Njuguna v Kimani (Civil Appeal E213 of 2024)
[2025] KEHC 15052 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E213 OF 2024

TW OUYA, J

OCTOBER 23, 2025

BETWEEN

PAUL GITHAIGA NJUGUNA ..... APPELLANT

AND

IAN MWAURA KIMANI ..... RESPONDENT

(An appeal under section 38 of the Small Claims Court Act from the judgement of the adjudicator V.A Ogutu in the small claims court at Thika, in claim no. E035 of 2023)

JUDGMENT

1. This appeal arises from a claim lodged at the Thika Small Claims Court based on the doctrine of subrogation. The crux of the appeal challenges the jurisdiction of the Small Claims Court to adjudicate over disputes brought under the doctrine of subrogation.

2. According to the statement of claim dated 13th January 2023, the Respondent sought compensation for loss or damage to his motor vehicle registration umber KCH 070P which occurred on or about the 24th January 2020 valued at:

    a. Kshs. 549,000.00 being settlement for total loss of motor vehicle,

    b. Kshs. 7,076) being assessors fee together with NTSA search costs and

    c. Disbursements fees of Kshs. 10,550.

    d. The total sum claimed was Kshs. 557,676.00.

3. The claim was based on the allegation that on or about 24th January 2020, the Respondent's motor vehicle registration number KCH 070P was lawfully being driven along the northern bypass just past Kenyatta University Referral Hospital heading towards the Kahawa West roundabout when the Appellant's Motor vehicle Registration number KTWA 564X was driven and or controlled so

carelessly and negligently that it collided into the Respondent's motor vehicle registration number KCH 070P thereby causing external damage to the said motor vehicle. The accident was reported at Kiamumbi police station and the Appellant's motor vehicle registration number KTWA 564X was blamed for the accident.

4. At the time of the accident, the Appellant's motor vehicle registration number KTWA 564X had been insured by Directline Assurance Company Ltd through policy claim number P/NO.03/84215. The Respondent on the other hand had taken out insurance for his motor vehicle registration number KCH 070P and was the policy holder of a valid insurance policy COMP/07/2882/07 issued by Occidental Insurance Company Limited.

5. It was averred that the Appellant had negligently caused the accident by driving without due care and attention and failing to break, to swerve, to slow down, or in any other manner so as to manage and control the said motor vehicle so as to avoid damages to the Policy holder's motor vehicle registration number KCH 070P.

6. Following the accident, the Respondent's motor vehicle was extensively damaged and he had to involve his insurer Occidental Insurance Company Limited for a settlement as the motor vehicle was written off. Subsequently, the Respondent incurred loss and damage for which the Respondent is liable for.

7. The Respondent averred that he had brought the claim on behalf of his insurer, Occidental Insurance Company Limited, for reimbursement and compensation to the insurer of all the costs incurred in the repair of the subject motor vehicle as the Respondent's insurer fully indemnified the Respondent for the damage suffered and the insurer met all the repair costs and incidentals thereto. Moreover, all the amounts recovered would be paid back to the insurer.

8. The Appellant denied the claim through its Amended response to claim and counterclaim dated 26th February 2023 where it denied the claim instead alleging that the accident was caused by the Respondent's own negligence. Regarding the doctrine of subrogation, the Appellant averred that the doctrine only allows an insurer, after compensating an insured for any loss under the insurance contract, to step into the shoes of the insured.

9. The Appellant counterclaimed that he was lawfully riding his tuktuk along the Northern bypass on 24th January 2020 when the Respondent whilst driving his motor vehicle registration number KCH 070P drove it so carelessly and negligently that it collided with the Appellant's Tuktuk from behind thereby causing damage to the Tuktuk and leading the Appellant to sustain injuries to wit multiple frontal and right temporal contusions/ petechial haemorrhages and incidental acute pansinusitis. Thus, incurring medical expenses amounting to Kshs. 533,613.00.

10. It was averred that the Respondent negligently drove the vehicle KCH 070P at an excessive high speed without due care and attention to other road users.

