

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. E142 OF 2023**

**BETWEEN**

**KENYA ORIENT  
INSURANCE COMPANY.....  
APPLICANT/APPELLANT**

**AND**

**CHRIS KINUTHIA.....  
RESPONDENT**

*(Being an appeal from the judgment of Hon. Mercy Thibaru,  
delivered on 5<sup>th</sup> June 2023 at the Small Claims Court at Makueni  
SCC E002 of 2023)*

**JUDGMENT**

**Background**

1. This appeal arises from the decision delivered in SCCCOMM No. E002 of 2023 dated 5<sup>th</sup> June 2023. In an amended Statement of Claim dated 16<sup>th</sup> March 2023, the respondent alleged that on 9<sup>th</sup> November 2021, motor vehicle registration number KBC 629G was lawfully being driven along Makueni-Wote Road by his delegatee, Mr. George Thara Wainaina when the appellant's Motor Vehicle Registration Number KCN 647N, driven and/or controlled carelessly and negligently by the 2<sup>nd</sup> respondent at the trial Court, Mr. Pius Mutuku, collided with the respondent's

motor vehicle thereby causing extensive damage to the said motor vehicle.

2. The respondent sought compensation from the appellant amounting to Kenya Shillings Four Hundred and Forty-Five Thousand and Eighty-four (445,084) comprising of Repair Costs of (Kshs. 318,884), Special damages for Assessment Fees amounting to Kshs. 5,000 Towing charges of Kshs. 60,000, Motor Vehicle Search Kshs. 550, CR12 Search amounting to Kshs. 650, disbursement costs of Kshs.10,000 and debt recovery fee of Kshs. 50,000.
3. The appellant opposed the claim by filing a response dated 4<sup>th</sup> May 2023 where it denied the existence of an insurance policy between itself and the respondent.
4. In its determination, the trial court found that there was no evidence to show that the appellant was the owner of the said motor vehicle apart from being the insurer. The learned magistrate held that the appellant being an insurer, could not be held vicariously liable for the acts of its insured. Consequently, the claim against the appellant was dismissed. The trial court further found that the respondent herein had proved his case against Mr. Pius Mutuku, the 2<sup>nd</sup> respondent at the trial court, and held him 100% liable.

### **The Appeal**

5. This decision triggered the appeal before me. In a Memorandum of appeal dated 20<sup>th</sup> June 2023, appellant

appealed the decision of the trial court on seven grounds to wit:

1. The learned Trial Magistrate erred in law and fact in awarding the respondent the damages herein without establishing whether there is an insurance policy in place.
2. The learned Trial Magistrate erred in establishing that the respondent was actually indemnified by the insurance company despite the adduced evidence showing the contrary.
3. The learned Trial Magistrate erred in relying on the evidence of the respondent which was not sufficiently corroborated and thus made a misinformed finding against the appellant.
4. The learned Trial Magistrate erred in fact and law in her interpretation of the insurance doctrine of subrogation.
5. The learned Trial Magistrate erred in fact and law in holding that the respondent is entitled to the relief sought.
6. The learned Trial Magistrate erred in law and fact by awarding costs to the respondent.
7. In view of the circumstances set out herein above, the Learned Magistrate misdirected herself in delivering judgment in favour of the respondent by failing to consider and appreciate the foundational

principles of insurance more so, the doctrine of subrogation.

6. Consequently, the appellant sought orders that: the judgment delivered in Machakos County Small Claims Court Claim No. E002 of 2023 be set aside and substituted with a proper judgement. The appellant further prayed that the honourable Court find the total award of Kshs. 466,448.18 unlawful and unwarranted, and that the appeal be allowed with costs.
7. The appeal was canvassed through written submissions. The appellant filed submissions dated 15<sup>th</sup> October 2024 in support of its appeal, while the respondent filed submissions dated 1<sup>st</sup> February 2025 in rebuttal.
8. Before the appeal could be determined, the appellant filed a Chamber Summons Application dated 21<sup>st</sup> February 2025 seeking leave to amend the Memorandum of Appeal dated 20<sup>th</sup> June 2023 and substitute the appellant with another party.
9. The application was also canvassed by way of submissions. In its written submissions dated 10<sup>th</sup> April 2025, the applicant contended that the error in naming the current appellant was inadvertent and arose from a *bona fide* mistake by counsel, who was unaware at the time of filing that the appellant had been struck out as a party in the primary suit.

