Kiiru v Manyenyu (Civil Appeal 75 of 2019)
[2023] KEHC 20272 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 75 OF 2019

SM MOHOCHI, J

JULY 17, 2023

BETWEEN

PETER CHEGE KIIRU .... APPELLANT

AND

CHARLES MULANDA MANYENYU .... RESPONDENT

(Being an appeal from the Judgment of the Honourable J. B. Kalo (Chief Magistrate) delivered on 18thDecember, 2018 in Nakuru CMCC No. 1413 of 2005)

JUDGMENT

Introduction

1. This Appeal contests the entire judgment by the Trial Court Vide a plaint dated 15th august, 2005, the Respondent herein sued the Appellant as 2nd Defendant and one Daniel K. Muthee (Deceased) as 1st Defendant in Nakuru Chief Magistrate's Court Civil Case No. 1413 of 2005 - Charles Mulanda Manyenyu v Daniel K. Muthee & Peter Chege Kiiru (the suit), seeking damages on account of injuries allegedly sustained in an alleged road traffic accident involving motor vehicle registration number KAH 453I Isuzu lorry (suit vehicle).
2. The 1st Defendant was sued as the registered owner of the suit motor vehicle whereas the 2nd Defendant (Appellant) was sued as the driver and agent of the 1st Defendant.
3. The Respondent was on 25th May 2004 lawfully cycling along Mau Narok road when the Appellant so negligently drove, managed and or controlled the said motor vehicle registration number KAH 453I Isuzu lorry violently knocked him down from behind thereby inflicting upon him severe injuries.
4. The Respondent obtained interlocutory judgment against the said Defendants and a final judgment was entered on 2nd October, 2007. An application to set aside the judgment was unsuccessfully made

by the Firm of M/s E.M. Juma & Co. Advocates acting for the legal representative of the 1st Defendant, who had died earlier on 22nd November, 2005, and for the 2nd Defendant (Appellant).

5. The said Law firm appealed against the dismissal of their application in High Court at Nakuru Civil Appeal No 10 of 2019 and the appellate Court, noting that no proper service of the suit had been affected as alleged, allowed the appeal, set aside the default judgment and ordered that the matter be heard afresh.

6. Hon Mulwa L.J held in her Judgment as follows: -

   a) The Firm of E.M. Juma & Co. Advocates for the Objector (wife of the Deceased owner of motor vehicle) and the 2nd Defendant (appellant) was properly on record. That the said Advocates had entered appearance for both defendants vide a memorandum of appearance dated 31st March, 2015.

   b) The Plaintiff's case against the 2nd Defendant who is the Appellant herein is still alive.

   c) The Appellant (2nd Defendant) is at liberty to file his statement of defence within thirty (30) days of the judgment dated 23rd July, 2015; and

   d) The matter be referred back to the Trial Court for hearing and determination.

7. The Appellant alleges that at the time directions were being taken for the suit to be heard afresh, the suit against Daniel K. Muthee (the 1st Defendant) had long abated and owing to abatement of the suit against the insured owner (1st Defendant), the Firm of E.M. Juma & Co. Advocates ostensibly appointed by the insurer of the insured vehicle (APA Insurance Ltd) to safeguard the interests of the insurer, did not participate further in the suit and as a consequence, the fresh suit was heard without the Appellant's knowledge and in his absence.

8. By the judgment delivered on 18th December, 2018, the Honourable Trial Magistrate entered judgment for the Plaintiff against the "Defendants jointly and severally". The Trial Court found the Defendants 100% liable for the accident and proceeded to make awards in favour of the Plaintiff.

9. Aggrieved by the judgment of the Trial Court, the Appellant preferred the instant appeal vide the Memorandum of Appeal comprising 3 grounds which has condensed into one ground: -

   That the Learned trial Magistrate erred in law and fact by failing to find that upon abatement of the suit against the insured owner, the Respondent's cause of action did not survive as against the Appellant alone.

