



REPUBLIC OF KENYA



**Musau v Chege & another (Civil Appeal E008 of 2024)  
[2025] KEHC 13032 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13032 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E008 OF 2024  
RC RUTTO, J  
SEPTEMBER 19, 2025**

**BETWEEN**

**ROSEMARY WAVINYA MUSAU ..... APPELLANT**

**AND**

**ELIATHA MAINA CHEGE ..... 1<sup>ST</sup> RESPONDENT**

**TIPU AUTO MOBILE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against part of the Judgment delivered on 21st December 2023 by Hon. H.O. Wanyaga in Thika Chief Magistrate's Court in CMCC No. 692 of 2019)*

**JUDGMENT**

1. This appeal arises from the judgment delivered by the Magistrate's Court in Civil Suit No. 692 of 2019. In that case, the Appellant filed the Complaint dated 5<sup>th</sup> November 2019 seeking general damages, itemized special damages of Kshs.9,898.00, costs of the suit and interest thereof. The Claim arose from a motor vehicle accident involving the Appellant. The Appellant claimed that the Motor Vehicle Registration No. KCK 617K was driven negligently and carelessly by the 1<sup>st</sup> Respondent, causing bodily injuries. She also claimed that the 2<sup>nd</sup> Defendant was the registered owner of the said motor vehicle, hence vicariously liable for the actions of the 1<sup>st</sup> Defendant.
2. The Respondents did not enter appearance, and an interlocutory Judgment was entered on 29<sup>th</sup> February 2022. The matter proceeded to formal proof. The Appellant filed her submission in support of the claim dated 5<sup>th</sup> August 2022. By a Judgment delivered on 28<sup>th</sup> September 2022, the lower court entered 100% liability in favour of the Appellant, special damages of Kshs.5,670.00 General damages of Kshs.1,500,000.00, costs and interest at the court rate from the date of judgment till payment in full.
3. On 17<sup>th</sup> November 2022, the 2<sup>nd</sup> Respondent filed an application under certificate of urgency seeking to set aside the ex parte judgment, all consequential orders and proceedings thereto; and leave to file



- a Notice of Appointment and defence out of time. The 2<sup>nd</sup> Defendant contended that there was no proper service of the Summons to enter appearance and the pleadings by the Appellant, and that it was unaware of the suit. The 2<sup>nd</sup> Respondent urged the court, to allow the application and protect its right to be heard in accordance with *the Constitution* and the dictates of the principles of natural justice. This application was opposed by the Appellant, who maintained that there was proper service.
4. By a Ruling delivered on 31<sup>st</sup> January 2023, the court allowed the application and set aside the ex parte judgment in the interest of justice, on condition that the 2<sup>nd</sup> Respondent deposited Kshs.750,000.00 in court within 30 days, failure to which the Appellant was at liberty to proceed with execution against the Respondents; a defence to be filed within 7 days; and throw-away costs of Kshs.30,000.00 be paid to the Appellant.
  5. The 2<sup>nd</sup> Defendant filed its Statement of Defence dated 7<sup>th</sup> February 2023 denying the allegations founded in the Plaintiff. It particularly contended that although it was the registered owner of the motor vehicle registration No. KCK 617, it was neither the beneficial owner nor the insured at the time of the alleged accident. It urged that pursuant to a sale agreement dated 21<sup>st</sup> November 2016, it had sold the said motor vehicle to one Solomon Mutuku Musyoka, upon payment of the agreed deposit, and had handed over possession to the said buyer. It was the 2<sup>nd</sup> Defendant's further case that the said Solomon Mutuku was responsible for insuring the motor vehicle. It prayed for the suit to be dismissed with costs.
  6. The Appellant maintained that the 2<sup>nd</sup> Respondent was the registered owner of the said motor vehicle and thus variously liable for the 1<sup>st</sup> Defendant's negligent actions.
  7. The matter was heard on 20<sup>th</sup> September 2023, and thereafter both parties filed their submissions, the Appellant's dated 12<sup>th</sup> October 2023 and the 2<sup>nd</sup> Respondent's dated 30<sup>th</sup> October 2023.
  8. By a judgment delivered on 21<sup>st</sup> December 2023, the lower court dismissed the suit against the 2<sup>nd</sup> Respondent with no orders for costs. The court reasoned that although the 2<sup>nd</sup> Defendant was the registered owner, it had proved on a balance of probabilities that it had already sold the vehicle to Solomon Mutuku Musyoka and its registration was purely for purposes of securing its interest in the vehicle. The court also found that it was not clear why the 2<sup>nd</sup> Respondent did not seek 3<sup>rd</sup> party proceedings to join the said Solomon, or the Appellant amend her pleading to add the said third party as a defendant.
  9. Thereafter, the trial court also proceeded to issue the following further orders set out verbatim;
    - i. Liability 100% in favour of plaintiff against the 2<sup>nd</sup> Defendant (sic)
    - ii. General damages of Kshs. 1,500,00.00
    - iii. Special damages Kshs. 5, 670.00
    - iv. Costs of the suit to the Plaintiff;
    - v. Interest at court rates from the date of judgment till payment in full
  10. The Appellant being dissatisfied with the trial court's judgment, lodged this appeal by a Memorandum of Appeal dated 16<sup>th</sup> January 2024, raising five grounds of appeal, as follows; that the Learned Magistrate erred in apportioning liability to a person not a party to the suit; holding that the Appellant ought to have amended her pleadings and joined a third party, who was a stranger to the Appellant; in holding that the 1<sup>st</sup> Respondent was wholly liable for the accident without determining the question of vicarious liability; failing to find that the 2<sup>nd</sup> Respondent was wholly liable for the accident for failing to



