Maghanga v Masugu & 2 others (Civil Appeal E048 of 2023)
[2025] KEHC 18236 (KLR) (1 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18236 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E048 OF 2023

PJO OTIENO, J

DECEMBER 1, 2025

BETWEEN

ELIZABETH WANYIKA MAGHANGA ..... APPELLANT

AND

RUTH NYAKAMBI MASUGU ..... 1ST RESPONDENT

KEN MAINA MUTHONI ..... 2ND RESPONDENT

KENNEDY WAMWEA MOGURU ..... 3RD RESPONDENT

(Being an Appeal Against the Judgment of the Hon. E. Cherop, Adjudicator, delivered on 11th January, 2023 at the Small Claims Court in Naivasha, Claim No. E057 of 2022)

JUDGMENT

1. Before the small claims court for determination was a claim for the sum of Ksh. 220,430 pleaded to be the costs suffered by the 2nd Respondent as a consequence of a collision between two motor vehicles; KCN 915J and KCP 573J.

2. The suit was founded on the tort of negligence for which the negligence alleged against only the 3rd Respondent here and before the trial court. The allegations of negligence were clearly particularized in a fashion that point to the 3rd respondent only and not the appellant nor 1st Respondent. In fact, as pleaded, the statement of claim solely blamed the 3rd Respondent for negligence leading to the loss with nothing being put forth to connect the appellant and the 1st respondent with the motor vehicle and the causation of the accident.

3. When served with the pleadings, in terms of the Affidavit of service filed before the trial court, the Appellant and the 3rd Respondent never entered appearance nor filed any Response to the claim. For that failure the 2nd Respondent, as claimant at trial, sought and was granted an interlocutory judgement against the appellant and the 3rd Respondent. To the court, the matter was clearly a liquidated claim

and if the court was satisfied that there had been due effective service, the resultant judgment ought to have been a final default judgment and not an interlocutory one.

4. In the reserved judgment by the trial court, the appellant and the 3rd were held to blame and thus wholly liable to the 2nd Respondent. The appellant was found to have been liable for being the beneficial owner while the 3rd respondent was liable for being the driver. The two were held 100% liable jointly and severally.

5. In coming to that conclusion, the court rendered itself as follows: -

> "I have perused the car hire agreement. There is no evidence that the 1st respondent was benefiting from the taxi business under which the 3rd Respondent hired the vehicle for.
>
> I have also noted that in Page 5 of the investigation report prepared by Spotlight Loss Assessors and adduced as Exhibit no. 4, the 3rd Respondent is recorded having confirmed that the vehicle had been hired from the registered owner. From the evidence on record, I cannot see how the 1st Respondent though the registered owner of the suit vehicle can shoulder liability as a result of the accident. Evidently, the car hire agreement unchallenged absolves her from liability and thus the case against the 1st Respondent fails.
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> Noting the interlocutory judgment was entered against the 2nd and 3rd Respondent and with no evidence to controvert the claimant's case, I find that the Claimant has on a balance of probability proved his case against the 2nd Respondent as the beneficial owner and the 3rd Respondent lawfully in possession of the suit motor vehicle at the time of the accident.
>
> As a result, the 2nd and 3rd Respondent are held 100% liable jointly and severally"

6. That decision has aggrieved the appellant who has lodged the instant appeal and challenges the judgment on the grounds that; -

