



**Alliance Leasing Limited v Kisilu & another (Civil Appeal E047 of 2023)  
[2024] KEHC 10685 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E047 OF 2023  
FR OLEL, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**ALLIANCE LEASING LIMITED ..... APPELLANT**

**AND**

**NEWTON SINGO KISILU ..... 1<sup>ST</sup> RESPONDENT**

**JAMES KINENE NJIRU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This appeal arises from the judgment/decreed of Honourable Mr S. Kandie, Resident Magistrate delivered on 4<sup>th</sup> October 2022 in Mavoko Chief Magistrate Court Case no. 502 of 2019, where he found both the appellant and the 2<sup>nd</sup> respondent 100% liable for the accident that occurred on 28<sup>th</sup> January 2022, and proceeded to awarded the 1<sup>st</sup> Respondent a total of Ksh.3,360,000/= as General damages, damages for diminished earning capacity, cost of future treatment and and Special Damages.
2. The 1<sup>st</sup> Respondent had filed his claim as against the appellant and the 2<sup>nd</sup> respondent claiming damages in tort. In the plaint and witness statement, the 1<sup>st</sup> respondent averred that on the 28.01.2022, at about 4.00pm he was lawfully and carefully riding his motor cycle registration Number KMFU 554D (herein after referred to as the suit motor cycle) along Kinanie road near Nairobi -Mombasa road at Devki Area, when the Appellant and 2<sup>nd</sup> respondent's driver, servant or agent drove and controlled and/or managed Motor vehicle registration Number KDE 103F, Tata Lorry ( herein after referred to as the suit lorry ) in a negligent and reckless manner that he caused it to knock the said suit motor cycle from the rear consequent whereof the 1<sup>st</sup> respondent sustained serious injuries for which he held the Appellant and 2<sup>nd</sup> respondent herein liable.
3. The appellant and 2<sup>nd</sup> respondent on their part did file a joint statement of defense where they denied owning the suit motor vehicle as well as the facts relating to the occurrence of the accident. They further



denied all the particulars of negligence, carelessness and recklessness attributed to them and/or their servant, employee or agents and put the 1<sup>st</sup> respondent to strict proof thereof. In the alternative the said appellant and 2<sup>nd</sup> respondent also blamed the 1<sup>st</sup> respondent for causing and/or contributing to this accident and particularized his negligence. They therefore prayed for the said suit to be dismissed with costs.

## **B. Evidence**

4. PW1 Cpl Amdany from Athi River police station produced into evidence the police abstract and confirmed that indeed an accident did occur at Devki Area involving the suit motor cycle and suit lorry. The brief circumstances thereof was that both the said lorry and motor cycle were joining the road from Kinanie and the motor cycle was ahead of the said suit lorry, which overlapped and hit the suit motor cycle resulting to the said cyclist and his passenger to sustain serious injuries. The Driver of the suit lorry was to blame for the accident as he had overlapped and did not keep a proper lookout for other road users. The said driver was bonded to attend court to be charged with the offence of careless driving, but had absconded.
5. PW2, the 1<sup>st</sup> respondent adopted his witness statement and produced into evidence all documents filed in support of his case. In the said statement he did aver that on 28.01.2022 at about 4.00pm he was at work using the suit motor cycle and had carried a pillion passenger for gain. At Kananie area near Devki junction, they encounter a slight Traffic Jam and kept riding at safe distance of other road users. However, upon reaching near Nairobi – Mombasa junction, the suit lorry emerged from the rear while overlapping other motor vehicles and knocked the suit motor cycle from the rear. As a result, his pillion passenger sustained slight injury, while his left leg was severely crushed. He was rushed to hospital but despite all efforts by the doctors, his leg could not be saved as the leg tissue had been severely crushed and eventually his left leg was amputated at Fork hospital.
6. As a result, he had lost 30% of his earning capacity and also could not continue to work as a boda boda rider, earning a living and providing for his family. He blamed the driver of the suit motor lorry for recklessly overlapping, when it was not safe to do so and driving without due regard to other road users and thereby causing the said accident. In cross examination PW2 affirmed that he had put on his helmet and protective gears as at the time of the accident and the suit lorry had overlapped and hit the suit motor cycle from behind, thereby causing him to suffer severe bodily injuries.
7. The Appellant and 2<sup>nd</sup> respondent did not call any witness, to testify on their behalf and closed their case. Upon considering the evidence submitted, submissions filed, the trial court did enter judgment for the 1<sup>st</sup> respondent as against the appellant and 2<sup>nd</sup> Respondent in the following terms;
  - i. Liability 100%
  - ii. General Damages Ksh.2,000,000/=
  - iii. Diminished earning capacity Kshs 600,000/=
  - iv. Future costs of Artificial Limb Kshs 540,000/=
  - v. Special damages Ksh. 220,000/=Total Ksh 3,360,000/=  
Plus, cost and interests
8. The appellant being wholly dissatisfied by the said judgement did file their memorandum of appeal dated 8<sup>th</sup> March, 2023 and raised the following grounds of appeal;



