

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL APPEAL NO. E008 OF 2021

**SAMUEL
MUKORA.....APPELLANT**

- V E R S U S -

**EMILY CHEMUTAI KIRUI.....1ST
RESPONDENT**

**A.M. TRANSPORTERS2ND
RESPONDENT**

JUDGMENT

1. This appeal No.E008 of 2021 was consolidated with appeals No.E009 of 2021 and No.E010 of 2021 for hearing as a single appeal or to be used as a test suit in the determination of the other two appeals

The appellant was the first Defendant in all the cases before the lower court from which the appeals arose and in which judgment was entered against him and the second Respondent (2nd Defendant) in favour of the first Respondent (Plaintiff) jointly and severally in the sum of Kshs.705,500/= together with costs and interest.

2. The claim arose from a road traffic accident which occurred on or about the 22nd December, 2013 along the Kericho-Kisumu road at Samutet area involving a Motor Vehicle

Registration No. KAY 441J for which the Appellant was registered as the owner and driver at the material time under the care, management and control of the second respondent as the beneficial owner and the insurance policy holder.

3. In the Complaint dated 31st May, 2018, it was pleaded that at all material times relevant to the suit, the Plaintiff (1st Respondent) was the beneficial owner of the Commercial and Residential Premises erected on land Parcel No. Kericho/Kapsoit/1786 registered in the name of Cherono Ruth Ngetich and situated along the Kisumu-Kericho road. That, on or about the 22nd December, 2013, the Motor Vehicle Registration No. KAY 441 J Mercedes Benz Prime Mover was being driven along the said road when it veered off the road and rammed into the Plaintiff's premises due to the carelessness and negligence of its driver.

4. It was further pleaded that as a result of the accident, shops erected on the Plaintiff's premises along the road on a portion of land parcel No. Kericho/Kapsoit/2354 were

extensively damaged thereby causing the Plaintiff to suffer loss and damage in the total sum of Kshs.705, 500/= made up as follows:-

- (a) Legal fees - Kshs.15,000/=
- (b) Value of destruction/damage - Kshs.675,000/=
- (c) Professional Valuation fees - Kshs.15,000/=
- (d) Search Certificate for Motor Vehicle Ref. No.KAY 441J - Kshs.500/=

5. The Plaintiff/1st Respondent therefore prayed for Special Damages in the sum of Kshs.705,500/= which was accordingly awarded to her as against the First Defendant/Appellant and the Second Defendant/2nd Respondent jointly and severally in the Judgment rendered by the Trial Court on 26th January, 2021. However, being dissatisfied, the Appellant preferred the present appeal on grounds set out in the Memorandum of appeal filed herein on 19th February, 2021 by **M/S. E. M. ORINA & CO. ADVOCATES.**

6. The Appellant mainly complains that the Trial Court erred in both law and fact by failing to consider the notice of claim filed by himself against his co-defendant. That, the finding that the Appellant and Co-defendant were jointly and severally liable was erroneous as the Appellant proved that he had sold the subject ill-fated vehicle as at the time of the accident.

7. The Appellant further complains that his evidence and submissions were disregarded by the Trial Court which then arrived at a wrong decision. That, the Court erred in relying on Kericho CMCC No.12 of 2017 in holding that both the appellant and second Respondent were 100% liable, yet the Appellant was not a party in that case nor was he a participant in the case.

8. The hearing of the appeal was by way of written submissions. Both parties filed their respective submissions in favour of and against the appeal.

Notably, the Second Respondent did not participate in the appeal nor did it file written submissions. The submission by

the Appellant are dated 19th October, 2022 while those of the First Respondent are dated 29th March, 2022.

9. Having considered the appeal on the basis of the supporting grounds and those in opposition thereto in light of the rival submissions, the role of this Court was to reconsider the evidence and draw its own conclusions being in mind that the Trial Court had the advantage of seeing and hearing the witnesses. Having done so, it became apparent that what fell for determination by the Trial Court was Firstly, the question of liability and Secondly, the question of damages in particular whether the special damages claimed by the Plaintiff/First Respondent were specifically pleaded and proved. The Notice of claim against the Second Defendant dated 7th August, 2019, was also a factor for considerations vis-à-vis the First and Second Defendants, but on the periphery.

10. Clearly, the Appellant's challenge on the impugned Judgment is more on the question of liability than anything else. The evidence indicated that the occurrence of the accident and the resultant destruction of the Claimant's

Commercial and Residential Premises were factors which remained undisputed, nor was it disputed that the “culprit” Motor Vehicle was the Mercedes Benz Prime Mover Registration No. KAY 441J driven at the time by the driver/servant/agent of the Second Defendant/Second Respondent.

11. Neither was it disputed or substantially disputed that the damaged premises belonged to the Plaintiff/First Respondent as the actual or beneficial owner thereof. In any event, this was duly proved by the Plaintiff **Emily Chemutai Kirui (PW.1)** and her witness, **Ruth Ngetich (PW.2)** .

The damaged portion of the property was valued at Kshs.675,000/= as established by the valuer, **Lawrence Sang (PW.3)**. No evidence was led by the Defendants in the matter.

