Mukira v Mutisya (Civil Appeal E1113 of 2023)
[2025] KEHC 8282 (KLR) (Civ) (11 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1113 OF 2023

DKN MAGARE, J

JUNE 11, 2025

BETWEEN

MOSES MUKIRA ..... APPELLANT

AND

JOHN KAMANZA MUTISYA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable V.M. Mochache (RM) given on 29.09.2023 in Milimani SCCC No. E3047 of 2023. The Appellant was the Claimant in the Small Claims Court.

2. The Appellant filed claim over loss or damages involving motor vehicle registration number KBL 735F, which occurred on 7.04.2021. The claimant set out particulars of negligence in the claim. He particularized special damages for Ksh 135,504/= being material damages. It did not bother the Appellant that the cause of action relates to a respondent who was not a resident of Nairobi County. It is not a matter for this appeal and I shall refrain from deciding this aspect.

3. Upon hearing and entering interlocutory judgment, the court proceeded by way of documents. Judgment was delivered on 4.10.2023 as follows:

    i. Liability 50:50

    ii. Special damages Ksh. 135,504/=

    iii. Costs of the suit

    iv. Interest at court rates

4. The Appellant was aggrieved and filed this appeal. He set out the following grounds of appeal:

a. The Honourable court erred in fact and in law by apportioning liability at 50:50 between the Appellant and the Respondent despite there being an interlocutory judgment against the respondent.

b. The Honourable court erred in fact and in law in holding that the appellant did not adduce any tangible evidence to establish the police carried out investigations and conclusion thereof, despite there being a police abstract on record.

c. The Honourable court erred in fact and in law in failing to appreciate that the police abstract on record indicates the particulars of the accident and results of the police investigations.

d. The Honourable court erred in law by holding that the doctrine of res ipsa loquitur allows the court to infer negligence from the circumstances in which an accident occurred, without considering the fact the doctrine also discharges the Appellant of the burden of proof to the respondent.

e. The Honourable court erred in fact and in law by introducing issues suo moto that were not pleaded by parties.

f. The Honourable court erred in fact and in law in failing to evaluate the evidence and submissions filed by the Appellant.

5. The Appellant filed humongous grounds of appeal. They are repetitive and anathema to a proper appeal. Further, the issues raised were largely issues of fact and not questions of law. They offend the requirement of Order 42 Rule 1 of the Civil Procedure Rules which provides as doth: -

1. 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.

6. The Court of Appeal had this to say about compliance with Rule 86 [now Rule 88] 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:
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> "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..."

7. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> " 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:
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> "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."

8. The matter proceeded by way of submissions. The Appellant filed submissions on 10.02.2024. The submissions are 11 pages long on one issue; liability. The respondent did not participate in the case. The appellant set out facts leading to the accident for which this court has no jurisdiction to review.

9. The only issue the appellant addressed was that interlocutory judgment is final and the court need not make a finding on liability. Reliance was placed in the case of Adan Hussein Ali & another v Geoffrey Ndiku Mutisya A.H. Hameed Traders [2015] eKLR and where Mabeya J stated as follows:

> The Plaintiff need not prove liability in instances where interlocutory judgment is entered since such judgment is considered final on the issue of liability. All the Plaintiff is required to do therefore is to prove damages. See Felix Mathenge v. Kenya Power & Lighting Co. Ltd (2008) eKLR where the Court stated:
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> "The role of the court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages."

10. In the case of Felix Mathenge v Kenya Power & Lighting Company Ltd [2008] eKLR, the Court of Appeal posited as follows:

> We would attempt to resolve the first issue bearing in mind the submissions made before us by Mr. Muturi, for the appellant. The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages. See Kavindu & Another Vs. Mbaya & Another [1976] KLR 164. We would agree,

therefore, with Mr. Muturi that it was an error on the part of the Hon. Commissioner of Assize to dismiss the suit for want of proof of liability instead of merely assessing damages.

11. It was submitted that under section 11(1) of the Small Claims Act, where there is default judgment, a decree should issue in favour of the claimant.

12. The submissions in regard to res ipsa loquitur are irrelevant to the determination of the matter herein as they go to evidence.

Analysis

13. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under section 38 of the *Small Claims Court Act* which provides as doth:

    1. A person aggrieved by the decision or an order 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.

14. However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second appeal was set out in the case of M/s Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

15. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

16. In Peter Gichuki King'ara vs IEBC & 2 Others, Nyeri Civil Appeal No. 31 of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) on 13.02.2014, the Court of Appeal held as follows: -

> " It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that

is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

17. The main issue for determination in this case is whether the trial court erred in law in apportioning liability where there was interlocutory judgment. The issue is not liability of the parties since liability qua liability is a question of fact. However, the issue before the court was whether, the court could apportion liability in the absence of pleadings to that effect and in light of the matter proceeding for formal proof.

18. A point of law is similar to a preliminary point of law but has a broader meaning. Justice Prof. J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

19. The court is bound by section 32 of the *Evidence Act* on aspects of the facts. The only question this court has been invited to determine, which is a question of law, was whether the court had jurisdiction to apportion liability on the face of pleadings and interlocutory judgment.

