



**Maisha Flour Mills Limited v Kalomut & 3 others (Civil Appeal
E001 of 2022) [2024] KEHC 14095 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL E001 OF 2022
AC MRIMA, J
NOVEMBER 13, 2024**

BETWEEN

MAISHA FLOUR MILLS LIMITED APPELLANT

AND

JOSEPH KALOMUT 1ST RESPONDENT

**GLADYS CHENANGAT KALOMUT (SUING AS THE PERSONAL
REPRESENTAIVES OF THE ESTATE OF JACOBPLIMO KALOMUT -
DECEASED) 2ND RESPONDENT**

WILLIAM ESOKON 3RD RESPONDENT

DOVE MOTORS LIMITED 4TH RESPONDENT

*(Being an Appeal arising out of the judgment and decree of Hon. L.G.G.
Okwengu (Resident Magistrate) in Kapenguria Chief Magistrate's
Court Civil Case No. 5 of 2017 delivered on 13th January, 2022)*

JUDGMENT

Introduction:

1. The appeal in this case is against the judgment and decree of the trial Court in Kapenguria Chief Magistrate's Court Civil Case No. 5 of 2017 (hereinafter referred to as 'the suit') in finding the Appellant, the 3rd Respondent and the 4th Respondent jointly and severally liable for a fatal accident that occurred sometimes in December 2014 and the award of damages.
2. In the suit, the 1st and 2nd Respondents herein were the Plaintiffs whereas the 3rd Respondent was the Defendant, the Appellant was the 1st Third Party and the 4th Respondent was the 2nd Third Party. It was the finding that the Appellant was liable that precipitated the appeal subject of this judgment.



3. The appeal was vehemently opposed.

The Appeal:

4. The Appellant, being dissatisfied with that trial Court's decision rendered on 13th January 2022, filed a Memorandum of Appeal dated 8th February, 2022. The Appellant raised 7 grounds of appeal in disputing the findings on liability and damages by the trial Court. The Appellant mainly faulted the trial Court for finding it liable and yet it had sold off the subject vehicle which was the Motor vehicle registration number KAJ 146E make Mitsubishi Fuso Lorry [hereinafter referred to as 'the Lorry'] to the 4th Respondent long before the accident occurred.

5. In buttressing the grounds of appeal, the Appellant filed written submissions and referred to several decisions in urging this Court to accordingly allow the appeal and to strike it out of the proceedings. In the alternative, the Appellant prayed that the damages under loss of dependency be set aside in totality.

6. The 1st and 2nd Respondents opposed the appeal in its entirety. They filed written submissions wherein they submitted that the Appellant failed to demonstrate that the trial Court exercised its discretion to apportion liability and to award damages injudiciously. They prayed that the appeal be dismissed with costs.

7. The 3rd and 4th Respondents did not participate in the hearing of the appeal.

Analysis:

8. This Court has duly considered the entire record and the parties' submissions as well as the decisions referred to.

9. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123).

10. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).

11. Bearing the above in mind, this Court finds that there are mainly two issues for determination. They are on the aspect of liability and quantum of damages. The Court will now deal with the issues in seriatim.

Liability:

12. The gravamen on this issue was the contention by the Appellant that it was wrongly found liable yet it had sold off the lorry to the 4th Respondent long before the accident took place. In support of the argument, the Appellant produced the documents in the Third-Party List of Documents dated 30th April 2018.

13. In the impugned judgment, the trial Court indeed acknowledged the veracity of the evidence contained in the exhibits, but held that since the Appellant was still registered owner of the lorry then the sale transaction was not completed and the Appellant's contention could not hold.

14. The parties submitted at length on the issue in this appeal. Both referred to decisions in support of their rival positions.



