



**Occidental Insurance Company Limited v Kajambo & another (Civil Appeal E170 of 2024) [2025] KEHC 12074 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12074 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E170 OF 2024**

**F WANGARI, J**

**JULY 7, 2025**

**BETWEEN**

**OCCIDENTAL INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**MTILI SAIDI KAJAMBO ..... 1<sup>ST</sup> RESPONDENT**

**FAB AUTO WORKS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. Muthoni on 05/06/2024 in Mombasa SCCC No. E094 of 2024)*

**JUDGMENT**

1. Through the Statement of Claim dated 14/02/2024, the Claimant/ 1<sup>st</sup> Respondent claimed against the 1<sup>st</sup> Respondent/ Appellant, inter-alia compensation for loss of motor vehicle as a result of an accident which occurred on 09/03/2021. The vehicle had been comprehensively insured by the Appellant and the claim was out of the insurance policy no. COMP/07/334372/05.
2. The 1<sup>st</sup> Respondent/ Appellant through the Response to Statement of Claim dated 13/03/2024 admitted that the Claimant's motor vehicle was comprehensively insured but the cover was repudiated on grounds of concealment and misrepresentation of facts. It was admitted that the Claimant had been directed to take his vehicle for repairs at the 2<sup>nd</sup> Respondent's garage before the repudiation of the insurance cover.
3. The 2<sup>nd</sup> Respondent filed its response dated 26/02/2024 pleading that the claim was non-suited against it and it counter-claimed Kshs. 364,182/= being storage charges for the claimant's vehicle.
4. After hearing the parties, judgment was entered in favour of the 1<sup>st</sup> Respondent against the Appellant for compensation as claimed and special damages of Kshs. 5,000/= being valuation report fees. The



judgment on counter claim against the Claimant/ 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent was also entered in favour of the party against the Appellant.

5. Aggrieved by the finding of the Trial Court, the Claimant/Appellant lodged a Memorandum of Appeal dated 19/06/2024 hence this Appeal. The appeal against the Claimant/ 1<sup>st</sup> Respondent was withdrawn. The appeal is now against the award of counter-claim in favour of the 2<sup>nd</sup> Respondent against the Appellant.
6. The appeal was canvassed by way of written submissions. Both parties complied by filing their rival submissions in support of their positions.

### **Analysis**

7. Having perused through the pleadings filed and the submissions on record, the issue for determination is;
  - a. Whether the court erred in entering judgment on counter-claim in favour of the 2<sup>nd</sup> Respondent against the Respondent.
  - b. Who bears the costs.
8. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (see *Peters vs Sunday Post Limited* [1958] EA 424 and *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123)
9. It is not in dispute that the Claimant's/ 1<sup>st</sup> Respondent vehicle was involved in an accident. It is also not in dispute that the said vehicle was comprehensively insured by the 1<sup>st</sup> Respondent/ Appellant. Further, it is also not in dispute that the Appellant directed the 1<sup>st</sup> Respondent to take his vehicle for repair at the 2<sup>nd</sup> Respondent's garage. It is a fact that after the insurance company declined to make good the claim, the vehicle remained at the 2<sup>nd</sup> Respondent's garage. Someone must pay for the said storage charges.
10. The lower court ordered that the Appellant do meet the storage charges. The Appellant on appeal states that the learned Magistrate erred in law by misapplication of procedural laws in the unjust imposition of liabilities. It was submitted that Order 7 Rule 3 of the [Civil Procedure Rules](#) requires counter-claims to be assessed on their own merits.
11. The Appellant also faulted the court for issuing an order that the Appellant do bear the costs of the 2<sup>nd</sup> Respondent. It was prayed that the judgment of the lower court be set aside and the matter be remitted to the magistrate's court to be considered on merits.
12. Order 7, Rule 3 of the [Civil Procedure Rules](#) provides as follows;

“ A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or



counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”

13. Further, Order 7, Rule 8 provides as follows;

“Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.”

14. From the above, the counterclaim is made against the Plaintiff or any other person not in the Plaint. If a Defendant is to file a claim against a co-defendant, nothing bars the party from filing a separate law suit. This allows the affected party to file its defence to counterclaim, and that was not accorded to the Appellant. The 2<sup>nd</sup> Respondent is at liberty to file a suit against the Appellant for the storage charges, and the same shall be determined on merits. The appeal succeeds that the extent that judgment in favour of the 2<sup>nd</sup> Respondent is hereby set aside. The rest of the judgment remains undisturbed.

15. On the issue of costs, the award is discretionary. The appeal being partially successful, each party shall bear its own costs.

#### **Determination**

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

- a. The Appeal is partially successful, and judgment entered in favour of the 2<sup>nd</sup> Respondent against the Appellant is hereby set aside.
- b. The 2<sup>nd</sup> Respondent is at liberty to file a separate suit against the Appellant
- c. Each party to bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 7<sup>TH</sup> DAY OF JULY, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Appellant

N/A by the Respondent

Ms. Getrude, Court Assistant