- a. That the learned magistrate erred in fact and in law in failing to appreciate that no liability could lie as against the Appellant as a financier and lender to the purchase of the motor vehicle registration Number KDE 103F Tata Lorry.
  - b. That the Honourable Magistrate erred in fact and in law in failing to appreciate that the appellant's co registration in the motor vehicle registration Number KDE 103F, Tata Lorry was exclusively as security measure for a lender and the risk over the said motor vehicle at all times remained with the borrower, the 1<sup>st</sup> defendant in the lower court.
  - c. That the Honourable learned Magistrate erred in law and in fact in failing to appreciate that at the material time of the accident the driver of the said motor vehicle was not an employee of the appellant and therefore no liability would arise at all.
  - d. That the Honourable learned Magistrate erred in fact and in law by finding that the appellant was 100% liable jointly and severally yet they did not have control whatsoever of the motor vehicle at the material time of the accident
  - e. That the trial Magistrate holding flies in the face of the law establishing doctrine of excluding liability against the financiers or lenders thus rendering judgment as against the appellant as erroneous and proper candidate for setting aside
9. The Appellant urged the court to find that the appeal filed had merit, it be allowed and the award of the trial Magistrate as against the Appellant be set-aside and/or be varied and it be replaced with an order dismissing the primary suit with costs.

### **C. The Appeal**

10. After filing the record of Appeal, the Appellant did file their notice of motion Application dated 20<sup>th</sup> July 2023, seeking leave to file addition evidence in support of their appeal. They averred that they were only registered as the co-owners of the suit lorry as they had financed its purchase but were not the beneficial owners thereof. Madison insurance company had already paid the 1<sup>st</sup> respondent part of the decretal sum of Ksh.3,000,000/= and the balance ought to have been paid by the 2<sup>nd</sup> respondent as the person vicariously liable for the action of his driver. The appellant annexed the hire purchase/ lease agreement entered into between themselves and the 2<sup>nd</sup> respondent and urged the court to find in their favour.
11. This application was opposed by the 1<sup>st</sup> respondent who filed his replying affidavit dated 6<sup>th</sup> September 2023. He averred that the said application was an afterthought and constituted an abuse of the process of court thus did not meet the threshold to warrant granting of the orders sought. It was to be noted that the appellant did not plead the issues raised in the said application in their joint statement of defence filed nor did they raise it during trial and thus no determination was made regarding the same. Secondly no sufficient reason had been advanced as to why they had not introduced this evidence during trial yet they were ably represented by counsel during trial. Finally, even when granted an opportunity to present their evidence during trial, the appellants failed to do so and opted to closed their case without calling any witness.
12. Based on the foregoing, it was clear that the appellant had not shown any exceptional circumstance as required in law to warrant this court to admit the fresh evidence they had sort to adduce. It was too late in the day to seek the orders sought and the 1<sup>st</sup> respondent therefore urged the court to find that the said application did not have merit and proceed to dismiss the same with costs.



