



**Auka Maxwell Otieno t/a Modern Securities v Ng'ang'ai & 3 others (Civil Appeal 32 of 2022) [2024] KEHC 8811 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 32 OF 2022  
HM NYAGA, J  
JULY 19, 2024**

**BETWEEN**

**AUKA MAXWELL OTIENO T/A MODERN SECURITIES ..... APPELLANT**

**AND**

**LUKA NJOROGE NG'ANG'AI ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MWAURA MAINA ..... 2<sup>ND</sup> RESPONDENT**

**FLORENCE KIBORE MWENDE ..... 3<sup>RD</sup> RESPONDENT**

**ALEX NGINGI MWANGI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgement and decree of the Hon B.Limo, Senior Resident Magistrate, in Nakuru CMCC No. 6 of 2014, delivered on 22nd February, 2022)*

**JUDGMENT**

1. The 1st respondent filed a suit against the appellant, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents before the lower court seeking Judgement for General Damages, Special Damages of Ksh. 208,000/=, costs and interests and any other relief that the Honourable Court may deem fit to grant.
2. The 1<sup>st</sup> Respondent averred that the 2<sup>nd</sup> Respondent was the authorized driver, agent and/or employee of the Motor Vehicle Registration No. KAQ XXXX whereas the 3<sup>rd</sup> Respondent was its registered owner, and that the Appellant was the beneficial owner and/or insured of the Motor Vehicle Registration No. KAM XXXX while the 4<sup>th</sup> Respondent was the registered owner.
3. Through his amended plaint, the 1<sup>st</sup> respondent alleged that on or about 1<sup>st</sup> September, 2013, at Bedi Road at Nakuru, he was a lawful fare paying passenger in the Motor Vehicle Registration No. KAQ XXXX. That the Appellant, 2<sup>nd</sup> and 4<sup>th</sup> Respondents so dangerously and negligently controlled and/



- or managed the aforesaid Motor Vehicles thereby causing the same to collide and as a result occasioned severe injuries to the 1<sup>st</sup> Respondent.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent through their statement of amended Defence denied the entire claim against them and stated that the accident was solely caused by the negligence of the 1<sup>st</sup> Respondent.
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent further averred that the 1<sup>st</sup> Respondent's claim was fraudulent and based on misrepresentation that he had been involved in an accident and injured and as such the same is unlawful, improper and or an abuse of the court process. The said Respondents herein further attributed the cause of accident to the driver of the Motor Vehicle Registration No. KAM XXXX . They denied the applicability of the doctrines of *res ipsa loquitur* and vicarious liability.
  6. The Appellant, through its statement of Defence dated 17<sup>th</sup> November,2016 denied the entire claim by the 1<sup>st</sup> Respondent. It averred that the suit was bad in law, inept, ambiguous and did not disclose proper particulars of claim and cause of action, and prayed that the same be dismissed with costs.
  7. The 4<sup>th</sup> Respondent did not enter any appearance.
  8. Upon considering the evidence by the respective parties, the trial court delivered its judgement on 22<sup>nd</sup> February,2022. The trial magistrate found that the Appellant and the 4<sup>th</sup> Respondent were to blame for the accident as the driver of the Appellant failed to give way to other road users resulting to the accident. Consequently, it dismissed the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and held the Appellant and the 4<sup>th</sup> Respondent jointly and severally liable for the accident.
  9. On quantum, the trial court awarded the 1<sup>st</sup> Respondent General Damages of Ksh. 350,000/=, Special Damages of Ksh. 208,000/=, and costs of the suit.
  10. Aggrieved by the judgment of the trial court, the Appellant lodged the instant Appeal raising the following grounds: -
    - i. That the Learned Magistrate erred in Law and fact in awarding what was not pleaded.
    - ii. That the Learned Trial Magistrate erred in Law and fact by failing to consider the evidence of the 3<sup>rd</sup> Defendant and critically analyse the same and accord it due weight to the extent that it was able to prove its case.
    - iii. That the Learned Magistrate erred in Law and fact in holding that the Appellant had established a *prima facie* case based on the pleadings on the record and evidence but failed to award as per the prayers sought.
    - iv. That the Learned Magistrate erred in Law and fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence, exhibits and submissions of parties.
  11. The Appeal was canvassed through written submissions.

