



**East African Sea Foods Limited v Abdi (Civil Appeal
29 of 2018) [2022] KECA 629 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 629 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 29 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 8, 2022**

BETWEEN

EAST AFRICAN SEA FOODS LIMITED APPELLANT

AND

MOHAMED TURKEY ABDI RESPONDENT

(Being an appeal from the judgment & decree (D. A. Onyancha, J) in the High Court of Kenya at Busia delivered on 8th October, 2012 in BUSIA HCCC NO. 48 OF 2005)

JUDGMENT

JUDGMENT OF TUIYOTT, JA

1. At the heart of the controversy in this appeal is whether Mohamed Turkey Abdi (Abdi or the Respondent) successfully proved that he was the owner of motor vehicle registration number KAC 519Y as at 21st March, 2003 so as to have the locus standi to bring a claim against East African Sea Foods Limited (EASF or the Appellant).
2. On that day the said motor vehicle, an Isuzu lorry, was involved in an accident with motor vehicle registration KAP 461N along Nakuru-Eldoret Highway at Ngata Bridge. It is common ground that motor vehicle KAP 461N was owned by EASF. Both vehicles were damaged.
3. So as to seek relief for the damage suffered to the Isuzu lorry, Abdi filed Busia High Court Civil Suit No. 48 of 2005 Mohamed Turkey Abdi vs East African Sea Food Ltd in which he sought special damages of Kshs. 1,113,400.00 in repair costs, loss of user at Kshs. 15,000.00 per week for 12 weeks, Kshs. 15,000.00 being payment for the assessment report and payment of Kshs. 100.00 for the police abstract. In turn, EASF filed a suit against Abdi being Busia HCCC NO. 8 of 2006. The two suits were consolidated with HCCC 48 being the lead matter. Upon consolidation, EASF amended its defence to include a counterclaim for a loss of Kshs. 5,722,000.00 and special damages of Kshs. 105,771.00.



4. At trial, Abdi's case was presented by five witnesses. EASF did not call any. In the end Onyancha, J, in the judgment dated 8th October, 2012, returned a verdict of Kshs. 1,329,100.00 in favour of Abdi and dismissed the counter claim of EASF. Aggrieved by that judgment, EASF questions the locus standi of Abdi to bring the suit and impugns the judge's finding in that regard on the following grounds;
- i. Evidence that the Plaintiff was not the registered owner of the suit motor vehicle at the time of the alleged accident;
 - ii. Evidence that M/s Busia Steel Enterprises Limited, a limited liability company, was the registered owner of the suit motor vehicle at the time of the alleged accident;
 - iii. Evidence that M/s Busia Steel Enterprises Limited, was not a party to the suit and that short of a Company Resolution under seal, the Plaintiff would not have standing to claim on behalf and to the benefit of the Company;
 - iv. Statute. That the Law of Succession Act, Cap 160 Laws of Kenya is a complete code regarding matters of succession in this country and the Learned Trial Judge in his final summation of the evidence did so on wrong principles of law and thereby arrived at a wrong decision.
5. This is a first appeal and I am alive to the duty of this Court to re-evaluate the evidence afresh and to draw its own conclusions bearing in mind that we did not see or hear the witnesses testify. This position was stated in the case of *Selle & Another v. Associated Motor Boat Company Ltd. & Others* [1968] EA 123 as follows: -

“I shall deal with the cross-appeal first as in my view it can be disposed of quite shortly. I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put that 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

6. The question of *locus standi* of Abdi is intertwined with the issue whether Abdi was the owner of motor vehicle KAC 519Y at the time of the accident. The entire appeal revolves around the argument that Abdi did not establish ownership over the motor vehicle and for that reason could not bring the claim against EASF. On this question, the trial Judge concluded;

“I have considered this issue carefully. There is clear evidence that the official ownership of the motor vehicle, was at the material time of the accident on 21st March, 2003 with the Busia Steel Enterprises Ltd owned by the plaintiff's deceased brother and his wife. However, there is evidence that the plaintiff, through a Muslim family inheritance agreement of transfer, Exhibit B, took over the ownership and management of the family jointly with his brother's wife. The plaintiff's evidence to that effect was corroborated by the evidence of the plaintiff's father who testified as PW4. This evidence, as earlier noted, was really not controverted. I accept it as sufficient to explain the ownership of the vehicle at the material time. In the



circumstances, I hold that the plaintiff had the right to claim, although clearly on behalf and to the benefit of the Busia Steel Enterprises Ltd. who held the registered ownership.”

