



**Michael v Kiunga (Civil Appeal E021 of 2023)
[2025] KEHC 14725 (KLR) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E021 OF 2023
LW GITARI, J
OCTOBER 14, 2025**

BETWEEN

PETER KITHURE MICHAEL APPELLANT

AND

GEOFFREY MUNGANIA KIUNGA RESPONDENT

JUDGMENT

1. This appeal rises from a Ruling delivered in the Chief Magistrate's Court at Meru Civil Case No. E097 of 2021.
2. The brief background is that the plaintiff had filed the Civil Suit No. E097 of 2021 vide a plaint dated 17/5/2021 claiming both general and special damages as a result of injuries sustained in a road traffic accident involving the respondent's motor vehicle. The plaintiff's case was that the accident occurred due to the negligent manner of driving by the respondent and/or his servant or agent.
3. When the matter came up for hearing before the learned magistrate, the parties entered a consent on liability in favour of the appellant as against the defendant in ratio of 80:20. The parties then filed submissions on the issue of quantum of damages. The learned magistrate then entered judgement on quantum of damages awarding the appellant damages for pain and suffering, loss of consortium, loss of earning capacity and special damages amounting to Kshs. 15,499,896/=
4. The respondent was alarmed by the turn of events as he had not instructed the Insurance Company to enter a consent on liability and it had intimidated that it would only settle Kshs. 3,000,000/= out of the judgement of the learned Magistrate.
5. The Respondent filed an application before the learned magistrate seeking to set aside the consent on liability and to have the case re-opened so that he can call his witnesses.



6. The application was heard inter partes and the learned magistrate rendered his ruling allowing the application on the grounds that the applicant was condemned unheard. The learned magistrate reasoned that the applicant ought to have been informed and obtained the concurrence of the applicant.
7. The applicant was dissatisfied with the said ruling and filed this appeal based on the following grounds:
 - a. The learned trial magistrate erred in both facts and the law in setting aside the judgement dated 28th July, 2022.
 - b. The learned trial magistrate erred in both facts and the law in reopening the case for the defendant and granting leave to the defendant to call his witnesses and file his documents.
 - c. The learned trial magistrate erred in both the law the facts in setting aside the consent judgement on liability entered on the 5th day of May, 2022.
 - d. The learned trial magistrate erred in both the law and the facts in setting aside the consent dated 5th May, 2022 entered by parties herein in absence of the vitiating factors.
 - e. The learned trial magistrate erred in both the facts and the law in setting aside the consent entered between the parties herein on 5th May, 2022 in total disregard of the doctrine of subrogation.
8. The appeal was canvassed by way of written submissions.

Appellant's submissions

9. He urges the court to determine whether the trial magistrate erred in both law and facts by setting aside the consent judgment on liability entered on 5/5/2022.
10. It is submitted that the principle of subrogation applies where there is a contract of insurance. That is, if the insured, "insured risk" takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by it's insured by seeking compensation that caused the loss.
11. It is submitted that since a contract existed between the judgment debtor and Heritage Insurance when the insured risk took effect, Heritage Insurance instructed the firm of Kiruki & Kanyika to defend it since the principle of subrogation the insurer is put to the position of insured. Thus, the respondent could not instruct counsel when the insurer has already stepped in his shoes.
12. On setting aside a consent judgement, the appellant submits that a consent can only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts, or mistake or for a reason that would enable court to set aside a contract.
13. The appellant cited the case of Flora N. Wasike –v- Destino Wambuke [1988] eKLR which cited selton on judgements and orders (7TH Edition) Vol 1 Page 124 and reiterated that "Any order in the presence and with consent of counsel is binding on all parties to the proceedings or action and those claiming under them ... And cannot be varied, discharged unless obtained by fraud or collusion or by agreement contrary to policy of court ... or if the consent was given without sufficient material facts, or in general for a reason which would enable a court to set aside an agreement."
14. The appellant also relies on Brooke Bond Liebig –v- Mallya [1975] E.A for the similar proposition and holding.



15. The appellant submits that the consent judgement was proper and the trial court erred in setting it aside with no regard to the doctrine of subrogation.
16. The respondent submits that the firm of Ngunjiri Michael is properly on record for the reason that they filed an application to come on record in line with Order 9 Rule 9 of the Civil Procedure Rules and they were allowed to come on record vide a ruling dated 6/12/2022.
17. On setting aside the consent judgement, the respondent submits that the learned magistrate properly directed himself in setting aside the consent judgement because the respondent was never informed of the said consent prior and after the said consent was entered.
18. It is further submitted that if the consent judgement is not set aside it will amount to condemning the respondent unheard which is against public policy. The case of Ahamed Mohamud Adam –v- Jimmy Tomino & others Nakuru H.C.C. C. No. 244/1998 (Koome, J.) as she then was and Republic –vs- District Land Registrar Nandi & Another Ex parte Tegerei & Another [2005] KLR 521. The holding in the cases was that a consent entered against a party without its consent or without express instructions by the client is null and void.
19. The respondent urges this court to find that the consent was properly set aside.
20. On whether the magistrate erred in re-opening the case, it is submitted that the learned magistrate properly directed himself as it would give the respondent an opportunity to be heard. The case of Susan Wavinya Mutari –v- Isaak Njoroge & Another [2020] eKLR where the court held that the jurisdiction to re-open a case is discretionary and should be exercised judicially.
21. It is submitted that the respondent has sworn an affidavit showing that he has eye witnesses to the accident and the inspection of the motor vehicle which would be critical in determining the dispute.
22. On the doctrine of subrogation, it is submitted it is the insurance company that can seek subrogation and not the insured.

