



REPUBLIC OF KENYA



KENYA LAW
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**Kundu v Mbugua & 3 others (Civil Appeal E051 of 2023)
[2025] KEHC 5404 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E051 OF 2023**

**AC MRIMA, J
APRIL 30, 2025**

BETWEEN

MARTIN SIMIYU KUNDU APPELLANT

AND

WILLIAM MBUGUA 1ST RESPONDENT

ELDORET EXPRESS SHUTTLE 2ND RESPONDENT

SAS AFRICA GENERAL TRADING COMPANY LIMITED .. 3RD RESPONDENT

EQUITY BANK (KENYA) LIMITED 4TH RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. C.M. Kesse (PM) in Kitale
Chief Magistrates Civil Case No. 2 of 2020 delivered on 27th June 2023)*

JUDGMENT

Background:

1. The dispute, subject of this appeal, emanates from the Ruling of the trial Court rendered on 27th June 2023 which struck out one William Mbugua, the 1st Respondent herein, from Kitale Chief Magistrates Civil Case No. 2 of 2020 [hereinafter referred to as ‘the suit’].
2. Through an undated amended Complaint, Martin Simiyu Kundu, the Appellant herein, sought various damages from William Mbugua, Eldoret Express Shuttle SAS Africa General Trading Company Limited and Equity Bank (Kenya) Limited for various bodily injuries he sustained, when motor vehicle KCT 801S (hereinafter referred to as ‘the vehicle’) allegedly veered off the road and hit him.
3. The 1st Respondent herein then filed an application by way of a Notice of Motion dated 7th January 2023, seeking that his name be struck out of the suit on the basis that he was neither a beneficial owner, possessory owner, registered or legal owner of the vehicle in issue.



4. The Appellant did not oppose the application. The trial Court then allowed the application by finding that as at the time of the alleged accident, the 1st Respondent herein was not the registered owner of the motor vehicle and as such he was improperly enjoined to the suit.
5. The Appellant was aggrieved by the said decision and preferred the appeal subject of this decision.

The Appeal:

6. Through the Memorandum of Appeal dated 26th July 2023, the Appellant sought to set-aside the impugned ruling on grounds as follows: -
 1. The learned trial magistrate erred in law and in fact in allowing the application without properly considering the law on ownership of motor vehicles.
 2. The learned trial magistrate erred in law and in fact in disregarding evidence that had been supplied by the Appellant by supplying a police abstract and letter from insurance confirming ownership.
 3. The learned trial magistrate erred in law and in fact in failing to address relevant matters before striking out the names of the Respondent from the proceedings.
 4. The learned trial magistrate erred in law and in fact in failing to address all the relevant issues and removing the name of a proper and necessary party to the proceedings.
 5. The learned trial magistrate erred in law and in fact in failing on extraneous matters.
 6. The finding of the learned trial magistrate erred in law and in fact in disregarding the weight of available evidence.
 7. The findings of the learned trial magistrate was against the weight of the evidence.

The Appellant's submissions:

7. The Appellant filed written submissions dated 8th April 2024. It was his case that the 1st Respondent made a request to the Base Commander through the letter dated 7th March 2022 to have his name removed from the Police Abstract but there was no response. He further contended that in the Replying Affidavit sworn on 27th February 2023, the Appellant deposed that the suit was filed based on information from the police. The Appellant submitted that there was no information from the Police confirming that the 1st Respondent's names were erroneously entered in the abstract.
8. In buttressing the claim that the trial Court failed to rightly address issue of ownership, the Appellant drew support from the case of *The estate of Josephat Mburu Gitau (Deceased) -vs- Jackton Ayieko Aruko & Another*, Civil Appeal No. 223 of 2016, where the Court observed that the police Abstract proved ownership of vehicle. On the claim that the Court considered extraneous matters, the Appellant submitted that the learned trial Magistrate ought to have considered the statement filed, the Police Abstract and the letter written by the Respondent to the Police. He submitted that since the Respondent alleged that he was wrongly sued, he bore the burden to discharge that claim. The decision in *Christine Kalama -vs- Jane Wanja Njeru & Another* (2021) eKLR was relied upon where the Court cited the decision in *Bristone PTE LTD -vs- Smith & Associates Far East LTD* (2007) 4 SLR 855 where it was observed: -

.... The court's decision in every case will depend on whether the party concerned had satisfied the particular burden and standard of proof imposed on him.



9. In conclusion, the Appellant submitted that the learned trial Magistrate jumped into conclusion without considering matters arising and according parties the opportunity to testify. He claimed that there was violation of the Appellant's right to fair hearing.

The 1st Respondent's case:

10. The 1st Respondent filed written submissions in opposition to the appeal. He mainly posited that he was not in any way involved in the accident in issue and that even the documents confirming the registration of the vehicle in issue do not bear his name, but the other Respondents, therefore, he was wrongly sued.
11. He prayed that the appeal be dismissed with costs.