7. The respondent thinks that the appeal must necessarily fail because the issue of *locus standi* needed to be raised at the earliest opportunity and as a preliminary objection at trial. This is the first issue I must address.
8. As I have already observed, the issue of *locus standi* was intimately connected with whether Abdi could prove ownership of the motor vehicle. If he succeeded in doing so, then he would have locus. The inverse would also be true. The issue of ownership was an issue of fact, a contested fact. Obviously, this could not be resolved through a preliminary demur and could only be determined upon the trial court receiving and considering evidence. Raising a preliminary objection would have been unhelpful.
9. I also make another observation: it is trite and so the appellant would be correct in its submissions that having asserted that he was the owner of the motor vehicle registration KAC 519Y, then the onus was on Abdi to provide proof of this. This obligation is placed on him by section 109 of the [Evidence Act](#) Cap 80 which reads:-

“ 109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

10. Abdi needed to provide sufficient proof that would rebut the presumption of ownership set out in section 8 of the [Traffic Act](#) which reads:

“ 8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

This is because it is undisputed that at the time of the accident, the motor vehicle was jointly registered in the name of Busia Steel Enterprises Ltd (the company) and NIC Bank. In a bid to rebut the presumption that, although registered in favour of these two the motor vehicle belonged to him, Abdi put together the following evidence.

11. He conceded that the logbook was not in his name. He told the trial court that the company belonged his brother who had died and no succession cause had been taken out in respect to his estate. It was his contention, nevertheless, that inheritance under Islamic law did not necessarily have to be processed through court.
12. Abdi's father, Hashim Abdi Omar, testified as the plaintiff's fourth witness. His evidence was that he had two sons; Abdi and the deceased (Abdi Rahman Hashim Abdi). His evidence was that the lorry was owned by the deceased before his death. As to how it came to be the property of Abdi, his testimony was;

“ After he died the motor vehicle went to the ownership of his brother Mohamed Turkey Abdi through tradition.”



13. PW2's further testimony was that Hashim, his deceased son and his wife Fatuma had a business at Busia in the name of the company. He stated;

“ My deceased son and wife were the owners of Busia Steel Enterprises Ltd by shares.”
14. Regarding the interest of NIC Bank in the motor vehicle, PW2 stated that monies owed to the bank had been paid off and the bank no longer had an interest in the vehicle.
15. This witness produced a copy of an agreement made between Amin Herse Moghe and Mohamed Turkey Hashim. Mohamed Turkey Hashim is Abdi, the respondent herein. The agreement though undated was made in 1995. The highlights are that; Amin Herse Moghe is the administrator of the estate of Fatuma Herse Moghe; Fatuma was in her life time married to Abdi Hashim, also deceased; all the family members agreed that motor vehicle registration KAC 519Y be bequeathed to Abdi; Abdi was to effect the transfer of the said motor vehicle from Busia Steel Enterprises to himself within 14 days from the date thereof. The transfer did not happen as contemplated as there is evidence that the vehicle was registered in the name of Abdi only on 11th March 2005, way after the accident.
16. Before going any further, I need to reflect on the submissions of counsel for the appellant regarding the law of succession under Islamic Law and its place in this dispute.
17. Counsel submits, correctly, that under section 2 (3) of the *Law of Succession Act*, the applicable law in relation to a deceased is Islamic law. Counsel then submits that apart from the undated agreement tendered to prove the bequest of the motor vehicle by the administrator of the estate of Fatuma Herse Moghe to Abdi, no proof of the succession cause was produced.
18. I have no doubt in my mind that Abdi could have done a lot more in proving his case. To start with, it is not without significance that as at 21st March 2003 when the accident occurred, the motor vehicle was registered in the name of a limited liability company. Even if Abdi Rahma Hashim Abdi and Fatuma Herse Moghe were the only shareholders of the company, still, disposal of a property of the company would have to be in accordance with the Memorandum and Articles of Association of the company. The vehicle belonged to the company and while the shares of the deceased in the company would pass to the respective estates of the deceased shareholders and so could be dealt with under Islamic law, the vehicle being the property of the company could not be subject to such succession proceedings. The evidence tendered by Abdi in regard to the ownership of the vehicle therefore had gaps.
19. Yet at the end of the day, when the threshold to be reached is that of proof on a balance of probabilities, the real question is whether, on the evidence tendered, Abdi proved that, though not the registered owner, he was nevertheless the owner of the motor vehicle at the time of the accident. Put differently, Abdi needed to rebut the presumption of ownership created by section 8 of the *Traffic Act*. On my own evaluation of that evidence it is proof, on a balance of probabilities, that PW4 was the father of Hashim (deceased) and Abdi; Hashim and Fatuma were the shareholders of Busia Company Limited; it was the wish of the administrators of the estate of the shareholders of Busia Company Limited that the motor vehicle would pass from the company to Abdi; indeed, ownership formally passed, albeit two years after the accident. This evidence is complemented by the testimony of George Mathu (PW2) a motor vehicle assessor who inspected the damaged vehicle at the site of the accident and later at the garage. His evidence was that he was called upon by Abdi to assess the motor vehicle. This shows some connection between the vehicle and Abdi. Once I accept that Abdi was the owner of the motor vehicle at the time of the accident, then I have to reach the conclusion that he had standing in law to bring the claim, which he did against EASF.



20. It would now be clear that I am not persuaded that the appeal has merit and, on my part, would dismiss it with costs.

JUDGMENT OF KIAGE, JA

I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.

Mumbi Ngugi, JA being agreed, the final orders are as proposed by Tuiyott, JA.

JUDGMENT OF MUMBI NGUGI, JA

I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022.

F. TUIYOTT

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed.

DEPUTY REGISTRAR

