

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**(CIVIL DIVISION)**

**HCCA NO. E 206 OF 2024**

**RIAZ & SON COMPANY LIMITED .....APPELLANT**

**VERSUS**

**ELIUD NGEI KAMANDO .....RESPONDENT**

**JUDGMENT**

1. This is an appeal against the decision of the Small Claims Court (per Hon. Gatambia Ndungu) delivered on **13<sup>th</sup> June 2024**, in **Mombasa Small Claims Court SCC No E143 of 2024; Eliud Ngei Kamande v Riaz & Son Co Ltd**. In the said judgment, the court below identified the sole issue for determination as being whether the respondent, who was the claimant in the court below, was able to prove his case to the required standard.
  
2. In a terse judgment, the said court relied on the provision of Section 8 of the Traffic Act, which provides that *“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”* The learned magistrate also relied on the decision of the Court of Appeal in the case of *Muhambi Koja v Said Mbwana Abdi* [2015] KECA 635 (KLR). The court noted that, *“save for a mere assertion and providing a copy of a motor vehicle sale agreement between itself and the said **Nahya Ahmed**, it remains baffling why the respondent did not make any effort to make an application for a joinder of a party even by way of a third-party notice.”*

3. The court held that it was the duty of the appellant to have joined the third party and that the failure to do so was fatal to its case. The learned magistrate found the appellant wholly liable and entered judgment for the claimant in the sum of **Kes 617,201.00**. Regarding costs, the court held that each of the parties bears their own costs of the suit.
4. Being aggrieved, the appellant filed an appeal to this court. The memorandum of appeal is dated **13<sup>th</sup> July 2024**. The appellant raised the following grounds of appeal:
  - a. That the trial magistrate erred in law in failing to find that the respondent was liable to enjoin **Nahya Ahmed Salim** as a party to the suit;
  - b. That the trial magistrate erred in law in failing to find that the police abstract furnished by the respondent confirmed that, as at 3<sup>rd</sup> April 2021, **Nahya Ahmed Salim** was the insurance policy holder of a motor vehicle registration number KCY 659V; and
  - c. That the trial magistrate erred in law by finding the appellant liable for the accident, yet it had discharged its burden of proof.
5. The appellant sought to have the appeal allowed, “*by setting aside the judgment and or decree of the trial magistrate and in lieu thereof dismiss the claimant’s statements of claim with costs,*” and to have the costs of the appeal paid by the appellant.
6. Before looking at the merits of the appeal, I will briefly set out the pleadings and the evidence tendered in the court below.

7. In the statements of claim dated 25<sup>th</sup> March 2024, the respondent, as the claimant in the court below, stated that he was seeking compensation for loss or damage to property which occurred on **3<sup>rd</sup> April 2021**, and that the loss or damage was worth **Kes 617,201**. He stated that he was driving his motor vehicle registration number KBZ 661B along Mombasa/Malindi Road, near the Nyali bridge area, when the appellant or its authorized agent, driver, or servant recklessly drove motor vehicle registration number KCX 659B, which hit his motor vehicle and extensively damaged it. He attributed the accident solely to the negligence of the appellant, its agent, driver, or servant. The respondent averred that his motor vehicle was insured by Sanlam Insurance Company Ltd and that the claim was brought on behalf of the said insurance company under the latter's right of subrogation.
8. The documents attached to the claim by the respondent showed that as at 3<sup>rd</sup> April 2021, the motor vehicle registration number KCX 659V was insured by G A Insurance Co. Ltd and that its owner was Riaz & Sons Co. Ltd of P.O. Box 41237-80100 Mombasa. The police abstract, on the other hand, indicated that the vehicle was owned by **Nahya Ahmed Salim**.
9. The appellant opposed the claim and filed a statement of response dated **29<sup>th</sup> May 2024** in which it denied liability in whole. The said statement was signed by **Rehan Malik**, for the appellant. It was contended at paragraph 3 thereof that vide a sale agreement dated 14<sup>th</sup> July 2020, the appellant sold motor vehicle KCY 654V Toyota Spade to Nahya Ahmed Salim Bayusuf for the price of **Kes 1,050,000**. It averred that despite paying the purchase

price in full, Nahya never transferred the motor vehicle to himself. It was contended that as at the date of the accident, the appellant had no control over the vehicle, nor did it derive any benefit from the use of the said vehicle, and the same was not being driven by its driver, agent, or servant, as it belonged to Nahya Ahmed Salim Bayusuf and was in his possession. In support of the said contention, a sale agreement dated **14<sup>th</sup> July 2020** was annexed.

**10.** The foregoing notwithstanding, the appellant made no claim against a third party. It sought the dismissal of the claim with costs.

