



**China Communications Limited v Mburu (Civil Appeal E248 of 2022)
[2025] KEHC 909 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E248 OF 2022
TW OUYA, J
JANUARY 30, 2025**

BETWEEN

CHINA COMMUNICATIONS LIMITED APPELLANT

AND

FAITH WANJIKIU MBURU RESPONDENT

(Being an appeal from the Judgement delivered on 4th October 2022 by the Honourable V. A. Ogotu Adjudicator in Thika SCCC No. E193 OF 2022.)

JUDGMENT

Background

1. This appeal was instituted by the Appellant after being dissatisfied with the Judgement and decree by the Adjudicator delivered 4TH October 2022 in Thika SCCC No E193 OF 2022.
2. The suit was initiated by Faith Wanjiru Mburu Claimant/Appellant vide Statement of Claim dated 11th June 2022 against China Communications Construction Limited Respondent herein following an accident on along Kiambu-Nairobi highway on 21st June 2019 involving motor vehicle registration number KCM 022Y and KCH 448E belonging to the Claimant/Appellant and the Respondent respectively. The Appellant brought a subrogation claim against the Respondent while the Respondent made a counterclaim. The Learned adjudicator made a finding in favour of the appellant for kshs.172,844 subject to 50% contribution. Regarding the counterclaim, the court found in favour of the Respondent for kshs. 337, 308 subject to 50% contribution.
3. The Appellant being dissatisfied with the above outcome filed the instant appeal based on the following grounds:
 - a. That the learned Adjudicator erred in law and in fact in failing to consider the Appellant's response to counterclaim.



- b. That the learned Adjudicator erred in law and in fact in failing to appreciate that the counterclaim filed by the Respondent was time barred
 - c. That the learned Adjudicator erred in law and in fact in apportioning liability at the ratio of 50:50.
 - d. That the learned Adjudicator erred in law and in fact in failing to consider that the appellant's motor vehicle registration number KCM 022Y had right of way.
 - e. That the learned Adjudicator erred in law and in fact in failing to consider the Appellant's submissions and authorities attached thereto.
4. The Appellants pray for orders that:
- a. This appeal be allowed and the small court's judgment be set aside.
 - b. The Honourable Court to dismiss the counterclaim with costs to the appellant.
 - c. There be such other or further orders as the Honourable Court shall deem just, fair and expedient.
 - d. The costs of this appeal and those in small claims court suit be awarded to the appellant with interest.

Submissions

5. This appeal was canvassed by way of written submissions. The Appellant through his counsel has raised the following issues. That the counterclaim filed by the Respondent was time barred being that the accident occurred on 21st June 2019 while the counterclaim was lodged on 2nd August 2022. It is his argument that the suit being based on a tort of negligence ought to have been filed on or before 20th June 2022. He cites the authority of *Mary Osundwa v Nzoia Sugar Company (2002)* eKLR where the court emphasized circumstances where the court has jurisdiction to extend time thus:

“...The action must be founded on tort and must relate to the tort of negligence, nuisance of breach of duty and the damages claimed and are in respect of personal injuries to the as a result of the tort....”

6. With reference to the *Limitation of Actions Act*, he cites the authority of *James Muruthi Kihara v Jackline Chepkemoi Kimeto (2018)* eKLR where court referred to section 35 thereof stated that:

“For the purposes of this Act and any other written law relating to limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or the counterclaim is pleaded.

He submits that the Respondent ought to have been cognizant of the legal timelines with regard to a suit founded on a tort of negligence.

7. The appellant faults the Trial court for apportioning liability at the ratio of 50:50 and failing to consider that the motor vehicle registration number KCM 022Y had the right of way and he makes reference to the police abstract which he states indicated that motor vehicle registration number KCH 448E was to blame for the accident. He submits that the respondent ought to have been found 100% liable for the accident as the Appellant's motor vehicle had the right of way.



