

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. E047 OF 2024

AYAN AUTOMOBILES
LIMITED.....APPELLANT

VERSUS

PAUL MWITA

MOGESI.....1ST

RESPONDENT

BENSON WAHUI MWANGI.....2ND

RESPONDENT

**(Being an appeal from the Ruling and Orders of the Hon. Ndeng'eri J. (SRM)
delivered on the 16th day of May 2024 in Naivasha CMCC Case No. E218 of 2022)**

JUDGMENT

Background of the Appeal

1. Before the court is an appeal against the Ruling and Orders delivered on the 16/05/2024 by the Hon. Ndeng'eri J. in Naivasha CMCC Case No. E218 of 2022. In that ruling, the trial court dismissed an application dated 8th December 2023, wherein the Appellant now as the 2nd Defendant before the trial court had sought the twin reliefs of setting aside and reviewing a judgment and decree delivered on the 5/10/2023.
2. The dispute stems from a road traffic accident that occurred on the 10th day of October 2021. The 1st Respondent, a police officer stationed at Makueni, was a lawful passenger traveling aboard motor vehicle registration number KCW 018J along the Mai Mahiu - Narok Road when at the George's area, a head-on there occurred a collision with motor vehicle registration number KDC 532X, which the 1st Respondent alleged was being driven negligently by the 2nd Respondent.
3. In the suit via a Plaint dated 7/04/2022, the 1st Respondent, as plaintiff then, sought general and special damages for serious personal injuries,

including a crack fracture of the pelvis. The Appellant, like the second respondent, entered separate appearance and filed a statement of defense, denying liability and ownership of the vehicle. The matter proceeded to a full trial on the 29.06.2023 when the plaintiff presented three witnesses and closed its case. At the close of the Plaintiff's case, the appellant who was represented by counsel chose to close the defence case without calling any witnesses. The coram of the day show that the appellant was duly represented but the 2nd respondent was not even though he had entered appearance and filed a defense.

4. Consequently, the trial court delivered a judgment on 5/10/2023 and held the appellant and the 2nd respondent 100% liable, jointly and severally. The court then awarded the 1st Respondent a total sum of Kshs. 805,120/- plus costs and interest.
5. Two months after the said judgment, the Appellant filed the application dated 8/12/2023 seeking the setting aside and review of the judgment while alleging that it had sold the vehicle to the 2nd Respondent prior to the accident and that its counsel had failed to attend the hearing or present this evidence.
6. The learned Magistrate made in its Ruling dated 16/05/2024 declined the application, noting that the Appellant had participated in the trial and that the evidence sought to be introduced was already within its knowledge long before the judgment. The Magistrate characterized the application as a *backdoor* attempt to reopen a trial that had been concluded on its merits. The decision aggrieved the Appellant who moved to the by this appeal. At the time of receiving the written submissions, the reigning pleading was the Amended Memorandum of Appeal dated the.

The Appeal

7. Pursuant to leave granted by the court on 3rd of December, 2025, the Appellant filed an Amended Memorandum of Appeal setting out six distinct grounds of objection to the ruling of the trial court dated 16/05/2024. The grounds of appeal. While somewhat repetitive, the grounds challenge and fault the judgment for failure to properly apply the law on setting aside, fr failure to consider the defense filed asserting sale of the motor vehicle prior to the accident and in shifting the burden of proof and thus denying it the right to be heard thereby demonstrating bias, unfair and unfair treatment that is absurd and contrary to the norms of equity and justice.
8. The first ground of appeal asserts that the learned Magistrate erred in law and in fact by failing to consider that the court possesses an inherent and statutory mandate to set aside or vary any judgment or consequential decree upon terms that are just. The Appellant argues that the trial court was overly rigid in its application of procedural rules, thereby sacrificing substantive justice.
9. In the second ground, the Appellant contends that the Magistrate failed to consider the factual reality that the subject motor vehicle had been sold to the 2nd Respondent via a hire purchase agreement dated 28th June 2021. The Appellant maintains that as of 10th of October 2021 when the accident occurred, it was no longer in possession or control of the vehicle and therefore could not be held vicariously liable.
10. The third ground of objection is that the trial court failed to appreciate that the burden of proof is not in any way lessened because a case is heard by way of formal proof or remains undefended. The Appellant argues that the 1st Respondent still had the legal obligation to prove agency or an employment relationship between the Appellant and the driver, which the Appellant claims was never established.
11. Fourthly, the Appellant argues that the Magistrate erred by failing to consider that the statement of defense filed on its behalf raised triable issues that went to the root of the litigation. The Appellant suggests that

