



**Prime Rock Company Limited v Ndegwa (Civil Appeal  
2 of 2017) [2023] KEHC 3552 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3552 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL 2 OF 2017  
FN MUCHEMI, J  
APRIL 20, 2023**

**BETWEEN**

**PRIME ROCK COMPANY LIMITED ..... APPELLANT**

**AND**

**JOSEPH MWANGI NDEGWA ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. K. Onesmus  
(SRM) delivered on 25th November 2016 in Nyeri CMCC No. 46 of 2015)*

**JUDGMENT**

**Brief Facts**

1. This appeal arises from the judgment of Nyeri Senior Resident Magistrate in CMCC No. 46 of 2015 where liability was apportioned at the ratio of 30: 70 with the appellant bearing 70%. The respondent was awarded damages of Kshs. 879,043/- all inclusive for the injuries sustained in the incident while working for the appellant.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred both in law and in fact in finding that the respondent proved his case against the appellant;
  - b. The learned magistrate erred in law and in fact in finding that the suit was not time barred.
3. By consent the parties put in written submissions to dispose of the appeal.



## Appellant's Submissions

4. The appellant denies that it is the right party to be sued and states that it is known as Primerock Insurance Agency Limited. It produced a certificate of incorporation to that effect and further denies knowing the respondent or dealing with electricity. Thus, the applicant submits that the burden of proof remained with the respondent to prove to the court that it sued the right party. The respondent ought to have amended the suit, enjoined the proper defendant or by cogent evidence establish that the defendant before the court was the right one. The appellant submits that the respondent did not do any of the options and proceeded against the wrong party. The appellant further submits that the trial court erred by calling it a mere technicality. The appellant argues that the suit out to be struck out against it and relies on the case of *Mary Vande & 2 Others v Jane Anyanga* [2019] eKLR to support its contentions.
5. Further, the appellant submits that the trial court did not make a clear finding whether it was the right party to be sued. Instead the court stated that there was a close similarity between the party sued and the appellant. Thus, the appellant urges the court to make a determination whether it was the correct party sued in view of the certificate of incorporation produced in court and its denial of liability.
6. The appellant submits that it denied that the respondent was an employee of the respondent. Further, the respondent did not produce any evidence that he was an employee of the appellant nor did he call any independent witness who may have working with him or even his alleged supervisor to prove that he was employed by the appellant.
7. The appellant cites the decision of *Joseph Njuguna vs Cyrus Njathi* [1999] eKLR and submits that having failed to enjoin the said supervisor or adduce evidence to prove negligence against the said supervisor, it could not be found to be vicariously liable. The respondent failed to prove any negligence on the part of the said supervisor, Norah nor did he establish that Norah was an agent of the appellant. Moreover, the appellant states that the respondent did not produce any document linking it with the accident directly or otherwise.
8. The appellant submits that by the trial court blaming it for failing to call Norah as a witness, it shifted the burden of proof to it thus falling into error. Pursuant to Section 107 of the *Evidence Act*, the appellant states that the burden of proof was upon the respondent to link the said Norah as its agent.
9. The appellant submits that the trial court erred in deciding issues that were not before it. For instance the trial court stated that the certificate of incorporation produced was a photocopy. The appellant contends that the issue had not been raised and neither had the document been objected to when it was produced. Further, the appellant contends that the issue of similarity of the party sued and the party that allegedly wronged the respondent was not pleaded. Neither was the level of engagement of the respondent and his ability to know the name of his employer was not pleaded either.
10. The appellant further submits that contributory negligence was not pleaded. It contends that it simply and flatly denied liability and sought for the suit to be dismissed yet the trial court ventured into apportionment of liability without any invitation or pleading or evidence and thus fell into error.
11. The appellant refers to Section 26 and 27 of the *Work Injury Benefits Act* and submits that the suit is not sustainable as the accident is alleged to have occurred on 26/4/2013. It was not reported in accordance with the law or at all and yet the suit was filed on 19/2/2015, which is almost two years later.
12. The appellant submits that the respondent never produced any demand letter sent to it before the filing of the suit. The appellant states that the trial court failed to address this issue though it was an issue raised for determination.