10. It was submitted that it is both just and necessary that the inadvertent error be corrected to allow the proper and lawful party, who was directly affected by the said judgment, to be substituted and to proceed with the appeal.
11. It was argued that the proposed amendment would not prejudice any party but would instead serve the ends of justice by enabling the matter to be determined on its merits and by the proper parties. Reliance was placed on Section 100 of the Civil Procedure Act and Order 8 Rule 5 (1) of the Civil Procedure Rules, as well as the decisions in **Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd [2019] eKLR**, **Philmark Systems Co. Ltd v Andermore Enterprises [2018] eKLR**, **Eunice Chepkorir Soi v Bomet Water Company Ltd [2017] eKLR**, **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR**, **J, and Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**.
12. The applicant concluded by urging that allowing the application for amendment safeguard the constitutional rights to access justice, and equality under Articles 50(1) and 27(1) of the Constitution of Kenya, 2010.
13. The application was opposed by the respondent through a Replying Affidavit dated 17<sup>th</sup> March 2025 and submissions dated 13<sup>th</sup> June 2025. The respondent argued that the application was an afterthought, made in bad faith,

and that the amendments sought would prejudice the respondent while undermining the finality of litigation.

14. It was submitted that the applicant lacked standing to file the instant appeal in the first place, and that if the alleged error by counsel, was genuine, it was fatal to the appeal.

15. The respondent emphasized that the court's discretion to allow amendments under Section 100 of the Civil Procedure Act and Order 8 Rule 5(1) of the Civil Procedure Rules is not unfettered.

16. While acknowledging that courts generally allow amendments to facilitate the determination of the real issues in controversy, the respondent argued that such amendments must be sought timeously, in good faith, and without prejudicing the opposing party. Reliance was placed on the case of **Elijah Kipngeno Arap Bii v KCB [2013] eKLR**.

17. The respondent noted that the applicant sought to amend the Memorandum of Appeal 20 months after filing it, without offering a compelling explanation for the delay. It was further submitted that seeking to substitute the appellant entirely is a drastic change that does not merely amend but recasts the appeal into one founded on a completely different party and locus. This, it was urged, is not a correction of form but of substance.

18. The respondent submitted that courts have consistently held that amendments are impermissible if they introduce a new action of a substantially different character. The decision in **Joseph Ochieng & 2 Others v First National Bank of Chicago [1995] eKLR** was cited to buttress this submission.
19. The respondent contended that he has expended considerable time and resources defending an appeal brought by an entity with no legal standing. Allowing substitution at this late stage would result in undue delay, procedural injustice, and prejudice as he would be forced to start afresh on an entirely new footing. The respondent maintained that the judicial system cannot countenance such shifting goalposts.
20. In conclusion, the respondent urged that litigation must come to an end.

### **Analysis and Determination**

21. I have considered the application pending determination, the record of appeal, the pleadings and the submissions of the parties to both the application and the appeal. The issues for determination are first whether to allow the applicant to amend the Memorandum of Appeal and substitute the appellant with another party and secondly whether this appeal is merited.

22. From the record, the impugned Judgment dated 5<sup>th</sup> June 2023, dismissed the claim against the 1<sup>st</sup> respondent who is the appellant in this matter with no orders as to costs. Following this the 1<sup>st</sup> respondent (now appellant) proceeded to lodge this appeal and now seeks to amend the Memorandum of Appeal to substitute itself with another party, the 2<sup>nd</sup> respondent in the trial court, Mr. Pius Mutuku.

23. The application has been made nearly 20 months after judgment was rendered and without any cogent explanation being made for the delay. The Court of Appeal in **Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] KECA 31 (KLR)**, citing *Bullen and Leake and Jacob's Precedents of Pleadings 12<sup>th</sup> Edition* emphasized that; “ ***that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be***

***allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed ; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; ... These are of course the principles upon which the courts act in allowing or disallowing any proposed amendments and our order VI A rule 3 sets out all such principles which have been gone into on many previous occasions."(emphasis mine)***

24. The applicant argues that the application was made before the matter is certified ready for hearing and would not prejudice the respondent. However, this is inaccurate. Both parties have already filed written submissions, and the appeal admitted and is ready for hearing. The application therefore comes late in the day.