15. This Court has carefully considered the issue. Whether or not the lorry was sold is largely a factual issue. It calls for proof. Among the documents the Appellant produced were a Payment Voucher dated 6th July 2005, a copy of a Cheque dated 8th July 2005 for Kshs. 1,400,000/=, a copy of the Lorry's logbook, the Lorry's inspection report, a transfer form and the Appellant's letter to Kenya Revenue Authority dated 6th July 2005. Further, the Appellant availed a witness, one Habil Asa Waseka, who testified as DW1 and produced the documents as exhibits.
16. DW1 narrated how the lorry was sold by the Appellant to the 4th Respondent and confirmed that, indeed, the full sale consideration of Kshs. 1,400,000/= was paid to the Appellant by way of a cheque which cheque was honoured by the banks. That was sometimes in July 2005. DW1 also stated that the Appellant forwarded the Lorry and its logbook, duly signed transfer forms and its PIN Certificate to the 4th Respondent and equally informed the Kenya Revenue Authority of the sale and requested it to assist with the transfer of the lorry to the new owner.
17. The 1st and 2nd Respondents supported the finding of the trial Court on the aspect of liability. They contended that since there was no sale agreement produced, then the payment could have been for any other purpose, say hire, and not necessarily for the sale of the lorry.
18. The Appellant filed a Third-Party Statement of Defence in the suit. It was dated 30th April 2018. In paragraph 8 thereof, the Appellant disclosed that it had transferred its rights and interests in the lorry to the 4th Respondent way back in 2005 and that it no longer enjoyed any possession or control of the lorry. As such, the Appellant put the Respondents into strict proof.
19. In a Reply to Defence dated 8th May 2018, the 1st and 2nd Respondents contended that the Appellant was still the registered owner of the lorry and not the 4th Respondent.
20. With such a state of affairs, there is need to look at the issue of the burden of proof. The issue has two facets. They are the legal burden of proof and the evidential burden of proof.
21. Sections 107(1), (2) and 109 of the Evidence Act, Cap. 80 of the Laws of Kenya deals with the burden of proof. It states as under: -
Sections 107(1) and (2):
 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.and
Section 109:
Proof of particular fact
The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
23. The foregoing provision brings out what is referred to as the legal burden of proof. That burden remains on the party instituting the matter throughout the case.



24. Reinforcing that the legal burden of proof [in constitutional Petitions is on the Petitioners], the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR stated as follows: -

.... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

26. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. IEBC & 2 Others (2018) eKLR as under: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.

27. The principle of ‘evidential burden of proof’ is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in Singh vs. Mota Singh & Another (2008) 1 KLR 1 stated that an election is a matter of public importance not to be lightly set-aside and in the case of Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC 258 the Supreme Court of India stated that ‘the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law....’.

28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -

132. Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

133. It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce



‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....

27. It, therefore, follows that whereas the legal burden of proof is static and rests on the party instituting the claim throughout the trial, the evidential burden of proof may shift to the opposite party depending on the nature and effect of evidence adduced by the party instituting the claim.
28. Applying the above to the matter at hand, the 1st and 2nd Respondents filed a Plaintiff which they later amended twice. The suit initially had two Defendants being Eldema Kenya Ltd and the 3rd Respondent herein. It was alleged that Eldema Kenya Ltd was the owner of the lorry and the 3rd Respondent was the driver of the offending lorry at the time the accident occurred. They relied on the documents they filed in their List of Documents dated 20th February 2017. Of particular import was the Official search certificate for the lorry from the National Transport and Safety Authority which confirmed that the owner of the lorry, as at 10th January 2017, was the said Eldema Kenya Ltd.
29. Eldema Kenya Ltd entered appearance and filed a Statement of Defence together with its List of Documents dated 5th March 2018. In its defence, Eldema Kenya Limited stated that it had sold the lorry to the Appellant. As such, it filed a Chamber Summons dated 5th March 2018 to enjoin the Appellant as a Third Party. The Appellant was eventually enjoined as a Third Party.
30. Eldema Kenya Ltd then applied to be struck out of the proceedings vide a Chamber Summons dated 2nd July 2018. It relied on the documents it had filed earlier which were a Sale Agreement dated 10th January 2003 between itself and the Appellant as well as an invoice for the purchase price of Kshs. 1,800,000/= issued by the said Eldema Kenya Limited.
31. The Chamber Summons dated 2nd July 2018 came up for hearing on 16th August 2018. On the said day, the 1st and 2nd Respondents herein did not oppose it. They left the matter to the Court. The Court allowed the application and Eldema Kenya Ltd was struck out of the suit as an unnecessary party.
32. The Appellant then filed a Chamber Summons dated 29th January 2019 also seeking to be struck out of the proceedings on similar grounds of having sold the lorry to Dove Motors Limited. They relied on their documents in the List of Documents dated 30th April 2018. The 1st and 2nd Respondents, however, opposed the application which was eventually dismissed through a ruling rendered on 13th May 2019. The Court was of the view that it was improper for the Appellant to be struck out since it had not even issued a third-party notice to the said Dove Motors Limited unlike how Eldema Kenya Limited had handled its part.
33. The Appellant later successfully applied and was granted leave to issue a Third-Party Notice to Dove Motors Limited to whom it alleged to have sold the lorry to. That was through a ruling delivered on 1st October 2020 since the application was also vehemently opposed. As a result, Dove Motors Limited was enjoined as the 2nd Third Party.
34. As the Appellant had already made an application to be struck out of the proceedings before enjoining Dove Motors Limited as the 2nd Third Party, it opted not to make a similar application again and instead pursued the hearing of the suit. To that end, it filed an application for directions and the Court directed that the issue of liability between all the parties be determined at the hearing. The matter then proceeded for hearing.
35. The 1st and 2nd Respondents called 3 witnesses being the 2nd Respondent who testified as PW1, the 1st Respondent who testified as PW2 and one Gerishon Mnangat Lomut who testified as PW3. The Appellant called one witness, Habil Asa Waseka, who testified as DW1. Dove Motors Limited neither entered any appearance nor filed a Defence. It also did not participate in the hearing of the case.