## The Respondent's Submissions

13. The respondent submits that he was a casual labourer employed by the appellant through its agent 'Norah' whom the appellant did not deny knowing. The respondent further argues that the issue of an employment letter ought not to arise as the appellant did not demonstrate that it actually issued all its employees employment letters.
14. The respondent relies on Order 1 Rules 9 & 10 of the Civil Procedure Rules and the cases of Werrot & Company Limited & Others v Andrew Douglas Gregory & Others [1998] eKLR and Kizito M. Lubano v KEMRI Board of Management & 8 Others [2015] eKLR and submits that the appellant is the correct party in this suit. Moreover, the respondent argues that the appellant's representative, Norah Wangui paid for some hospital bills and the appellant did not controvert this but in fact the appellant admitted to knowing Norah but denied having worked with her. The respondent further submits that it is also uncontroverted evidence that he visited the appellant's offices for help and the appellant refused to sign the labour forms as required necessitating filing of the suit in the trial court. Moreover, the respondent submits that he led evidence that he had been in talks with DW1 with a view of getting assistance and thus this cannot be a case of mistaken identity as claimed by the appellant.
15. The respondent further submits that the trial court did not shift the burden of proof to the appellant as alleged by the appellant. The trial court simply stated that the issue of payment of the hospital charges would have been settled by Norah if either party would have called her as a witness. Further the respondent contends that since the appellant denied carrying on business with Norah, it was upon him to actually establish that Norah did not work for them in any capacity and more so in the capacity claimed by him.
16. The respondent states that the allegation by the appellant that the trial court erred by deciding issues not raised by the parties is unfounded. The honourable trial court only pointed out that the document produced in court was a photocopy. The court went further to point out that the articles of association had not been produced which the respondent submits was an issue that arose in cross examination of the appellant.
17. The respondent submits that the appellant did not raise or prosecute the issue of the suit being time barred. As such, since the appellant attempted to raise a preliminary objection and subsequently abandoned it, it should not be allowed to raise the issue as the appeal stage.
18. The respondent further submits that the appellant was aware of the injuries sustained by him and therefore whether a demand letter was issued or not was not an issue for determination by the trial court. That notwithstanding, the respondent states that it does not prejudice either party's case and as such, it was not necessary for the court to render a judgment upon it.
19. The respondent refers to the case of Kizito M. Lubano vs Kemri Board of Management & 8 Others [2015] eKLR and submits that the suit herein is not based on an issue of vicarious liability. The respondent states that he sued the company for being negligent through its management and employees. The respondent further argues that if the appellant felt aggrieved being sued alone, it ought to have sought the honourable court's leave to enjoin the said Norah as a co-defendant under Order 1 Rule 15 of the Civil Procedure Rules. The respondent states that the appellant failed to enjoin Norah in the matter as this exonerated the appellant from any wrong doing.
20. The respondent argues that apportioning liability at 30:70 is not justified for the mere reason that the appellant was in charge of the area and the parameters of work. The respondent thus urges the court to enter liability at 100% in his favour as against the appellant.



## Issue for determination

21. The main issue for determination is whether the appeal has merit.

## The Law

22. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

23. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
24. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

25. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

## Whether the appeal has merit.

26. The appellant argues that the trial court erred by finding that the respondent had proved its case against it. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that:-

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.

27. Therefore, a party who wishes the court to give judgment or to declare any legal right dependent on a particular fact or set of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.

28. Once the plaintiff discharges the legal burden of proof, the burden is then shifted to the defendant to adduce evidence against the plaintiff’s claims. This burden is well captured under Section 109 and 112 of the *Evidence Act*. These two provisions were dealt with in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 where the Court of Appeal held that:-

As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.



There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act.

