

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT CIVIL CASE NO. E100 OF 2024.**

ANTONY MATERE GATHURU-----

APPELLANT

VERSUS

SPEED CRAFT AFRICA LIMITED-----1<sup>ST</sup>

RESPONDENT

CRAFT MACHINERY SERVICES-----2<sup>ND</sup>

RESPONDENT

*(Being an appeal from the judgment of Honorable Emily Cherop, Adjudicator delivered on 7<sup>th</sup> August 2024 at Naivasha vide Naivasha Small Claims Case No. E285 of 2024)*

**JUDGMENT**

1. By a statement of claim dated 8<sup>th</sup> May, 2024, the claimants (herein “the respondents”) sued the respondent (herein “the appellant”) seeking for judgment against the appellant for:

- a) Special damages of Kshs284,230,*
- b) Costs of the suit,*
- c) Interest on (a) and (b) above; and f*
- d) Any other relief that the court may deem fit to grant.*

2. The claimants averred that, on or about 16<sup>th</sup> May 2021, at about 1330 hours, their authorized driver, servant and/or agent, was lawfully and carefully driving motor vehicle registration number KCQ 231V along the Nairobi-Naivasha road heading towards Nakuru, when at Kayole area, the appellant and/or his authorized driver, servant and or agent, so negligently, carelessly and/or recklessly drove, managed and controlled motor vehicle registration number KCC 913R and caused the said motor vehicle to violently ram into the rear of the motor vehicle registration number KCQ 231V, causing it to ram into the rear of a motor vehicle that was ahead

of it and as a result, the motor vehicle KCQ 231V was extensively damaged.

3. The claimants attributed the cause of the accident on the negligence of the driver of motor vehicle KCC 913V and tabulated the particulars of negligence at paragraph 4(d) of the statement of claim as inter alia: -

a) Driving his vehicle without due care and attention to other road users, in particular the claimants' subject vehicle.

b) Driving at a high speed causing the vehicle to lose control and collide with the claimants' vehicle.

c) Failing to control, swerve, stop or apply brakes or act in any other manner to avoid hitting the respondent's vehicle,

d) Driving in a zigzag manner and causing the accident.

e) Failing to keep distance between the two motor vehicles herein and causing the accident.

4. That as a result of the accident, the claimants' motor vehicle was extensively damaged occasioning the claimants' loss as tabulated at paragraph 4(g) in the sum of Kshs 284,630. It is averred that despite demand and notice, the appellant declined to oblige hence the suit.
5. The claimants rely on the doctrine of Res Ipsa Loquitor, the Highway Code and the Traffic Act.
6. However, the claim herein was opposed vide a "statement of defence" dated 5<sup>th</sup> June 2024 wherein the respondent/appellant generally denied each and every allegation in the claim, save to add that the claimants had no claim against him.
7. The matter proceeded to full hearing. The claimants' case was supported by the evidence of Cheryl Odipo, Legal officer at Old Mutual General Insurance, who stated that the claim was filed under

the principle of subrogation. She relied on her statement dated 8<sup>th</sup> May 2024 and produced the documents attached thereto as exhibits. That the claimant Speed Craft are policyholders and they have authority to file a suit on their behalf as they repaired the vehicle.

8. The second claimants' witness was one Paul Kariuki, who told the court that he was involved in the accident as the driver of the claimants' vehicle. He relied on his statement and produced the documents attached thereto. He testified that the vehicle was insured by UAP company. He confirmed that the accident involved three vehicles and that the vehicle KCC 913R hit his motor vehicle from the rear.
9. In cross-examination the witness stated that directors of Speed Craft Ltd, as listed in CR12, are Charles Kabiru and Aaron Mwangi Kabiru, therefore he's one of the directors. That the vehicle KCQ231V

is owned by Speed Craft Limited. However, he conceded that he's not a director in Craft Machinery Services, and neither did he file CR12 for the Crater Machinery.