Analysis and determination

23. I have considered the proceedings before the trial court, the impugned ruling and the submissions. The issues for determination are:
 1. Whether the learned magistrate erred in setting aside the consent judgement and ignored the doctrine of subrogation.
 2. Whether the learned magistrate erred by setting aside the consent judgement.
 3. Whether the learned magistrate erred in re-opening the case.
24. This is a first appeal and the duty of this court has been laid down in various authorities of this court and the Court of Appeal that it has a duty to analyse, evaluate the evidence and itself come up with its own independent finding. See the case of Selle –v- Associated Motor Boat Company.

Whether the learned magistrate erred in setting aside the consent judgement and ignored the doctrine of subrogation.

25. On the first issue, the court has to determine whether the learned magistrate erred in failing to consider the doctrine of subrogation. Doctrine of subrogation describes the right of an insurer to seek damages from a third party that caused a loss.



26. Thus, subrogation is a legal right of an insurance company to request reimbursement from the at-fault party after it has paid a covered claim. So the doctrine of subrogation defines the rights of an insurance company both before and after it has paid claims against a policy.
27. The doctrine applies to the Insurance Company which steps in to satisfy the claims by its insured (indemnity) and itself follows the 3rd party who was at fault to settle its claims. The doctrine applies to the insurers and not to the insured. In Sampson –v- Thompson [1977] E.R It was stated:

“Where on person has agreed to indemnify another he will on making good the indemnity be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimburse himself for the loss.”
28. It is therefore clear that it is only the insurance company that can claim subrogation and not the insured. The respondent was the insured. The doctrine does not apply as the respondent was the applicant and was the insured.
29. The learned magistrate did not therefore err in not considering the doctrine of subrogation.

Whether the learned magistrate erred in setting aside the consent judgement.

30. It is clear from the submissions by the parties and the authorities cited that a consent judgement is not cast in stone and can be set aside on various grounds which include, where it is obtained by fraud, collusion or by agreement contrary to policy of the court or in general for a reason which would enable a court to set aside an agreement.
31. In this case, the learned magistrate set aside the consent judgement on the ground that the insurer ought to have informed and obtained the concurrence of the applicant. That by failing to do so, the applicant was condemned unheard.
32. It is not in contest that the consent of the respondent was not obtained when the impugned consent judgement was entered. Furthermore, the respondent was not informed after the said consent was entered. The Advocate who entered the consent was not instructed by the respondent. He entered a consent on liability admitting more than Kshs. 3,000,000/= without informing the respondent.
33. It is clear that the respondent was not given an opportunity to be heard and yet he would be adversely affected by the consent. It is contrary to the rules of natural justice and public policy to condemn a person without giving him an opportunity to be heard.
34. The Court of Appeal in Intercountries Importers & Exporters Limited –v- Teleposta Pension Scheme Registered Trustees Civil Appeal Nairobi 230/2016, the Court of Appeal set aside a consent order for misrepresentation and failure to give a full disclosure.
35. In this matter there was a misrepresentation that the respondent had given consent to the consent judgement entered.
36. I have looked at the defence which was filed and I am of the view that the respondent would not have consented to bear the liability which the insurer consented to. The consent on liability would have affected him adversely and he ought to have been given an opportunity to be heard. This is essentially what the learned magistrate was saying when he set aside the consent judgement.
37. For the reasons stated above, I come to the conclusion that there was a reasonable ground to set aside the consent judgement and the magistrate did not err in facts and the law.



38. The order to re-open the case was an exercise of discretion by the learned magistrate. It is trite law that discretion of the court should be exercised judicially.
39. In exercising the discretion, the Judge should be careful not prejudice the opposite party. In this case it is the respondent who would be prejudiced if he is not given an opportunity to present his side of the story to tenable the court to give an informed decision. To that extent, the discretion was exercised judicially and this court would not have reason to interfered with that order.
40. The appellant had raised an issue as to whether Ngunjiri Michael & Company Advocates are properly on record. I note from the record that the Advocates complied with Order 9 Rule 9 of the Civil Procedure Rules by filing an application to come on record after the judgement and a Ruling dated 6/12/2022 allowed their application. They are therefore properly on record.

Conclusion

41. It is trite law that each case must be determined on its own individual facts and circumstances.
42. In this case having considered the circumstances of the case, the consent judgement on liability dated 15/5/2022 was properly set aside. I therefore order that:
 1. The Ruling of the learned trial magistrate is upheld and the consent judgement on liability stands set aside.
 2. The Order to re-open the case and give the respondent an opportunity to be heard is upheld.
 3. The appeal is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF OCTOBER, 2025.

HON. LADY JUSTICE L. GITARI

JUDGE