20. It is not correct to state that the court is not entitled to determine liability. However, it is not entitled to ignore interlocutory judgment. The matter proceeded by way of formal proof. In the case of Awich v Okello & another [2023] KEHC 2779 (KLR), R E Aburili, J posited as follows:

> It must be remembered that it was the appellant's duty to prove his claim against the respondents as he who alleges must prove. Even if the case proceeds by way of formal proof, the plaintiff is expected to adduce evidence to proof his or her case on a balance of probability. In the case of GNN & another v Geoffrey Gichohi Njeri [2019] eKLR the learned Judge relied on the observations of Emukule, J in the case of Samson S. Maitai & Anor v African Safari Club Ltd & anor [2010] eKLR, where Emukule, J observed thus;"... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.
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> Can hearing therefore, by formal proof, be similar to a full hearing." According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing,

to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits."

21. What constitutes formal proof was addressed in the case of Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia [2021] eKLR, where E. Muriithi posited as follows:

> The Court and the Appellant's Counsel made use of the term formal proof, which term this Court observes is not defined in the Civil Procedure Rules. The term formal proof has been considered by Emukule J in Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR and approved by Havelock J in Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR as follows: In the present circumstances however, the Defence was struck out and thus the Defendant does not have the opportunity or privilege to present its evidence and argument. In light of the absence of a Defence on the file, it follows logically, that the matter would proceed to formal proof. What therefore is hearing by formal proof" In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J observed thus; "..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption." 8. Can hearing therefore, by formal proof, be similar to a full hearing" According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits. I respectfully agree. 22. To reproduce the record, on 15th June 2018, the Court made the following directions: http://www.kenyalaw.org - Page 6/10Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia [2021] eKLR The defendant having been duly served with summons to enter appearance together with suit papers and whereas the same defendant has neither entered appearance nor filed any defence within the stipulated time, interlocutory judgment be and is hereby entered as prayed by the plaintiff through his Advocates M/S Mutembei & Kimathi Advocate. Case to proceed for formal proof.

22. In the case of Midans Services Limited & another v Ronald Kapute [2022] eKLR, C Meoli J posited as follows regarding formal proof:

> The same court stated in Eastern Produce (K) Ltd V. Christopher Atiado Osiro [2006] eKLR, that the onus of proof lies upon him who alleges and where negligence is alleged,

some form of negligence must be proved against the defendant. The court in that case cited the famous decision of Kiema Mutuku V. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated 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."

22. In Gideon Ndungu Nguribu & another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

" To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

23. There being no strict liability in Kenya, the Appellant was under duty to prove negligence. In formal proof the court has two options, to allow the suit on liability or dismiss the same. The court cannot apportion liability in law in absence of particulars of contributory negligence. In the case of *Mwatech Enterprises v Jihan Enterprises Ltd (Civil Appeal 127 of 2021)* [2023] KEHC 17524 (KLR) (27 April 2023) (Judgment), this court posited as follows:

In contributory negligence this is also informed by the decision of Court of Appeal (Gicheru Kwach and Tunoi, JJA in Maina Kaniaru and Another =vs= Josephat M. Nang'odun (1995) eKLR where the court stated:-"On appeal by the plaintiff it was held, allowing the appeal, that contributory negligence had to specifically pleaded by way of defence to plaintiffs claim of negligence; that, since there had been no such plea, the judge had erred in law in finding that the plaintiffs negligence had contributed to the accident.The authority, though not of course in any away binding on this court, is directly on the point and is in favour of the proposition on which the appellant relies herein. With all due respect to the learned judge it was not open for him to treat the matter as if there was a plea of contributory negligence before him. Again, it was an error on his part having disallowed the application to amend the defence to hold that he still had a discretion to consider the issue in final judgment."

42.This court has a right to interfere on the finding of liability, if it is shown that a finding was based on no evidence at all. In attempting to explain negligence and contributory negligence the court in Mois Bridge Quaru Ltd =vs= Martin Omuge Edoan, Justice E.K. Ogola, on 31/1/2022 stated as doth: -"What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by Alderson B in Blyth vs Birmingham Waterworks Co. (1843 – 60) ALL ER 478."Negligence is the omission to do something which a reasonable

man, guided upon those with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."In my view negligence and contributory negligence in infinite forms and would therefore depend on a case-to-case basis. Furthermore, once the plaintiff has established a prima facie case showing the defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant. In the instant appeal both the evidence and submission indicate that the Respondent was employed as truck driver to ferry stones from the Appellants quarry."

43In this case, once the Respondent established, prima facie that the Appellant was liable, there was no room, to find contributory negligence in absence of pleading to that that effect. The appellants non suited themselves by failing to plead contributory negligence.

24. Having not filed a defence, the court could only deal with liability of the Respondent and not the contributory negligence of Appellant. It could have been perfectly correct to dismiss the case for lack of proof but it was not open to share liability. In that context the finding of 50:50 liability was erroneous. In the absence of contributory negligence being pleaded, the Respondent can only be 100% liable. The scenario is different where contributory negligence is pleaded and the respondent testifies. In that case the court below is king as regards facts.

25. The appeal is allowed in the circumstances. The next question is the award of costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

26. Costs are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

27. Since costs follow the event, the respondents did not oppose the appeal. In the circumstances, each party shall bear its own costs in the appeal.

Determination

28. In the upshot, I make the following orders:

    a. Judgment and decree of the Honourable V.M. Mochache made on 14/9/2023 in Nairobi SCCC No. E3047 of 2023 is hereby set aside. In lieu thereof, I substitute with an order, finding the respondent 100% liable for the accident

    b. Each party shall bear its own costs.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Jedidah