join a third party to the proceedings; and failing to consider the Appellant's submissions, facts, evidence and issues, thereby arriving at a wrong conclusion.

11. The Appellant prayed that this Honourable court allows the appeal with costs and that the impugned part of the judgment of the Hon. Wanyaga delivered on 21<sup>st</sup> December 2023 be set aside, and an order that the 2<sup>nd</sup> Respondent was fully liable for the accident be made.
12. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 20<sup>th</sup> November 2024, while the 2<sup>nd</sup> Respondent's submissions are dated 21<sup>st</sup> November 2024.

### **Appellant's submissions**

13. The Appellant restated the grounds of appeal and primarily submitted on the issue of third-party proceedings. She contended that it was incumbent upon the 2<sup>nd</sup> Respondent to institute third-party proceedings, having introduced Solomon Mutuku in its pleadings, a party unknown to the Appellant. She relied on Order 1, Rule 15 of the Civil Procedure Rules to urge that the 2<sup>nd</sup> Respondent was mandatorily obligated to file a formal application within 14 days after the close of pleadings for the issuance of a third-party notice to Solomon Mutuku. To further buttress this assertion, the Appellant cites Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR; and Kubai Kithinji Kaiga (suing as the legal representative of the estate of John Kaiga (deceased) v Kenya Wildlife Services (Civil Appeal 136 of 2019) [2021] KEHC 7088 (KLR).
14. While citing Benson Charles Ochieng & another v Patricia Atieno BSA HCCCA No. 69 of 2010 [2013] eKLR, the Appellants emphasised that the 2<sup>nd</sup> Respondent, having failed to institute 3<sup>rd</sup> party proceedings within the prescribed timeline, was vicariously liable and should have borne full liability for the accident.
15. In conclusion, the Appellant urged the court to allow the appeal with costs by setting aside the part of the judgment by the Magistrates' Court dated 21<sup>st</sup> December 2023.

