

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. E110 OF 2024

JOSEPH MWANGI.....1

1ST APPELLANT

**AGNESS MWANGI (Suing as legal representative of the
estate of the late DENNIS KIMATHI**

MWANGI).....2ND APPELLANT

VERSUS

UNITED ASSIASIS INVESTMENT LTD.....1ST

RESPONDENT

HIRA TRADING LTD.....2ND

RESPONDENT

MASHWA

BREWRIES.....3RD

RESPONDENT

JAMES NGUGI RUIRU.....4TH

RESPONDENT

***(Being an appeal from the Ruling of the Chief
Magistrate's Court at Naivasha delivered on 6th
September 2024 in Naivasha CMCC Civil Case No. E503
of 2021)***

JUDGMENT

1. The 1st and 2nd Respondents filed an application dated 11th March 2024 seeking orders to be struck out from the suit on grounds that they were unnecessary parties. In a ruling delivered on 6th September 2024, the trial court struck out the 1st and 2nd Respondents from the suit.
2. Aggrieved by the said ruling, the Appellants filed the instant appeal contending that the trial court erred in law and fact by striking out the 1st and 2nd Respondents yet the Appellants had pleaded a sustainable claim founded on ownership, liability, and vicarious liability, and had tendered documentary evidence to support that pleading.
3. The 2nd Respondent opposed the appeal and maintained that it was properly struck out under Order 1 Rule 10(2) of the Civil Procedure Rules as it had sold the subject motor vehicle long before the accident, had no beneficial/legal interest at the material time, and had no relationship with the driver.
4. The appeal was canvassed by way of written submissions which I have considered.

The Appellants' submissions

5. The Appellants submitted that the suit before the trial court arose from a fatal road traffic accident which occurred on 8th August 2020, involving motor vehicles registration numbers KCT 799S (Toyota Sienta) and KCU 173K.
6. They pleaded that the deceased, Dennis Kimathi Mwangi, was lawfully a passenger and died following the accident

attributed to negligence of the drivers/agents/employees of the defendants.

7. It was the Appellants' position that the 1st and 2nd Respondents were the registered owners of the subject motor vehicles and were therefore necessary parties who could potentially bear vicarious liability for the acts of the drivers.
8. They faulted the Trial Court for striking out the 1st and 2nd Respondents despite the Appellants having conducted due diligence and obtained search certificates which, in their view, confirmed ownership of the motor vehicles by the said parties at the material time.
9. The Appellants relied on the settled duty of a first appellate court to re-evaluate evidence and reach its own conclusion, citing ***Selle & Another vs. Associated Motor Boat Co. Ltd* [1968] EA 123**.
10. They also submitted that striking out a party is a drastic remedy which should be sparingly used, and that a matter should proceed to trial if there exists a reasonable cause of action.
11. They prayed that the appeal be allowed, the ruling be set aside, and the application striking out the 1st and 2nd Respondents be dismissed so that the suit proceeds on its merits.

The 2nd Respondent's submissions

12. The 2nd Respondent submitted that the appeal challenges the Trial Court's finding that it was improperly joined and

that the court properly exercised discretion under Order 1 Rule 10(2) of the Civil Procedure Rules to strike it out.

- 13.** It submitted that it demonstrated that it had sold motor vehicle KCT 799S about 18 months before the accident and therefore had no legal or beneficial interest in the vehicle when the cause of action arose. It added that it could not bear liability for the actions of the 4th Respondent, who was the driver at the time.
- 14.** The 2nd Respondent submitted that the sole issue is whether the Trial Court properly exercised its discretion in striking it out as an unnecessary party.
- 15.** It relied on the law on striking out improperly joined parties under Order 1 Rule 10(2) and procedural guidance under Order 1 Rule 14, and the overriding objective under sections 1A and 1B of the Civil Procedure Act.
- 16.** The 2nd Respondent cited ***Diamond Trust Bank Kenya Limited vs. Richard Mwangi Kamotho & 2 others [2017] eKLR***, emphasizing that an improperly joined party need not endure a full trial to vindicate itself.
- 17.** It further submitted that the Police Abstract and NTSA records in the record of appeal confirm that the 4th Respondent was the driver and owner at the time of the accident and had taken an insurance cover.
- 18.** On vicarious liability, it submitted that there was no employer-employee or principal-agent relationship between it and the 4th Respondent. Reference was made to the case of ***John Nderi Wamugi vs. Ruhesh Okumu Otiangala & 2 others [2015] eKLR***, where it was held that vicarious

liability depends on control/relationship and not merely ownership.

Issues for Determination

19. From the pleadings, the ruling appealed against, and the rival submissions, this Court finds the issues for determination to be: -

- a) Whether the learned trial magistrate properly exercised discretion under Order 1 Rule 10(2) to strike out the 2nd Respondent from the suit as an unnecessary/improperly joined party.***
- b) Whether the Appellants disclosed a reasonable cause of action against the 2nd Respondent sufficient to warrant a full trial.***
- c) Whether vicarious liability was pleaded and/or sustainable against the 2nd Respondent on the material presented at the interlocutory stage.***

Analysis and Determination

20. This being a first appeal, this Court is under a duty to reconsider and re-evaluate the material placed before the Trial Court and reach its own independent conclusion. (See ***Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123***).