Likewise, the 3rd Respondent did not take part in the suit despite having been charged in Kitale Chief Magistrates Traffic Case No. 474 of 2014 [hereinafter referred to as ‘the traffic case’] with the offence of causing death by dangerous driving contrary to Section 46 of the *Traffic Act* where he was found guilty and accordingly convicted. He was sentenced to pay a fine of Kshs. 60,000/= in default to serve a jail term of one year.

36. At the close of the respective cases, the parties filed written submissions and a judgment was delivered on 13th January 2022. That is the impugned judgment subject of the instant appeal.

37. In the impugned judgment, the trial Court dealt with the issue as to whether the Appellant sold the lorry to Dove Motors Limited. The Court acknowledged all the documents produced by the Appellant to back the argument. In rejecting the Appellant’s position, the trial Court stated as follows: -

... However, the suit motor vehicle is still in the names of the 1st third party [Appellant herein] and whether there was completion of the sale and transfer is apparent on the search document produced by the plaintiff. For this reason, I find that the sale of the motor vehicle KAJ 146 is neither here nor there as the same was not transferred to the 2nd 3rd party [Dove Motors Limited].

38. In apportioning liability to the Appellant, the 3rd and 4th Respondents jointly and severally, the trial Court further stated as under: -

... However, there was no further proof of whether possessory ownership was with the 2nd third party. They did not provide details as to whether the Defendant [3rd Respondent] was an employee of the 2nd third party or hired the suit motor vehicle for use. However, by virtue of the third party issuing a third-party notice to Dove Motors indicates that the said Dove motors had an interest in the said motor vehicle.

For this reason, I find that liability is apportioned to the Defendant, third party and 2nd third party jointly and severally.

39. The above was the trial Court’s reasoning which was faulted by the Appellant and approved of by the 1st and 2nd Respondents. Before this Court ventures into ascertaining whether or not the trial Court erred on the issue, suffice to remind ourselves that the 1st and 2nd Respondents did not oppose the application by Eldema Kenya Ltd to be struck out of the proceedings as it had allegedly sold the lorry to the Appellant. In the said application, Eldema Kenya Ltd relied on Sale Agreement dated 10th January 2023 between itself and the Appellant and an invoice for the purchase price of Kshs. 1,800,000/= issued by the said Eldema Limited.

40. This Court’s attention was, however, drawn to the status of the said two documents. The sale agreement and the invoice were never signed by any of the parties. They were just plain unsigned documents. However, the 1st and 2nd Respondents had no issue with the said documents and allowed Eldema Kenya Ltd to exit the stage whereas it instead took issue with the documents relied upon by the Appellant.

41. Be that as it may, in their submissions in this appeal, the 1st and 2nd Respondents argued that the Appellant did not avail an executed sale agreement and a resolution of the company authorizing the sale of the lorry. They relied on Eliud Muya Kariuki & 2 Others vs. Mary Wanjiku Njenga & 4 Others (2019) eKLR in advancing the argument. They equally took issue with the documents produced by the Appellant.



