



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

CIVIL APPEAL NO. E1084 OF 2023

BETH NDUTA GITHIRE.....
.....APPELLANT

VERSUS

INVESCO ASSURANCE CO. LTD.....1ST
RESPONDENT
JUBILEE INSURANCE CO. LTD.....2ND
RESPONDENT

(Being an Appeal from the decision of the Learned Senior Resident Magistrate Hon A. N. Ongonda (Ms) given on 29th September 2023 in Nairobi CMCC No. 2691 of 2020)

JUDGEMENT

Brief Facts

1. The Background to this Appeal is that the Appellant sued four Defendants, jointly and severally, in **CMCC No. 8120 of 2017 (“the primary suit”)** through Plaintiff dated 19th June, 2017 seeking general and special damages as well as

the costs of the suit and interest following injuries she sustained in a road traffic accident that occurred on 28th June, 2016 involving motor vehicle registration number KAU 645Y driven and owned by the then 1st and 2nd Defendants respectively, and motor vehicle registration number KBX 359 driven and owned by the 3rd and 4th Defendants in the suit respectively.

2. The 1st and 2nd Defendants filed a joint Statement of Defence dated 23rd February, 2018 while their Co-Defendants also filed their joint Statement of Defence dated 15th March, 2018 . They all generally denied the occurrence of the accident and the particulars of negligence attributed to them, and blamed any such accident as might be proven to have occurred on the Appellant.
3. *Vide* Judgement delivered on 16th October, 2019 by Hon G. A. Mmasi (Mrs) (SPM), the Court apportioned liability among the Defendants thus;

“..... The 1st and 2nd defendants on the one hand and the 3rd and 4th defendants on the other hand will bear liability herein on 50:50 basis respectively.” (sic)

4. The trial court also awarded general and special damages in favour of Appellant resulting in a Decree dated 29th November, 2019 for Kshs. 713,581.37 together with a certificate of costs in the sum of Kshs. 211, 270.00.
5. The Judgement and/or Decree in the primary suit was not satisfied, prompting the Appellant to file **MCCC 2691 of 2020 (“the declaratory suit”)** seeking to have the Respondents herein who were the Insurers of the motor vehicles involved in the accident subject of the primary suit, compelled to satisfy the decree in the primary suit jointly and severally. The Trial Court in its Judgment delivered on 29th September, 2023 found that the Respondents were liable to satisfy the Judgement in the primary suit as ordered on behalf of their insured clients/ Judgement debtors, and further ordered as follows:

“6. The 1st Respondent to pay its portion of the award and half the costs which is Kshs. 105,635/=. The total sum payable by the 1st Defendant is Kshs. 810,411.50. Interest to apply at court rates from date of filing the suit until payment in full. The 1st Defendant

shall pay the costs of this suit as per this award.

7. The 2nd Defendant has already paid Kshs. 704,778.50 which is 50% as apportioned by the court before adding costs and interest. It shall pay the interest as calculated in the decree issued on 29/11/2019 and no more than half of the costs as per the certificate of costs . The interest payable was assessed at Kshs. 8,804.87/=. Half the costs would be Kshs. 105,635/=. The total amount payable by the 2nd Defendant is Kshs. 114,431.87/=. I note that the 2nd Defendant had made efforts to settle the decretal amount in the primary suit and I will therefore not allow interest on this amount. The 2nd Defendant shall pay the plaintiff's costs as per this award....." (sic)

6. The Appellant aggrieved by the decision preferred this Appeal through the Memorandum of Appeal dated 16th October, 2023 on grounds that:-

a) The Learned Magistrate erred by misinterpretation and/or misunderstanding the principle of joint and several liability

b) The Learned Magistrate erred by disregarding precedents on the issue at hand cited and availed by the Appellants which were binding on her.

7. The Appellant prays for:

a) Judgment against the Respondents jointly and severally for the entire decretal sum, costs and interests. (*sic*)

b) An order that the respondents do fully satisfy the judgement sum together with costs and interests in Nairobi CMCC 8120 of 2017 from 23rd November, 2019 to date of full payment jointly and severally. (*sic*)

c) Costs of the appeal and in the trial Court.

8. The Appeal was heard by way of written submissions. Only the Appellant's submissions were on record at the time of preparing this Judgement.

Appellants' Submissions

9. The Appellant restates the duty of the first appellate Court as set out in the famous case of **Selle vs Associated Motor**

Boat Co. Ltd [1968] EA 123 and further points out that the matters raised are purely points of law.