11. The Appellant thus counterclaimed for general damages for pain and suffering, special damages as well costs and interests of the suit.

12. The Respondent responded to the amended response to claim and counterclaim on 11th April 2023 where he denied the contents of the counterclaim and reiterated that the Appellant was to blame for the accident. Therefore, he was to bear the consequences arising from his negligent act including the damage to the Respondent's motor vehicle KCH 070P.

13. It was further averred that an insurer can only claim through the insured under the doctrine of subrogation.

14. The matter proceeded to trial whereupon the Respondent called two witnesses. CW1 No. 66944 Cpl Duncan Ananda, testified that on 24th January 2020 he visited a scene following an accident around 2143 hrs along northern bypass involving motor vehicle KCH 070P and KTWA 654S. The driver of KTWA 654S was to be blame for the accident. The abstract was filled by PC Ruto who was unable to attend court as he was on off duty. No charges were preferred on humanitarian ground as the driver of the Tuktuk was bedridden.

15. CW2 Mwaura Kimani, testified that the accident occurred on 24th January 2020. His insurance informed him that they needed to claim money for repairs. Therefore, a demand letter was sent to Directline Assurance, which had insured motor vehicle KTWA 654S.

16. The Appellant testified as RW1, adopted his witness statement in evidence but the production of his documents was objected to on the basis that his counterclaim was statute barred.

17. On the issue of liability, the trial court found that the Respondent's version on the accident was corroborated by the police officer who visited the scene. Motor vehicle registration KTWA 564X was to blame for the accident as he had joined the road from a feeder road and had failed to give way while joining the road. Therefore, the court found the Appellant 100 % liable for the accident.

18. Regarding the issue of damages, the trial court found that the same had been pleaded and proved as required by law. however, the claim for disbursements was excluded as the same was incurred by the Respondent's advocates. Ultimately, judgment was entered for the Respondent as against the Appellant for Kshs. 546,626 plus costs and interests from the date of judgement until payment in full.

19. The court also found that the counterclaim by the Appellant was based on the tort of negligence and was thus statute barred. It was therefore dismissed for offending the provisions of the *Limitation of Actions Act*.

20. Aggrieved and dissatisfied with the judgment of the trial court, the Appellant lodged the instant appeal vide a Memorandum of appeal dated 15th July 2024 on grounds that:

    a. The learned adjudicator erred in law by failing to appreciate that the jurisdiction of the trial court was time bound that ran and ceased by effluxion of time on the 31st March 2023, being the day and date of court time bound jurisdiction ceased to exist by dint of section 34(1) of Small Claim court

    b. The learned adjudicator erred in law by failing to take into account legal and the fact that the moment the sixty days ended, the jurisdiction of the court also ended

    c. The learned adjudicator erred in law by failing to take into account the fact that section 10 of the insurance (Motor Vehicle Third Party Risk Cap 405) provides that a notice of intention to sue should be issued before one institute any legal proceedings in court

    d. The learned adjudicator erred in law and fact in concluding that the appellant was negligent in operating his tuk tuk while evidence shows that has the respondent been careful on the look out the accident would have not happened

    e. The learned adjudicator erred in law and fact for holding that the appellants pleading was statutory barred

    f. The learned adjudicator erred in law and fact in disregarding and failing to objectively analyze the evidence of the appellant

g. The learned adjudicator erred in law and in facts in awarding the respondent excessive damages against the appellant.

21. Therefore, the Appellant prayed that the appeal be allowed and judgement of the adjudicator be set aside with costs.

22. By order of the court, the appeal was canvassed through written submissions.

23. It was submitted by the Appellant that the Small Claims Court lacks Jurisdiction to entertain claims on the doctrine of subrogation. Reliance was placed on the case of Kenya Power and Lighting Company Limited versus Julius Wambale & Another [2019] eKLR to advance the circumstances under which the doctrine of subrogation applies.

