NCBA Bank (Formerly National Industrial Credit Bank Kenya PLC) v Shikanga & another (Civil Appeal 24 of 2023) [2025] KEHC 8180 (KLR) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 24 OF 2023

AC BETT, J

JUNE 13, 2025

BETWEEN

NCBA BANK (FORMERLY NATIONAL INDUSTRIAL CREDIT BANK KENYA PLC) ..... APPELLANT

AND

DOUGLAS IHANJI SHIKANGA ..... 1ST RESPONDENT

ERNEST KANDU ISIAHO ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. R.N Akee (SRM) in Kakamega CMCC. No. 189 of 2018 delivered on 6th July 2022)

JUDGMENT

Background

1. The 1st Respondent (then the Plaintiff) sued the Appellant and the 2nd Respondent (then the 1st and 2nd Defendants) for general and special damages for injuries sustained in a road traffic accident involving motor vehicle registration No. KCL 446C Suzuki Maruti omnibus and Motorcycle registration KMCZ 215E at Mukumu area along Kakamega Kisumu road which occurred on 31st December 2017.

2. After hearing the parties, the trial court delivered a judgment in which it found the Appellant and the 2nd Respondent 100% jointly and severally liable for the accident. The court proceeded to award the 1st Respondent a sum of Kshs. 1,521,000/= being general and special damages as well as future medical expenses, plus costs and interest.

3. Being aggrieved with the judgement of the trial court, the Appellant lodged a memorandum of Appeal in which it faulted the trial court's decision and relied on the following grounds:-

1. That the learned trial Magistrate erred in fact and law in failing to appreciate that no liability could lie against the Appellant as a financier and or lender in the purchase of the motor vehicle registration number KCL 446C.

2. That the learned trial Magistrate erred in fact and law in failing to appreciate that the Appellant's co-registration of the motor vehicle registration number KCL 44C was exclusively as a security for the lender and that the risk over the motor vehicle at all times remained with the borrower, the 2nd Respondent, the 2nd Defendant in the lower court.

3. That the learned trial Magistrate erred in fact and law in failing to appreciate that at the material time of the road traffic accident, the subject motor vehicle was not in possession and or control of the Appellant and therefore liability could not attach to the Appellant whatsoever or at all.

4. That the learned trial Magistrate erred in fact and law in failing to appreciate that the driver of the subject motor vehicle at the material time of the accident was not an employee of the Appellant and was driving with neither express nor implied authority of the Appellant thus no vicarious liability would attach to the Appellant whatsoever or at all.

5. That the learned trial Magistrate erred in fact and law in failing to hold that mere registration of the Appellant as a co-owner in respect of the subject motor vehicle to secure financial interest did not invite risk or liability, vicarious or otherwise whatsoever or at all.

6. That the learned trial Magistrate erred in fact and law in failing to appreciate that there was no agency relationship between the driver of the subject motor vehicle and the Appellant and therefore liability vicarious or otherwise could not be imported or attach.

7. That the learned trial Magistrate erred in fact and law in failing to appreciate that the subject motor vehicle and or its driver at the material time of the accident was not driven and or driving on the Appellant's behalf and or on its benefit thus no liability could attach or at all.

8. That the learned trial Magistrate erred in fact and law in holding that the Appellant was jointly and severally liable yet the subject motor vehicle at the material time of the accident was not driven at the Appellant's request or instruction and neither did the Appellant have interest, concern nor control whatsoever or at all.

9. That the holding of the learned trial Magistrate flies on the face of established doctrines of excluding negligence liability against financiers or lenders ignored the doctrine of stare decisis thus rendering the entire Judgment as against the Appellant erroneous and a proper candidate for setting aside.

10. That the Judgment of the learned trial Magistrate was entered against the weight of the exculpatory overwhelming evidence tendered by the Appellant thereby deriving an erroneous finding of not exonerating the Appellant but condemning it to 100% liability.

Plaintiff's/1st Respondent's Case

4. The 1st Respondent's case vide its plaint dated 4th April 2018 was that on 31st December 2017, he was a lawful pillion passenger on board motorcycle registration No. KMCZ 215E being driven along Kakamega - Kisumu road when the Appellant's driver, agent or servant so negligently drove, managed, or controlled motor vehicle registration No. KCL 446 Suzuki Maruti Omni Bus that it encroached onto the lane of the oncoming motorcycle registration No. KCMC 215E resulting in a collision in which the 1st Respondent sustained multiple injuries. The 1st Respondent's case was that the Appellant

and the 2nd Respondent were the registered owners of motor vehicle registration No. KCL 446C and were wholly liable for the accident.

5. The 1st Respondent sought special damages in the sum of Kshs. 121,630/= as well as general damages and diminished earning capacity plus costs of the suit and interest.