25. But what is the import of the amendment sought? The appellant want to amend the appeal so that, it is 'removed' from the matter as an appellant and replaced by someone

else. In essence if the amendment is allowed, it will mean that the appellant herein will cease being an appellant and its place be taken by a third party. The ultimate will be that the appellant moved the court, then introduced a third party as a substantive party (appellant) then existed the proceedings. I find this move irregular.

26. A single substantive party, like the appellant in this matter, cannot move the court by filing an appeal, then make an application to introduce a third party to take its place while it exists. Notably, the appellant and the party sought to be introduced were distinct parties before the trial court. The other party, against whom adverse orders were made, has not moved the court on appeal. He cannot be dragged to court by the appellant, then be left exposed to costs incase the appeal is dismissed.

27. The import of Order 1 rule 10(2) of the [Civil Procedure Rules](#) is that the court may at any stage of the proceedings either upon application of either party order that the name of a party who ought to have been joined whether as plaintiff or defendant or whose presence before the court is necessary to effectually and completely adjudicate all questions be added. Order 8 rule 1 allow for amendment of pleadings at any stage of the proceedings with leave of the court. Of most significant is that a party is to be “enjoined”. The matter herein is not to “enjoin” a party but to drag him to court as the sole substantive appellant. The third party

herein will not be enjoined in the matter, but will be the main and only appellant. The current appellant will then exist the proceedings with the amendment. I find this irregular.

28. The upshot is that this application has not only been made late in the day when both parties have already filed their written submissions and the appeal is ready to proceed for hearing, but it also seeks to replace a substantive appellant with a total different party as the sole appellant, which is irregular.

29. I am of the view that to allow substitution at this late stage would not only result in undue delay, cause procedural injustice, but also be prejudicial to the respondent.

30. The upshot is that the application has no merit and is dismissed in its entirety.

31. Dismissing the application, inevitably grants this Court the impetuosity to determine the appeal and the issue arising herein is whether the appeal is merited. Appeals from the Small Claims Court are governed by the provisions of Section 38 of the Small Claims Act which provides as follows:

### **38. Appeals**

**(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.**

**(2) An appeal from any decision or order referred to in subsection (1) shall be final.**

32. Black's Law Dictionary defines matters of fact and matters of law as: -

**“Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and matter of law: A matter involving a judicial inquiry into the applicable law.”**

33. The Supreme Court has binding precedent on what constitutes appeals on matters of law only. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition 2B of 2014 [2014] eKLR**, the Court in paragraph 80 delivered itself as follows:

***“From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase “matters of law” as follows:***

***(a)the technical element: involving the interpretation of a constitutional or statutory provision;***

***(b)the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;***

***(c)the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.***

**.....82. Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.**

34. Guided by these principles, I have carefully considered the Memorandum of Appeal as framed and find that all grounds save for grounds 4 and 7, relate primarily to questions of fact rather than law. In those grounds, the appellant essentially seeks a re-evaluation of evidence, which the court is prohibited from undertaking. As such, they do not qualify as grounds that can be determined on appeal. I therefore dismiss these grounds *in limine*.

35. Grounds 4 and 7, raise a question of law. The appellant contends that the trial court erred in its interpretation of the insurance doctrine of subrogation.

36. Upon reviewing the trial court judgment, however, it is clear that the trial court found the appellant was not the owner of the motor vehicle but was just the insurer. On that basis, the court held that the appellant could not be vicariously liable for the acts of its insured and accordingly, dismissed the claim against the appellant. The trial court by dismissing the claim against the appellant did not invoke nor interpret the doctrine of subrogation. Its reasoning was confined to the issue of ownership and liability. Consequently, the appellant assertion that the trial court misapplied the doctrine of subrogation is unfounded.

37. The upshot is that the application dated 21st February 2025 is devoid of merit and dismiss. Further, I do not find any reason to interfere with the trial court judgment. This appeal therefore fails in its entirety.

38. Cost to follow the event.

It is so ordered.

Dated, signed and delivered at Machakos this 12<sup>th</sup> day of February, 2026

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....Applicant

.....Respondent

Selina Court Assistant

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