10. The Appellant contends that the Court ought to have been guided by the authorities referred to in her submissions before it, namely; **Lawrence Gitonge & others vs Kinoro Tea Factory Ltd & Another HCCC 1153 of 2002** and **Francis Muchene Kanyenje vs Dominic Karanja Gachanja & 2 Others [2018] eKLR.**
11. The Appellant argued that a finding of liability in cases of tort has the effect of adjudging joint tortfeasors liable for a Judgement sum jointly and severally as held in **Zarina vs Noshir [1963] 239** cited by Counsel.
12. The Appellant seeks to have this Court set aside the lower Court's decision of apportioning liability and substitute the Judgement with one directing the payment of the full decretal sum by the Respondents jointly and severally.

Analysis and determination

13. I have considered the entire record and the Appellant's submissions. This being a first appeal, this Court is bound to re-evaluate and re-appraise the evidence adduced before

the trial court to arrive at its own independent conclusion on both points of law and fact (See **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** *supra*.

14. The Appellant faults the trial Court's Judgement in the declaratory suit for what she claims to be misapprehension of the principle of "*joint and several liability*" and also faulted the Court for failing to consider and be guided by judicial authorities she cited.
15. The Appellant prays that the Respondents be held jointly and severally liable for the entire decretal sum, costs and interest. The sole issue for determination in the Appeal is **Whether the Respondents are jointly and severally liable in the declaratory suit, to satisfy the Judgement in the primary suit.**
16. The Appellant extract a decree dated 29th November, 2019 which shows the 1st and 2nd Defendants' Judgement debt to be Kshs 713, 581.37 while the 3rd and 4th Defendants' indebtedness was also Kshs 713, 581.37 in line with the 50%:50% determined liability ratio.

17. **Thuranira J. in Africa Planning & Design Consultants vs Sololo Outlets Ltd (In Receivership) & Anor [2018] KEHC 2573 (KLR)**; stated that:

“17. The concept of joint and several liability is defined in Blacks law Dictionary 10th Edition as follows:

“liability that may be apportioned among two or more parties or to only one or a few select members of the group at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.”

18. **In Republic vs PS charge of Internal Security ex parte Joshua Mutua Paul [2013] eKLR, the court held as follows:**

“Clearly, therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several, the Plaintiff has the

option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasor according to their individual liability... Either way he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-defendants in the event that the Plaintiff only opts to recover from one of them.”

18. In Samuel Mwamba Ambundo 387 others vs Spell Investment Company Limited & 4 other [2021]eKLR

the Court observed :

“According to the extract of the Decree reproduced hereinabove, it is evident that judgment was entered against the Defendants severally but NOT jointly. The judgment sum was apportioned amongst the four Defendants/Judgment Debtors according to the tune of their liability. In the premises, I find that the Plaintiffs argument to the contrary is incorrect and they cannot therefore execute the entire judgment sum against the 3rd Defendant only merely on the ground that they have been unable to trace the other Defendants. It is only the sum of Kshs. 54,094,130/= plus interest

thereon, which the 3rd and 4th Defendants were found liable for, that can be executed against the 3rd Defendant entirely, if at all.”

19. I find that the Learned Trial Magistrate did not err in declaring the Respondents' liable to satisfy their respective insured clients' judgement debts as determined in the primary suit. While the Appellant's Counsel's submissions on the principle of joint tortfeasors liability is appreciated, the court is only mandated in a declaratory suit to enforce the Judgement entered in a primary suit. Such Judgement may only be varied on Appeal or Review as may be found appropriate. This Court's duty in this Appeal is therefore limited to deciding whether or not the Learned Magistrate who heard the declaratory suit lawfully and properly found the Respondents liable to satisfy the primary suit Judgement as entered against their respective insured clients.
20. Although the trial court does not seem to have considered judicial authorities the Appellant cited before it, no prejudice resulted. The trial court still arrived at the right decision in the opinion of this court.

21. The upshot is that the Appeal is found to lack in merit and is dismissed with costs to the Respondents.

J. M. NANG'EA - JUDGE.

Judgement Delivered Virtually this 13th day of April 2026.

In the presence of:

Mr. Kaburu Advocate for the Appellant

Ms Sagini Advocate for the 2nd Respondent

1st Respondent

Court Assistant (Ng'eno)

J.M. NANG'EA - JUDGE.