8. Thirdly, the Appellant submits that the trial court failed to consider the Appellant's submissions while assessing general damages and urges this court consider the Appellants' submissions in the trial court.
9. The Respondent through her counsel has raised three issues. The first issue is that this appeal is incompetent for failure to file the decree that is the subject of this appeal. This was despite court directions on 20th July 2023 directing the Appellant to file a supplementary record to include the decree and the respondent's submissions at the lower court. It is the Respondent's submission that the above stated failure is fatal rendering the appeal incompetent and ripe for striking out. She cites Order 42 Rule 2 of the Civil Procedure Rules provides that:

“Where no certified copy of the decree or order appealed against is filed with the memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”

The Respondent relies further on the provisions of order 42 Rule 13(4)(f) requiring that an appeal should not be allowed to go for hearing without confirming the presence of the judgement, order or decree on the court record. She relies on the authority of *Bwana Mohamed Bwana v Silvano Bonaya & 2 others* (2015) eklr where it was held that:

“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.”

The same principle is reflected in *Chege v Suleiman* (1988) eklr and *Lucas Otieno Masaye v Lucia Olewe Kidi* (2022)eklr.

10. The Respondent maintains that her counterclaim was not counterclaim was not time-barred as a counterclaim is deemed to be commenced on the same date as the action in which the set-off or counterclaim is pleaded. She argues that the subject matter of the claim arose on 21st June 2019 which was the date of the subject accident and that the Appellant's statement of claim was filed on 17th June 2022 while her response and counterclaim were filed on 7th September 2022 pursuant to an order of the Lower court in its ruling on 6th September 2022 setting aside default judgement.
11. The respondent does not contend that three years had lapsed as at the time she filed the counterclaim on 7th September 2022 but maintains that the law makes an exception to the tabulation of time for purposes of limitation of time for counterclaims. She makes reference to section 35 *Limitation of Actions Act*, Cap22 that gives an exception on counter and set-off claims that:

“For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set- off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”

She cites the cases of *John Nandukule Omukuba v Nimesh Shah Bhimji* (2008) eklr citing *Ernst &Young v Butte Mining PLC (No.2)*(1997)ALL ER471 and; *Beatrice Mumbi Wamahiu v Mobil Oil*



Kenya Ltd(2011)eklr all espousing that a counter-claim will be considered as having been filed on the same date as the original action.

12. Lastly, the respondent addresses the issue as to whether the Adjudicator erred in apportioning 50:50 liability. The Respondent contends that the Appellant failed to prove negligence on the part of the Respondent's vehicle on a balance of probabilities. The respondent mentions that there were two police abstracts on the record, each produced by either party. One indicated that the matter was pending under investigations while the other indicated that matter is referred to insurance. The upshot is that it was not possible at the material time to determine which driver was responsible for the accident. The respondent decisions in Hussein Omar Farar v Lento Agencies Civil Appael No.34/25 (2006) eklr and in Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another where the courts held that in the absence of any other evidence in exoneration of either party, the Appellant and the respondent must bear culpability.
13. For the above reasons, the respondent urges the court to dismiss this appeal.

Analysis

14. This court has considered the memorandum of appeal, the record of appeal, original lower court record together with the submissions by counsel for both parties. The court notes that the substratum of this appeal is premised on three issues: Whether the appeal is incompetent, whether respondent's counterclaim was time barred and whether the finding of 50:50 ratio on liability was justified.
15. This court will first address the issue as to whether this appeal is incompetent before the court and whether or not it should be entertained as raised by the Respondent. The respondent avers that the Appellant has failed to include in the record of appeal a copy of the decree that is the subject of this appeal in contravention of the requirement of order 42 rules 2 and 13(4)(f) of the Civil Procedure Rules. It is the Respondent's submission that the above stated failure is fatal rendering the appeal incompetent and ripe for striking out. A quick perusal of the record confirms that indeed a copy of the judgement was filed but the decree does not form part of the record.
16. Order 42 rule 2 refers to: "...where no copy of decree or order appealed against is filed with the memorandum of appeal..." This may seem to suggest that the filing of a copy of decree or order is mandatory while order 42 rule 13 (4)(f) refers to "the judgement, order or decree". It is my understanding that the essence of a record of appeal is to assist the court to determine what is before it including the determination that is appealed against.
17. Under section 2 of the *Civil Procedure Act*, a decree is defined inter alia

“...for the purposes of an appeal, “decree” includes judgment and a judgement shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgement may not have been drawn up or may not be capable of being drawn up.”

