Car House Limited v Wairimu & 2 others (Civil Appeal E036 of 2024)
[2025] KEHC 17131 (KLR) (20 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17131 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E036 OF 2024

DKN MAGARE, J

NOVEMBER 20, 2025

BETWEEN

CAR HOUSE LIMITED ..... APPELLANT

AND

JOSHUA MAINA WAIRIMU ..... 1ST RESPONDENT

VIRGINIA WANJIRU ..... 2ND RESPONDENT

HENRY KIPKORIR BIRGEN ..... 3RD RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of Hon. Lubia delivered on 11.1.2024 in Nyeri CMCC E176 of 2021. The Appellant was the first defendant in the suit. The trial court found all the defendants liable, prompting this appeal. The Appellant raised twelve prolix grounds, all of which address a single issue, that is, liability as the hirer of a motor vehicle. It is unnecessary to set out the said grounds as they are a waste of judicial time. Order 42 Rule 1 of the Civil Procedure Rules provides:

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

    2. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

        > " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument

or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

3. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *akn ke act 1978 2 Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

4. The first respondent filed suit against two respondents. Subsequently, the third respondent was added as a party. The court found as a fact that there was a hire purchase agreement between the appellant and the second respondent. However, she interpreted this to mean that, even with ownership retained, the appellant is liable. This is the subject of the appeal.

5. Submissions were filed over a single issue. I find it prudent to subsume them into the analysis for the sake of economy of space.

Analysis

6. 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, keep at the back of its mind that a trial court, unlike the appellate

court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of Mbogo and Another vs. Shah [1968] EA 93, where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

7. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

8. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

9. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows: -

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

10. It must be remembered, however, that documents speak for themselves. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;

> "Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what is sometimes called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

11. In Prudential Assurance Company of Kenya Ltd v Jutley & another [2005] KECA 262 (KLR), the Court, citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106, emphasized that in construing the terms of a written contract;

> "It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

12. The court is called upon to determine the liability of the appellant. There is no dispute regarding the occurrence of the accident or the liability of the vehicle in question. The question concerns which party is liable for the accident involving Toyota Belta, registration number KCE 081 M.

13. The evidence on record is that the 2nd appellant bought the same through hire purchase and had not completed payment. She was using the same as a matatu. it was involved in an accident. The police indicate that the second respondent was the insured for the said vehicle.

14. However, registration is not conclusive proof of liability. It was the Appellant's case that the Motor vehicle was sold by hire purchase to the second respondent. She actually took out insurance for the car and had it registered as a motor vehicle. The court went into the details of ownership to place liability on the appellant. The Appellant relied on the hire purchase agreement to eschew liability. the position on the aspects of section 8 of the *akn ke act 1953 39 Traffic Act* was addressed in the case of Securicor Kenya Limited v. Kyumba Holdings Limited [2005] 1KLR 748, the Court of Appeal found as follows:

> " It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle, its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the *akn ke act 1953 39 Traffic Act* when she states that the true owner of the motor vehicle was the appellant."

15. It must be understood that ownership is not a sine qua non liability. The mere fact that a person owns a vehicle does not make him liable for an accident in which it is involved. There has to be a reason that the driver was driving as an agent of the owner. In the case of Jane Wairumu Turanta v Githae John Vickery & 2 others [2013] KEHC 5826 (KLR), R Ougo, J, held as follows:

> The doctrine of vicarious liability was expounded in the case of Morgan –vs- Launchbury (1972)2 All ER 606 which stated that to establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. Moreover, the fact that the applicant was the owner of the vehicle by way of the logbook being in its name, Such ownership was not sufficient to create vicarious liability for the negligence of anyone who happened to drive it.
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> It is a common ground now that the Munene Don was not the servant of the applicant within the normally accepted meaning of vicarious liability from the facts Munene Don and the bank would not ordinarily be vicariously liable for the tort of Munene Don since he was not an agent. The case of HCM Anyanzwa &2 others –vs-Lugi De Casper &Anor (1981) KLR 10 stated that "vicarious liability depends not on ownership but on the delegation of tasks or duty"

16. The police abstract contained details of ownership and insurance. the same was not impeached in terms of ownership. It was driven by a particular driver, an agent of the second respondent. the vehicle was not used for the benefit of the appellant. The issue has been dealt with by this court and the Court of Appeal, and the court has held that continuing to walk a beaten path serves no useful purpose. Regard

should be given to the cases of Superfoam Ltd & Another v Gladys Nchororo Mbero [2014] KEHC 6986 (KLR), where the court, JA Makau, stated as follows:

> In the case of Samwel Mukunya Kamunge V John Mwangi Kamuru Civil Application No.34 of 2002 Hon. H. M. Okwengu, J as she then was stated:-
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> > "It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the *akn ke act 1953 39 Traffic Act* provides that the contrary can be proved. This is in recognition of the fact that often time's vehicles change hands but the records are not amended.
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> I find that the trial magistrate was wrong in holding that only a certificate of search from the Registrar of motor vehicle could prove ownership of the motor-vehicle. I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A, and evidence having been adduced that letters of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent.
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> I also on this point refer to the case of Wellington Nganga Muthiora V Akamba Public Road Services Ltd & Another CA NO.260 OF 2004(Kisumu) (2010) eklr Court of Appeal sitting at Kisumu held:
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> > "Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

17. The court was also referred to the case of Nancy Ayemba Ngaira V Abdi Ali [2010] KEHC 1866 (KLR).

18. The net effect is that I set aside the judgment of the lower court in its entirety. In lieu thereof, I dismiss the suit against the Appellant. Judgment against the other respondents is not affected.

19. On costs, the award of costs in this court is governed by Section 27 of the *akn ke act 1924 3 Civil Procedure Act*. They are discretionary. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the

> preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

20. In the circumstances, the Appellant is entitled to costs against the Respondents.

Determination.

21. In the upshot, I make the following orders: -

    a. The Judgment and Decree of Hon. Lubia delivered on 11.1.2024 in Nyeri CMCC E176 of 2021 as against the Appellant only is set aside.

    b. The case against the Appellant in the lower court is dismissed with costs.

    c. Costs of Ksh 45,000 = to the Appellant.

DELIVERED, DATED AND SIGNED AT NYERI VIRTUALLY ON THIS 20 TH DAY OF NOVEMBER, 2025 . JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Osoro for the Appellant.

No Appearance for the Respondent.

Court Assistant – Michael.