Kagema v Muraguri (Civil Appeal E068 of 2022)
[2025] KEHC 13109 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13109 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E068 OF 2022

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

JEREMIAH KARIUKI KAGEMA ..... APPELLANT

AND

JOHN MAINGI MURAGURI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. F.K. Muguongo (SRM) given on 31.10.2022 in Nyeri CMCC No. E082 of 2020. The appellant was the successful plaintiff in the court below. The appeal will be dismissed shortly.

2. The Appellant filed suit wherein he claimed as part of prayers a sum of Ksh. 178,028/= with interest from 18.03.2020. The Appellant filed suit being Nyeri CMCC No. E082 of 2020 on 11.11.2020. He is said to be the owner of motor vehicle registration number KBU 328J Toyota Hiace Matatu. He stated that he was driving the said car. It is clear from the evidence on record it was a public service vehicle.

3. My dictionary, tells me the vehicle was under Namuga Sacco. It is not clear which vehicle the appellant was driving as the matatu was owned by the respondent while the appellant owned the Saloon car. The pleadings are confusing at best.

4. He set out particulars of negligence, which are not of any use since liability is not an issue. He pleaded that the vehicle was repaired by the insurance. This prompted him to have an alternative means of transport. He claimed loss of user. He then hired a self-drive vehicle for a humongous amount of money during the period of repairs. He particularized the car hire receipts for a period starting 11.02.2020 to 30.03.2020. He is not, rightly so claiming the cost of repairs. However, the nature and extent of the damages are not set out in the plaint. There is no report to the extent of repairs, period required and when they were repaired. He also claimed for the police record and a sum of Ksh 10,678/= from APA being a policy excess.

Evidence

5. Upon hearing the parties, the court dismissed the suit in limine with costs. Since the question turns not on evidence but the nature of claim, it is unnecessary to set out the entire evidence of parties. The court will nevertheless summarize the appellant's evidence. The appellant testified on the occurrence of the accident and produced all the supporting documents. In support of his evidence, he reiterated contents of paragraphs 3-10 of the plaint. Paragraphs 13-24 covered fuel receipts.

Submissions

6. The Appellant submitted heavily on liability that the court erred in dismissing his claim for Ksh. 162,800/=. He stated that on analysis of the judgment, the same supports the appeal. He submitted that he satisfied the burden of proof as required under Section 107 of the *Evidence Act* and therefore proved his case on a balance of probabilities. He insisted that the claim for excess insurance cover cannot be sustained as the same is a statutory obligation and cannot be correct as they are special damages.

7. Respondent submitted that the claim ought to fail. They stated that even if the appellant was driving his own vehicle he ought to use fuel. They agreed with the court that there was no justification for special damages.

8. On the question of policy excess the respondent submitted that the same could not be granted.

Analysis

9. 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 subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

10. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

11. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

12. The costs pleaded in the nature of special costs were too remote. They are sunken costs and cannot be recovered. Even when the appellant was using his vehicle, if it were a private vehicle, then fuel was still to be paid. Therefore, fuel is a remote damage. It could not be reasonably foreseen that if a matatu is involved in an accident its owner will abandon the normal way of transport and hire a self-chauffeured car. It smirks of opportunistic self-aggrandizement not related to the accident. The fuel cost is remote. In the persuasive English case of Hadley vs. Baxendale (1954)9 Exch. 341 the test for recoverable damages as based on remoteness was discussed as doth:

    1. The damages must therefore flow naturally from the breach.

    2. The damages, although difficult to predict in the ordinary case, were reasonably foreseeable because the unusual circumstances were communicated to the defendant.

13. The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law but one of fact, dependent on the circumstances of each particular case. The plaintiff must also demonstrate a nexus between the damages suffered and the negligence attributable to the defendant. I am fortified in this view by the decision in African Highlands Produce Limited V. Kisorio, KLR (2001) 172, where the Court of Appeal emphasized that:

> " It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues. He cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the Defendant ... The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case..."

14. Secondly the nature of the claim was for special damages. They must not only be particularized and pleaded but must be specifically proved. Special damages must be both pleaded and proved before they can be awarded by the court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

15. A party cannot throw special damages to the court without linking causation to damages. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it.

16. Therefore, what was the link between damages pleaded and the accident? The accident herein was for a public service vehicle and a private car. Though the appellant pleaded to be the owner of the public service vehicle, he led evidence that he was the owner of the car. Loss of user must relate to the accident not the life of the proprietor. He was not using the vehicle as a private car but a means of earning a living. No particulars of loss were pleaded. Further, the car hire services were not in any way connected to the accident involving the matatu.

17. Secondly, there was no evidence of damage, repair and assessment. It is not possible to know whether there was any damage, the length of repair period and the period of loss of user. In addition, there is no evidence led on how much in terms of profits were lost. The appellant could as well use a private jet from his village to Nairobi. He must however link the use of that jet to the loss.

18. In unlikely event the car was the one damaged, the extent of damage was not given, or how many days were required for repair if at all. Was there evidence that the vehicle was damaged in that accident? With all these questions the Appellant failed to prove damage.

19. Addressing question of loss of user in the case of Equity Bank Ltd v Gerald Wang'ombe Thuni [2015] KEHC 2474 (KLR), Ngaah Jairus J posited as follows:

> The Court then cited with approval its earlier decision in the case of Siree –v- Lake Turkana El Molo Lodges (2002) 2EA 521 where it had said:
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> > "This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages"
> >
> > It was the court's view that damages for loss of user are quantifiable meaning that they can only be pleaded as special damages and failure to plead them as such is fatal to a claimant's claim under this head; in this regard the court relied on its decision in Maritim & Another –v- Anjere (1990-1994) EA 312 at 316, where it was emphasised:
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> > > "In this regard, we can only refer to this court's decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically

proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

Having made references to its earlier decisions on the question of special damages and in particular damages for loss of user the Court came to the conclusion that:

> "It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given."
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> With the foregoing explicit pronouncements on the law it is unnecessary to belabour the point that a claim for loss of user is a claim in special damages and it can only be awarded where the pleadings in which it is sought meet the threshold for such claims.

20. More fundamentally, a party must be held to their pleadings. The appellant pleaded that he was the owner of motor vehicle registration number KBU 328J. However, he failed to prove loss of user as alleged. It is settled law that parties are bound by their pleadings and cannot depart therefrom. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima J, emphatically held that a party is bound to plead their case fully and will not be permitted to advance a different or inconsistent case at the hearing.

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

21. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The

Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

22. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

23. The last issue is the amount paid as policy excess, which is not recoverable under tort. This is the Appellant's contribution to top up his own insurance to avoid moral hazard. It has nothing to do with the culpability of the tortfeasor. The policy excess is part of the insured loss that an insurer bears when talking out a comprehensive insurance to avoid him being careless since the insurance is paying the entire claim. It is a self-absorbing loss that the Appellant must take. By refunding him, he will benefit and be in a status of taking a moral hazard.

24. The claim for loss of user is insufficiently pleaded and was not proved. Consequently, the appeal lacks merit and is accordingly dismissed. The next issue is costs. Costs are 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.

25. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

26. The Supreme Court 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. The Respondent defended the appeal. He is entitled to costs of Ksh. 65,000/= since costs follow the event.

Determination

28. The upshot of the foregoing is that I make the following orders: -

a. The appeal lacks merit and is dismissed with costs of Ksh. 65,000/=.

b. 30 days stay of execution.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

Peter M. Muthoni & Co. Advocates for the Appellant

Gori Ombongi & Co. Advocates for the Respondent

Court Assistant – Michael