



**Fortis Limited v Muthama & another (Civil Appeal E410 of 2024)
[2025] KEHC 11940 (KLR) (Appeals) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11940 (KLR)

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

APPEALS

CIVIL APPEAL E410 OF 2024

DKN MAGARE, J

JULY 23, 2025

BETWEEN

FORTIS LIMITED APPELLANT

AND

MARTIN MUINDI MUTHAMA 1ST RESPONDENT

YAN FU 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. C.A. Okumu dated 23.2.2024, arising from Milimani SCC COMM. No. E627 of 2023. The appellant was the 1st defendant in the matter.
2. The Memorandum of Appeal raises the following grounds:
 - a. The trial court erred in failing to consider the evidence by the Respondent that it had sold motor vehicle registration number KCQ xxx B.
 - b. The trial court erred in law and fact in awarding the Respondent excessive ksh. 343,500/= repair costs without evidence.
 - c. The trial court erred in law and fact in failing to find that the chassis number of the Respondent's motor vehicle was different from the chassis number of the car allegedly involved in the accident.
 - d. The trial court erred in law and fact in finding in favour of the Respondent without evidence.
 - e. The trial court erred in failing to consider the Appellant's submissions.



3. The Statement of Claim dated 10.2.2023 claimed repair costs of Ksh. 373,700/= as special damages in respect of a road traffic accident in which the Respondent's motor vehicle was extensively damaged.
4. It was pleaded that on or about 11.2.2020, the Respondent was driving his motor vehicle registration number KCT xxxP along Ngong Road when the Appellant's agent negligently drove motor vehicle registration number KCQ xxxB by accelerating while joining the highway and as a result of which the said motor vehicle hit the Respondent's motor vehicle. The following special damages were pleaded:
 - i. Repair costs Ksh. 332,200/-
 - ii. Tracing charges Ksh. 30,000/-
 - iii. Towing fees Ksh. 11,500/-
 Total Ksh. 332,700/-
5. The Appellants as 1st Respondent entered appearance and filed a Response dated 19.7.2023 denying the particulars of negligence and injuries pleaded in the claim. Particularly, the Appellant averred that it had sold the subject motor vehicle and the same was not in its possession or use.
6. The lower court heard the parties and proceeded to render judgment in which the court allowed the claim. Aggrieved by the finding of the lower court, the Appellant lodged a memorandum of appeal hence this appeal.
7. In the submissions dated 11.12.2024, the Appellant submitted that under Section 8 of the [Traffic Act](#), registration was not conclusive proof of ownership of the motor vehicle. Reliance was placed among others on *Ali v Ashur Ahmed Transporters Limited* Civil Appeal No. 138 of 2019.
8. The Respondent filed submissions dated 8.12.2024, where it was submitted that a person whose names appears on the log book is the presumed owner and the Appellant failed to provide contrary evidence. Reliance was placed inter alia on *Saidi v Haji & Another* (2015) eKLR. The Respondent also relied on Section 107 of the [Evidence Act](#).

Analysis

9. 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.
10. An appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters of law it is. An appeal on matters of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of [Otieno, Ragot & Company Advocates v 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 v Bernard Munene Ithiga* (2016) eKLR).”



11. Then what constitutes a matter of law? In *Twaber 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 v 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 v Oxney* (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani v 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 v David Marakaru* (1960) EA 484.”

12. To this court, even where the matter involves application of judicial discretion, such discretion though unfettered, must be exercised in accordance with the law. This Court therefore is persuaded that the exercise of judicial discretion is a matter of law. In *Peter Gichuki King'ara v 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.”

13. A matter 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 v 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.

14. The Appellant’s position is that registration of the motor vehicle ought not to have been taken as conclusive proof of ownership. The Appellant relied on the sale agreement dated 1.8.2018 and a delivery note of the same date and averred that the transfer could not be immediately done since the buyer, one Li Haixiang was a foreigner who did not have an NTSA TIMS Account at the time.

15. To this court, the issue of ownership was the primary issue to be determined. It was upon the 1st Respondent to present evince that the Appellant was the registered owner of motor vehicle registration number KCQ xxxB and the 2nd Respondent was vicariously liable.