1st Defendant's/Appellant's Case

6. The Appellant filed a statement of defence dated 23rd June 2018 in which it denied liability. It averred that it had only financed the 2nd Defendant/2nd Respondent to purchase the subject motor vehicle by equal monthly instalments with the aim of transferring the motor vehicle to the 2nd Respondent upon completion of payment of the purchase price.

7. It was the Appellant's defence that it could not be held vicariously liable for the acts or omissions of the 2nd Respondent as its rights and liabilities are only limited to those of a financier. The Appellant further pleaded that it had no knowledge of the accident, the particulars of negligence, injury and special damages set out in the plaint and gave notice that it would raise a preliminary objection to the suit.

8. The appeal was canvassed through written submissions.

Appellant's Submissions

9. The Appellant submitted that liability could not lie against a financier or a lender in a financed purchase of a motor vehicle and relied on the case of Equity Bank limited v Nathan Anyumba Onyango &2 others [2014] eKLR. They submitted that at the time of the alleged road accident, the Appellant Bank did not have any direct control or actual possession of the subject motor vehicle and so the trial court erred in fact and in law in entering judgement against it as its interest as a financier was limited to security for the loan only. The Appellant further relied on the case of Consolidated Bank Kenya Limited v Mwangi & another [2022] KEHC 3104 (KLR).

10. It was the Appellant's submissions that the registration of the Appellant as co-owner of the subject motor vehicle to secure its financial interest did not invite risk or liability.

11. The Appellant further contended that there was no proof of any agency relationship between the Appellant and the 1st Respondent since at the material time, the subject motor vehicle was not being driven on its behalf or for its benefit nor was the vehicle being driven upon its request or instructions.

12. Regarding who should bear the costs of the appeal, it was submitted that the Appellant ought to be awarded the costs of the appeal and costs of the suit in the trial court.

1st Respondent's Submissions

13. On his part the 1st Respondent submitted that the court ought to find that based on the law, the facts and evidence rendered by the parties herein, the Appellant had an interest in the subject motor vehicle.

14. Relying on Section 8 of the *Traffic Act* and Section 107 and 108 of the *Evidence Act*, the 1st Respondent argued that the Appellant and the 2nd Respondent took out a joint insurance of the subject motor vehicle at the time of purchase which insurance cover was still valid at the time of the accident. He submitted that the conduct of the Appellant in taking out a joint insurance cover is a manifestation that the Appellant was aware that the motor vehicle was in control of a competent driver of that vehicle for such insured liability to attach. Reliance was placed on the case of Lucena v Crawford (1806) 2

BOS PNR 269 at 302 where Lawrence J stated that an insurable interest is essentially the pecuniary or proprietary interest that the insured stands to lose if the risk attaches.

15. The 2nd Respondent also relied on the case of Anctol v Manufacture Life Insurance Company (1899) AC 604 where it was held:-

> " That basic requirement of an insurance contract unless waived, that it generally means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be 'a life or property or a liability' to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid."

16. It was the 2nd Respondent's submissions that he had proven, on a balance of probability that the Appellant, having taken out a third-party insurance over the subject motor vehicle, cannot claim that its driver was not their agent at the time of the accident. He therefore urged the court to dismiss the appeal with costs.

Analysis and Determination

17. This being a first appeal, the duty of the court is to review the evidence afresh and reach its independent conclusion as to whether to uphold the decision of the trial court while being mindful of the fact that it neither heard nor saw the witnesses testify. See Selle v Associated Motor Boat co [1968] EA 123.

18. From the memorandum of appeal and the parties' submissions, there are four issues for determination:-

    a. Whether liability could lie against the Appellant as a financier or a lender in a financed purchase of a motor vehicle.

    b. Whether registration of the Appellant as a co-owner of the subject motor vehicle invites risk or liability.

    c. Whether there was an agency relationship between the 2nd Respondent and/or driver of the subject motor vehicle and the Appellant.

    d. Who should bear the costs.

19. It was not disputed by the Respondents that the Appellant and the 2nd Respondent are jointly registered as owners of motor vehicle registration No. KCL 446C. The Appellant through its witness DWI testified that the Appellant company had advanced money for the purchase of the subject vehicle to the 1st Respondent and the entry of its name in the logbook was objectively intended to secure its interest as a financier. She produced a copy of the Chattels Mortgage Agreement between the Appellant and the 1st Respondent, a copy of the logbook and copies of statements of accounts to prove their case.

20. On the first issue as to whether liability could lie against the Appellant as a financier of the subject motor vehicle, I agree with the Appellant that as a mere financier, it had no control whatsoever over the subject motor vehicle. The vehicle was procured by the 2nd Respondent exclusively for his own use and he was the one who enjoyed the beneficial ownership thereof. No evidence was adduced by the 1st Respondent to suggest that the Appellant was in control of the vehicle or benefited from it except for loan repayment. The Appellant's only interest on the subject vehicle was the full repayment of its loan and its registration as owner would cease upon completion of the payment.