In the circumstances, I find that this appeal is competent by virtue of including a copy of the judgement which is the determination that is disputed in this appeal.

18. The second issue for determination is whether the Respondent's counterclaim was time-barred as contended by the Appellant. From the record, it is clear that three years had lapsed as at the time the respondent filed the counterclaim on 7th September 2022 being that the accident which is the subject matter of this appeal occurred on the on 21st June 2019. However, the respondent maintains that the said response and counterclaim were filed pursuant to an order of the Lower court in its ruling on 6th



September 2022 setting aside default judgement and that the law makes an exception to the tabulation of time for purposes of limitation of time for counterclaims.

19. Section 35 of the *Limitation of Actions Act*, Cap 22 provides that:

“For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.”

20. The above principle was well established in *Ernst & Young V Butte Mining PLC (No. 2) (1997) ALL ER 471*

“By virtue of section 35 of the 1980 Act, a defendant could use a counter claim as a vehicle immune from existing accrued limitation defences to bring a claim which would be statute-barred if brought in separate proceedings, provided the subject matter of the counter claim was not one which, having regard to the interests of procedural convenience, ought to be tried in a separate action...”

21. Based on the legal provisions and principle above, I find that the Respondents counter claim was not time barred as, although filed three years after the cause of action arose, the law deems it as filed on the same date as the filing of the original claim which was filed on 17th June 2022.

22. The third issue for determination is whether the finding of 50:50 ratio on liability was justified. In ordinary appeals, the first appellate court will only interfere with a finding of fact made by a trial court when such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 – 1988) 1 KAR 278*. Nevertheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and it would be remiss if this Court were not at the outset, satisfy itself that the appeal before it falls within the purview of Section 38 of the *Small Claims Court Act*.

23. It would be apt to observe at this juncture that this is a first appeal and specifically one from the Small Claims Court. Section 38 of the *Small Claims Court Act* prescribes the nature of appeals that lie from the said Court to the High Court by providing that; -

“(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.”

24. Black’s Law Dictionary, 9th Ed. Pg. 1067 defines; -

“Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and
Matter of law as: A matter involving a judicial inquiry into the applicable law.”.

25. The finding on liability is based on the evidence availed during the trial and such is not available for review by this court for purposes of appeal. The issues raised by the Appellant that the trial court did not take into account their submissions is unfounded as the trial court finding is that:

“...the matter borders on two rival accounts of how the accident occurred...I am unable to decide with certainty on which one to pick over the otherIt is my view that each party had some duty of care to exercise while using the road..... I therefore apportion liability at the



ratio of 50%:50% with the guidance in the case of Farah v Lento Agencies (2006) 1KLR125 where the court held that: where there is no concrete evidence to determine who is to blame between the two drivers, both should be equally to blame.”

26. It is my view that the above finding by the Adjudicator was sound and based on the law. This court does not have the liberty to interrogate the evidence that was taken into consideration in arriving at the finding and will not interfere with it.

Determination

Based on the above findings, this court therefore determines that:

- i. This appeal is herewith dismissed
- ii. The judgement delivered on 4th October 2022 by Hon. Oguto in Thika SCCC No. E 193 of 2022 is hereby upheld
- iii. Costs to the Respondent

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30th DAY OF JANUARY, 2025

HON. T. W. OUYA

JUDGE

For Appellant... Mshila

For Respondent... Owade

Court Assistant...Martin Korir