16. However, registration is not conclusive proof of liability. It was the Appellant's case that the motor vehicle was sold and delivered to one Li Haixiang, a foreigner on 1.8.2018. The Appellant relied on the delivery note and a sale agreement slip both dated 1.8.2018. In *Securicor Kenya Limited v Kyumba Holdings Limited* [2005] 1KLR 748, the Court of Appeal found as follows:

“It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle was the appellant.”

17. The second respondent was sued as the owner of the suit motor vehicle. He did not defend the case. The court had before it documents showing prior sale of the vehicle. By ignoring the presence of the 2nd respondent and finding a stranger liable vicariously for the accident, the court made a decision-based on no evidence. In the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Pauline Akai Lokuruka & another* [2018] eKLR, the court [E. M. Githinji, Hannah Okwengu & J. Mohammed, JJA) addressed the question of perverse findings of fact that reasonable tribunal would have arrived at the same as follow:

- (35) In the same Peter Munya decision the Supreme Court appreciated that, even where the appellate court is restricted to determining matters of law, it is not expected to shut its mind to the evidence on record. The Court set out the limits of that consideration in the following terms:

“Much as the Court is free to navigate the evidential landscape on appeal, it must, in a distinct measure, show deference to the trial Judge: regarding issues such as the credibility of witnesses and the probative value of evidence. The Court must also maintain fidelity to the trial record. The evaluation of the evidence on record is only to enable the Court to determine whether the conclusions of the trial Judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same.”

18. The duty on the 1st respondent was to prove the case against the Appellant and the 2nd respondent. As against the 2nd Respondent, the case proceeded by way of formal proof. What constitutes formal proof was addressed in the case of *Samson S. Maitai & Another -v- African Safari Club Ltd & Another* [2010] eKLR, where the court stated as follows:

“..... 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.”

19. In the case of *Peri Formwork Scaffolding v White Lotus Projects Limited* [2021] eKLR, A. Mabeya, FCIArb posited as follows:



9. *Rosaline Mary Kabumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court held: -
- “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.
8. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth.
20. In this case, the court proceeded on the premises that ownership is sine qua non liability. The mere fact that a person owns a vehicle does not make him liable for the accident that it gets into. There has to be that the driver was driving as an agent of the owner. In *Jane Wairumu Turanta v Githae John Vickery & 2 others* [2013] KEHC 5826 (KLR), R. Ougo, J, held as follows:
- The doctrine of vicarious liability was expounded in the case of *Morgan v Launchbury* (1972)2 All ER 606 which stated that to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. Moreover, the fact that the applicant was the owner of the vehicle by way of the logbook being in its name, such ownership was not sufficient to create vicarious liability for the negligence of anyone who happened to drive it.
- It is a common ground now that the Munene Don was not the servant of the applicant within the normally accepted meaning of vicarious liability from the facts Munene Don and the bank would not ordinarily be vicariously liable for the tort of Munene Don since he was not an agent. The case of *HCM Anyanzwa & 2 others v Lugi De Casper & Anor* (1981) KLR 10 stated that “vicarious liability depends not on ownership but on the delegation of tasks or duty”
21. The court sadly, found as follows:
- The Respondent did not enjoin the person whom they sold the motor vehicle registration number KCQ xxxB as a party in the instant suit thus the Court finds the 1st and 2nd Respondents jointly and severally liable for causing the said accident.
22. The Appellant was not under such a duty. The 2nd Respondent was already party to the suit as the owner of the suit motor vehicle. He did not defend the claim. The police abstract was not impeached in terms of ownership. The court therefore fell into error by placing the burden on the appellant to sue a person that the vehicle was sold to, when the person in possession was already a party.
23. The net effect is that I set aside the judgment of the lower court in its entirety. In lieu thereof I dismiss the suit against the Appellant. Judgment against the 2nd respondent is not affected.
24. On costs, the award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionary. 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.

25. In the circumstances, each party shall bear their own costs in the appeal.

Determination

26. In the upshot, I make the following orders: -

- a. Judgment of the Small Claims Court dated 23.2.2024 is set aside.
- b. Judgment against the 2nd respondent is not affected.
- c. The claim against the Appellant is dismissed.
- d. Amounts deposited in court are refundable to the depositor.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kipkurui for the Appellant

No appearance for the Respondent

Court Assistant – Michael

M. D. KIZITO, J.