**11.** The matter was heard by way of documents only pursuant to section 30 of the Small Claims Court Act, Cap 10A of the Laws of Kenya. The parties filed written submissions, whereafter the court below delivered its judgment, whose substance I have set out above.

**12.** This is the first and only possible appeal against the decision of the Small Claims Court. The duty of the 1<sup>st</sup> appellant court is well settled. The appeal from a decision of the Small Claims Court is in respect of the matters of law only (Section 38 of the Small Claims Court Act).

**13.** In the case of **Mbogo & another v Shah (1968) EA 93**, the court stated that:

**“I think it is well settled that this Court will not interfere with the exercise of its 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 it**

should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

14. The appeal was canvassed by way of written submissions. I will summarize each of the parties’ submissions below.

15. The submissions of the appellant are dated 29<sup>th</sup> July 2025. The appellant urged that the question as to whether the court below correctly exercised its discretion was a question of law, as was the question as to whether the court correctly analyzed the evidence. In support of the said contention, reliance was placed on the case of **Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR**.

16. The appellant submitted that it was the duty of the respondent to add Nahya Ahmed Salim as a party under Order 1 Rule 6 of the Civil Procedure Rules and that the court could have, on its own motion, added the alleged third party pursuant to Order 1 Rule 10(2) of the Civil Procedure Rules. In support of the said contention, reliance was placed on the case of *Youth Limited v Kihiko & 2 others [2024] KEELC 1413 (KLR)*, where Angote, J, stated that:

**“The power of a court to order joinder is one based on its discretion. The discretion must, however, be exercised judiciously and in accordance with the parameters set out in Order 1 Rule 10(2) of the *Civil Procedure Rules*. This position**

was ably elucidated in *Civicon Limited v. Kivuwatt Limited and 2 Others* [2015] eKLR as follows: “Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience, and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

17. It was urged that the court below was wrong to find the appellant liable even where the police abstract lay blame on the driver of motor vehicle KCY 654V, Nahya Ahmed Salim, and the policy holder was stated to be the said person. It was thus urged that the trial court was wrong, and

this court was urged to set aside the trial court's decision and dismiss the respondent's statement of claim.

**18.** The submissions of the respondent are 5<sup>th</sup> August 2205. The respondent identified issues for determination as being:

- a. Whether it had a duty to join Nahya Ahmed Salim as a party to the suit;
- b. Whether the trial court erred in disregarding the police abstract, which indicated Nahya Ahmed Salim was the policyholder of motor vehicle registration number KCY 654V; and
- c. Whether the court was wrong to find the appellant liable.

**19.** In respect of the first question, counsel for the respondent urged that the duty to join a third party lay with the appellant. In support of the said contention, reliance was placed on the case of **Tipper Haulers Ltd v Rosaline Tumbi & Daniel Jamwaka [2020] KEHC 7899 (KLR)** and **Joseph Leboo & 2 others vs Director Kenya Forest Service & another [2013] eKLR**. In the latter case, the court was emphatic that the choice of which party to sue lay with the plaintiff and that the court should be reluctant to impose defendants upon them. It was contended that since the appellant did not deem it necessary to join a third party, it was 100% liable. The respondent relied on the case of **Pauline Wangare Mburu v Benedict Raymond Kutondo & another [2005] KEHC 2370 (KLR)**.

**20.** Regarding the police abstract, it was urged that the said document could not override the statutory presumption of ownership arising from the registration records. It was contended that the respondent's own

investigation showed that the appellant was both the registered owner and the insured.

- 21.** It was urged that the appellant did not discharge its burden of proof. The respondents contended that the alleged sale agreement was not followed by an actual transfer of the title to the motor vehicle; it remained in the appellant's name, and the statutory presumption of ownership stood unrebutted. The respondents contended that it was the duty of the appellant to join the said Nahya Ahmed Salim as a party. That being the case contended that the trial court was right to find that the appellant remained the owner of the motor vehicle.
- 22.** I have considered the record of appeal, the submissions of the parties, and applicable law. In the view, the issues that this court ought to determine are:
- a.** Whether the court should have added Nahya Ahmed Salim as a third party to the suit; and
  - b.** If the police abstract and the sale agreement were conclusive evidence of ownership.
- 23.** Section 107 of the Evidence Act states that:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist; and**
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.**