Appellant's Written Submissions

10. It is submitted that, vide a Plaint dated 15th August, 2005, the Respondent herein sued the Appellant and one Daniel K. Muthee in Nakuru Chief Magistrate's Court Civil Case No. 1413 Of 2005 - *Charles Mulanda Manyenyu v Daniel K. Muthee & Peter Chege Kiiru* (The Suit), seeking damages on account of injuries allegedly sustained in an alleged road traffic accident involving motor vehicle registration number KAH 453L Isuzu Lorry (suit vehicle).

11. The 1st Defendant was sued allegedly as the registered owner of the suit vehicle whereas the 2nd Defendant (Appellant) was sued as the driver and agent of the 1st Defendant.

12. The Respondent obtained interlocutory judgment against the said Defendants where after a final judgment was entered on 2nd October, 2007. An application to set aside the judgment was

unsuccessfully made by the Firm of M/s E.M. Juma & Co. Advocates acting for the legal representative of the 1st Defendant, who had died earlier on 22nd November, 2005, and for the 2nd Defendant (Appellant herein).

13. That the said law firm appealed against the dismissal of their application and the Appellate Court, noting that no proper service of the suit had been effected as alleged, allowed the appeal, set aside the default judgment and ordered that the matter be heard afresh.

14. The Appellant contend that at the time directions were being taken for the suit to be heard afresh, the suit against Daniel K. Muthee (the 1st Defendant) had long abated. Owing to abatement of the suit against the insured owner (1st Defendant), the firm of E.M. Juma & Co. Advocates ostensibly appointed by the insurer of the insured vehicle (APA Insurance Ltd) to safeguard the interests of the insurer, did not participate further in the suit and as a consequence, the fresh suit was heard without the knowledge and in the absence of the Appellant herein.

15. Vide a judgment delivered on 18th December, 2018, the Honourable Trial Magistrate entered judgment for the Plaintiff against the "Defendants jointly and severally". The Trial Court found the Defendants 100% liable for the accident and proceeded to make awards in favour of the Plaintiff.

16. That being aggrieved by the judgment of the Trial Court, the Appellant preferred the instant appeal vide the Memorandum of Appeal (page 1) comprising 3 grounds condensed into the following one ground: -

> That the Learned trial Magistrate erred in law and fact by failing to find that upon abatement of the suit against the insured owner, the Respondent's cause of action did not survive as against the Appellant alone.

17. The Appellant Submitted that issues that commend themselves for determination are: -

    a) Whether the Respondent's cause of action survived against the Appellant alone upon the death of Daniel K. Muthee or abatement of the suit;

    b) What are the appropriate orders to issue?

    c) Who should bear the costs of the suit and the appeal?

18. Appellant contend that this Honourable Court has power to re-evaluate and re-examine the evidence adduced in the suit and does not necessarily have to rely on the Trial Court's findings of fact, we shall first set out the undisputed facts as the starting point of our submissions. The following facts were/are undisputed and/or undisputable: -

    a) By the Plaint dated 15th August, 2005, Daniel K. Muthee 1st Defendant was sued as the registered owner of the suit vehicle whereas the Appellant was sued as the authorized driver, servant and/or agent;

    b) As per the Plaint, the date of the alleged accident was 25th May, 2004;

    c) The Plaint dated 15th August, 2005 was not amended and remained intact up to the point of judgment;

    d) The Plaintiff's cause of action was negligence on account of a road traffic accident;

e) Daniel K. Mutheedied on 22nd November, 2005 soon after the suit had been instituted; and The Police Abstract produced as Exhibit 3 indicates Daniel K. Mutheeas the owner of the suit vehicle;

f) The Police Abstract produced as Exhibit 3 indicates that the suit vehicle was insured by APA Insurance Ltd under Policy Number MCV129433A which cover was to expire on 21st June, 2004;

a. Whether the Respondent's cause of action survived against the Appellant alone upon the death of Daniel K. Muthee or abatement of the suit?

19. The Appellant submits that Order 24 Rule 4 of the *Civil Procedure Rules,* 2010 provides: -

> "(1) Where one of two or more defendants dies and the cause of action does not Survive or continue against the surviving defendant or defendants alone, ... the court, on an application made in that behalf shall cause the legal. Representative of the deceased defendant to be made a party and shall proceed with the suit
>
> (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant."

