Mugwanja v Acceler Global Limited (Civil Appeal E006 of 2024) [2025] KEHC 13200 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E006 OF 2024

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

JOHN KINYANJUI MUGWANJA .... APPELLANT

AND

ACCELER GLOBAL LIMITED .... RESPONDENT

(Being an appeal from judgment and decree of the Honourable P.K. Rotich SPM delivered on 15.03.2024 in Chief Magistrate Court at Milimani CMCC No. E3326 of 2020)

JUDGMENT

1. This is an appeal from the Ruling of the Honourable P.K. Rotich SPM delivered on 15.03.2024 in Chief Magistrate's Court at Milimani CMCC No. E3326 of 2020. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal. The appeal is on the Trial Court's finding on judgment. and is based on 2 grounds, to wit:

    a. That the trial court erred in law and fact by finding that the Appellant was to blame for the accident.

    b. That the learned trial magistrate erred in law and in fact by failing to consider the Appellants evidence that he had sold the subject matter vehicle when the accident occurred.

2. In summary, the appellant contended that, the Appellant contends that the trial court fell into error both in law and fact by holding him liable for the accident. It is further argued that the learned trial magistrate failed to take into account the Appellant's evidence showing that, at the time of the accident, he had already sold the subject motor vehicle and was therefore not responsible for its involvement in the accident.

3. The Respondent filed a Plaint dated 16.07.2020 in which it named Daniel Mwango as the 1st Defendant, the Appellant as the 2nd Defendant, and David Nganga Mwangi as the 3rd Defendant. It is noteworthy that the 1st and 3rd Defendants are not parties to the present appellate proceedings.

4. The Respondent averred that it was the registered owner of motor vehicle KCF 799J, which at the material time was insured by UAP Insurance Company. It was further averred that Daniel Mwango was the beneficial owner of motor vehicle KBB 657A, which had previously been registered in the name of the Appellant but was, at the material time, registered in the name of the 3rd Defendant. The said motor vehicle was allegedly involved in a road traffic accident along North Airport Road on 22.07.2017.

5. According to the Respondent, its driver was lawfully driving motor vehicle KCF 799J when Daniel Mwango, either personally or through his agent or servant, negligently drove motor vehicle KBB 657A, thereby causing the accident. The Respondent particularized the alleged negligence of Daniel Mwango at paragraph 7 of the Plaint and sought Kshs. 368,206 as the cost of restoring its vehicle to roadworthiness.

6. In a Defence dated 15.05.2021, the Appellant denied the contents of the Plaint. The Appellant subsequently filed an application dated 09.12.2022, contending that it was not the registered owner of the subject motor vehicle, having sold the same to one Francis Njuguna in 2015, well before the accident in question.

7. The application dated 9.12.2022 was dismissed for want of prosecution on 31.05.2022. The court heard the matter and delivered its judgment on 15.03.2024, thereby giving rise to the present appeal. This causes unnecessary nuanced questions.

Evidence

8. PW1, Morris Evans Okumu, of Investic Insurance International Investigations, testified that their firm had been instructed by UAP Insurance to trace the owner of motor vehicle KBB 657A. He produced an invoice of Kshs. 29,950 as tracing fees. He stated that their report indicated that the Appellant was the owner of KBB 657A at the time the accident occurred. He further testified that the Respondent's driver was lawfully driving motor vehicle KCF 799J when she was hit by the driver of KBB 657A.

9. The 2nd Defendant, on the other hand, testified that he had sold the said motor vehicle to Francis Njuguna and produced a sale agreement dated 30.03.2015 in support. However, the police abstract produced in court showed that the Appellant was still the registered owner of KBB 657A, and that the vehicle was insured with XPLICO Insurance under policy number XPL.601512.

10. PW1 further stated that there was no proof that the Defendant had received the purchase price for the alleged sale, nor were there any witnesses called to corroborate the transaction.