24. Citing Section 2 of the *Small Claims Court Act*, the Appellant urged that the definition of a claimant was not intended by Parliament to include individuals or entities who are involved in the proceedings in any role other than as someone who asserts a claim. It was not intended for legal representatives, agents, or proxies unless acting on behalf of the actual claimant with the court's permission.

25. It was further submitted that the claimant is the party who personally lodges the claim and directly asserts a right in the proceedings. Therefore, the definition of a claimant is not transferrable between parties or applicable to persons who join the proceedings in a capacity other than as an original or additional claimant. An insurer does not meet the criteria of a claimant under the Act by any means including under the doctrine of subrogation. Kenya Orient Insurance Limited v Otieno Civil Appeal E166 of 2023 [2024] KEHC 7637 (KLR) was relied on to urge the position that claims under the doctrine of subrogation do not fall within the jurisdiction of the *Small Claims Court Act*.

26. It was also submitted that the Respondent's failure to attach a demand letter and a notice of intention to sue fell short of Section 10 (2) of the *Insurance (Motor vehicles Third Party Risks) Act* CAP 405. The Respondent ought to have served the Appellant with the demand and notice of intention to sue be served upon his insured.

27. Citing the case of Egypt Air Corporation vs Suffish International Food Processors (U) Ltd and another (1999)1 EA, it was submitted that the Respondent's claim was fatal as he had failed to annex any contract of insurance upon which his claim was based. In fact, there was no evidence that the Respondent was a policy holder with Occidental Insurance Limited as there was neither a contract nor a consent letter from Occidental Insurance to institute the suit on its behalf.

28. Regarding the issue that the Counterclaim was statute barred, it was submitted that the Respondent having lodged his claim just before the lapse of the Limitation period could not bar the Appellant from Responding to the Claim after the Limitation period. The counterclaim was therefore served within time as per the provisions of Order 7 rule 1 of the Civil Procedure Rules. Flowing from the above, the Appellant submitted that his counterclaim was merited and urged that liability be apportioned at 80% 20% in favour of the Respondent and quantum be assessed at Kshs. 500,000.00. Reliance was placed on the case of Francis Ochieng and Another v Alice Kakimbo where the Plaintiff was awarded Kshs. 350,000 as general damages for sustaining head injury with bilateral tempor- parietal scalp haematoma, back pain, bleeding from the left ear, subconjunctival experienced dizziness.

29. The Appellant ultimately prayed for Kshs. 533,613.00 inclusive of both general damages and special damages.

30. The Respondent submitted that the Appellant was guilty of laches by deliberately delaying the filing of his response so that he could fall out of the statutory limitation period. Section 34 of the SCCA does not tie down the hand of a judicial officer from delivering a judgment beyond the 60- day statutory

period. In any case, the 60-day limitation period is directory and not mandatory as was the position in Crown Beverages Limited v MFI Document Solutions Limited [2023]. Therefore, the trial court was within its mandate in determining the case as it did.

31. Regarding the issue of the subrogation claim, the Respondent submitted that it supplied a copy of its policy schedule with Occidental Insurance Company annexed at pg 9 of the Record of Appeal. Pg 116 of the record also contained the payment voucher issued by Occidental Insurance Company to the Respondent for settlement of total loss of vehicle as the vehicle was classified as a write off. Therefore, the Respondent having been indemnified, had a duty as per the policy schedule to seek reimbursement from the 3rd Party tortfeasor on behalf of its insurance under the doctrine of subrogation. In any case, the affidavit in support of the claim was deponed o by the insurer. Therefore, it shows that the claim was not filed for mere unjust enrichment but on behalf of the insurer.

32. Regarding the issue of whether the demand and notice of intention to sue was served upon the Appellants, it was submitted that Pg. 100 of the record of appeal contained correspondence dated 25th June 2020 referring to a demand letter and intention to sue dated 11th June 2020 which had been served upon the Appellant's insurance company, Directline Assurance. Therefore, the allegation that the Appellant was not served is false.