20. Upon the death of Daniel K. Mutheeon 22nd November, 2005 and given that no application for his substitution was made within one year as prescribed or at all, the suit against him abated as from 23rd November, 2005. The question therefore that we must grapple with is whether on the death of Daniel K. Muthee and/or abatement of the suit against him, did the Respondent's cause of action survive as against the Appellant alone?

21. That once the default judgment earlier entered on 2nd October, 2007 was set aside, the suit against the Appellant proceeded ex-parte culminating in the impugned judgment. The effect of the failure by the Appellant to challenge the Respondent's testimony and/or adduce evidence, is that, the evidence adduced by the Respondent remained uncontroverted hence intact. The Trial Court captured this effect in the judgment. In that regard, we draw the attention of the Court to the following uncontroverted evidence: -

    i. Through production of the Police Abstract the Respondent proved that Daniel K. Mutheewas the owner of the suit vehicle at the time of the accident;

    ii. An accident occurred on 25th May, 2004 involving the suit vehicle and the Plaintiff;

    iii. The Police Abstract fortified and proved the averment at paragraph 4 of the Plaint that the Appellant was the authorized driver of the suit vehicle.

    iv. The Police Abstract provided evidence that at the time of the alleged accident, the suit vehicle was insured by APA Insurance Ltd and that the cover was still valid;

    v. The Plaintiff suffered injury on account of the accident;

22. From (a) above, the Respondent proved that Daniel K. Mutheewas the owner of the suit vehicle. Given that said evidence was not challenged/rebutted, nor was rival evidence adduced, as far as the suit and the appeal herein are concerned, Daniel K. Mutheewas the owner of the suit vehicle at the time of the

accident. We draw the attention of the Honourable Court to the persuasive decision in *Michael Thuo & 2 others v Kaylift Services Limited* [2017] eKLR where the Learned Judge, citing the case of *Francis Mutito Mwangi vs, MM*[2016] eKLR, held that: -

> " A certificate of search is not the only way to prove ownership of the motor vehicle, it can be proved by police abstract and it is incumbent upon the defendant to rebut that evidence".

23. What is the effect, in law, of the uncontroverted evidence showing that Daniel K. Mutheewas the owner of the suit vehicle at the time of the accident and the Appellant was the authorized driver? We reference is made to the Court of Appeal decision in *Kenya Bus Services Ltd v Dina Kawira Humphrey* [2003] eKLR as cited in high regard in *Michael Thuo & 2 others v Kaylift Services Limited* (*supra*) where the appellate Court held that: -.

> " ...where it is proved that a car has caused damage by negligence then in the absence of evidence to the contrary a presumption arises that it was driven by a person for whose negligence the owner is responsible..."

24. The upshot of the above is that, owing to the fact that no evidence was adduced to the contrary, either on behalf ofDaniel K. Mutheeor by the Respondent, Daniel K. Muthee was/is vicariously liable for the alleged negligence of the Appellant. It is our humble submission therefore, that, in light of the above holding, in-order for the above presumption to be rebutted, it was necessary for the Respondent to lead evidence that the owner of the suit vehicle (Daniel K. Muthee)was not responsible for the alleged negligence of the Appellant. No evidence was adduced in that regard. That begs the inevitable question that - given that Daniel K. Muthee was responsible for the alleged negligence of the Appellant, did the cause of action in the suit survive as against the Appellant alone? In other words, can a cause of action against A and B, where A is responsible for B's negligence, survive the death of A? We think not where it is proved that a car has caused damage by negligence then in the ne of evidence to the contrary a presumption arises that it was driven by a person for whose negligence the Owner is responsible...

25. The Appellant's foregoing submission is further fortified by the provisions of Section 4(1), 5(b) and 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* (Cap, 405). The foregoing sections provide that: -

> " 4(1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act
>
> 5(b) In order to comply with the requirements of section 4, the policy of insurance must be a policy which .. insures Such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to, any person caused by or arising Out of the use of the vehicle on a road
>
> 10(1) If after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the poteg the insurer shall, Subject to the provisions of this section, pay to the persons d to the benefit of the judgment any sum payable thereunder in respect of the

liability, including any amount payable in respect of costs and any sum payable in respect of interest on judgment that sum by virtue of any enactment relating to interest."