11. The trial court ultimately found the Appellant liable and ordered him to pay Kshs. 398,156, being the cost of repairing motor vehicle KCF 799J to roadworthiness. The Respondent sought compensation via the doctrine of subrogation.

Appellant's submission

12. The Appellant submissions dated 15.11.2024 wherein they prayed that the court allows the appeal. They stated that the proceedings of 15.11.2023 were not in the file hence it is a mystery how the court reached its verdict. They prayed for a retrial. They averred that there was a sale agreement dated 30.03.2015, wherein the appellant sold the vehicle to Francis Njuguna. Reliance was placed on section

8 of the *Traffic Act*. they relied on the case of Muhambi Koja v Said Mbwana Abdi [2015] KECA 635 (KLR), where the Court of Appeal [Makhandia, Ouko & M'inoti, JJ.A], stated as follows:

> Only after the Registrar is satisfied as to any one or more of these conditions and upon payment of fees will the new owner be registered. In the meantime, before the Registrar is satisfied, although not named in the log book, the new owner, will for all intents and purposes be deemed to be the owner, and in case of an accident, will be held liable.

13. This was magnified in the case of Nancy Ayemba Ngaira V Abdi Ali [2010] KEHC 1866 (KLR), where the High Court, J. B. Ojwang, J, as he then was, stated 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.

14. He submitted that though registered, he was not the owner of the said motor vehicle.

15. The Respondent filed its submissions dated 22.10.2024. They submitted that the appellant had not demonstrated how the court erred in law and in fact in entering the judgment. They stated that the record is incompetent for lack of decree.

16. On ownership, they submitted that the court was guided by section 8 of *Traffic Act*. Reliance was placed on section 107 and 108 of the *Evidence Act*. they submitted that the 1st defendant confirmed that the appellant was the owner of the said motor vehicle. They refuted the applicability of the case of Muhambi Koja v Said Mbwana Abdi [supra]. They stated that the appellant did not disclose that the appeal in Muhambi Koja v Said Mbwana Abdi [supra] was dismissed. They submitted that the appellant's driver testified that he was driving the suit motor vehicle. They stated that the appellant was to blame.

Analysis

17. 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. In the case of Mbogo and Another vs. Shah [1968] EA 93 where 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."

18. The duty of the first appellate Court was settled in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by 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-trial and the Court of Appeal is not bound to follow the trial 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."

19. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial 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 the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

20. One troubling question I am faced with is the incomplete proceedings. On 15.11.2023, the court directed the matter to be taken to the trial court to avail proceedings of 19.09.2023. These proceedings are not available. The record of proceedings are not available. The whereabouts of the proceedings of 19.09.2023 is unknown. The court delivered judgment without proceedings. Those proceedings are unknown to the court.

21. One troubling issue in this appeal is the incompleteness of the record of proceedings. On 15.11.2023, the court directed that the matter be referred back to the trial court for purposes of availing the proceedings of 19.09.2023. However, those proceedings were never supplied, and their whereabouts remain unknown. Despite their absence, the trial court proceeded to deliver judgment.

22. The failure to avail the proceedings of 19.09.2023 renders the record incomplete and undermines the validity of the judgment. A judgment must flow from the totality of the evidence and proceedings properly on record. In the absence of material proceedings, the judgment cannot be said to have been based on a complete record, thereby occasioning a miscarriage of justice.

23. The Court of Appeal in Selle v. Associated Motor Boat Co. Ltd [1968] EA 123 underscored that an appellate court is obliged to reconsider and evaluate the evidence on record, and draw its own conclusions. This presupposes the availability of a complete record. Further, the Court held that where proceedings are incomplete or missing, the resultant judgment is incurably defective as it is not founded on the full record of the trial.

24. Accordingly, the absence of the proceedings of 19.09.2023 is not a mere procedural lapse but a substantive omission that goes to the root of the judgment, thereby vitiating the judgment.