## D. Submissions.

### i. The Appellants Submissions

13. The Appellant submitted that in the year 2021, they had entered into a hire purchase agreement with the 2<sup>nd</sup> respondent and financed him to purchase the suit lorry. As is customarily done, they were jointly registered as the owner thereof to allow them protect their interest but were not in actual control or daily possession of the said suit lorry. On or about 28.01.2021, the suit lorry was involved in a road traffic accident and subsequently judgment entered jointly and severally as against them and the 2<sup>nd</sup> respondent. They had therefore filed the application to adduce additional evidence, so as to help the court make a fair and just determination of the Appeal.
14. The appellant further urged the court to find that their application was supported in law by Section 78(1),(d) of the *Civil procedure Act*, Cap 21 which allowed the Appellate court to take additional evidence or to require the evidence to be taken. The Appellant also relied on the supreme court case of *Mohammed Abdi Mohammed v Ahmed Abdullahi Mohammed & 3 others* (2018) Eklr , which laid down the governing principles on allowing additional evidence in appellate courts in Kenya.
15. The Appellant further submitted that, when the accident was reported, its insurer, Madison Insurance company appointed counsel to represent the 2<sup>nd</sup> Respondent and that they was not aware and/or did not get information of the hire purchase agreement that was so crucial to prove that the Appellant was a mere financier and he ought not to be a party to the suit. The additional evidence was credible and its authenticity and veracity had not been challenged by the 1<sup>st</sup> respondent. It was therefore in the interest of justice to have the same admitted to remove any doubt as to the position of liability of the Applicant/ Appellant. Reliance was also placed on the case of *Sharon Mwendu Ndol v Rahab Nyangima John & another* (2022) eklr, *EO v COO* (2020) Elr, *John Kiplagat Barbaret & 8 others v Isaiah Kiplangat Arap cheboget* (2016) eKLR, & *Justus Kavisi v Coast Broadways Company Limited* MBSA HCC No 169 of 2007 (2008) Eklr, where the appeal court allowed for introduction of additional evidence and where the court had also held that a financier registered as co-owner of a motor vehicle was not a necessary party to the proceedings.
16. As regards the Appeal, the appellant averred that the insurer, Madison Insurance company had already settled a sum of Ksh.3,000,000/= leaving a balance of Ksh.360,000/=. If the court admitted the additional evidence, the appeal could be determined on the basis of the doctrine of excluding liability against financiers or lenders in matters relating to accident matters/cases and it had been severally held that financiers and lenders could not be held liable for the actions of the driver or agents of the borrower/ beneficial owner. Reliance was further placed on the case of *Trust Bank limited v Amalo Co Lt* Kisumu CA Civil Appl No 215 of 2000(2002) eKLR, *Ali Abdi Dere v Hash Hauliers Limited & Another* MKS HCC 16 of 2014 (2018) eklr, *Justus Kavisi v Coast Broadways Company Limited* Mbsa Hcc No 169 of 2007 (2008) Eklr & *Consolidated Bank of Kenya Limited v Mwangi & Another* ( Civil Appeal No E056 of 2021)(2022) KEHC 3104(KLR)
17. The appellant urged the court to find that this Appeal had merit and be pleased to allow the same with costs in their favour.

### ii. The Respondents submissions

18. The respondent averred that they would be prejudiced if the said application was allowed, as the appellant was seeking to strengthen their appeal through the back door and it was obvious that the grounds of appeal solely depended on whether or not the said application was allowed by this court.



The Appellant were ably represented by counsel during trial and filed a joint defence consisting of mere denials, but never raised the issue that they were only financier of the said suit lorry, despite having the opportunity to do so. Parties were bound by their pleadings and since the issue of the appellant being a financier before the trial court did not arise, it could not be raised as a new issue before this court. The appellant had also not meet the threshold as laid out in law for allowing addition evidence as provided for under Order 42 rule 27, 28 & 29 of the civil procedure rules and also as was espoused in the case of *Mohammed Abdi Mohammed v Ahmed Abdullahi Mohammed & 3 others* (2018) Eklr, *G.M Combine (u) ltd v A.K. Detergent ltd and others* (1999) 1 EA 84 & *Joginder Auto services Ltd v Shaffique & Another* (2001) KLR 97.

19. The evidence sought to be adduced was not new as the Asset finance agreement sought to be introduced had always been in possession of the applicant when this matter was proceeding before the primary court. No sufficient reasons have been advanced to explain why it was not produced as evidence during trial and the 1<sup>st</sup> respondent reiterated that he would be extremely prejudiced to have the same evidence produced at this late stage as he would not have a chance to challenge the same. Reliance was placed in the case of *Mwinzi Muli v James Kenneth Kiarie & Another* (2020) eKLR, where Odunga J faced with a similar Application dismissed the same.
20. The 1<sup>st</sup> respondent thus urged that this court finds that both the Appeal and Application to adduce addition evidence lacked merit and proceed to dismiss the same.

#### **E. Analysis & Determination**

21. I have considered the pleadings, evidence presented and submissions of both parties filed in this appeal, and will first deal with the applicants/appellants application dated 20<sup>th</sup> July 2023 seeking leave to file addition evidence in support of his case/Appeal.
22. Section 78(1), (d) of the *Civil procedure Act*, Cap 21 provides that;
  - i. Subject to such conditions and limitations as maybe prescribed, an appellate court shall have power; -
    - a. To determine a case finally;
    - b. To remand a case;
    - c. To frame issues and refer them for trial;
    - d. To take additional evidence or to require the evidence to be taken;
    - e. To order a new trial.
23. Further Order 42 rule 27, 28 and 29 of the *Civil procedure Rules* also makes provision of allowing additional evidence and provides that ;
  - 27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if-
    - a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
    - (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.