26. The Appellant submit that there must be a policy of insurance insuring the person specified therein of liability for injury or death to third parties from use of every motor vehicle, save a few specified under the Act and where judgment is entered against an insured person in terms of liability covered under the policy of insurance and a valid policy of insurance exists, the insurer is obligated to settle the sums payable under the judgment.

27. That in the present circumstances, there was a valid policy of insurance and/or an insurer as unchallenged evidence from the Police Abstract confirms that there was a cover by APA Insurance Ltd as at the time of the accident. The persuasive decision in *Martin Onyango Vs Invesco Insurance Company Ltd* [2015] eKLR as cited with approval in *Kenya Alliance Insurance Ltd v Thomas Ochieng Apopa (suing as the Administrator of the Estate of Pamela Agola Apop) deceased* [2020] is instructive. In the former case. the Learned Judge held: -

> "Information in the police abstract is sufficient proof of the insurer because police are charged with the responsibility of Investigating accidents and gather relevant information and evidence which they use to found a charge against the law.
>
> Self- involved or where there is no fault attributable to anyone or owner thereof or for closure of an accident case even where it is the offending driver"

28. It was the Appellant's view, that the information regarding ownership of an accident vehicle and details of insurance as indicted on a Police Abstract is obtained by the police after investigations under Section 9 of Cap 405, a certificate of insurance is required to be displayed on every motor vehicle for which a policy of insurance is necessary. That the Court takes judicial notice of the fact that, among other information, a certificate of insurance displayed on a motor vehicle contains the name of the insurer, name of the insured and expiry date of the cover.

29. Turning to the facts of the present matter, it is not in doubt that on the Police Abstract, the Police indicated Daniel K. Mutheeas the owner of the suit vehicle. They further indicated the insurance information/particulars regarding the suit vehicle. This information as above observed, was derived from the certificate of insurance displayed information, on the suit vehicle. Consequently, since no evidence was led in rebuttal of the evidence contained in the Police Abstract, it is clear that Daniel K. Mutheewas the insured in as far as the suit vehicle was/is concerned and that APA Insurance Ltd was the insurer.

30. That in the spirit of Section 4(1), 5(b) and 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, upon the death of Daniel K. Muthee, the insured owner of the suit vehicle, the Respondent's cause of action could not and did not survive as against the Appellant since at the time of the accident, there was a valid policy of insurance in favour of Daniel K. Muthee in respect of which APA Insurance Ltd was liable to settle third party claims.

31. That the Appellant did not file a declaratory suit against APA to compel it to settle the judgment sum as he was not privy to the policy of insurance between Daniel K. Mutheeand APA and that the *insurance (Motor Vehicles Third Party Risks) Act* Section 101 of Cap. 405, provides that for an insurer to be liable to settle judgment sums by dint of the policy of insurance, there must be judgment against a person insured by the policy. Who the is a person insured by a policy of insurance and sought reliance in the case of *James Akhatioll Ambundo v Lion of Kenya Insurance Co Limited* (202I| eKLR the Learned Judge referred to the following excerpt of *Halsbury's Laws of England, Volume 22, (3 Edition)* as culled

by Honourable A. Visram, JA in *Philip Kimani Gikonyo v Gateway Insurance Company Limited* 2007) eKLR: -

> "A permitted driver is not directly a party to the original contract of insurance and, on ordinary common law principles of contract law, he cannot therefore have any policy, unless it is possible to show that the assured, when making the contract, intended to act as agent or trustee of the permitted driver. Frequently this is not possible, because the particular permitted driver was not, at that time, in contemplation at all."

32. That Section 5(b) makes it mandatory for motor vehicle owners and/or operators to obtain third party cover for death or bodily injury to all persons, except for those categories of people specifically excluded such as employees or passengers. Therefore, the Appellant was one such person and that Section 10(1) of the *Act* obliges the Insurer to settle judgment of its "insured by the policy".

