidenced both in her plaint and Dr. Okere's medical report dated 25.5.2021 and he concluded by stating that he had relied on the police abstract, treatment noted from Naj Hospital, P3 form, radiological request form, laboratory reports, paediatric discharges summary and x-ray films.
19. It was in her said application that she sought amendment of the plaint so as to reflect the true injuries she sustained as reflected in Dr. Wokabi's medical report dated 14.6.2023 noting that the date of re-examination was 12.6.2023, 2 months after they recorded a consent which was adopted as the trial court's judgment. This therefore proved that the Appellant is not being candid when she claims that she is not introducing new evidence and does not intend to set aside the consent judgment/order. By



the time they entered into the said consent, the Appellant and her counsel were well aware she was to undergo a second medical examination on her own volition for this re-examination was not upon the Respondents request.

20. Nothing could be further from the truth that the said medical report and alleged new injuries she sustained during the accident is new evidence and which she is introducing not only after the consent judgment, closing of their cases but also after the parties have filed their final submissions awaiting a mention date for them to be given a judgment on quantum payable to the Appellant. The consent on liability was on liability as they awaited the proof on damages. They had the witness statements, the medical report and documents which they relied on and were aware of what the Appellant would be asking for from the court.
21. It is therefore true that the Respondents will be prejudiced for indeed they can be said that a match was stolen from them yet other than the omission of the claim to be added, they had not been made aware of the full claim. The Appellant cannot therefore claim that she was denied the opportunity to get substantive justice on the real issue that ought to be determined by the trial court. It is therefore my considered view the learned trial court exercised its discretion to achieve substantial justice in the matter by giving itself and the parties the opportunity to deal with the real issue in the matter.
22. As to whether the Appellant's case ought to be reopened, a perusal of the application clearly shows that the respondent sought to reopen the case and that the draft amended plaint attached hereto and which is also undated be deemed as duly filed and the suit be re-opened for further evidence. From what I have stated in the foregoing paragraphs, it is evident that the Respondents would suffer prejudice if the application was allowed as the same would also amount to setting aside their consent judgment which was binding to them and also already this court's judgment.
23. I do state the above being fully aware that once amendments are allowed parties are given a chance to give more evidence, cross examine and be cross examined or they can make use of the available multidoors to access justice made available under Article 159(2)(c) of our Constitution. There was an opportunity for the parties and their advocates to come and reason together which I can say has already been overtaken by the consent judgment entered and adopted by the trial court and the matter was only awaiting delivery of judgment on quantum payable to the Appellant since their submissions had been duly filed and served.
24. That said on the law and the authorities cited this appeal does not have merit and I find no reason to disturb the decision of the subordinate court. The appeal is dismissed with costs to the Respondents.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF JUNE 2025  
IN THE PRESENCE OF:**

Mutua for the Appellant

Musudi for the Respondents

Siele/Mark (Count Assistants).

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**J. NG'ARNG'AR**

**JUDGE**