21. Section 8 of the *Traffic Act* provides:-

> " The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

22. From the reading of the above section, it can be deduced that whereas the names that appear in a logbook are prima facie deemed to be that of the owner of a motor vehicle, a party can adduce evidence to prove that notwithstanding the registration, a different party or entity is the beneficial and possessory owner thereof.

23. In the case of Nancy Ayiemba Ngaira v Abdi Ali (2010) eKLR, the court held as follows:-

> " There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question."

24. Regarding whether registration of the Appellant as a co-owner of the subject vehicle invites risk and liability in Consolidated Bank of Kenya Limited v Veronicah Wangechi Mwangi & Another [2022] KEHC 3104 (KLR) Majanja J. held that:-

> " 13. Ownership of a motor vehicle does not, of itself, establish liability for an accident. The plaintiff must prove that the owner is vicariously liable for the acts of the driver of the motor vehicle by showing that the driver is an employee or agent (see Jane Wairimu Turanta v Githae John Vickery and Equity Bank Limited & Munene Don ML HCCC No. 483 of 2012 [2012] eKLR). As whether the owner who has a financial interest in a motor vehicle has control over the driver, which is at the heart of this appeal, our courts have held that a financier's only interest in the security is to secure the repayment from the owner and it is not in control of the motor vehicle for that reason. The same position was taken by the Court of Appeal in Mohammed Hassan Musa and Another v Peter Mailanyi and Another NYR CA Civil Appeal No. 243 of 1998 [2000] eKLR stated as follows:
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> 'There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realise the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd, which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached'."

25. In its judgement, the trial court failed to address the issue of vicarious liability despite the fact that it was contested by the Appellant. He only stated that since the Appellant was a juristic person, it could not drive a vehicle and hence the 2nd Respondent drove it on its behalf and so the Appellant and 2nd Respondent were 100% jointly liable for the accident. With respect, this was simplistic way of dealing with the issue of liability and led to an erroneous conclusion.

26. Upon reviewing the evidence, I find that the 2nd Respondent was not only the sole beneficial owner of the subject motor vehicle but was also the one in possession and exclusive control as was confirmed by the police abstract that indicated that he was the owner thereof. No vicarious liability could lie against the Appellant in respect of any acts of negligence committed by the 2nd Respondent and or his employees.

27. On whether there was an agency relationship between the 2nd Respondent and/or driver of the subject motor vehicle and the Appellant, having already determined that the 2nd Respondent was the de facto sole owner of the suit motor vehicle, there was absolutely no agency agreement between him and/or his driver and the Appellant financier. At no point was the Appellant the owner of the subject vehicle as the purchaser was the 2nd Respondent; albeit with financing from the Appellant. Simply put, the Appellant had nothing to do with the accident at all.

28. In the case of Equity Bank limited v Naftali Anyumba Onyango & 2 others (supra), while addressing the issue of the relationship between litigants Sitati J said:-

> " There was no relationship either in employment, agency or servant between the appellant and the driver who drove the motor vehicle which allegedly caused the said accident."

29. The 1st Respondent argued that from the registration of the Appellant as a joint insured it can be deduced that the Appellant's conduct in taking out joint insurance cover is a manifestation that it was aware that the motor vehicle was in the control of a competent driver for such insured liability to attach. According to him, by taking out the joint insurance cover, the Appellant assumed the risk and cannot claim that the driver in control of the motor vehicle was not their agent at the time of the accident.

30. The 1st Respondent further posited that the concept of insurable interest is essentially the pecuniary or proprietary interest that the insured stands to lose if the risk attaches.

31. I have perused the Chattels Mortgage Instrument between the Appellant and the 2nd Respondent. Clause 5 (m) of the Mortgage Instrument obligates the 2nd Respondent to take out a comprehensive insurance cover in the joint names of the 2nd Respondent and the Appellant while the mortgage remains in force. In the circumstances, the person who paid for the insurance cover was the 2nd Respondent and the fact that the cover is issued in the joint names of the Appellant and the 1st Respondent is in order to secure the interest of the Appellant as a financier. The financier's interest was an insurable interest as it held a lien over the subject motor vehicle and hence its demand for a comprehensive insurance cover as a requisite condition of the mortgage. There is no indication of any intention to assume a risk by virtue of the mortgage.

32. Ultimately, I find the appeal meritorious. The only issue left to be addressed is who should bear the costs.

33. Costs, it is said, often follow the event. It is only fair that the Appellant have the costs of the suit as well as costs of the appeal as compensation for the trouble taken in pursuing its case. See Cecilia Karuru Ngaya v Barclays Bank of Kenya & another [2016] eKLR.

34. The upshot is that the appeal is allowed. The judgement of the lower court is set aside. In lieu thereof, I enter judgement on liability at 100% as against the 2nd Respondent. The Appellant shall have the costs of the suit and the appeal to be paid by the 2nd Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF JUNE 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Sang holding brief for Mr. Ooko for the Appellant

No appearance for the Respondents

Court Assistant: Polycap