once a defense exists on the record, the court should be slow to shut out a party from ventilating that defense through oral testimony.

12. The fifth ground alleges a violation of the right to be heard. The Appellant contends that the denial of its application to set aside the judgment was a violation of the constitutional principle that a litigant should be given their day in court, and that such an opportunity should only be denied as a last resort. Finally, the Appellant asserts that the ruling of 16th May 2024 was unfair, biased, unjust, and represented an absurdity to the established norms of equity and justice.

Summary of the Trial Proceedings

13. The Plaintiff at the trial court provided the evidence of three witnesses in support of his case. PW1, Dr. George Kung'u Mwaura, testified as a medical expert witness and a registered medical practitioner practicing at Kinoo Medical Clinic. He informed the court that he examined the Plaintiff, Paul Mwita Mogesi, on the 28th of March 2022. The purpose of the examination was to assess the injuries sustained in a road traffic accident that had occurred on the 10th of October 2021.
14. PW1's findings were that the Plaintiff had sustained grievous harm, general injuries, and multiple soft tissue injuries. He noted that at the time of the examination, the Plaintiff was still undergoing treatment and continued to experience pain consistent with the nature of the injuries. He produced his medical report and a receipt as evidence. The witness was never cross-examined by the defence witness at the close of his evidence in chief.
15. PW2 was the investigation officer in the matter who testified regarding a fatal road traffic accident that took place at approximately 13:00 hours on the 10/10/2021 along the Mai Mahiu - Narok road. He described the collision involving motor vehicle KCW 0138J and motor vehicle KDC 532S. He testified that the driver of the motor vehicle KDC 532S, swerved from

his lane and collided head-on with the KCW vehicle. He identified the Plaintiff as one of the victims and produced the police abstract.

16. During cross-examination by Mr Nganga advocate, for the appellant, the officer stated that he considered the 2nd Respondent as the owner of the vehicle and had come to the station with the driver to claim the motor vehicle after the incident. However, the officer admitted he did not know the specific legal relationship between the 2nd respondent and the Appellant and had not conducted a search at the Registrar of Motor Vehicles to confirm registered ownership.
17. The Plaintiff testified as PW3 and adopted his witness statement dated 7/04/2022 as his evidence-in-chief. He confirmed he was a lawful passenger in the KCW matatu when the motor vehicle registration number KDC 532X swerved onto their land and path before hitting them. He blamed the driver of the KDC vehicle entirely for the collision. During cross-examination, the Plaintiff asserted that police records identified both Defendants as the owners of the vehicle. He admitted he was not aware of any internal sale agreements or the specific nature of the relationship between the Appellant and the 2nd Respondent.
18. Following the conclusion of the Plaintiff's case, the Appellant through its counsel informed the court that the defense would close its case without calling any witnesses. No documents were produced by the defense, and no oral testimony was offered to rebut the Plaintiff's claims.
19. In its judgment delivered on 5th October 2023, the trial court found that the accident to have been as a result of the negligence of the driver of motor vehicle KDC 532X based on the head-on nature of the collision and the swerving reported by the police officer and the Plaintiff. The trial court proceeded to lay liability on both the Appellant and the 2nd Respondent at 100% jointly and severally because ownership was linked to the Appellant via registration and the 2nd Respondent via possession. The court then assessed and awarded general damages in the sum of Kshs 800,000 and Kshs 5,120/- in special damages. It was that judgment which was targeted

for setting aside by the application filed by the appellant and leading to the instant application.

