Omar v Alginza Automobiles Limited & 2 others (Civil Appeal E980 of 2022) [2025] KEHC 14663 (KLR) (Civ) (16 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14663 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E980 OF 2022

TW OUYA, J

OCTOBER 16, 2025

BETWEEN

MOHAMED OMAR ..... APPELLANT

AND

ALGINZA AUTOMOBILES LIMITED ..... 1ST RESPONDENT

DAVID MUTINDA JOSEPH ..... 2ND RESPONDENT

CANON MOTORS LIMITED ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of the small claims court at Milimani Hon. V.M Mochache (R.M) Adjudicator in Milimani SCCC No. E 1819 of 2022 delivered on 4th November 2022)

JUDGMENT

1. This is an appeal emanating from a road traffic accident claim. The Appellant sought to recover Ksh. 194,988.00 from the Respondent following an accident that occurred on or about the 23rd day of July 2019 between motor vehicle registration number KAY 830B and KCN 574N.

2. The appellant's case is that on or about 23rd July 2019 his motor vehicle registration number KCN 574H was being lawfully driven along Mombasa Road in Nairobi when the Respondents' driver, servant, employee or agent carelessly, negligently, and or recklessly drove, managed and or controlled the Respondent's motor vehicle registration number KAY 830B that he caused and or permitted the same to violently hit and collide with the Appellant's motor vehicle KCN 574N from the rear thus causing extensive damage to the appellant's motor vehicle. As a result of which the appellant incurred a total of Ksh. 194,988.00 in repair charges, assessment fees and investigation fees.

3. The 1st Respondent denied that it was vicariously liable for the accident, claiming instead that the motor vehicle KAY 830B was in the management and control of the 3rd Respondent who had bought it. Transfer of ownership of the motor vehicle was subject to completion of payment of the purchase price.

4. The 2nd Respondent on the other hand averred that he had agreed with one Mariam Ibrahim to settle the matter since the accident involved a minor bumper and left rear wing scratch. Having reached at an amicable solution, there was no cause for further dispute.

5. The 3rd Respondent joined the suit as a third party and denied the claim. It averred that it had since sold the subject motor vehicle to Henry Simiyu Murwa vide a Sale Agreement dated 15th May 2017. In the self-same date, he handed over possession and actual control to the said purchaser. Therefore, at the time of the accident motor vehicle registration number KAY 830 B was not being driven by its agent nor was it being used for the benefit of or on the instructions of the third party.

6. Therefore, the 3rd Respondent was neither liable to the Appellant nor the 1st Respondent for any acts allegedly occurring on the 23rd July 2019, long after it parted with possession of the subject Motor vehicle registration number KAY 830 B.

7. At the end of the trial, the trial court found that at the time of the accident, the subject motor vehicle belonged to the 2nd Respondent. Accordingly, he was held fully liable for the accident. The court also found that the Appellant had already been compensated by the insurer, hence allowing the claim would amount to unjust enrichment. The court further held that, the Appellant was bound by his pleadings as he had failed to plead the doctrine of subrogation.

8. Regarding the issue of special damages, the court found that only Ksh. 188,128.00 had been proved to the required standard through production of receipts. The claim was therefore dismissed.

9. Aggrieved and dissatisfied with the finding of the court, the Appellant lodged the instant appeal vide a Memorandum of Appeal dated 1st December 2022 on grounds that:

    i. The learned adjudicator erred in law and fact by going against the spirit of the small claims court by stretching the requirements of pleadings in the Small claims court to unduly onerous levels of precision yet the Appellant's pleadings, documents and witness statements looked at in totality demonstrated that the suit was a subrogation claim;

    ii. The learned adjudicator erred in law and fact in failing to find in favour of the Appellant yet the 2nd Respondent had admitted the Claim.

    iii. The learned adjudicator erred in law and fact in introducing on her own motion a defence on behalf of the Respondents that none of them pleaded or contemplated.

    iv. The learned adjudicator erred in law ad fact by considering extraneous matter that were not pleaded or made issues for determination by any party in the suit thereby violating the Appellant's right to a fair trial.

    v. The learned adjudicator erred in law and fact in finding that allowing the claim would amount to an unjust enrichment to the appellant yet there was unchallenged evidence to the effect that the claim was instituted by the Appellant's insurer under the doctrine of subrogation;

    vi. He learned adjudicator erred in law and fact in failing to be guided by Section 3 (d), 24, 26 and 32 of the *Small Claims Court Act*.

10. Therefore, the Appellant prayed that the appeal be allowed and the judgment and decree of the honourable V.M Mochache dated 4th November 2022 be set aside. It was also prayed that the court be pleased to enter judgment for the Appellant for the sum of Kshs. 194,988.00

11. By consent of the parties, the appeal was canvassed through written submissions.

12. The Appellant submitted that the Statement of Claim as read with the Witness statements duly informed the Respondents that the suit was a subrogation claim under the doctrine of subrogation. Therefore, the mere fact that the Statement of Claim itself did not have such paragraph on submissions could not countermand the express paragraphs in the Witness statements. Similarly, the 2nd Respondent admitted the Appellant's claim vide his statement of response by stating that he had agreed to do the minor repair and we exchanged contacts and she said she was very okay.