10. The third witness who testified on behalf of the claimant is No. 88790 PC Pauline Kibati, attached to Naivasha Police Station, who produced a police abstract that showed that three vehicles were involved in the accident and that motor vehicles KCC 913R Subaru was held to blame according to the investigations as indicated in the abstract. She confirmed that she did not visit the scene, nor witness the accident, and that the third vehicle is unknown as it is not indicated in the police abstract.

11. The fourth claimants' witness was Nelson Nyoike, an assessor with Universal Assessors and Valuers, who testified that they were instructed by Old Mutual to assess motor vehicle KCQ 231V. That they assessed it and estimated the cost at Kshs 243,600, and

prepared a report to that effect, submitted it, and were paid Kshs 6,380. According to him, the vehicle appeared to have been sandwiched by two vehicles as both sides of the vehicle were equally damaged. However, he was not aware of the 3<sup>rd</sup> vehicle involved in the accident.

12. The respondent's response was supported by his evidence. He relied on his statement and testified that the motor vehicle KCQ 231V rammed into the vehicle in front of it. That he cannot remember the registration number of that vehicle since the accident occurred three years earlier although was a Ford Ranger.

13. That he was keeping reasonable distance and to avoid the accident, he could not swerve on the right or left as there were people walking and vehicles from the opposite direction. That he applied emergency brakes but it was futile and hit the motor vehicle KCQ 231V on the rear. He could not

confirm if that vehicle moved and hit the vehicle in front.

14. At the conclusion of the hearing, the court delivered a judgment dated 8<sup>th</sup> August 2024, and held both the claimants and the respondent/appellant to blame and then apportioned liability at 50%-50%. The judgment on quantum was entered in the sum of Kshs 260,250, less 50% consequently, judgment was entered against the respondent/appellant in the net sum of Kshs 130,125,

15. However, the respondent/appellant is aggrieved by the subject decision and appeals against it vide a memorandum of appeal dated 29<sup>th</sup> August 2024, wherein the appellant is seeking for an order that the judgment read on 7<sup>th</sup> August 2024 be set aside.

16. The appeal is based on the ground that;

*a) That the Learned Trial Magistrate erred in law and in fact in failing to find that the claim was improperly default court.*

*b) That the Learned Trial Magistrate erred in law and in fact in failing to find that the first respondent herein had no interest in motor vehicle KCQ231V.*

*c) That the Learned Trial Magistrate erred in law and in fact in disregarding the appellant's submissions and judicial authorities cited without providing adequate reasons.*

*d) That the Learned Trial Magistrate erred in law and in fact in finding that the appellant was equally liable with the respondent's herein considering the foregoing.*

*e) That the Learned Trial Magistrate erred in law and in fact in finding that the claimant's claim was proved on balance of probability.*

17. The appeal was disposed of vide filing of submissions. The appellant submitted that the 1<sup>st</sup> respondent was improperly before the court as there was no resolution passed by its directors

appointing the advocate to act for it in this claim. The case of East Africa Portland Cement Ltd vs Capital Markets & Authority & 4 Others (2014) eKLR was relied on.

18. Further, from the log book produced the 1<sup>st</sup> respondent is the only registered owner of the vehicle KCQ 231V. That in the memorandum of appeal, the appellant meant the 2<sup>nd</sup> respondent had no interest in the vehicle and therefore did not have locus standi. The appellant relied on the provisions of section 8 of Traffic Act (Cap 403) of the laws of Kenya, and the case of Jared Magwaro & Another vs Primarosa Flowers Ltd [2018] eKLR.

19. The appellant further submitted that CW4 failed to prove that he was skilled in the area of motor vehicle assessment and therefore is an incredible witness. Further the appellant was not charged for causing the accident. Furthermore, for receipts to be admissible they must bear revenue stamps and

therefore the receipts produced herein were inadmissible.

20. Finally, the appellant argued that the respondents did not prove the claim on the threshold of section 107 of the Evidence Act (Cap 80) of the laws of Kenya.

21. However, the respondents submitted that the issue of resolution does not arise as the suit was filed under the doctrine of subrogation. That the consent to the insurer was sufficient or adequate.