Summary of the Appellant's Submissions

20. The Appellant's submissions, dated 22/05/2025, advance three key issues for determination by the court to be that; the trial court was wrong to dismiss the application for review, that ownership of the vehicle had effectively passed to the 2nd Respondent, and that vicarious liability could not attach to the Appellant.
21. On the dismissal of the Review Application, the Appellant argues that the learned Magistrate erred by not considering that the judgment of 5th October 2023 was *ex-parte* in substance because the Appellant had not been called upon to give its evidence. Relying on Order 10 Rule 11, the Appellant maintains that such judgments can be set aside on terms that are just.
22. The Appellant further contends that it had a triable issue that should have mandated the reopening of the trial. Citing the case of ***Saudi Arabian Airlines Corporation vs Premium Petroleum Company Ltd (2013) eKLR***, the Appellant defined a triable issue as one that passes the test in ***Patel V E.A. Cargo Handling Services Ltd (2009) eKLR***, meaning an issue that raises a *prima facie* defense regardless of its prospects of eventual success.
23. The Appellant's primary substantive defense is that it was not the owner of motor vehicle KDC 532X at the time of the accident. While the Appellant admits it was the registered owner as at the date of the accident, it argues that Section 8 of the Traffic Act provides that registration is only *prima facie* evidence of title. Relying on ***Securicor Kenya Ltd vs Kyumba Holdings Ltd (2008) eKLR***, the Appellant argues that actual possession and control are the *substance* of ownership for liability purposes. The Appellant then exhibited a hire purchase agreement dated 28th June 2021, an Affidavit of Liability, as well as a

Deed of Indemnity and Consent, all signed by the 2nd Respondent. These documents purportedly show that the 2nd Respondent had taken full responsibility for all claims arising from the vehicle.

24. The Appellant also points to the police abstract, which lists the 2nd Respondent as the owner and policyholder for the insurance cover with Occidental Insurance Company Limited, and makes no mention of the Appellant. The Appellant contends that these documents cumulatively rebut the presumption of ownership under the Traffic Act.
25. On vicarious liability, the Appellant submits that no employer-employee or agency relationship existed between it and the driver/hirer. Citing **Gichira Peter vs Lucy Wambura Ngaku & Another eKLR (2019) eKLR**, the Appellant argues that mere registration of a vehicle in a person's name is insufficient to create vicarious liability for the negligence of everyone who happens to drive it.
26. The Appellant concludes that the only reason it was joined in the suit was its entitlement to the balance of the purchase price, and it holds the logbook only as security. It asks the court to set aside the ruling and allow the parties to give evidence on the issue of beneficial ownership.

Summary of the 1st Respondent's Submissions

27. The 1st Respondent opposes the appeal and argues that the record of appeal is fatally and incurably defective because the Appellant omitted essential documents. Specifically, the Appellant failed to attach the certified proceedings from the time of the review application until its determination, and also excluded the Plaintiff's trial submissions.
28. Relying on the Supreme Court case of **Bwana Mohamed Bwana vs Silvano Buko Bonayo & Others eKLR (2021) eKLR**, the Respondent asserts that a court cannot determine an appeal without a proper record. Furthermore, citing **Setpoint East Africa Limited & Another vs Zhongmei Engineering Group Limited (2017) eKLR**, the Respondent

argues that Article 159 of the Constitution cannot cure substantive failures like an incomplete record of appeal.