### **Appellant's Submissions**

12. The Appellant submitted that he was wrongfully sued. He submitted that he did not own and operate the subject Motor Vehicle and that the same was owned by Modern Securities Limited.
13. He argued that misjoinder and non-joinder goes to the root of this suit and cannot be wished away as the enforcement of the Judgement will be untenable. To support this position, the Appellant relied on the holding in *Zephic Holdings Limited v Mimoso Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya* (2014) eKLR.



14. The Appellant posited that the trial court ought to have invoked Order 10 Rules 2 and 4 which give the court discretion to order the name of an improperly joined party to be struck out and the proper party to be joined in the suit.
15. The Appellant placed reliance on the case of *Apex International & Anglo Leasing Finance Ltd v Kenya Anti-Corruption Commission* [2012] eKLR where Emukule J (as he then was) quoted the case of *Goodwill and Trust Investment Ltd & Another v Witt & Bush Limited* (Nigerian SC 266/2005) where the import was that that proper parties must be identified before an action can be found to be competent and have jurisdiction.
16. The Appellant thus prayed that the lower court judgement and decree be reviewed and/or set aside and the suit against him be dismissed with costs.

### **Respondents' Submissions**

17. Regarding ground 1 of the Appeal, the 1<sup>st</sup> Respondent submitted that contrary to the Appellant's assertion, he had pleaded for General Damages, Special Damages of Ksh. 208,000/=, costs and interest of the suit and any other relief that the court may deem fit to grant. He argued that the trial court rightly exercised its discretion in awarding General damages of Ksh. 350,000/= and Special Damages of Ksh. 208,000/= plus costs of the suit. To buttress his submissions that award of damages is discretionary and the appellate court will be slow to interfere with the same unless the trial court was clearly wrong in its exercise of discretion, the 1<sup>st</sup> Respondent relied on the cases of *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR; *Mbogo and Another v. Shah* [1968] EA 93; *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another* (No 2) [1987] KLR 30; [1982-88] 1 KAR 727; *Re H and Others (Minors)* [1996] AC 563, 586; *William Kabogo Gitau v. George Thuo & 2 Others* [2010] eKLR; *& Stephen Mwallyo Mbondo v County Government of Kilifi* [2021] eKLR .
18. With regard to the second ground, the 1<sup>st</sup> Respondent submitted that the Appellant did not adduce any evidence to show that he was not the driver of the subject Motor Vehicle at the time of the accident, and thus based on evidence and submissions on record, the trial court rightly found that he had successfully proved his case on a balance of probabilities against the Appellant and 4<sup>th</sup> Respondent.
19. The Respondent submitted that the Appeal is unmerited and should be dismissed with costs to him.

### **Analysis & Determination**

20. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle – v- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.



In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

21. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. (See the cases of *Nkube v Nyamiro* (1983) KLR 403; & *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278).
22. Having considered the record of appeal, the pleadings and the submissions by the respective parties, I am of the view that the appeal turns on a singular issue, that is, whether the Appellant was wrongfully sued.
23. In determining the above issue, I have to bear in mind the trite law that he who alleges must prove. Sections 107 and 108 of the *Evidence Act* provide as follows:
  - 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
    - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