33. That owing to the want of privity of contract of policy of insurance, which policy was/is not known to the Appellant therefore he could not seek to rely on or enforce a document he did not know the contents of.

34. That the Appellant drew attention to a persuasive finding of the Learned Judge in *James Akhatioů Ambundo v Lion of Kenya Insurance Co. Limited* (*supra*) where in determining an appeal against a decision in a declaratory suit by a decree-holder against an insurer, the Court found that an obligation on the part of an insurer exists, to wit: -

> "In my view, the law requires the insurer to satisfy the claim of the third party so long as the damage can be attributed to the accident vehicle."

35. The Appellant further submits that the above obligation means that an insured owner is a necessary party to the suit, if that is not done and the third party succeeds against the driver or agent it would be nearly impossible to enforce the said obligation given the lack of privity of contract and oblivion as to the contents of a policy of insurance or the driver or agent to maintain a declaratory suit against the insurer.

36. That it would be utterly unfair to leave the driver or agent at the mercy of an insurer who has all the time and means to insert, amend or delete clauses in the policy document to ensure exoneration and the inclusion of an insured is necessary in furtherance of the obligation above set-out and that provision Section l0(2)(a) of Cap 405 provides that: -.

> "No sum shall be payable by an insurer before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings in respect of any judgment."

37. That the above condition would obligate the Appellant in a declaratory suit by him, to prove that a statutory notice prepared by a third party or his Advocate was sent and received by the insurer. On the other hand, if an insured owner were party to the suit in which Judgment is entered in favour of a third party, it would be quite easy for the insured owner to prove, in a declaratory suit by him, that he notified the insurer of the suit thus meeting the above condition

38. That it is a matter of general notoriety, that Advocates appearing for an insured (and his driver or agent) in a road traffic accident claim, do so under the appointment and instruction of the insurer. That they act in the matter in the interests of the insurer who is liable to settle the judgment in the event the claim is allowed.

39. With the above in mind, we submit that the participation by the Firm of E.M. Juma & Co. Advocates in the suit was as per the instruction of the insurer. Upon abatement of the suit against the insured, the firm ceased participating albeit it was still on record for the Appellant. As deposed to by the Appellant, he was not: -

a) Notified of the outcome of appeal through which the default judgment was set aside;

b) Notified when the matter was slated for formal proof hearing;

c) Notified of the impugned judgment.

d) Notified of the requirement by the judgment in said appeal that he files a statement of defence;

40. That in view of the Appellant's oblivion, he could not make an application for substitution of Danielk. Mutheeupon his demise.

41. That the Respondent's cause of action did not survive against the Appellant alone. The common law principle that where the principal is disclosed, an agent ought not be sued is also relevant herein. The evidence easily showed that Daniel K. Mutheewas the owner of the suit vehicle while the Appellant was his authorized driver/agent. In *Anthony Francis Wareheim T/A &, Wareheim & 2 Others v Kenya Post Office Savings Bank*, Civil Applicaon Nos Nai 5 & 48 of 2002 with approval by the Court of Appeal in Victor Mabachi & another Nurtun Bates Limited [2013] eKLR, the same Court stated that: -

> "It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were Impleaded as agents of a disclosed principal contrary to the clear principal of common law, that, where the principal is disclosed, the agent is not to be sued."

42. That the Respondent pleaded, that the Appellant was an agent of Daniel K. Muthee.He did not amend the Plaint even after the death of Daniel K. Muthee.That the least the Respondent could have done is apply to substitute Daniel. K. Mutheewith his personal representative.

b. What are the appropriate orders to issue?

43. That based on the powers as set out under Section 78 of the *Civil Procedure Act* the Court is urged to allow the appeal and quash the impugned judgment, dismiss the same. In the alternative, he urges the Court to allow the appeal, quash the impugned judgment and order a new trial where substitution of Daniel K. Muthee will be a pre-requisite.

c. Who should bear the costs of the suit and appeal?

