**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL NO. E004 OF 2025**

**JAMES KIBE MUCHIRI ……………………………………………………APPELLANT**

**VERSUS**

**DANIEL WAMBUGU MWANGI…………………………………… RESPONDENT**

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## JUDGMENT

1. This is an appeal from the decision of Ismael S.I. (Adjudicator) given on 25.09.2025 in Nyeri SCCCOMM No. E083 of 2025. The same relates to a claim filed in E081 of 2024. In that suit, Andrew Karimi Thuku filed suit against the claimant in Nyeri SCCC E081 of 2024. Andrew Karimi Thuku was awarded a sum of 312,410/=. It is in respect of that amount that the respondent filed suit. The amounts were claimed as special damages, whereas in truth these were general damages awarded to a non-party.

2. It was averred that the respondent, despite being issued with a statutory notice, did not defend the suit. They stated that the appellant had a duty to pay the judgment amount on behalf of the respondent.

3. The court entered judgment in favour of the respondent as prayed. The appellant raised the following grounds:

   a) That the learned trial Adjudicator erred in law in delivering a judgment that was against the weight of the evidence.

   b) That the learned trial Adjudicator erred in law in failing to consider that a motor vehicle sale agreement pertaining motor vehicle KCA 022M to the Appellant was non-existent.

   c) That the learned trial Adjudicator erred in law in reaching an erroneous finding that the Appellant was the legal owner of the motor vehicle KCA 022M against the weight of the evidence adduced.

   d) That the learned trial Adjudicator erred in law in failing to consider the Appellant's evidence, submissions and authorities cited therein on the issue of ownership of the motor vehicle and as such came to a wrong conclusion in the judgment.

   e) That the learned trial adjudicator erred in law by totally disregarding and shutting out the Appellant's evidence and as such occasioned an injustice to the Appellant.

4. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under section 38 of the Small Claims Court Act which provides as doth:

   **(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.**

5. However, an appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law, but matters of law it is. An appeal on matters of law is akin to a second appeal to the Court of Appeal. The duty of a second appellate court was set out in the case of **Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR**:

> "This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below- considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR)."

6. Then what constitutes a matter of law? In **Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR**, the court stated as doth:

> "4. Although the phrase 'a matter of law' has not been defined by the Elections Act, it has been

held in *Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA)* of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle vs Oxney (1947) 1 All ER 126*. See also *Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA)* of 23.01.2014 following *AG vs David Marakaru* (1960) EA 484."

7. The parties filed submissions that are basically no facts.

8. Section 12 of the Small Claims Act provides as follows:

> The jurisdiction of the court is provided under Section 12 of the act as follows:
> Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to:
> (a) A contract for sale and supply of goods or services;
> (b) A contract relating to money held and received;
> (c) Liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
> (d) Compensation for personal injuries; and
> (e) Set-off and counterclaim under any contract.

> (2)Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
> (3)The pecuniary jurisdiction of the Court shall be limited to one million shillings.
> (4)Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.

9. The question then the court asks itself, is which of the categories above is the respondent claiming? He is not claiming as against a tortfeasor or as an injured. His claim is that the small claims court was wrong to attribute liability to him rather than to the respondent. The judgment in E081 of 2024 remains good until it is set aside. The appellant is not an insurer to indemnify the respondent. If the court in the former suit was wrong, then the only remedy was an appeal. If he thought that there ought to have been another party responsible, then it is the court in E081 of 2024 that ought to deal with liability. The court cannot sit on appeal of its own decision. A party that is found liable is the one to pay. It cannot, without a statutory underpinning, eschew liability.

10. Even in limited cases where a party under the Civil Procedure Rules is entitled to indemnity, it is the opposite party. Parties fighting over one vehicle ought to have the question settled in the primary suit. The court cannot go

around a judgment delivered by itself in E081 of 2024 to find another party liable.

11. The court therefore agrees that the court erred in finding liability on the basis of no evidence. That is to say, the judgment in E081 of 2024 found who is to settle, and that settlement cannot be impeached unless the judgment in the said suit is set aside. Therefore, the court was involved in a cause without a basis since the question of liability was settled.

12. This does not in any way mean that the court had jurisdiction over personal injury cases. This was settled in two landmark decisions of **Ogwari v Hersi [2023] KEHC 20111 (KLR)** **and** **Gathaiya v Attorney General & 2 others; & 176 Interested Parties [2026] KEHC 290 (KLR).**

13. The case herein is not a personal injury case. It is a settlement of judgment in E081 of 2024 against the respondent. In the absence of the issue being live before me, I have to refrain from making a pronouncement.

14. The question of liability could not be dealt with in this matter. A court cannot hear a matter that has been heard by another court of competent jurisdiction and a decision made, and as such, they cannot be reopened in a new suit. The appellant was not an insurance company to indemnify the

respondent. The court in law cannot be invited to deal with who is responsible for settling a judgment that was passed in E081 of 2024. In the case of **Attorney General & another ET vs (2012) eKLR** the court posited as follows in matters close to this one.

> "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".
> In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

15. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties

and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All E.R 378, observed thus:

> "…where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

16. The issue of liability to indemnify the plaintiff in E081 of 2024 was placed on the shoulders of the respondent. He cannot transfer it to any party other than the insurer. In the circumstances, the appeal is allowed. Decision of Ismael S.I. (Adjudicator) given on 25.09.2025 in Nyeri SCCCOMM No. E083 of 2025 is set aside. In lieu thereof the entire suit is dismissed for lack of merit.

17. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

18. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold

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costs either partially or wholly from a successful party for good cause to be shown.

19. The Supreme Court 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.



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20. The appellant was a successful party. The costs of Ksh 45,000/= to the appellant will suffice.

Determination

21. In the upshot, I make the following orders:

a) In the circumstances, the appeal is allowed. Decision of Ismael S.I. (Adjudicator) given on 25.09.2025 in Nyeri SCCCOMM No. E083 of 2025 is set aside. In lieu thereof, the entire suit is dismissed for lack of merit.

b) Each party will bear their own costs in Nyeri SCCCOMM No. E083 of 2025.

c) Costs of appeal of Kshs. 45,000/= to the Appellant.

d) 30 days' stay of execution.

e) The file is closed.

**DELIVERED, DATED** and **SIGNED** at **NYERI** on this **24th** day of **February, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Mr. Kimani Wanjama for the Appellant



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Mr. Ngure for the Respondent

Court Assistant – Michael

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