25. The Respondent stated that the record is incompetent for lack of decree. This is an erroneous argument since there is a copy of judgment on the file. It is only the court of appeal that requires a certified decree. This court as a court of record relies on section 2 of the *Civil Procedure Act*, which provides as follows:

> "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include-
>
> (a) any adjudication from which an appeal lies as an appeal from an order; or
>
> (b) any order of dismissal for default:
>
> > 3Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

26. Since this matter is before this Court by way of appeal, the proviso is applicable.

27. Section 8 of the *Traffic Act* states that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. Effectively interpreted this will go to mean that there can be actual, possessory and beneficial ownership of a motor vehicle which exists independently of registration. In Samuel Mukunya Kamunge vs John Mwangi Kamuru, Nyeri (2002) the court held:

> It is true that a certificate of search from the Registrar of Motor vehicles would have shown who was the registered owner of motor vehicle according to the records. That however, is not conclusive proof of actual ownership of the motor vehicle as section 8 of the *Traffic Act* provides that the contrary can be proved. This is the recognition of the fact that often times motor vehicles change hands but the records are not amended. I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of Motor Vehicles could prove ownership of the motor vehicle. I find a police abstract report having been produced showing the respondent as the owner of the motor vehicle No. KAH 204A, and evidence having been adduced that letters of demand sent to the respondent elicited no response from him denying ownership of the motor vehicle and the respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle No. KAH 204A was owned by the respondent."

28. Unfortunately, there is no evidence on record. The record is incomplete. It is not incomplete because they were left out. The appellant and respondent were aware as far back as November 2023 that proceedings where a hearing occurred was not present. The proceedings from where the court made the judgment are not on any of the known records of the court. The court cannot base its decision on submissions alone.

29. In the case of while addressing a scenario similar to the case herein, in Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, Odunga J stated as follows:

    17. In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The

law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced, they do not acquire the status of exhibits in the case. This was the position in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR where the court held; -

16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"

17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification......."

18. In this case no witness was called and no document was referred to. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such document. The Court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed with the plaint as if there was a consent by the parties that the same were agreed documents. It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

29. The same court proceeded as follows; -

25. Whereas parties are at liberty in civil proceedings to consent to the manner of proceeding and even to compromise a suit, any compromise whose effect is to amount to the court abdicating its adjudicatory duty or one that amounts to abuse of the court's process or exposes the adjudicatory process to ridicule ought not to be accepted by the Court hook, line and sinker, simply because it is consensual. In my view whereas in adversarial systems like ours parties are at liberty to conduct their matters in a manner they deem fit, the process of doing so ought to lawful and procedural. A consent that leaves the court in a dilemma on how to make a final decision ought not to be countenanced. To quote Oder, JSC in the case of Gokaldas Tanna vs. Rosemary Muyinza & DAPCB SCCA No. 12 of 1992 (SCU):

> An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the

negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions".

30. Mwera J, posited as follows when postulating on what is the role of submissions are. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case."

31. Submissions are not, strictly speaking, part of the case, the absence of which may do prejudice to a party. There presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

32. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

33. In the circumstances, the appeal is allowed. The matter is remitted to be heard before any other court other than Honourable P.K. Rotich SPM. The other question is the issue of 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.

34. 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 if 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.

35. 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.

36. The error arose from the court, not providing proceedings that were ordered on 15.11.2023 by Hon. Motari. In the circumstances, each party to bear its own costs.

Determination

37. The upshot of the foregoing, I make the following orders:

a. The Appeal is allowed partly. The judgment of the lower court given on 15.03.2024 in Chief Magistrate's Court at Milimani CMCC No. E3326 of 2020 is set aside. In lieu thereof, the same is remitted to the lower court for fresh hearing in the absence of the proceedings, by a court other than, Honourable P.K. Rotich SPM.

b. Each party to bear its own costs.

c. The lower court file be fixed for directions on 22.10.2025 before the lower court, other than Honourable P.K. Rotich SPM.

d. 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: -

Gitonga Muthee & Co. Advocates for the Appellant

Kamotho Njomo & Co. Advocates for the Respondent

Court Assistant – Michael