44. The Appellant urges the Court to be guided by Section 27 of the *Civil Procedure Act* and award costs of the suit and allowed appeal him.

Respondent's Written Submissions

45. Vide a Plaint dated 15h August, 2005, the Respondent herein sued the Appellant and the owner of M/V Registration Number, KAH 453L. The Respondent herein moved Court vide a Plaint dated 15th August, 2005 seeking compensation against the Appellant driver herein and the 1st Defendant therein

one Mr. Daniel K. Muthee and the Court was informed he had passed away on 22nd November, 2005. The death certificate is on record herein.

46. The matter proceeded for hearing without any input by the said Defendants and judgment for the Respondent/ Plaintiff was entered accordingly.

47. Upon issuance of the warrants of attachment and proclamation notice, the Defendants instructed the firm of E.M Juma & Co. Advocates who made an application on their behalf to set aside the said judgment. However, the said application was dismissed and the Respondent herein appealed against the same to the High Court vide Nakuru Civil Appeal No 10 of 2009.

48. Hon. Mulwa LJ heard the appeal and in her judgment held as follows:-

    a. The firm of E.M Juma for the Objector (the wife of the Deceased owner of motor vehicle) and the 1" Defendant (Appellant herein was properly on record). The said Advocates had entered appearance for both Defendants in the lower Court matter vide memorandum of appearance dated 31/3/2008 on record herein.

    b. The Plaintiffs case against the 2 Defendant who is the Appellant herein is still alive.

    c. The Appellant (2nd Defendant) is at liberty to file his statement of defence within 30 days of the judgment dated 23rd July, 2015.

    d. That the matter be referred back to the Lower Court for hearing and determination.

49. That indeed, the said judgment was read in the presence of both parties' Counsel. Hence the Appellant knew or ought to have known the Court's stand in regard to the suit against him. Following the Court's directions issued in the above-mentioned judgment, the Respondent on 5th April, 2018 requested for interlocutory judgment to be entered against the Appellant herein who had failed to comply with the Court's above directions. The same was endorsed and on 20th August, 2018, the Respondent testified and closed his case. Judgment therein was delivered on 18th December, 2018 by Hon. JB Kalo and service of entry of judgment was duly served upon the Appellant's firm of Advocates, E.M Juma & Ombui Co Advocates.

50. That upon receipt of the notice of entry of judgment by the Appellant's said Advocates, they responded to the same vide their letter dated 3rd April, 2019 advising the Respondent's Advocates to proceed with execution of the judgment herein against their said Client, the Appellant herein.

51. That a copy of the said letter was annexed as CMM IV in the Respondent's Replying Affidavit dated 10th May, 2019 on record herein. Thus clearly, it is evident that both Counsels were aware the matter before Court was between the Appellant and the Respondent herein and not the owner of the subject motor vehicle.

52. Having submitted and demonstrated that the Appellant herein was well represented by Counsel was well aware the suit was against him; the Respondent submits that the issues for determination are as follows: -

    i. Whether the Appellant herein complied with the directions issued vide judgment entered by Hon. Mulwa L.J on 23/7/2015?

ii. Whether the Appellant herein was aware of the hearing date on 20/8/2018?

53. On the self-framed issues, the Respondent submits as follows: -

i. As to whether the Appellant herein failure to file and serve his defence as directed by the Court vide judgment entered by Hon. Mulwa L.J on 23/7/2015 was indolent?

54. That the record clearly confirms that the Appellant herein was well represented by Counsel on 23rd July, 2015 when Hon. Mulwa L.J delivered her judgment and directed that the suit judgment proceed to hearing and the second defendant who was alive was at liberty to file his defence within 30 days.1`

55. That the Court will further note that, despite having Counsel representation, the Appellant herein did not bother to file any defence as directed, and/or file any application to substitute the Deceased whom he was well aware had passed on.

56. That from the Appellants pleadings on record, it is clearly evident that he knew or ought to have known the wife of the 1st Defendant who was his employer and the owner of the subject motor vehicle, reliance was placed on the Replying Affidavit dated 22nd April, 2008 in respect to their application dated 31st March, 2008 that the 1st Defendant, Mr. Muthee had passed on.