42. This Court will now look at the Appellant's documents which were produced as exhibits by the Appellant. The starting point is that the documents were produced by the consensus of the parties. They were also certified as true copies of the originals. There was a Payment Voucher dated 6th July 2005 by Dove Motors Limited. The invoice signified payment by Dove Motors Limited to the Appellant. The invoice was duly signed by the Appellant and Dove Motors Limited. The amount involved was Kshs. 1,400,000/=. The payment was acknowledged by the Appellant and by the Appellant's witness in Court, DW1. According to the invoice, the purpose of the payment was in respect of the lorry. It stated that it was 'full and final payment'.
43. The Appellant stated that it had sold the lorry to Dove Motors Limited in its Statement of Defence, the Third-Party Notice and the application seeking to be struck out of the suit. DW1 also clarified as much when he appeared before Court. There is no doubt the record affirms the purpose of the payment by Dove Motors Limited to the Appellant. Such can be gathered from what further transpired between the parties. There is evidence that upon receipt of the purchase price, the Appellant released the lorry alongside its original logbook, original vehicle inspection report, duly signed transfer form, copy of the Appellant's PIN Certificate and a copy of the Appellant's certificate of incorporation to Dove Motors Limited. The said documents were sent to Dove Motors Limited by way of the Appellant's letter dated 23rd July 2005 whose receipt was acknowledged by Dove Motors Limited by signing and stamping thereon. The Appellant also wrote to Kenya Revenue Authority on 6th July 2005 [a period of 17 days prior to releasing the documents to Dove Motors Limited] about the lorry and inter alia stated as follows:
- Please note that we have sold the vehicle and the current owner would like to have an urgent transfer to its ownership.....
44. As the above evidence was never controverted, this Court finds that the holistic meaning and interpretation of the documents produced by the Appellant favours a holding that the purpose of the payment of Kshs. 1,400,000/= by Dove Motors Limited to the Appellant was the purchase price for the sale of the lorry. Therefore, the position taken by the 1st and 2nd Respondents as well as the trial Court that the purpose of the payment was unclear does not hold and is hereby dismissed.
45. The trial Court also made a somewhat conflicting finding in the impugned judgment relating to the lorry. The Court stated that the lorry was still registered in the name of the Appellant and the official search document produced by the 1st and 2nd Respondents revealed as much. However, that was not the correct position. According to the search document, the owner of the lorry as at 10th January 2017 was Eldema Kenya Limited and not the Appellant. That finding was, hence, without any factual or legal basis.
46. As to the absence of the sale agreement between the Appellant and Dove Motors Limited over the lorry, this Court takes the position that there is no legal requirement that a simple commercial transaction like the one in this matter between private entities must be reduced into writing by way of a sale agreement. This Court remains alive to the fact that a contract may be written or otherwise inferred from the conduct and actions of the parties. In this matter, the documents affirm a binding contract between the Appellant and Dove Motors Limited. Furthermore, unlike in the instant case, the sale agreement and invoice between Eldema Kenya Ltd and the Appellant were not even signed or at all and yet the 1st and 2nd Respondents took no issue with such and allowed Eldema Kenya Ltd to exit the proceedings. The conduct by the 1st and 2nd Respondents may, therefore, be akin to approbating and reprobating.
47. The decision in *Eliud Muya Kariuki & 2 Others vs. Mary Wanjiku Njenga & 4 Others* case [supra] is, however, distinguishable since it related to land transactions which are legally required to be in writing



pursuant to Section 3 of the Law of Contract Act, Cap. 23 of the Laws of Kenya. In respect to the submission of lack of a resolution by the Appellant over the sale of the lorry, the law and company practice allows officers of companies to transact on behalf of companies and such actions may be later ratified accordingly.

48. On the aspect of possession of the lorry, the Appellant through DW1 testified that it released the lorry to Dove Motors Limited on receipt of the purchase price. That evidence was not controverted and this Court equally so finds.
49. Having said as much, this Court now finds that the trial Court erred in finding that there was no evidence that the lorry did not belong to the Appellant when the accident occurred. Conversely, there is ample evidence to confirm that the Appellant sold the lorry to Dove Motors Limited in July 2005 and that the sale was concluded. The Appellant could not, therefore, be found culpable as a result of an accident that occurred in 2014. As such, the correct finding was that the Appellant was not the owner, whether legally or otherwise, of the lorry as at the time the accident occurred and as such, could not be liable. Just like Eldema Kenya Ltd, the Appellant was equally not a necessary party in the suit. The trial Court ought not to have found the Appellant liable at all.
50. Had this Court, however, found the Appellant as the owner of the lorry, it would have upheld the findings by the trial Court both on liability and quantum.

Disposition:

51. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
52. In the end, this Court hereby determines the appeal as follows: -
 - a. The appeal is successful and is hereby allowed.
 - b. The judgment entered against the Appellant herein, Maisha Flour Mills Ltd, in Kapenguria Chief Magistrate's Court Civil Case No. 5 of 2017 on liability and quantum is hereby set-aside and quashed. The said Maisha Flour Mills Ltd is also struck out of the said civil case. For clarity, the Plaintiffs are at liberty to jointly and severally execute the judgment against William Esokon and Dove Motors Limited, but not against Maisha Flour Mills Ltd.
 - c. The Respondents shall jointly and severally bear the costs of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 13TH DAY OF NOVEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Maina, Counsel for the Appellant.

No appearance for Mr. Barongo, Counsel for the 1st and 2nd Respondents.

No appearance for the 3rd and 4th Respondents.



Chemosop/Duke – Court Assistants.