33. On the issue of liability, the Respondent submitted that it had demonstrated to the required standard that the Appellant was wholly liable for the accident. The award on quantum was also based on proven facts and receipts as required by law.

34. The appellant therefore prayed that the appeal be dismissed with costs.

35. Before I consider the grounds of appeal and the parties' written submissions, it is important to recall the appellate jurisdiction of this court in relation to appeals from the Small Claims Court is circumscribed by Section 38(1) of the *Small Claims Court Act*, 2016 ("the SCCA") which provides that 'a person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.' A court limited to resolving matters of law is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (see John Munuve Mati v Returning Officer Mwingi North Constituency and 2 others NRB CA EPA No 5 of 2018 [2018] eKLR).

36. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In the case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

37. I have distilled the following issues for determination upon considering the record, the pleadings and the submissions by the parties.

    i. Whether the trial court had jurisdiction to entertain the claim

    ii. Whether the counterclaim was statute barred

iii. Whether the Respondent proved his case on a balance of probabilities

38. The appellant is challenging the jurisdiction of the Small Claims Court to entertain disputes under the principle of subrogation. It is common ground that the current suit is based on the principle of subrogation. The principle of subrogation applies as between an insurance company and the owner of the property insured. It arises where the insurance company compensates its insured for the loss or damage incurred then the insurer steps into the shoes of the owner of the owner of the property to recover the compensation from a third party who is found liable for the incident. In real sense, the litigator in the suit is the insurance company although it sues in the name of the owner of the property.

39. In Fredrick Odowa Abungu vs Collins Ondigo & Another (2021) eKLR the court held that:

> " The principle of subrogation applies where there is a contract of insurance. If the 'insured risk' takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. The extent of the compensation is not more than what has been paid to the insured."

40. It has to be observed in the first place that jurisdiction of a court of law is such an important aspect that for a court to act on a matter when it has no jurisdiction will amount to an exercise in futility. In the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) EA, the Court held that:

> " Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction, which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

41. The Supreme Court in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others, Civil Appeal (Application) No. 2 of 2011, stated as follows regarding a Court's jurisdiction:

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

42. The jurisdiction of the Small Claims Court is set out in section 12 of the Small Claims Court (herein the Act) which provides as follows:

> " Nature of claims and pecuniary jurisdiction
>
> (1) subject to this Act, the rules and any other law, the court has jurisdiction to determine any civil claim relating to—
>
> a.a contract for sale and supply of goods or services;

b.a contract relating to money held and received;

c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;

d. compensation for personal injuries; ande.set-off and counterclaim under any contract.

(2) Without prejudice to the generality of subsection (1), the court may exercise any other civil jurisdiction as may be conferred under any other written law...."

43. Under the aforesaid section, among the claims that may be filed before the Small Claims Court is a claim relating to a contract for sale and supply of goods or services. It is usual for insurance companies to enter into contracts with their clients to offer insurance cover to them. In my view, these kinds of contracts are for supply of services. Therefore, a claim brought before the Small Claims Court seeking to enforce obligations arising pursuant to a contract for supply of insurance services fits a dispute relating to a contract for sale and supply of goods and services within the meaning of Section 12(1)(a) of the Small Claims Act.

44. It is therefore my finding that the Small Claims Court has jurisdiction to entertain claims under the doctrine of subrogation as long as they fall within the pecuniary jurisdiction limits of the Court.

45. It is common ground that Section 34 (1) provides:

> All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day-to-day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.

46. The spirit of the Small Claims Act is to facilitate expeditious disposal of cases in a just manner without undue regard to procedural technicalities. Therefore, Section 34 of the Act is to be read as an enabler of justice and not a means to barring parties from the seat of justice. I therefore associate with the remarks of Hon. D.S Majanja J (deceased) in the persuasive decision of Crown Beverages Limited v MFI Document Solutions Limited (Civil Appeal E833 of 2021) [2023] KEHC 58 (KLR)

> " Although section 34(2) of the SCCA is couched in mandatory terms, the court must look at the context of the provision in light of the guiding principles which include, inter alia, the timely disposal of all proceedings before the court using the least expensive method. The provision as to delivery of judgment is meant to be directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. To adopt such a position would undermine the statutory objects and cause injustice to the parties as the case would have to be reheard."