29. The 1st Respondent accuses the Appellant of sneaking irregular documents into the appeal record that were never part of the trial. These include a witness statement by Shafik Samji, various contracts, and an internal memo from Soni & Associates. Citing **Joseph Sombo & 4 Others v Nyari Investments & 5 Others (2010) eKLR**, the Respondent maintains that such an action is an abuse of the court process and prays that these documents be expunged.
30. The Respondent argues that review is not for parties dissatisfied with a judgment or who wish to fill gaps in their case. Again, citing **Multichoice Kenya Ltd vs Wananchi Group (Kenya) Ltd & 2 Others (2020) eKLR**, the Respondent submits that the Appellant had full opportunity to present its evidence at trial but chose not to.
31. The Respondent submits that the documents the Appellant now calls new were available as early as June 2021 and were pleaded in the defense in June 2022. Therefore, the Appellant failed the due diligence test required by Order 45 Rule 1 and cited **Francis Origo & Another vs Jacob Kumali Mungala (2005) eKLR**, emphasizing that review is only available where there is demonstrated errors apparent on the face of the record or, discovery of *new* important matter or for other sufficient cause.
32. Finally, the Respondent rejects the Appellant's excuse of being let down by counsel and cited **Savings and Loans Limited v Susan Wanjiru Muritu (2006) eKLR**, for the proposition that a case belongs to a litigant and not the advocate, and the court should not set aside a judgment solely on the ground of a mistake by counsel.

Issues, Analysis and Determination

33. Having duly considered the evidence on record, the grounds of the appeal as well as the parties' rival submissions, the court isolates the following issues as pertinent for determination of this appeal: -

- i) **Whether the record of appeal is so defective that the court is divested of jurisdiction, and whether extraneous documents should be expunged?**
- ii) **Whether the learned Magistrate erred in finding that the Appellant failed to establish sufficient cause for setting aside or reviewing the judgment of 5th October 2023?**
- iii) **Whether the Appellant's claim of beneficial ownership and the indemnity agreement constitute a prima facie defense that would justify a rehearing?**
- iv) **What orders should be made as to costs?**

Whether the record of appeal is so defective that the court is divested of jurisdiction, and whether extraneous documents should be expunged?

34. The 1st Respondent has raised contention regarding the completeness of the Record of Appeal and the inclusion of documents that were not part of the trial court's proceedings. The importance of a complete and accurate record of appeal before the Supreme Court and the Court of Appeal cannot be overstated in our appellate system. That is simply the undeniable position of the law as reiterated by the Supreme Court in **Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others [2015] eKLR**, that an incompetent record divests the court of the jurisdiction to consider factual or legal controversies. The court stated as follows:

“Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or

the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others, SC. 11/2012, Judge Bode RhodesVivour, JSC highlighted pertinent issues of jurisdiction:

“A court is competent, that is to say, it has jurisdiction when-it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and the subject matter of the case is within its jurisdiction, and no feature in the case...prevents the court from exercising its jurisdiction; and the case comes before the court initiated by the(due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction””

35. However, an appeal to this court is not governed by the Supreme Court Act and the Rules made thereunder nor are the Court of Appeal Rules applicable in this appeal. This appeal is governed strictly by the Civil Procedure Act and the Rules made thereunder.
36. Under Order 42 Rule 11(4) the only requirement before an appeal can be certified ready to go for hearing are; the memorandum of appeal, the pleadings, the proceedings; including transcripts of any official shorthand, typist notes, electronic recording or palantypist notes made and recorded at trial; all affidavits, maps and other documents produced in evidence before the trial court, and the judgment of order appealed against, and , only where applicable, an order, if any, giving the leave to appeal.

37. The obligation is not upon the appellant to compile and file a record. Rather the obligated duty bearer is the court to ensure that the trial court file containing all the enumerated documents are placed in the appeal file.
38. The practice of filing that bundle called a record of Appeal before the High court is thus a practice of convenience which has not been backed by legislation, unlike the position before the court of Appeal and the Supreme Court.
39. For that reason, there is no basis to challenge the competence of an appeal before the High Court on the failure of the appellant to avail complete record or indeed absence of a compiled and filed record of appeal. An appeal cannot thus be defeated on failure to comply with a practice that may not have a legal backing.
40. This however, is not to say that parties ought not to file and serve a complete record of appeal when ordered or directed by the court. Where the court makes such specific direction then the parties are bound on the basis of the duty to court under Section 1A (3) to comply because failure to comply invite sanctions include striking out of the pleadings.
41. In this matter, the documents enumerated under the rule are indeed in the original trial court file, including the ruling appealed against, which captures the essence of the arguments made. The court views the challenge on the competence of the appeal based on requirements of a record of appeal to lack merit and otherwise misconception of the applicable law.
42. However, the court find the allegations of sneaking in strange documents to merit its comment. The record of the appeal filed by the appellant includes a witness statement by Shafik Samji and internal memos from Soni & Associates that were never filed before the trial court prior to judgment. The documents were never filed as part of the defendants list of documents or were they annexed either to the affidavits verifying the correctness of the plaint or the amended plaint. They have