### **Respondent's submissions**

16. The 2<sup>nd</sup> Respondent submitted on two main issues: whether it was vicariously liable for the negligence of the 1<sup>st</sup> Respondent; and whether the omission to institute 3<sup>rd</sup> party proceedings must infer vicarious liability. On the first issue, the 2<sup>nd</sup> respondent submitted that vicarious liability for negligence is not pegged on legal ownership of a motor vehicle, but on the delegation of task and duty to the tortfeasor (driver).
17. It cited the case of John Nderi Wamugi v Ruhesh Okumo Otiangla & 2 others Civil Appeal 24 of 2015 [2015] KECA 214 (KLR); Securicor Kenya Limited vs Kyumba Holdings Ltd [2005] eKLR; and United Millers Ltd v Benjamin Okari Oigo (Civil Appeal No 81 of 2006) 2010 KEHC 315 (KLR) to persuade the court that for the 2<sup>nd</sup> Respondent to be deemed vicariously liable for the negligence of the 1<sup>st</sup> Respondent, it was indispensable for the Appellant to prove the existence of an agent - principal or employer - employee legal relationship respectively. To this end, the Respondent urged that it had proved before the trial court that it had transferred the motor vehicle in issue to Solomon Mutuku vide a sale agreement dated 21<sup>st</sup> November 2016, and therefore the 1<sup>st</sup> Respondent was not an agent or employee of the 2<sup>nd</sup> Respondent.
18. On the second issue, the 2<sup>nd</sup> Respondent contended that even in the absence of third-party proceeding joining Solomon to the suit, for the court to hold it vicariously liable, the Appellant had an evidentiary duty to prove its nexus with the 2<sup>nd</sup> Respondent, which she had failed to meet. It relied on Sumer Singh



Bachu v Nicholas Wainaina Kago Waweru (Civil Appeal 14 of 1976) [1976] KECA 17 (KLR) that the Appellant had a duty to prove her case against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

19. In conclusion, the 2<sup>nd</sup> Respondent urged this court to find that the Appeal lacks merit, uphold the judgment of the Magistrate's Court, and dismiss the appeal with costs.

### **Analysis and Determination**

20. This court acknowledges its appellate jurisdiction to hear and determine appeals from the Magistrate's Courts in civil matters as donated by Article 165 of *the Constitution*. The statutory framework, including the *Civil Procedure Act* and Civil Procedure Rules, governs the procedure and conditions under which appeals from the Magistrates' Courts can be brought to the High Court. Particularly, Section 65 of the *Civil Procedure Act* provided for appeals from the subordinate courts to the High Court as follows; Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court -
- (b) from any original decree or part of a decree of a subordinate court, on a question of law or fact.
21. Having carefully considered the memorandum of appeal, record of appeal, the parties' written submissions and authorities, the following key issues arise for determination;
- a. Who has a duty to institute 3<sup>rd</sup> party proceedings?
  - b. Whether the 2<sup>nd</sup> Respondent was vicariously liable
  - c. What Reliefs can the Court grant.

### **Who has a duty to institute 3<sup>rd</sup> party proceedings?**

22. The Appellant argues that it was incumbent upon the 2<sup>nd</sup> Respondent to institute 3<sup>rd</sup> party proceedings, having introduced a party unknown to her through its pleadings.
23. The 2<sup>nd</sup> Respondent does not dispute the duty to institute 3<sup>rd</sup> party proceedings, but contends that even if it did not join the third party to the proceedings, the Appellant had a duty to prove her claim against the Respondents, a requirement that was not met.
24. The starting point is the Civil Procedure Rules, which are clear on who bears the duty to institute 3<sup>rd</sup> party proceedings. Order 1 Rule 15 of the Civil Procedure Rules states as follows;
- 15 (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
- a. that he is entitled to contribution or indemnity; or
  - b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
  - c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third-party notice) to that



effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

25. The jurisprudence on this obligation is replete. In *Gacheru v Ready Consultancy Company Limited & 2 others; Badbess & 3 others (Intended Third Parties)* (Environment & Land Case 218 of 2021) [2025] KEELC 56 (KLR), the court cited with approval *Kenya Commercial Bank vs Suntra Investment Bank Limited* (2015) eKLR that:

In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.”

26. In *Mayuki v Siku & another; Wanjema (Intended Third Party)* (Environment & Land Case 965 of 2016) [2023] KEELC 18084 (KLR), the court stated as follows;

Order 1 Rule 15 of the Civil Procedure Rules is clear that it is only a defendant who can seek the issuance of a third-party notice to enjoin the third party. A third-party notice is brought at the instance of the defendant who has a claim against him for indemnity, contribution or other remedy or relief connected with the plaintiff’s claim against the defendant.