12. Apparently, the evidence led by the Plaintiff and her witness was basically on the question of damages and loss occasioned by the accident rather than the Defendant’s liability in respect thereof. The reason for this could be deciphered from the Court’s proceedings which show that

the question of indulging was anchored and concluded in favour of the Plaintiff by the Trial Court's finding in that regard in a similar suit No. CMCC12/2017. However, there was indications that there were other similar suit including CMSS 134/2018, subject of this Appeal. The additional suits were CMCC Nos. 135, 136, 137 and 138 of 2018.

13. The proceedings of the Court conducted on 11th June, 2019 indicated that CMCC 134/2018 was to be used as a test suit for determination on liability in all the related cases, but that determination on the question of damages would be done separately in the related cases.

14. A consent to that effect was recorded in Court on that 11th June 2019. An attempt made by the First Defendant on 3rd December, 2019 to set aside the Consent orders on liability was somehow declined when the Court affirmed that the question of damages will be determined in the individual cases. So, the determination of liability in the test suit No.134 of 2018 was to be "imported" to the rest of the similar suits involving the same Defendants, but different Plaintiffs. This came to pass with the impugned Judgment of

the Court delivered on 26th January, 2021 in which both Defendants were held fully liable at 100% for the consequences of the unlawful act and/or omissions attributed to the driver of the ill-fated vehicle.

15. It is evident that the Trial Court's findings or liability in Kericho CMCC No.12 of 2017 was imported into this matter. In that regard, the trial court rendered itself as follows:-

“It is worth noting that the Defendants in Kericho CMCC 12 of 2017 filed a joint defence. The Judgment therein against the Defendants jointly and severally has never been set aside on behalf of the 1st Defendant. Therefore, it is presumed that the 1st Defendant is liable. The earlier case was out of the same accident as this one. The circumstances remain the same and as such liability will not be interfered with. Therefore, the Defendants are held liable 100%.”

16. A copy of the Judgment in CMCC No.12 of 2017 forms part of the Lower Court record. It shows that the Defendants in that case were the same Defendants in this case, but

whereas the former case was a personal injury claim under the Law Report Act and the Fatal Accidents Act, the present case was a material damage claim arising from the same accident but affecting several claimants in different ways. Therefore, the finding on liability in the former case was not expected to go any different from the finding on liability in the present case especially by the same Trial Court. The adoption of the finding in the former case on the question of liability was therefore proper and valid.

17. This Court would therefore find that the Defendants (.e. Appellant and 2nd Respondent) were fully liable to the Plaintiff (i.e. 1st Respondent) for the loss and damage occasioned to her as a result of the material accident involving their vehicle whose ownership by them in whatever capacity was never disputed and/or substantially disputed at the Trial and ought not have been raised in this Appeal by dint of grounds two (2) of the appeal which is hereby overruled and dismissed.

18. Similarly, grounds three (3), Four (4) and Five (5) of the appeal are overruled and dismissed in view of this court's

finding that the trial court acted properly and lawfully in adopting in its judgment, the finding on liability in CMCC No.12 of 2017.

19. As regards ground One (1), it is on record that a Notice of claim against a Co-Defendant was filed on 8th August, 2019 by the First Defendant (Appellant) against the Second Defendant (Second Respondent) under **Order 1 Rule 24** of the **Civil Procedure Rules**. However, the Trial Court disregarded and/or ignored the notice in its Judgment. There was nothing said about it even by way of a footnote. Indeed, the notice was given a total “blackout” by the Trial Court and rightly so because it was not pleaded in the Appellant’s statement of defence dated 22nd June, 2018. Neither was it addressed in the Appellant’s final submissions at the trial. Most importantly, there was no evidence of service of the notice upon the affected parties i.e. the 2nd Defendant/2nd Respondent.

20. Clearly, the Notice, for reasons aforementioned did not fall for determination at the trial court and raising it in this appeal can be considered to be an afterthought. The

circumstances of this case are distinguishable from the circumstance in the case of ***John Kimani Njenga -vs- Margaret Wanjiru Kanyiri & 2 others [2015]eKLR***, in which the provisions of ***Order 1 Rule 24 Civil Procedure Rules*** were discussed. In that case, the notice was specifically pleaded and duly served upon a Co-Defendant.

21. The provisions of Rule 24 of Order 1 Civil Procedure Rule are very clear and specific and anything that appertains to it cannot be effected without service of the Notice upon the affected party, otherwise the party may end up being condemned without being given the opportunity to be heard. On the basis of the foregoing observations, ground one (1) of the appeal must also fail. It is therefore overruled and dismissed.

22. In sum, this appeal must and is hereby dismissed for want of merit with costs to the First Respondent. Orders accordingly.

Dated, signed and delivered at Kericho this 26th day of November, 2025.

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J. R. KARANJAH

JUDGE

In the Presence of:-

C/Assistant – Peter

M/s Otieno for Appellant/Applicant

Mr. Kipngetich holding brief for M/s Koech for 1st Respondent

2nd Respondent – Absent