- (2) wherever additional evidence is allowed to be produced by, court to which the appeal is preferred the court shall record the reason for its admission.

Rule 28; wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and send it when taken to the court to which the Appeal is preferred.

Rule 29; Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits the evidence to which the evidence is to be confined and record on its proceedings the points so specified.

24. The appellate court, therefore no doubt is seized with the jurisdiction to entertain an application to admit additional evidence or document and allow for witnesses to be examined. *Chesoni AJA in Mzee Wanje & 93 others v A.K Saikwa* (*supra*) did state that the rule;

“ Gives the court power on any appeal from a decision of a superior court acting in exercise of its original jurisdiction, in its discretion, for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. The rule requires the applicant to establish sufficient reason for receipt of such further evidence, and the court can exercise the discretion to receive further evidence only after sufficient reason has been shown. The principles that guide the court in deciding whether or not to receive additional evidence are

- i. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
- ii. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive
- iii. The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.....

This rule is not intended to enable a party who had discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omission in the court of appeal. The rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence appellate court must find the evidence needful. Additional evidence should not be admitted to enable the plaintiff to make out a fresh case in the appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.

25. The supreme court in the case of *Mohammed Abdi Mohammed v Ahmed Abdullahi Mohammed & 3 others* (2018) eKLR also did Set out guidelines/governing principles on allowing additional evidence at appellate courts and provided that;

- a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice.
- b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;



- c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
  - d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit;
  - e. The evidence must be credible in the sense that it is capable of belief;
  - f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
  - g. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
  - h. Whether the additional evidence discloses a strong prima facie case of wilful deception of the court;
  - i. The court must be satisfied that the additional evidence is not utilized for the purpose of removing a lacunae and filling gaps in evidence.
  - j. The court must find the further evidence needful;
  - k. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the omissions or patch up the weak point in his/her case.
  - l. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand and the need for swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
26. The appellant filed a joint statement of defence with the 2<sup>nd</sup> respondent and did not raise/plead that they were mere financiers of the suit lorry, nor did they call any witness to testify on their behalf. No plausible reason has been advanced to explain this lacuna and it stands to reason, that the appellant has failed to adequately explain the exceptional circumstance which exists, and which would tilt the courts discretion in their favour. Further the information relating to financing of the suit lorry was within the knowledge of the appellant and once served with summons and the plaint, they ought to have raised this issue before the trial magistrate at the earliest convenience. They failed to do so and their advocate on record too did not file any affidavit to explain why this defence was not raised. It is therefore clear that additional evidence is being introduced as an afterthought for purposes of patching up omissions and weak points in the appellants case and/or to remove the lacunae and fill in the evidential gap in support of their weak appeal.
27. Further the court has to consider proportionality and prejudice which could be occasioned by allowing the additional evidence. The principles of proportionality and equality of arms are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v. Amboseli Resort Limited* [2004] 2 KLR 589.
28. The appellant confirms that the appellant has been paid Ksh.3,000,000/= by their insurer and the balance remaining is Kshs.360,000/=. The primary decree is therefore substantially settled and the



respondent therefore stands to be more prejudiced if at this late stage the court allows additional evidence, which will disentitle him from the fruits of his judgment. He also will not be in a position to cross examine the appellants on the veracity of the said document and/or even if taking of evidence is referred back to the trial court, it will take more precious judicial time relating to a substantially settled decree. On the other hand even if the appellant settled the decree, they still have an ongoing hire purchase contract with the 2<sup>nd</sup> respondent and can easily recover their money.

#### **E. Disposition**

29. The upshot is that the application dated 20<sup>th</sup> July 2023 fails and is dismissed with costs to the 1<sup>st</sup> respondent. The wholly appeal was premised/predicated on this application being allowed. Since the same has been dismissed the court has no basis upon which it can consider any of the grounds of Appeal as they all were premised on the additional evidence being allowed.
30. This appeal filed therefore lacks merit and the same is dismissed with costs to the 1<sup>st</sup> respondent.
31. The said costs of the application and this appeal are assessed at Kshs.220,000/= all inclusive.
32. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Team this 16<sup>th</sup> day of September, 2024.**

**In the presence of: -**

Mr. Langat for Applicant

No Appearance for Respondent

Susan/Sam Court Assistant