47. This position was further reflected in the persuasive decision of Lumumba v Rift Gas Limited (Civil Appeal E805 of 2022) [2023] KEHC 25998 (KLR) (Civ) (30 November 2023) where the court remarked that:

> " Whereas these timelines are valid, it should not be lost that the SCCA grants the court flexibility to do justice to the parties and the said court has the right to impose any terms and conditions to ensure that the hearing can proceed within the time limited (see Rutere v Muigai [2023] KEHC 17345 (KLR)). The 60-day timeline in the SCCA is directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. To adopt such a position would undermine the statutory objects

and cause injustice to the parties as the case would have to be reheard afresh with attend costs to the parties (see Crown Beverages Limited v MFI Document Solutions Limited [2023] KEHC 58 KLR)]."

48. The phrase, 'so far as is practicable in the circumstances' means that where the circumstances render it impossible to deliver judgment within the 60- day period, then the judgment of the court will still be valid. I note that the Appellant filed its amended response and counterclaim on 24th February 2023. This was about 41 days from the time when the claim was filed. It is thus evident that the appellant did not file his response in time. It is therefore unconscionable for the Appellant to challenge the finding of the honorable adjudicator on the basis that the statutory 60-day limit had passed when he in fact contributed to the delay. I therefore dismiss the ground that the judgment delivered outside the 60-day period prescribed in section 34 of the *Small Claims Court Act* is invalid.

49. The second issue for determination is whether the trial court exercised its discretion properly in finding that the appellant's counter-claim was statute bard. It is common ground that the appellant's claim was based on the tort of negligence.

50. Order 3 rule 7 of the Civil Procedure Code which provides that:

> " A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross- suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof."

51. It goes without saying then that a counterclaim is a separate entity from a suit. It resides in independence but when tried together fate calls on them to merge as one judgment. A counter claim is treated as a separate suit under Section 35 of the *Limitation of Actions Act* hence its survival cannot be pegged on the pendency of the primary suit. Section 35 of the *Limitation of Actions Act* provides:

> For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

52. It is common ground that the counterclaim is based on the tort of negligence. Section 4 (2) of the *Limitation of Actions Act* provides that:

> An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

53. The accident in question having occurred on 24th January 2020, any claim or action arising from the accident ought to have been filed on or before 24th January 2020. In the instant case, the claim was filed on 13th January 2023, yet the amended response and counterclaim was filed on 24th February 2023. From the examination of the pleadings in court the Appellant's cause of action as against the Respondent was time barred on the 24th January 2023.

54. The Appellant's explanation that the delay in filing claim was occasioned by the Respondent's act of filing his claim just about the close of the limitation period does not hold. A counterclaim is a separate

action and can survive on its own. From the plain reading of Section 35 of the *Limitation of Actions Act*, the appellant's counterclaim is a separate cause of action independent of the main suit. The appellant ought to have been cognizant of the legal timelines with regard to the tort of negligence. I concur with the learned adjudicator that the counterclaim was time barred.

55. The court's jurisdiction in dealing with appeals from the Small Claims Court is limited by section 38(1) of the *Small Claims Court Act*, 2016 which provides that 'A person aggrieved by the decision or an order of the court may appeal against that decision or order to the High Court on matters of law.' A court limited to matters of law is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR).

56. Going through the record, I find no fault with the adjudicators finding on liability for the accident. I have also noted that the Appellant was duly noted of the intention to file or institute the suit pursuant to Section 10 of the Motor Vehicle Third Party Risk, Cap 405.

57. The upshot of the matter is that the appeal fails and is subsequently dismissed with costs.

58. Thirty (30) days stay of execution orders to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 23RD DAY OF OCTOBER, 2025.

HON. T. W. OUYA

JUDGE