    1. The Small Claims Court misapplied Section 8 and 9 of the *Traffic Act* Chapter 403 Laws of Kenya, when it recognized motor vehicle registration number KCP 573W as having been transferred to the 1st Respondent, but ruled that the Appellant was the beneficial owner when the transfer of beneficial ownership had already crystallized and take effect when the Appellant sold the said motor vehicle.
    2. That the learned Adjudicator erred in law and misapprehended the doctrine of vicarious liability viz a viz agency and/or employee/employer relationship.
    3. That he learned Adjudicator erred in law and fact in holding that the Appellant was vicariously liable for the negligence of the 3rd Respondent when the relationship of master servant and/or agency did not exist.
    4. That the learned Adjudicator erred in law and fact in holding that the insurance cover perse created vicarious liability on the part of the appellant.
    5. That the learned Adjudicator erred in law and in fact by delivering a judgment that was contrary to common understanding, custom, and practice in the Insurance Industry by failing to recognize that insurable interest is lost once the insured property is sold; and
    6. That the learned adjudicator erred in law and in fact when she recognizes the Appellant as having been served pursuant to Order 5 rule 22 of the Civil Procedure Amendment Rules 2020 and Section 1B (1) (e) of the Civil Procedure Rules, 2010, when the WhatsApp messages did not show when the Mention Notices were served upon the Appellant.

7. That the learned Adjudicator erred in law and in fact when she awarded the 2nd Respondent costs of the suit when he did not serve the Appellant with a demand letter.

8. That the learned Adjudicator erred in law and in fact in finding that the 1st Respondent was not liable, when her failure to secure an insurance policy after purchasing the vehicle meant that she used/permitted her vehicle to be used on the road without a third-party insurance policy contrary to Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 Laws of Kenya.

7. Even where so escalated into eight grounds, the court reads the challenge against the judgment to be that the trial court misapprehended and misapplied; section 8 and 9 of the *Traffic Act*, the doctrine of vicarious liability, common understanding, customs and practice in the insurance industry that the law that insurance cover is lost when insurable interest dissipates. The judgment is equally faulted for exonerating the 1st Respondent contrary to his admissions of having bought the motor vehicle and hired same to the 3rd Respondent for reward. There was also a fault that there was no sufficient proof of effective service upon the appellant.

8. The appeal was directed to be canvased by way of written submissions and the three parties have duly filed the rival submissions. The court has had the opportunity to read the submissions, derived valuable assistance therefrom and appreciate the counsel for the industry employed.

9. Being a first appellate court, the usual mandate is to re-evaluate, re-appraise and re-examine the entire material at trial afresh, with a view to coming to our conclusions, but while deferring to the trial court on findings of fact. However, being an appeal from the Small Claims Court, the mandate is constricted by section 38 of the Act to making such re-appraisal and re-evaluation to only matters of law.

10. Having executed the court's mandate and upon reading the pleadings at trial, the evidence taken and the submissions made then and judgment of the trial court, as well as the submissions filed herein and duly highlighted by counsel, the court discerns the issues for determination to be only two: -

    a. Whether the grounds of appeal raised are limited to issues of law in accordance with section 38 *Small Claims Court Act*?

    b. Whether the trial court was right in its finding and decision that the Appellant was liable for being the beneficial owner of the offending motor vehicle?

Analysis and Determination

11. Section 38 limits the jurisdiction of this on appeal from the Small Claims Court to points of law only. That limitation in law, on basis of arguments in the submissions by parties in this appeal, begs the question of what amount to a part of law.

12. It is now well settled in law that a conclusion not supported by the evidence on record or just failure to properly analyse and apply the evidence led, to the pleadings, and thus arriving at an erroneous conclusion that is irreconcilable with the evidence, is a matter of law. It is a matter of law when a court rejects or fails to consider the evidence tendered by a witness under circumstances that call to question whether evidentiary principles have been observed. See Kenya breweries Ltd vs Godfrey Odoyo (2010) eKLR

13. In this matter, that there was an unequivocal admission of the fact of sale and purchase from the Appellant to the 1st Respondent, is irreconcilable with the trial courts finding that the Appellant was the beneficiary owner of the offending motor vehicle.

14. In any event, the contract of insurance is personal to the insured and not transferable to a third party upon sale without the concurrence of the insurer. The law is so particular to protect the basic requirement of insurable interest that even where one buys a motor vehicle, he cannot be issued with a full insurance cover prior to being registered as the owner thereof. See section 76A *Insurance Act*.