29. In this instant case the appellant argues that it denied being the defendant in the trial suit. It argued that through its representative in court, it produced a certificate of incorporation where it shows that it is known as Primerock Insurance Agency Limited. Further it stated that it did not know the respondents and neither did it deal with electricity. The respondent testified that he was an employee of the appellant by virtue of being sub contracted to provide manual labour consisting of erecting power poles at deregulated positions. I have perused the record of appeal and noted that indeed the respondent in his pleadings stated that he was an employee of the appellant in his capacity as a manual labourer. The appellant in rebutting such claim produced the certificate of incorporation to challenge the respondent's evidence. Notably, the certificate of incorporation is not an original document. Further, to the plaintiff testified that his main job was to erect power poles at designated positions and the appellant denied such a claim. However as rightfully pointed out by the trial court, the appellant only produced a copy of the certificate of incorporation. It did not provide its Memorandum and Articles of Association to ascertain whether indeed it did not deal with electricity. Thus upon the respondent testifying that he was a manual labourer working for the appellant by erecting power poles at designated positions, the evidential burden shifted to the appellant to show that indeed it was the wrong party to be sued and further that it did not deal with electricity. The appellant ought to have produced an original copy of the certificate of incorporation as per the law in Section 65 and 67 of the [Evidence Act](#). It matters not, that the respondent did not raise the objection during trial. The law is clear under Section 67 of the [Evidence Act](#) that documents must be proved by primary evidence except in the cases as provided by Section 68 of the Act. The appellant did not show that he met the requirements under Section 68 of the Act. Therefore it is my considered view that on this ground, the appeal fails.
30. On the issue of whether the respondent was an employee of the appellant, the appellant denies knowing the respondent. The respondent on the other hand testified that he was a manual labourer and his supervisor was one Norah Wangui. During DW1's evidence in chief and cross-examination, the appellant's witness admitted that he knew Norah but he denied having employed her. Additionally, of importance is that from the court proceedings in the trial court, the learned magistrate noted that the witness was merely denying the facts about Norah. The respondent further stated that he received Kshs. 50,000/- to pay for his medical bill from the appellant. It is my considered view that one of the parties ought to have called the said Norah Wangui as a witness who would have clarified this issue. However, since the trial court had the advantage of assessing the appellant's witness during trial and noted that the said witness was evasive of the truth and responsibility over the case, and the fact that the respondent testified that he talked to the appellant on the phone on numerous occasions, a fact that was not denied by the appellant, it is my considered opinion that the respondent did prove that he was an employee of the appellant. Moreover, the appellant has argued that the claim is a work based injury. This fact acknowledges that the respondent worked for the appellant.
31. The appellant also argues that the trial court erred by apportioning liability to it. The law provides that an appellate court ought not to interfere with apportionment of liability save in exceptional cases. This was stated in the case of *Khambi & Another v Mahithi & Another* [1968] EA 70 where the court held:-
- It is well settled that where a Trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.



Furthermore the respondent did not file a cross-appeal on review of apportionment of liability and as such, there is no legal basis of doing so.

32. The respondent testified that on the material day they were laying out electric poles. He further testified that as he was laying out the pole it touched the other wires above it and electrocuted him. He blames the accident on the appellant as it did not execute a shut down. The appellant on the other hand merely denies the accident. It is therefore my considered view that the trial court did not err by apportioning liability at the ratio 30:70 to the appellant.
33. On the issue of whether the claim is time barred, the appellant argues that contrary to Section 26 and 27 of the *Work Injury Benefits Act*, the accident occurred on 26/4/2013 and the respondent filed the suit on 19/2/2015 which was about two years later. I have perused the *Work Injury Benefits Act* and noted that Section 5 of the Act outlines who an employee is under the act. Section 5(1) of the Act provides:-  
In this Act, “employee” means a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured learner.
34. Section 5(3) of the Act provides:-  
The following persons shall not be regarded as employees for the purposes of this Act-
- a. A person whose employment is of casual nature and who is employed otherwise than for the purpose of the employer’s trade or business.
35. Therefore it is evident that the above provision does not apply to the respondent. The trial magistrate dealt extensively with this issue and arrived at the correct decision that the respondent as a casual labourer was not covered by section 5 of the *Work Injury Benefits Act*.
36. The appellant has further claimed that the respondent did not issue it with a demand letter before instituting the suit arguing that failure to issue a demand letter before filing the suit confirms that the respondent mistook the appellant and further that the respondent is not entitled to costs. It is trite law that costs follow the event. In the case of Stanley Kaunga Nkarichia vs Meru Teachers College & Another [2016 eKLR the court held that:-  
The mere fact that a demand may not have been issued and even if it was, none was produced in court, is not alone a good reason to deny a successful party his costs of the suit.  
I have given enough reasons that the appellant was the successful party and the mere fact that a demand letter was not issued or was by inadvertent or otherwise not produced in evidence will not justify an order to deny him costs of the suit. He is entitled to a recompense of expenses he has expended in this litigation.
37. Thus the fact that the respondent did not issue the appellant with a demand notice does not preclude the respondent from being granted costs of the suit. The respondent was the successful party in the suit and the court below awarded him costs as provided for by the law. I find no merit in this ground of appeal.
38. Notably the appellant did not dispute the quantum of damages and as such the award will not be disturbed.

## Conclusion

39. In view of the foregoing, I find that the appeal lacks merit and dismiss it with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF APRIL, 2023.**



**F. MUCHEMI**

.....

**JUDGE**

I Certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

**JUDGEMENT DELIVERED THROUGH VIDEOLINK THIS 20TH DAY OF APRIL, 2023.**