[See *Alice Wanjiru Rubiu v Messiah Assembly of Yabweh* [2021] eKLR].
24. It is common knowledge that the standard of proof in civil cases is proof on the balance of probability. [See *Abmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR].
25. The 1<sup>st</sup> Respondent pleaded that the Appellant herein was the beneficial owner and or insured of Motor Vehicle Registration No. KAM XXXX while the 4<sup>th</sup> Respondent was the registered owner. The copy of records for this Motor Vehicle which was produced as Exhibit No. 9(a) confirms the latter position.
26. So did the 1<sup>st</sup> Respondent prove that the appellant was the beneficial and/or the insured owner of the motor vehicle?
27. During hearing the 1<sup>st</sup> Respondent produced a copy of records for the said Motor Vehicle Registration No. KAM XXXX , confirming its registered owner as the 4<sup>th</sup> Respondent. On cross examination, he stated that he was not aware whether the Appellant was the driver of the said Motor Vehicle.
28. PW2, PC Sammy Okello produced the Police Abstract as P. Exhibit. No.3 He also told court that the driver of Motor Vehicle Registration No. KAM XXXX ran away after the accident.
29. I have perused the Police Abstract in issue and I do confirm that the Appellant is listed as the “owner” of the Motor Vehicle Registration No. KAM XXXX .
30. It is trite law that evidence of registered ownership is proven by a copy of the records held by the official state authority responsible for motor vehicle registrations. Section 8 of the *Traffic Act* provides that the person in whose name a motor vehicle is registered is unless the contrary is proved to be deemed to be the owner of the vehicle.



31. However, it is possible that the term “owner” may have a meaning that does not refer to the registered owner. It is very possible, and this has been a common occurrence, that whereas the vehicle was registered in the name of the 4<sup>th</sup> respondent, in reality the vehicle was owned by someone else but he had not effected registration changes. That is why the police took the insurance details of the vehicle.
32. The principle envisaged in the said section is that there can be actual, possessory and beneficial ownership of a motor vehicle which exists independently of registration.
33. In *Samuel Mukunya Kamunge – v- Jobn Mwnagi Kamuru*, Nyeri H.C. Civil Appeal No. 34 of 2002, Okwengu J. (as she then was) held that: -

“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 (that) a police abstract report having been produced showing the respondent as the owner of the motor vehicle No. KAH XXXX, 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 XXXX was owned by the respondent.”

34. On the same issue Ojwang J. (as he then was) in *Nancy Ayemba Ngaira – v- Abdi Ali*, Msa HCCA No. 107 of 2008 (2010) eKLR held that: -

“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, the 1<sup>st</sup> defendant was one of the owners of the matatu in question.”

35. In *Jared Magwaro Bundi & Another – v- Primarosa Flowers Limited* (2018) eKLR the Court of Appeal reviewed previous cases on beneficiary ownership of motor vehicle and held that: -

“It was therefore held in *Muhambi Koja (supra)* that section 8 of the *Traffic Act* recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not



yet registered, to a de facto owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.

The position taken by the court in Jael Muga Opija (*supra*) and Mohamed Koja (*supra*) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case ...”

36. Having stated the law I will now address the issue as regards the vehicle in question.
37. It is common knowledge that details contained in a police abstract are a summary of investigations conducted by the police after an accident. Using the details of the insurance certificate for the vehicle, which are set therein, the police established that the “owner” was the appellant.
38. Thus the fact that the vehicle was still registered with the name of the fourth respondent does not discount that the same was insured in the name of the appellant and that made him the beneficial/insured owner of the said vehicle and not the registered owner.
39. The appellant produced the Certificate of Incorporation as D. Exhibit No. 1. In this appeal he has stated that the subject motor vehicle was owned by Modern Securities Limited. I do not see the relevance of it as the said company has not been sued herein. It was not found to be the beneficial owner of the vehicle in question.
40. I therefore find that the evidence of PW2 that the Appellant was the “owner” of the subject Motor Vehicle was uncontroverted. Thus on a balance of probability, the appellant was rightly held to be the beneficial/insured owner of the vehicle in question.
41. There was no appeal against the award of damages so I will not address the same.
42. In light of the foregoing, the Appeal lacks merit and it is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU 19<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of:

C/A Jeniffer

Mr. Oumo for Appellant

Mr. Mwithifor Respondent 1

No appearance for others