22. That the trial court rightfully held that the claim was properly before the court and that the appellant only raised the issue of locus standi in cross-examination and submissions. The respondent relied on the case of; Okoth vs Nyaberi & Another (Civil Appeal 248 of 2018) (2024) KECA 427 (KLR).

23. Furthermore, the memorandum of appeal has not been amended to reflect the 2<sup>nd</sup> respondent and not

the 1<sup>st</sup> respondent, yet parties are bound by their pleadings.

24. That without prejudice to the aforesaid, an insured owner has a beneficial interest in a motor vehicle and so did the 2<sup>nd</sup> respondent.

25. Furthermore, the trial court properly apportioned liability where the evidence did not prove who among the drivers was to blame. The case of; Hassan Omar Farah vs Lento Agencies (2016) eKLR was relied on.

26. In considering the appeal, I note that the role of the first appellant court is to re-evaluate, reassess, and re-analyze the entire evidence from the trial court. It must reach its own independent conclusions on both fact and law, though it must consider that it did not hear or see the witnesses directly.

27. The afore role and/or principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd [1968] EA 123 where the Court of Appeal

outlined the mandate of a first appellate court as follows:

*“An appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”*

28. To revert back to the matter herein, the circumstances under which the appellate court will entertain an appeal from Small Claims Court are clearly stated under section 38 of the Small Claims Court Act as follow: -

*(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.*

29. The grounds herein are mainly (at the expense of repeating the same) that the court failed to find the suit was improperly before court, 1<sup>st</sup> respondent had no interest in the vehicle KCQ 231V, failing to consider the appellant's submissions and authorities therein, finding the appellant partly liable and holding that the claimants' claim was proved on a balance of probability.

30. A consideration of the afore grounds clearly reveals most, if not all, are matters of fact falling outside the provisions of section 38 afore. In particular grounds 2, 3, 4 and 5 and therefore arguments thereon are untenable.

31. Be that as it were, even if the court were to delve in the merits of the matter, it is trite law that parties are strictly bound by their pleadings, meaning they cannot lead evidence or argue issues outside the scope of what is pleaded, ensuring parties know the case they must meet and preventing surprise. Evidence at variance with pleadings must be disregarded, as courts are bound to adjudicate only on specific matters raised in the pleadings. (See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR reaffirmed the principle that parties are bound by their pleadings.

32. It is a trite principle that parties cannot depart from their pleadings without the court's leave to amend and any evidence that does not support the averments in the pleadings, or is at variance with them, goes to no issue and must be disregarded.

33. A perusal of the “statement of defence” filed which was a response to the claim does not reveal any pleading(s) to the effect that the claim was improperly before the court and therefore based on the fact that parties are bound by their pleading that ground cannot stand and the trial court was well guided and properly held that the subject issue was not available for consideration.

34. But even then, the issue of locus standi is key to any proceedings and a matter cannot proceed to hearing unless and until it is resolved. The appellant did not raise the issue of the 1<sup>st</sup> respondent’s locus standi at any given time.

35. It suffices to note that, locus standi, or the right of a party to appear and be heard, is a threshold jurisdictional issue requiring a party to demonstrate sufficient interest, legal capacity, or a direct stake in a case, as confirmed in Alfred Njau & Others vs City

*Council of Nairobi [1982] and Law Society of Kenya vs Commissioner of Lands & Others (2000).*

36. Pursuant to the aforesaid, it is evident that the appellant did not plead to issues of: a suit improperly before the court or even locus standi, and did not amend their pleadings. Further the memorandum of appeal was not amended to reflect the 2<sup>nd</sup> respondent instead of the 1<sup>st</sup> respondent.

37. Furthermore, the provisions of section 38 of the Small Claims Court Act have not been met. In any event even if the judgment is set aside as it relates to the 2<sup>nd</sup> respondent, it will not exonerate the appellant from liability.

38. Consequently, the appeal is dismissed with costs to the respondent.

39. It is so ordered

Dated, delivered and signed this 23<sup>rd</sup> day of March 2026.

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

Ms. Wahome for the appellant

Ms. Muyuke for the respondents

Ms. Hannah: court assistant