Analysis:

12. Having carefully considered the Memorandum of Appeal, the parties' submissions, the various decisions referred to therein and the lower Court record, the only issue that renders itself for determination is whether the learned trial Magistrate properly directed herself in striking out the 1st Respondent herein from the suit.
13. This Court's role, as a first appellate Court, is well established. The Court of Appeal in the case of *Susan Munyi -vs- Keshar Shiani* [2013] eKLR observed thus;

.... As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.
14. In the application dated 7th January 2023 which resulted to the impugned ruling, the Respondent herein in urging the Court to strike him out from the suit asserted that he was neither the registered, beneficial, possessory, legal or insured owner of the vehicle that allegedly caused the accident. The 1st Respondent annexed a vehicle search he conducted on 15th December 2022 at the National Transport and Safety Authority which indicated that the subject vehicle, KCT 801S, had SAS Africa General Trading Company Limited registered as its previous owner and Equity Bank (Kenya) and Multiply Enterprises Limited as the current owner.
15. Further, by a letter dated 7th March 2022, the Respondent wrote to the Base Commander, Kitale Traffic, imploring him that the suit linking him to the accident as the owner of the motor vehicle was erroneous. He thus urged the said Base Commander to correct the entry of his name in the Police Abstract. The letter was indeed received on 11th March 2022 by the Base Commander.
16. In the Replying Affidavit deposed to on 27th February 2023, the Applicants challenged the bid by deposing that there was no response from the Police in respect to the details captured in the Police Abstract in respect to the accident. It further was his case that 1st Respondent herein never issued rejoinder to the demand letter and that his insurers acknowledged receipt and even proposed a compromise.
17. The law on parties to a suit is codified in Order 1 of the Civil Procedure Rules. Rule 1 thereof states as follows: -
 1. Who may be joined as plaintiffs [Order 1, rule 1]



All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

18. As to who may be joined as Defendants, Order 1 Rule 3 provides as follows: -

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

19. A Court is empowered to strike out a party improperly joined to a suit by virtue of Order 3 Rule 10 of the Civil Procedure Rules which states thus;

10. Substitution and addition of parties [Order 1, rule 10]

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

20. The Court of Appeal in *JMK -vs- MWM & Another* [2015] eKLR remarked on the foregoing provision in the following manner: -

Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

... The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.

21. The decision in *Werrot & Company Ltd & Others -vs- Andrew Douglas Gregory & Others* [1998] eKLR spoke to the foregoing provision as follows: -

For determining the question of who is a necessary party there are two tests;

- i. There must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and
- ii. It should not be possible to pass an effective decree in the absence of such a party.



22. In *Pizza Harvest Limited -vs- Felix Midigo*, [2013] eKLR the Court referred to the decision of Devlin J. in the case of *Amon -vs- Raphael Tuck & Sons Ltd*, (1956) 1 All ER 273, where a necessary party was expounded in the following terms: -

.... What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose.

The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.

23. From an appreciation of the law as espoused above, it goes beyond any peradventure that the issue as to whether a party ought to be substituted, added or struck out of civil proceedings is an issue of fact. As such, evidence must be availed to that end. In this case, the 1st Respondent having already been enjoined as a Defendant in the suit and in his quest to be struck out, he then bore the burden of proving that his presence in the suit was not necessary in determining the outstanding issues.
24. One of the issues in the suit was definitely the ownership of the subject vehicle. On one hand, the 1st Respondent's name was entered into the Police Abstract issued by the police as the owner of the vehicle. On the other hand, the 1st Respondent relied on a motor vehicle search from the National Transport and Safety Authority to exclude himself from the suit. The trial Court agreed with the 1st Respondent.
25. Courts have interpreted the concept of ownership to include various facets thereof. It can, therefore, be easily gleaned and respectfully so, that the Learned Magistrate did not take into account the fact that the issue of ownership is such a broad legal terminology and instead it ended up taking a rather narrow view thereto. The Court also failed to appreciate that since there was conflicting evidence on whether the 1st Respondent was the owner of the vehicle, such could only be safely settled in a hearing.
26. Deriving from the above discussion, this Court finds and hold that the decision to absolve the 1st Respondent from the suit was not only premature but also erroneous.

Disposition:

27. The appeal is, therefore, successful. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
28. In the end, the following final orders hereby issue: -
- a. The appeal is hereby allowed. The ruling dated 27th June 2023 is hereby set-aside and the Notice of Motion dated 7th January 2022 is hereby dismissed with costs.



- b. The 1st Respondent shall bear the costs of this appeal assessed at Kshs. 50,000/= [Fifty Thousand Only] which amount shall be paid before the 1st Respondent is allowed to participate in the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wanyonyi, Learned Counsel for the Appellant.

Miss. Masinde, Learned Counsel for the Respondent.

Amina – Court Assistant.