not been mentioned anywhere in the proceedings nor had referred to by any of the witnesses who testified. In fact, having not been foiled and served, such documents were not capable of being produced or referred to at the hearing. Because the appellant never filed any documents witness statement nor documents, it had no right to call a witness and in fact called none. Having not produced any documents, it was a clear attempt at misleading the court to push the strange documents before the court. That must be called out and discouraged for it portends the risk of the court being misled into relying on documents not put to consideration in coming to the decision appealed against by counsel being reminded that may not only an abuse of the process but equally portend professional misconduct.

43. The need for fair hearing prohibits ambush by the introduction of new evidence at the appeal stage without a formal application and leave of the court. In **Joseph Sombo & 4 Others vs Nyari Investments & 5 Others eKLR**, the Court of Appeal was clear that such conduct is an abuse of the court process. The court held that:

“From the foregoing, it is clear in our minds that the list in question was not part of the record. The list is so long, over 200 pages and the learned trial Judge could not have failed to see it, nor would learned counsel on record then. Had it been part of the record, it would have elicited several questions on cross-examination for instance, why does the list have 17,000 persons and not 15,000; the large number of the under-age and who were suing on their behalf etc.

We are not in the least persuaded that the list formed part of the record before the High Court. We also find that sneaking it in at this point is not just irregular and unprocedural, but tantamount to abuse of the process of the court.”

44. The court being guided and bound by the above position holds that the integrity of the judicial process depends on the principle that the appellate court reviews the record that was before the trial court, not a newly curated version of events. Consequently, the court finds that the the documents exhibited in the application for setting aside and review was strange to the proceedings sought to be disturbed and were calculated to misled the court and thus abuse its processes. The cure of such abuse is to have all expunged and kept out of consideration by the court. Thus, the witness statement of Shafik Samji and the internal memos from Soni & Associates and expunged from the record of appeal.

Whether the learned Magistrate erred in finding that the Appellant failed to establish sufficient cause for setting aside or reviewing the judgment of 5th October 2023.

45. The Appellant sought to have the judgment of 5th October 2023 set aside under Order 10 Rule 11 and reviewed under Order 45 Rule 1. Its first contention is that the judgment was *ex-parte*. In legal terms, an *ex-parte* judgment is one entered in the absence of a party, typically for default of appearance, failure to file a defense or failure to attend court on the appointed date.

46. The trial record reveals that the Appellant, being the 2nd Defendant in the main suit, was very much involved in the proceedings. It entered appearance, filed a defense through its advocate, and appeared for several pre-trial mentions. On the day of the hearing, the Appellant's counsel, Mr. Ng'ang'a, was present and actively participated by cross-examining the Plaintiff's witnesses.

47. Notably, after the Plaintiff closed its case, the Appellant's counsel voluntarily informed the court that the defense was closing its case without calling any witnesses. This is not an *ex-parte* situation in the court's mind. It is a judgment on the merits following a full hearing in which the defense chose to remain silent.