24. Section 108 of the said Act states that:  
**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**
25. I note that the respondent produced an extract from the National Safety and Transport Authority records, which showed that the motor vehicle belonged to the appellant. It would appear to me that, being so, it was incumbent on the appellant to produce evidence to prove the contrary position that the motor vehicle in fact belonged to **Nahya Ahmed Salim**. This is so because of the presumption under Section 8 of the Traffic Act, to the effect that the person in whose name a motor vehicle is registered is deemed, unless the contrary is proved, to be the owner of the vehicle.”
26. My understanding of the said provision is that the burden lay with the appellant to prove that Nahya Ahmed Salim owned the motor vehicle with cogent evidence to displace the evidence on record. If it failed to do so, and as Section 109 of the Evidence Act provides, the case would fall.
27. Did the appellant discharge its burden? The appellant, as the court below rightly observed, did not go beyond providing a copy of the motor vehicle sale agreement. In my view, the appellant ought to have added Nahya Ahmed Salim as a third party. The form of the statement of response used had the option of ticking a box and providing the details of the third party.
28. Order 1 Rule 15(1) of the Civil Procedure Rules 2010, provides that:

“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 the 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.”

29. My understanding of the foregoing provision is that the appellant had the primary obligation of joining the said **Nahya Ahmed Salim** as a third party. In my view, the trial magistrate was right to find and hold that in an adversarial system, the duty to ventilate a case lay with the parties, not with the court, and that it wasn't propitious for the court to add parties on its own motion as contended by the appellant.

30. I agree with the holding in the case of **Joseph Leboo & 2 others vs Director Kenya Forest Service & another [2013] eKLR**, where it was stated that:

**“I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacuna in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff, and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even in the absence of any reason, the choice to sue ought to be left to the litigant, and this choice ought not to be disturbed without the presence of compelling reasons. Joining a defendant to the proceedings on an application which is not coming from the plaintiff may also compel the plaintiff to pursue a cause of action that the plaintiff, for his own reasons, or lack of any, of which there is perfect freedom, the plaintiff has opted not to pursue. Where there is an application for a person to be joined as a defendant, and the plaintiff objects to such joinder, the court should be even more cautious before making an order for such joinder. It ought to be clear that the remedy sought by the plaintiff in the proceedings actually ought to be directed against the party sought to be**

enjoined, or that the remedy the plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party.”

**31.** By not issuing a third-party notice, the appellant did not help its case. In the case of **Tipper Haulers Ltd v Rosaline Tumbi & Daniel Jamwaka [2020] KEHC 7899 (KLR)**, it was stated that:

“19. It is notable that in the case of **John Kibicho Thirima v Emmanuel Parsmei Mkoitiko [2017] eKLR** the court, pointing out that the person who pleads liability on the part of another is the one to enjoin the party alleged to be at fault, stated: “Further, I find the defendant’s submissions that the plaintiff should have joined owners of all the motor vehicles involved in the material accident an act of chasing the wind. The plaintiff never claimed that the other vehicles contributed to the occurrence of the material accident. He was clear in his testimony and pleadings. It is the defendant who pleaded that other motor vehicles were responsible for the accident; hence, the burden of proof lay on the defendant to enjoin those owners and prove how they contributed to the accident.”

20. I agree with that reasoning. The Plaintiff was entitled to sue any party of its choice. However, since the defendant was the one who was blaming the driver of KCE 567Z, it was incumbent upon them to enjoin that party to the suit for apportionment of liability. The plaintiff proved their case on balance, and thus the defendant was rightly held liable.”

32. The court below was right to find that the non-joinder of a third party by the appellant prejudiced its defence. In the case of **Pauline Wangari Mburu** (Supra), it was held by Kimaru, J (as he then was), that:

**“As stated earlier in this judgment, the defendants did not deem it necessary to issue a third-party notice to enjoin the owner of motor vehicle registration number KAH 129V to this suit. In the circumstances, therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability.”**

33. My view is that the police abstract carries less weight than an extract from the records of the National Transport and Safety Authority. In saying this, I am guided by the decision of the Court of Appeal in the case of **Ignatius Makau Mutisya v Reuben Musyoki Muli** [2015] KECA 612 (KLR), where it was stated that:

“Also recently, this Court in the case of **Joel Muga Opinja v. East Africa Sea Food Ltd** [2013] eKLR restated this position as follows:-

***“We agree that the best way to prove ownership would be to produce to the Court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied.”***

34. Based on the foregoing, I am not satisfied that the appeal has merit. In my view, the learned magistrate correctly applied the law to the facts

and properly exercised his discretion. I am unable to fault him. His decision is sound and unimpeachable.

**35.**The upshot of the foregoing is that the appeal has no merit; the same is dismissed with costs.

**36.**Orders accordingly.

**Dated and signed in Mombasa, this 23<sup>rd</sup> day of February 2026.** Delivered virtually through **Microsoft TEAMS.**

**Gregory Mutai**  
**JUDGE**

In the presence of:

Ms. Gatimu, holding brief for Mr. Mwanzia, for the Appellant;

Mr. Kariuki, for the Respondent; and

Ms. Bancy- Court Assistant.