Also see *Benson Charles Ochieng & another v Patriaicia Atieno BSA HCCCA No. 69 of 2010* [2013] eKLR; and *Kubai Kithinji Kaiga (suing as the legal representative of the estate of John Kaiga (deceased) v Kenya Wildlife Services (Civil Appeal 136 of 2019)* [2021] KEHC 7088 (KLR)

27. It is not in doubt, as per Order 1 Rule 15 of the Civil Procedure Rules, the duty to join a 3<sup>rd</sup> party lies squarely on the defendant, who is attributing fault or liability to a third party, not a party to the proceedings. Guided by the foregoing, I find that the trial court erred to the extent that it found that the Appellant had a duty to amend its pleadings to join Solomon Mutuku Musyoka, a third party, introduced by the 2<sup>nd</sup> Respondents in its statement of defence.

### **Whether the 2<sup>nd</sup> Respondent was vicariously liable**

28. The Appellant contends that the 2<sup>nd</sup> Respondent, having failed to institute 3<sup>rd</sup> party proceedings against Solomon Mutuku Musyoka, within the set timeline, was vicariously liable and should have borne full liability for the accident. In opposition, the 2<sup>nd</sup> Respondent urges that, even with the non-joinder of the third party, it was indispensable for the Appellant to prove the existence of an agent-principal or employer-employee legal relationship between itself and the 1<sup>st</sup> Respondent to successfully plead vicarious liability.
29. To begin with, in *BM Security Limited v Kibira & another* (Civil Appeal 12 of 2019) [2025] KECA 166 (KLR), the Court of Appeal held that;

The test contains two parts. First, is the subjective test- being the subjective state of mind of the employee which asks the question “did the employee act wrongfully solely for his own purposes?” and second, is the objective test which asks the question- if the employee was pursuing affairs in his own interests, was such deviation connected closely to his employment and the business of the employer? If the employee’s unlawful act is not even in the slightest way directed to furthering the employer’s business, but his own interests; then



the employer is not vicariously liable. We note that the second leg of the test must be looked at depending on the peculiar circumstances and facts of the case.

30. Similarly, in *John Nderi Wamugi v Ruhesh Okumu Otiangala Julius Thiga Karemi Geoffrey Karemi Thiga* (Civil Appeal 24 of 2015) 2015 KECA 214(KLR), the court held that

Vicarious liability is not pegged on legal ownership but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor.

31. There is no dispute that on 21<sup>st</sup> November 2016, the 2<sup>nd</sup> Respondent sold motor vehicle Registration No. KCK 617A to one Solomon Mutuku Musyoka. Although it retained the motor vehicle registration pending the payment of the full purchase price, the said Solomon had full use and control of the motor vehicle. There is also no dispute that the 1<sup>st</sup> Respondent was driving the motor vehicle as an employee of the said Solomon when the accident occurred, resulting in injury to the Appellant.

32. The 2<sup>nd</sup> Respondent could only have been vicariously liable for the activities of its servant, agent and or driver. In the absence of such a connection and or nexus, liability cannot attach to the 2<sup>nd</sup> Respondent. Consequently, no liability would arise to be indemnified by way of 3<sup>rd</sup> party proceedings.

33. For these reasons, this Court finds that the Magistrate Court misapprehended the legal provisions governing 3<sup>rd</sup> party proceedings in finding that it was the duty of a plaintiff, the Appellant herein, to amend its pleadings to join a third party. However, having found that the 2<sup>nd</sup> Respondent could not be held vicariously liable for the actions of the 1<sup>st</sup> Respondent, the Magistrate's finding of 100% liability in favour of the Appellant against the 1<sup>st</sup> Respondent is upheld.

34. Accordingly, the Trial Court's judgment delivered on 21<sup>st</sup> December 2023 is upheld save for the clarification that a Defendant has a duty to institute 3<sup>rd</sup> party proceeding. The appeal is dismissed, and each party is to bear its own costs.

35. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

..... Appellant

.....Respondent

Selina Court Assistant

