REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E131 OF 2023

CASSIM BILALI ……

APPELLANT

VERSUS

OSBORN NJOKI NYABONGO ……1ST RESPONDENT

PURITY NJOKI CHEGE……2ND RESPONDENT

ISAAC OCHIENG WAMAYA …… 3RD RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of Hon. P.K. Mutai, Principal Magistrate, delivered on 30.10.2023 in Kisii CMCC No. 560 of 2018. The appellant was a Third Party.
2. The Appellant raised eight 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.**

3. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules [now rule 88 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…"

4. 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 **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:

> **"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."**

5. The first respondent filed suit against the second respondent, claiming damages arising from an accident of 27.11.2017 involving motor vehicle registration number KBJ 933 W belonging to the second respondent and motor vehicle registration number KBZ 602 G driven by the first respondent. Material claim of a paltry Ksh. 135,996/= was sought together with loss of for a period of one week.

6. The matter was heard and judgment entered in favour of the first respondent against the first third party. The claim against the defendant and the second third party was dismissed. Even before the appeal, the first respondent did not notice the profound error of judgment he made in respect of this claim, which will cost the first respondent shortly.

7. One of the fundamental mistakes parties make is to fail to join the actual driver who was driving the motor vehicle. Although it is not fatal to the case, it resolves the question of who the tortfeasor was. Though framed as a question of liability, it

turns on a very narrow point, the liability of the third party in a case where there is no liability against the defendant.

8. It is noted from the record that the defendant added a third party who also issued a second third-party notice. It was his case that he sold the vehicle. It is unnecessary to go to the evidence regarding liability of the vehicles and the quantum of damages only.

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

Analysis

10. 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."

11. The duty of the first appellate Court was settled 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 Judges 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."

12. The Court is to bear 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.

13. In cases involving documents, the court will have the same jurisdiction. This was so when addressing evidence taken by a court other than the trial court. In such a case the appellate court has a longer rope to play with. In the case of **Sugut v Jemutai & 3 others** (Civil Appeal 110 of 2018) [2023] KECA

202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

14. 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.

15. 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."**

16. 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 motor vehicle registration number KBJ 933 W. It is a foregone

conclusion that the vehicle caused the accident. However, who is liable? The appellant was joined as a third party. He also joined a third party, the third Respondent herein.

17. The evidence on record is that the 2nd appellant sold the vehicle to the Appellant. The court exonerated her from the case. This brought two fundamental flaws in the case as at that point. There is no case filed against the third party by the plaintiff. Even if the court was to find him to have caused the accident, he can only be liable to the defendant as the case in court, though the pleadings were between the plaintiff and defendant on one hand and between the third party and the third party. The third party also had a case against the second third party. There is no nexus between a plaintiff and a third party. It is only when liability is shared that the third party can settle a claim for the plaintiff. The dismissal of the suit against the defendant ended the plaintiff's case forever. Order 1 rule 15 provides as follows:

> (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
> (a) that he is entitled to contribution or indemnity; or
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

> (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
> (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summon

18. The claim was thus between a defendant and a third party. The plaintiff's case collapsed with the dismissal of the defendant's case. It must also be remembered that a third party in this respect was a person the defendant sold the vehicle to and not another vehicle involved in the accident. The burden of proof thus lay on the plaintiff to prove whose vehicle hit his vehicle. The burden was not on the defendant to show who caused the accident. It could be different if the defendants was another tortfeasor, and the question is who between their drivers is liable. A former owner has no burden to show who caused an accident. It is enough if he brings credible evidence of sale of the vehicle.

19. The registered owner was able to show that she sold the vehicle to the appellant. The appellant also demonstrated that he sold the vehicle. The sale took place on 15.07.2013. The appellant sold the vehicle to the third respondent on 27.11.2013. The said vehicle was sold 4 years before the accident occurred. The actual owner or the subsequent buyer was joined to the suit. Service on the third party was effected through a family member in 2019. The position on the aspects of section 8 of the 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 Traffic Act when she states that the true owner of the motor vehicle was the appellant."**

20. In any case, 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*"

21. Indeed, the police abstract indicated the name of the owner of the vehicle as Joshua Motiri Nyasinga, and his insurance was given. The *raison d'être* for not suing the owner indicated in the police abstract is beyond peradventure. The abstract

was available as far back as 29.11.2017. The police abstract contained details of ownership and insurance.

22. The same was not impeached in terms of ownership. It was driven by a particular driver, an agent of Joshua Motiri Nyasinga, who is not party to the suit. There is no evidence that the said vehicle was 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:-
>
> "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 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.

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.

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:

“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"

23. In the case of **Nancy Ayemba Ngaira V Abdi Ali** [2010] KEHC 1866 (KLR), the court addressed the said issue as follows:

> Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the *de facto* owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: *actual ownership*; *beneficial ownership*; *possessory ownership*. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the *matatu* in question.
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> The trial Court, therefore, had no legal basis for limiting ownership to 2nd defendant whose name was shown on the certificate of registration for the motor vehicle.

24. In the end, I find and hold that the appeal is merited. The appellant had sold the said motor vehicle. It was not necessary to join a third party in a case where a sale took place. It is where there is a need for indemnity or contribution as a tortfeasor that such joinder is necessary. I also found that the first respondent limited his case against the second respondent, who successfully defended herself. The respondent must rue the decision not to join the suit despite the police indicating him as the owner. The details came out in the cross-examination of PW1.

25. 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. Unfortunately, I cannot enter judgment against the second third party as there are no pleadings supporting such. In any case, the only evidence of ownership relates to Joshua Motiri Nyasinga. He is not a party to the suit, and no order can issue *in vacuo* against a non-party.

26. On costs, the award of costs in this court is governed by Section 27 of the 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.

27. In the circumstances, the Appellant is entitled to costs against the 1st Respondent. A sum of Ksh 45,000/= will suffice.

Determination

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

(a) The Judgment and Decree of Hon. P.K. Mutai, Principal Magistrate, delivered on 30.10.2023 in Kisii CMCC No.

560 of 2018 is set aside and in lieu thereof I dismiss the case against the appellant in the lower court.

(b) Given the lack of nexus between the appellant and the 1st Respondent in the court below, the appellant shall bear his costs in the lower court.

(c) Costs of Ksh 45,000/= to the Appellant payable by the 1st Respondent.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **17th** day of **December, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Simolo for Odongo for the Appellant

Ms. Atuhuire for the 1st Respondent

Ms. Gogi for the 2nd Respondent

Court Assistant – Michael.