Striking Out the 2nd Respondent

21. Order 1 Rule 10(2) of the Civil Procedure Rules grants the court power, at any stage of proceedings, to strike out a party who has been improperly joined in the suit and to add

necessary parties, so as to enable the court effectually and completely adjudicate all questions involved in the suit.

22. The purpose of the power was explained in ***Diamond Trust Bank Kenya Limited vs. Richard Mwangi Kamotho & 2 others*** [2017] eKLR, where the Court held that an improperly joined party should not be forced to undergo a full trial merely to vindicate itself.

23. In the instant appeal, the 2nd Respondent stated that it had sold motor vehicle KCT 799S long before the accident occurred and that it therefore had no legal/beneficial interest in the said vehicle at the time of the accident. It added that the 4th Respondent was the driver of the said vehicle at the material time and that the 4th Respondent had also taken out an insurance cover for the vehicle.

24. Courts have taken the position that where evidence is presented, at an interlocutory stage, to demonstrate that a party had no proprietary interest in the subject matter at the material time and further had no control over, or relationship with, the alleged tortfeasor, then retaining such a party in the proceedings may offend the overriding objective of the efficient and just disposal of matters. This approach is consistent with the “oxygen principle” as articulated by the Court of Appeal in ***Stephen Boro Gitihia vs. Family Finance Building Society & 3 Others*** (Civil Application No. Nai. 263 of 2009) and ***Kenya Commercial Bank Ltd vs. Kenya Planters Co-operative Union*** (Civil Application No. Nai. 85 of 2010), where the Court emphasised that the overriding objective under sections 1A

and 1B of the Civil Procedure Act requires courts to actively facilitate expeditious, proportionate and cost-effective resolution of disputes, and to prevent parties from being unnecessarily dragged into litigation where no sustainable basis exists.

25. Accordingly, I find no error in principle in the Trial Court exercising discretion to strike out the 2nd Respondent where the documentary evidence strongly indicated that the vehicle was no longer in the 2nd Respondent's ownership or control at the time of the accident.

Cause of Action against the 2nd Respondent

26. The Appellants' main grievance is that the 2nd Respondent was wrongly removed from the suit despite ownership searches allegedly supporting their case. The critical question that begs an answer is whether the Appellants' pleadings and material placed before the Trial Court disclosed a sustainable claim against the 2nd Respondent as at the time of the accident.

27. The 2nd Respondent tendered a sale agreement dated 9th March 2019 showing that the vehicle had already been sold long before the date of the accident and NTSA records showing that the 4th Respondent was the registered owner at the time of the accident. These documents were not refuted by the Appellants.

28. In light of the above, and bearing in mind that striking out is a discretionary power, I find that the Trial Court was entitled to conclude that no reasonable cause of action lay

against the 2nd Respondent once it was demonstrated that it did not own, possess, or control the vehicle at the time of the accident.

- 29.** On whether vicarious liability against the 2nd Respondent was sustainable, I am alive to the fact that vicarious liability is principally founded on an employer/employee or principal/agent relationship and the element of control. In ***John Nderi Wamugi vs. Ruhesh Okumu Otiangala & 2 Others [2015] eKLR***, the Court emphasized that pegging vicarious liability purely on ownership without proof of the necessary relationship and control would occasion injustice.
- 30.** In the present appeal, the 2nd Respondent's position is that it had no employment or agency relationship with the 4th Respondent, who was the owner and driver at the time of the accident. I have already found that the 4th Respondent was the registered owner of the suit motor vehicle which means that the issue of vicarious liability does not arise.
- 31.** This Court further finds that without proof of an employment/agency relationship or control by the 2nd Respondent over the driver, the claim of vicarious liability against it would not be sustainable.
- 32.** Accordingly, I find that the learned trial magistrate did not err in finding that the 2nd Respondent was an unnecessary party and in striking it out at that stage.

Conclusion

- 33.** In the end, and for the foregoing reasons, I find that the appeal lacks merit as against the 2nd Respondent, and that

the Trial Court properly exercised discretion under Order 1 Rule 10(2) of the Civil Procedure Rules.

34. Consequently, I make the following final orders: -

- a) The appeal is hereby dismissed as against the 2nd Respondent.***
- b) The ruling of the Trial Court striking out the 2nd Respondent is hereby upheld.***
- c) Costs of the appeal are awarded to the 2nd Respondent.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 9TH DAY OF APRIL, 2026.

HON. W. A. OKWANY

JUDGE

9/04/2026

FOR APPELLANT Ms Onyango for Ms Aketch

FOR RESPONDENT 1st Mwangi for Ms Abuya

FOR RESPONDENT 2nd Ochang

COURT ASSISTANT Karani

File closed