Joseph v Gitonga (Civil Appeal E084 of 2024)
[2026] KEHC 1561 (KLR) (17 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1561 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E084 OF 2024

HM NYAGA, J

FEBRUARY 17, 2026

BETWEEN

KIMUTAI CHANGWONY JOSEPH .... APPELLANT

AND

MARTIN MWENDA GITONGA .... RESPONDENT

(Being an appeal from the judgment of Hon. L.N. Juma delivered on 25th April 2024 in Meru MCCC No. E454 of 2021)

JUDGMENT

Background:

1. By a plaint dated 8th November 2021 the respondent moved the lower court seeking judgment against the appellant for:

   a. Special damages of Kshs.285,580/=

   b. Costs of the suit

   c. Interest on (a) and (b) above

   d. Any further or other relief.

2. The respondent's case was that at all material times, he was the registered owner of motor vehicle registration number KCH 240K while the appellant was the insured registered at beneficial names of motor vehicle registration number KBQ 696A.

3. It was the respondent's further case that on 10th December 2018, his authorized driver was driving the said motor vehicle registration number KCH 240K at Katheri area, along Meru-Nanyuki road when the appellant, his authorized driver, agent or servant negligently drove motor vehicle registration

number KBQ 696A that he caused it to collide with the appellant's motor vehicle, causing extensive damage to it. The particulars of negligence, the damage and the cost of repairs were set out in the plaint.

4. It was the respondent's case that his motor vehicle was subsequently repaired by his insurer. He thus sought the amount claimed under the doctrine of subrogation.

5. The appellant filed defence denying liability. It was his case that after the accident, the parties were referred to their respective insurance companies and the respondent was fully compensated.

6. To the defendant, the suit was an abuse of the court process. He urged the court to dismiss the suit.

7. After a full hearing, the trial court delivered its judgment and entered judgment for the respondent against the appellant as prayed in the plaint.

8. Aggrieved by the lower court's judgment, the appellant filed the Memorandum of appeal dated 19th July 2024.

The appeal

9. The appellant set out the following grounds of appeal:

    I. That the learned trial magistrate erred in law and in fact and wrongly entered judgment against the appellant for a sum of Kshs.285,580/= plus costs without evidence from Martin Mwenda Gitonga the respondent, the owner of the subject motor vehicle registration number KCH 240K and the principal witness.

    II. That the learned trail magistrate erred in law and in fact and was wrong to award the judgment to the respondent without evidence that the motor vehicle assessor PW3 Stephen Njomo invited the appellant to attend the assessment of the damages allegedly caused on motor vehicle registration number KCH 240K

    III. That the learned trial magistrate erred in law and in fact and failed to find that both motor vehicles registration number KBQ 696A belonging to the appellant and KCH 240K belonging to the respondent were both damaged on or about 10th December, 2018 along Meru Nanyuki road at Katheri area within Meru County as a result of careless driving negligent driving of both motor vehicles thereby causing the said accident.

    IV. That the learned trial magistrate erred in law and in fact and failed totally to find that there was no valid motor vehicle assessment report produced in court for both motor vehicles to enable the trial court make a fair decision on contributory negligence and percentage on damages.

    V. That the learned trial magistrate erred in law and in fact and proceeded to determine the suit without jurisdiction the accident having happened on 10th December, 2018 and suit was filed on 10th December, 2021

    VI. That the learned trial magistrate erred in law and in fact and acted contrary to the mandatory provisions of 10(2) (a) of the insurance (Motor Vehicle Third Party Risk Act) Cap 405 Laws of Kenya) by failing to issue the appellant's insurance with a third-party statutory notice to sue.

10. The appeal was canvassed by way of written submissions which I will not rehash, but will refer to them where necessary.

Analysis and determination

11. Being a first appeal, this court's duty is as was set out in Selle & Another v. Associated Motor Boat Company Ltd & Others (1968) EA 123, where the Court of Appeal stated as follows: -

> " ... This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen nor heard the witness and should made due allowance in that respect ..."

12. With the above in mind, I will proceed to look at the evidence adduced in the lower court.

13. PW1 was police corporal Pius Njagi, attached to Timau Police Station. He confirmed the occurrence of the accident in question. He stated that according to the police investigations, the driver of motor vehicle KBQ 696A was to blame having left his lane and hit motor vehicle registration number KCH 240K which was on its lane.

14. Erick Koome was PW2. He testified that he was the authorized driver of motor vehicle registration number KCH 240K. That at the scene of the accident, the driver of motor vehicle KBQ 694A drove in a reckless manner and caused his vehicle to collide with the respondent's vehicle. He denied that he was negligent.

15. Stephen Njomo, a motor vehicle loss assessor, was PW3. He testified that he assessed the damage to the respondent's motor vehicle which was subsequently required by his insurer.

16. PW4 was Regina Ireri, a Legal Officer with Heritage Insurance Company Limited. She confirmed that the Company had insured the respondent's motor vehicle. That after the accident, the respondent lodged a claim and the company repaired his vehicle. She confirmed that the suit was brought under the doctrine of Subrogation.

17. The appellant conceded that the accident occurred. However, he denied liability and blamed the respondent's authorized driver for the accident.