15. With the evidence that it was the 1st respondent who was the registered owner of the motor vehicle, and not the appellant, the court determines that as at the date of the accident, occurring often transfer to the 1st Respondent, the appellant retained no insurable interest over the motor vehicle and could thus not maintain an insurance policy with any insurer.

16. Thirdly, in the statement of claim, there was no facts pleaded to connect the appellant with the motor vehicle and the accident. No relationship was established between the appellant and the person pleaded and proved to have been the driver, the 3rd respondent. Even the phrase beneficial owner cannot be traced or read into the 2nd Respondents pleadings. It was just not pleaded and the finding on it being alien to the pleadings is erroneous and ought to be set aside. Consequently, not even the principle of vicarious liability could be applied to found liability against the Appellant on the basis that it was equally never pleaded.

17. It is equally an established principle of law that parties are bound by their pleadings, as a principle of the right to fair hearing, so that a party can only lead evidence on the pleaded facts, which have been served upon the adversary, to prepare the adversary on how to respond to the claim.

18. Because beneficial ownership was never alleged nor proved against the Appellant, but an admission was offered by the 1st Respondent in his evidence and on the fact of the hire of the motor vehicle to the 3rd respondent for reward, it was both contrary to the law, that parties are bound by their pleadings and also perverse to the evidence on record for the trial court to have found the Appellant liable on the basis beneficial ownership.

19. Beyond the admissions in the witness statement, the 1st respondent was more candid in her evidence in chief and cross examination. The record bears her to have said: -

> " I was in possession of the motor vehicle, my driver the 3rd Respondent was driving...
>
> As per the agreement, I am the owner of the motor vehicle and the 3rd Respondent was in possession. The vehicle belongs to me. He was supposed to inform, so I can inform the insurer. I have liability over the motor vehicle..."

20. To this extent, that evidence pointed to the trial court, that the 1st Respondent was the registered owner of the motor vehicle which was in possession of the 3rd Respondent with consent and authority of the 1st Respondent.

21. With such evidence alone, without any other to connect the Appellant with the motor vehicle, it is inconceivable how the 1st Respondent was absolved and liability found against the appellant. It is to this court clear that the finding was never logical or natural conclusion to be drawn from his evidence. When it cannot have been drawn from the evidence on record, it was an unexpected conclusion that affronts the evidence on record and thus a point of law to be argued as such but not a fresh analysis in factual evidence adduced at trial.

22. More untenable was the anomalous finding that the car hire agreement did not show that the 1st Respondent was benefitting from the taxi business. That finding is anomalous because the agreement was clear on its face that the 3rd Respondent was obligated to pay to the 1st Respondent a reward of Kshs

10,000/= to 12,000/= per week. In no way could the agreement be read to say that the 1st respondent derived no benefit in the use of the car as a taxi. To find that the appellant was the beneficiary in the absence of evidence is wholly incapable of being a logical conclusion based on the evidence.

23. Flowing from the foregoing, the court finds that the finding that the Appellant was a beneficial owner thus liable to 2nd Respondent was erroneous in law from being contrary to the evidence on record.

24. The judgment against the Appellant is thus set aside and, in its place, substituted with a judgment dismissing the suit against the appellant with cost.

25. There was then ground 7 of the Memorandum of Appeal that challenged due and effective service upon the appellant. The court finds that challenge to be a good ground for an application for setting aside before the trial court and not a ground of appeal.

Accordingly, the appeal is found merited and is thus allowed as prayed. The judgment on liability against the appellant is set aside and substituted with a judgment dismissing the suit against the appellant with costs.

Having succeeded on this Appeal, the appellant is awarded the cost of this appeal together with the costs of the dismissed suit before the trial court.

DATED, SIGNED AND DELIVERED AT NAIVASHA, THIS 1ST DAY OF DECEMBER, 2025

PATRICK J O OTIENO

JUDGE

In the presence of;

Mr. Matata for the Appellant.

Mr. Amasa for the 1st Respondent

Mr. Otieno for 2nd Respondent

Ms. Hannah – Court Assistant