13. From the foregoing, it was submitted that by introducing a defence that the Respondents had not raised or contemplated anywhere, the court denied the Appellant a chance to counter the defence and thus violated the Appellants right to fair hearing. The trial court considered extraneous considerations. The assertion that the claim amounted to an unjust enrichment was flawed and thus occasioned a miscarriage of justice. The appellant therefore prayed that the appeal be allowed.

14. The 1st Respondent submitted that there is overwhelming evidence adduced at the hearing by all parties that the 1st Respondent was not in possession and control of motor vehicle registration KAY 830B at the time of the alleged accident hence cannot be held responsible for the acts of the 2nd Respondent and or any third party. Reliance was placed on the case of John Nderi Wamugi v Ruhesh Okumu Otiangala & 2 others [2015] eKLR where the Court of appeal dealt with the issue of contract and vicarious liability.

15. Therefore, the Respondent urged that the court finds that it was not vicariously liable for the acts of the 2nd Respondent and or any other 3rd party.

16. A first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify. (See the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.

17. The main issue for determination is whether the Appellant proved her case on a balance of probabilities. The Appellant argues that he tendered enough evidence to establish his case on a balance of probabilities.

18. It is not in dispute that the appellant's motor vehicle registration KCN 574H was insured under an insurance policy in his name. It is further not in dispute that the insurance company settled the costs of repair of the appellant`s motor vehicle after it was involved in an accident with the respondent`s motor vehicle.

19. While noting that the appellant had successfully proved special damages of Ksh. 188,128.00, the trial court dismissed the appellant's claim on the basis that he had failed to plead the principle of subrogation. Consequently, allowing the claim would have amounted to an unjust enrichment as the insurance company had already settled the costs of repair of the appellant's motor vehicle. The appellant therefore contends that the trial court erred since the tenure of the pleadings are that the claim was based on the principle of subrogation.

20. The doctrine of subrogation is a principle in insurance law that enables an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. The Court of

Appeal in Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR held as follows with regards to the doctrine of subrogation:

> " The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party."

21. For the doctrine of subrogation to be invoked properly, there are conditions precedent. First, there must be in existence a contract of insurance, risk must have crystallized and there must be actual payments made in order to indemnify the insured. This was held in the case of Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 where the Court defined the basis of the doctrine of subrogation as follows:

> " The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation."

22. In order to receive compensation from an insurance company, an insured person must demonstrate to the court that he had an existing contract (Insurance policy) with the insurance company. This was the position of the court in AIG Insurance Company Limited v Benard Kiprotich Kirui [2022] eKLR.

23. In this case however, the Appellant did not plead the doctrine of subrogation. In fact, the appellant has admitted that even though he did not explicitly plead or indicate that the claim was based on the principle of subrogation, he had hoped that the court would infer, based on his pleadings, that the claim was based on the principle of subrogation. It is in my view because of that that the Learned Trial Magistrate in her reasoned judgment reached the conclusions that she did.

24. Courts of law make determination of issues raised in pleading or issues brought by the parties for determination. This principle, that parties are bound by their pleadings was the subject of a court of appeal decision in: Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 8 others [2014] eKLR viz:

> " In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called: Any other business" in the sense that points other than those specific may be raised without notice."

25. Relying on the persuasive decision in Leslie John Wilkins v Buseki Enterprises Limited [2015] KEHC 4402 (KLR) where the court cited with approval the decision of the Kwazulu Natal High Court on appeal in Nkosi – Vs – Mbatha (Ar 20/10 (2010) Zakzphc 38 (6 July 2010). The Plaintiff in the lower court for the first time while being cross examined stated that her claim was under the doctrine of

subrogation. That doctrine had not been pleaded. The Magistrate's dismiss the claim. The Kwazulu-Natal High Court in considering the appeal against that dismissal stated thus:

> "I am of the view that a subrogation claim is something which must clearly be proved and specifically pleaded. Nor had any mention been made in the plaintiff's pleadings that her motor vehicle was insured and that after the collision the insurer fully indemnified the plaintiff for the loss she had suffered. Nor did the plaintiff plead that the amount to be recovered from the defendant would be paid over to the insurer. The object of pleading is to define the issues between the parties and the parties must be kept strictly to their pleas where any departure could cause prejudice. See Robinson v Randfontein Estates GM Co. Ltd 1925 AD 173 at 178 as per Rose-Innes CJ.

26. I am wholly persuaded by the above decision and similarly hold in this appeal that the dismissal of the Appellant's suit is incontestable. The Appellant claim in the Lower Court was not one brought under the doctrine of subrogation. It was as rightfully observed by the trial court that the Appellant was seeking to be double compensated. It is for that reason that this appeal fails.

27. The final order is that this appeal is hereby dismissed with costs to the Respondent.

28. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 16TH DAY OF OCTOBER, 2025.

HON. T. W. Ouya

JUDGE