18. The issues for determination are as follows:

    a. Whether the appeal is incompetent for want of a decree,

    b. Whether the respondent's suit was time barred.

    c. Whether the respondent proved his case against the appellant

    d. Whether there was valid motor vehicle assessment report.

Whether the appeal is incompetent for want of a decree

19. The respondent argued that the appellant failed to file a decree, hence the appeal is incompetent.

20. Order 42 of the Civil Procedure Rules provides for the manner in which appeals are to be filed. It provides as follows: -

    [Rule 2.]

    Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible

    and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

[Rule 13(4)]

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

(i) a translation into English shall be provided of any document not in that language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

21. It is not in dispute that the appellant did not file a copy of the decree either at the time of lodging the Memorandum of Appeal, or at the time of filing the record of appeal. Is this omission fatal to the appeal?

22. Section 65 of the *Civil Procedure Act* provides as follows:

Appeal from other courts

(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(b) from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;

24. . Section 2 of the said Act defines a decree as follows:-

> " decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—
>
> (a) any adjudication from which an appeal lies as an appeal from an order; or
>
> (b) any order of dismissal for default:
>
> Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

23. From the proviso, it is clear that for purposes of appeal, a decree includes a judgment.

24. A look at the record of appeal shows that a copy of the judgment extracted from the CTS was filed. In my view in the age of e-filing, a judgment/order extracted from the CTS does not require to be certified like the conventional orders or judgments of the past. As, such the judgment filed in the record of appeal is sufficient to meet the requirement of section 65 of the Act and Rule 42 Rule 2 and Rule 13(4) of the Civil Procedure Rules.

25. This issue was duly considered in Ponda v Mweu [2023] KEHC 24132 (KLR). Thande, J held as follows;

> " An appellant is required to include in the record of appeal, the judgment, order or decree appealed from. The use of the word "or" is indicative of a disjunctive intent of the requirement. Accordingly, for purposes of an appeal, the filing of the judgment or order or decree is sufficient"

26. Going by the above findings I find that the appeal was competently before the court. There is really no prejudice to the parties since they all knew what decision was being appealed against.

Whether the respondent's suit was time barred

27. The suit was filed on 10th November 2021. The accident in question occurred on 10thDecember 2018. Section 4(2) of the *Limitation of Actions Act* provides as follows as regards claims in tort;

    (2) 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:

28. Evidently, the suit before the lower court was filed within the statutory period.

Whether the respondent proved his case

29. The appellant submitted that the failure to call the respondent as a witness was fatal to his case.

30. A party to a suit is under no obligation to actually give evidence to prove his/her case. If there are witnesses who can sufficiently prove the case, then it is not necessary to have the party give evidence. This position was reiterated in Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2022] eKLR, the Environment and Land Court (ELC) held stated as follows;

> " The law does not require that a Plaintiff or Defendant must testify in a matter. Where they choose to testify there is no prescribed order of calling witnesses or producing the documents or marking them before the witness produces them. The parties may call witnesses in any order to produce the documents they are entitled by law to produce provide the rules of evidence are followed."

31. Similarly, in Gekonge v Mochoge [2023] KEELC 108 (KLR), the same Court states as follows;

> " I, however, do not agree with the appellant's position that the trial magistrate erred in allowing the case to proceed, without him (as plaintiff) giving evidence. The fact that one is plaintiff does not mean that he must testify. I am not aware of any rule that prescribes that the plaintiff (or indeed any party to a suit) must testify. It is the prerogative of the plaintiff (or such other party to the suit) to either testify or refuse to testify. A party can indeed prove

a case through the testimony of other witnesses, and it is not a requirement that before a case can be considered as proved, then the plaintiff must testify."

32. In the instant case, the witnesses who testified clearly laid out the respondent's case in respect to the occurrence of the accident, the extent of the damage to his vehicle and the costs involved on repairs.

33. The appellant's argument that he should have been involved in the assessment of the damage does not hold any water. There is no requirement in law for that.

34. The respondent was entitled to undertake repairs to his vehicle either personally or through his insurer and could not be expected to start looking for the appellant to assist him in doing so.

35. PW3 produced the assessment report. While such a report is not binding on the court, in the absence of a counter-report and the production of payment receipts, the same was sufficient to prove the respondent's case.

36. Although the appellant claimed to have compensated the respondent, the evidence was tendered to prove this.

37. This was a case filed by the respondent's insurer by applying the Doctrine of Subrogation. The insurer cannot sue on its own name so it applies the doctrine in order to recover the costs it incurred in repairing its insured's vehicle. In Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR the Court of Appeal had this to say on this doctrine:

> " The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated....
>
> As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co. [1994] eKLR and Michael Hubert Kloss & another vs. David Seroney & 5 others [2009] eKLR."

38. The said doctrine was also discussed in Egypt Air Corporation vs Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 where it was held that:

> " The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity then there is no juristic scope for the operation of the principle of subrogation."

39. I find that the suit was properly filed under the said doctrine.

40. After considering the evidence, I am in agreement with the trial magistrate that the respondent proved his case to the requisite standard in law.

41. In the end, I find that the appeal lacks any merit and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF FEBRUARY, 2026.

H. M. NYAGA

JUDGE