48. The principles in **Shah vs Mbogo and another [1967] 1 EA 116**, on setting aside of a default judgment ordain that for a party to succeed, he must demonstrate that he was not served or had a valid reason for non-appearance. Those are therefore inapplicable here because the Appellant was there fully participating after filling his pleadings but chose or simply failed to file witness statement and use the opportunity availed to present its case. The circumstances revealed do not invite the discretionary remedy of setting aside.
49. On the prayer for review, the law is equally sound. Section 80 of the Civil Procedure Act and Order 45 Rule 1 limit review to three narrow circumstances being discovery of new and important matter of evidence which could not be produced at the time of the decree after the exercise of due diligence; an error or mistake apparent on the face of the record; and/or, any other sufficient reason.
50. The Appellant's ground for review is that it now has evidence that the vehicle was sold. However, this information was already known to the Appellant prior to the occurrence of the accident. The Appellant's own statement of defense, filed on 21st June 2022, denied ownership of motor vehicle KDC 532X and asserting the fact of sale prior to the accident. That demonstrates that the Appellant was aware of the sale and had the documents allegedly in proof thereof a whole full year before the trial but chose not to avail same at the trial.
51. The court holds that evidence that was in a party's possession at the time of trial cannot be termed newly discovered evidence for the purpose of a review application. The requirement of due diligence is absolute. As the learned Magistrate correctly noted, the Appellant chose to close its case without calling witnesses despite having this information.
52. In **Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation [2020] KECA 633 (KLR)**, the court warned that review jurisdiction should not be used to fill gaps left during the hearing. The

Appellant's application was a textbook example of an attempt to fill own created gaps. To accede to his request would have been to reward indolence and design to delay the course of justice.

53. Furthermore, the Appellant's attempt to blame its advocate does not satisfy the criteria for a review. The principle in **Savings and Loans Limited v Susan Wanjiru Muritu (2005) eKLR**, as reiterated in **J.G. Builders vs Plan International [1998) (KLR)** is that a case belongs to the litigant, who has an ongoing duty to follow up on its progress. Here the applicant has made no effort to explain why it was not presented in court on the date set for hearing. The court finds no error in the Magistrate's conclusion that the threshold for review was not met and adds that there are times when a litigant must surely bear the shortcomings of counsel and if genuinely aggrieved, pursue the counsel as appropriate. Having chosen counsel of own choice, he must equally accept the benefits and burdens which accompany that choice without seeking to offload same on his opponent.


Whether the Appellant's claim of beneficial ownership and the indemnity agreement constitute a *prima facie* defense that would justify a rehearing.

54. Even if the court were to look past the procedural failures, the substantive arguments raised by the Appellant regarding ownership and liability are legally suspect. On the alleged ownership, Section 8 of the Traffic Act provides that the registered owner is deemed the legal owner unless the contrary is proved. While the Appellant cites **Securicor Kenya Ltd vs Kyumba Holdings Ltd [2005] KECA 348 (KLR)** to argue that possession is the key to ownership, the decision is of no assistance to his case because of two reasons.
55. The first reason is that the decision involved an absolute sale unlike her where the sale was on hire purchase. The law relating to hire purchase transaction is that the title and legal ownership remain with the

seller, herein the Appellant, until the final instalment is paid. The Appellant admits it retained the logbook as security to ensure the purchase price of Kshs. 1,470,000/- was realized. By its own admission, the Appellant remained the legal owner.

56. The second reason is that cases are proved on evidence. The appellant having filed a defence totally failed to file a witness statement to give him the pedestal to lead evidence then totally failed to file a list of documents as would have availed him the opportunity to prove the fact of sale and its terms. The consequence is that there was no proof of sale and passage of the title and the burdens attaching to such title. The deed of indemnity was never proved before the court and the court had no way of receiving and relying on it as evidence.
57. The Magistrate's determination that the Appellant has a separate remedy, to sue the 2nd Respondent for recovery of any losses under the indemnity agreement, is the correct application of the law. The Appellant cannot use a private contract to unseat the plaintiff from the seat of justice once negligence has been proven against the legal owner.
58. From the discussions and conclusions above, the court finds that the appeal lacks merit for which reason It is hereby dismissed with costs to the respondent

Dated, signed and delivered virtually this 6th day of March, 2026



Patrick J O Otiemo

Judge