57. That following the Appellant's failure to file any defence and/or file any application for substitution of the Deceased herein, the Respondent herein requested the Court for an interlocutory judgment vide letter dated S4/2018.

58. An Interlocutory judgment against the Appellant was properly entered and on 20th August, 2018, the Respondent testified and closed his case. Hon, J.B Kalo, CM having heard the Respondent in the Trial Court delivered his judgment against the Appellant.

59. The Respondent prays that the Judgment is not disturbed since the hearing was properly done as by Law and the Court ought not aid the indolent.

60. In demonstrating indolence reliance was placed in the case of *Aggrey Sakwa Waswa Vs Patrick Omonge Kilaemba & 4 Others* |2020] elKLR where Hon. Matheka, L.J held as follows;

> " As no evidence has been adduced by the Appellant to show any intended substitution as per the provisions of the Succession Act. All the Appellant has done is to say he was the son of the Deceased Defendant. He should have filed the necessary application for substitution since the suit against him was active. Only the suit against the Deceased abated... "Emphasis added.

61. That the Appellant was indolent and should not turn around and blame the Respondent for the same. He never moved Court to have the wife of his Deceased employer be enjoined as a party to this suit yet he was well aware of her whereabouts.

62. The Respondent pray that, the Court upholds the decision of hon. mulwa l.j in nakuru hcca no. 10 0f 2009 that the suit herein was against the appellant and not his deceased employer.

63. That having failed to defend his case against him, then the judgment for the Respondent in the Trial Court be upheld and the security deposited in the bank be released to the Respondent herein who has waited for over 17 years to enjoy the fruits of his judgment.

Whether the Appellant herein was aware of the hearing dated on 20/8/20182

64. The Respondent submits that, the Appellant's Advocates were well aware of the hearing date on 20th August, 2018 as is evidenced in the Return of Service dated 16th August, 2018 and hearing notice dated 28th June, 2018 received by the firm of E.M Juma &Co. Advocates exhibit CMM II in the Record of Appeal

65. The Respondent in further demonstration of the Appellant's knowledge that the suit herein is against him and not his Deceased employer, contend that his Advocates advised the Respondent's Advocates to proceed with execution against the Appellant herein vide their letter dated 3rd April, 2019 and clearly it is totally misleading for the Appellant herein to claim and submit, that the suit against him abated.

66. The Respondent submit that, if at all the appellant was not pleased with the judgment of hon. mulwa l j in nakuru hcca n0. 10 of 2009 that the suit herein was against the appellant and not his deceased employer, then he should have appealed against the same. Having failed to do so, then it is the Respondent's submission that, that the appeal is frivolous, a waste of Court's precious time, lacks merit, and must be dismissed with costs to the Respondent who has waited for more than 17 years to enjoy the fruits of his Judgement.

67. Since the Appeal hinges on the effect of the death of the Appellant's insured and principal, it is imperative that I first deal with the law on the subject. The relevant law is Order 24 of the *Civil Procedure Rules* that provides that: -

    i. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

    ii. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or of continues to the surviving plaintiff or plaintiffs alone or against them or defendants dies surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants

    iii. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

    (2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

    Provided the court may, for good reason on application, extend the time.

    1. "Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

    2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant;

4. ....

5. ....

6. ......

7.

   (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

   (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit".

68. This court finds that the Suit against David Muthee abated on 22nd November, 2006 (one year after his demise), however the cause of action survived as against the Appellant herein.

69. The Court equally finds that the Appellant was the driver of the offending motor vehicle and cannot thus escape liability on the account of the death of his co-defendant, he would otherwise benefit on account of vicarious liability had his co-defendant's suit not abated.

70. I find the Appeal to be without merit and accordingly dismiss the same.

71. The Appellant to bear the costs of this Appeal.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF JULY, 2023.

____

S. MOHOCHI (JUDGE)

In the Presence of;

Appellant: Gatonye & Gatonye Advocates

Respondents: Githiru& Co. Advocates

Ms. Schola C.A