



REPUBLIC OF KENYA



Mark Holdings Limited v Mutua aka Dennis Mutua Mumo aka Dennis Mutua Kakuthu & 3 others (Civil Appeal E1231 of 2023) [2025] KEHC 9247 (KLR) (Civ) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9247 (KLR)

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

CIVIL

CIVIL APPEAL E1231 OF 2023

WM MUSYOKA, J

JUNE 30, 2025

BETWEEN

MARK HOLDINGS LIMITED APPELLANT

AND

**MUMBO MUTUA AKA DENNIS MUTUA MUMO AKA DENNIS MUTUA
KAKUTHU 1ST RESPONDENT**

JAMES KIMATHI 2ND RESPONDENT

AUTO INDUSTRIES LIMITED 3RD RESPONDENT

CHARLES NZAU MWENDWA 4TH RESPONDENT

(Appeal from judgement and decree delivered and passed on 19th October 2023, in Milimani CMCCC No. E5447 of 2020, by Hon. Irene N. Ruguru, Senior Principal Magistrate, SPM)

JUDGMENT

1. The suit, at the primary court, was by the 1st respondent, against the 2nd and 3rd respondents. It was with respect to compensation for loss and injury, arising from a motor traffic accident, on 30th April 2020, along Likoni Road, Nairobi. The 1st respondent was a pedestrian along that road, when he was hit and injured by a motorcycle registration mark and number KMEC 430N, allegedly controlled and owned by the defendants in the suit. He attributed negligence on them.
2. The 3rd respondent, Auto Industries Limited, entered appearance, and filed a defence. It denied liability, on the basis that it had sold the accident motorcycle to Mark Holdings Limited, the appellant herein, who had control of the said motorcycle, as at the date of the accident. The 3rd respondent subsequently had the appellant added as a third party to the suit. The said third party filed a



- defence, stating that it had sold the motorcycle to Nzau Charles Mwendwa, and took out third party proceedings against the said Nzau Charles Mwendwa, and an order joining Nzau Charles Mwendwa was made. The said Nzau Charles Mwendwa never entered appearance nor filed defence. The appellant became the 1st third party and Nzau Charles Mwendwa the 2nd third party.
3. A hearing happened. All the parties, save the 2nd third party, presented witnesses. Judgement was delivered, on 19th October 2023, against the 2nd respondent and the 1st third party. Liability was assessed at 100%, general damages at Kshs. 750,000.00, with special damages of Kshs. 7,450.00, plus costs and interests.
 4. Aggrieved, the appellant, the 1st third party at trial, brought the appeal against the 1st respondent, the plaintiff at the trial; the 2nd respondent, the 1st defendant at trial; the 3rd respondent being the 2nd defendant at trial; and the 4th respondent being the 2nd third party at trial. The grounds, in the memorandum of appeal, dated 14th November 2023, are that the totality of the evidence and submissions were not considered; the principles relating to determination of third party claims were not appreciated and applied; the case was not established against the 3rd respondent, and the entire suit should have been dismissed; failing to dismiss the case after the 1st respondent failed to establish the nexus between the 2nd respondent and the appellant for purposes of establishing vicarious liability; evidence on transfer of ownership of motor vehicle not considered; the appellant not being a registered or insured owner of the subject motorcycle; not finding the 4th respondent liable as beneficial owner; and the decision not being supported by the law, substance, court record and the evidence.
 5. Directions were given, on 23rd May 2024, 10th June 2024, 21st June 2024 and 1st July 2024, for canvassing of the appeal by way of written submissions. I have seen written submissions by the appellant and the 1st respondent.
 6. The appellant submits on three issues; entering judgement in favour of the 1st respondent as against the appellant, when there was no direct claim by the 1st respondent against the appellant, contrary to the principles of third party claims; failing to dismiss the suit against the appellant, when the 1st respondent had failed to establish the nexus between the 2nd respondent and the appellant herein for purposes of establishing vicarious liability; and failing to consider, appreciate and take into account the evidence adduced to demonstrate transfer of ownership.
 7. On the first issue, it is submitted that the suit was between the 1st, 2nd and 3rd respondents, as the appellant was not a defendant in the plaint, and, as such, the plaint did not raise any cause of action against the appellant. It is argued that the 1st respondent blamed the 2nd and 3rd respondents for the accident, according to the evidence adduced. The appellant submits that it was a third party in the matter, on the basis that it had bought the accident motor vehicle from the 3rd respondent. It is submitted that the liability borne by a third party is for indemnity and contribution. Order 1 rule 15 of the Civil Procedure Rules is cited in support. It is submitted that the third party could only be called upon to contribute or indemnify; and *City Hoppa Limited vs. Harrison Kamau Karabi & 2 Others* [2021] eKLR [2021] KEHC 13201 (KLR) (Jaden, J) and *Sammy Ngigi Mwaura vs. John Mbugua Kagai & Another* [2006] eKLR [2006] KECA 377 (KLR) (Omolo, Onyango-Otieno & Deverell, JJA) are cited.
 8. On the second issue, it is submitted that the evidence tendered by the 1st respondent related to the 2nd and 3rd respondents, and the allegations of negligence were against them, but as against the appellant, no evidence was led, by either the 1st respondent or the 3rd respondent, particularly on vicarious liability. *John Nderi Wamugi vs. Ruhesh Okumu Otiangala & 2 others* [2015] eKLR (Maraga, Musinga &



- Gatembu, JJA) and Anyanzwa vs. Gasperis [1981] KLR 10 (Law, Miller & Potter, JJA) are cited in support, with respect to vicarious liability.
9. On the third issue, section 20 of the *Sale of Goods Act*, Cap 31, Laws of Kenya, is cited for the submission that the accident motorcycle had effectively been sold to the 4th respondent, based on the evidence, by way of a sale agreement, invoice and ETR receipts. It is submitted that the trial court misinterpreted the alteration on the sale agreement, and argued that only the 4th respondent could legitimately challenge the validity of the sale agreement.
 10. The respondent has argued three points. The first is that the accident was not disputed by the appellant, neither was the sale between the appellant and the 3rd respondent, with respect to the accident vehicle. It is argued that the 3rd respondent never submitted that ownership of the accident motorcycle passed to the 4th respondent. It is submitted that it was the appellant who failed to prove that he had sold the motorcycle to the 4th respondent. It is further submitted that no third-party directions were taken at the trial. It is argued that the trial court resolved the issue of liability between the 1st respondent and the 3rd respondent, as well as between the 3rd respondent and the appellant, or any or either of them. *Bhundia Properties Ltd vs. East African Airways Corporation* [1976] eKLR [1976] KEHC 23 (KLR) (Madan, J) is relied on. There is also submission on the appellant raising issues on appeal that did not arise before the trial court.
 11. The second issue is around the appellant misapprehending or disputing the law on vicarious and tortious liability. It is conceded that the 3rd respondent's claim, against the appellant, was based on indemnity, and the cause of action, in the third-party proceedings, was not directly related to the main cause of action relating to the claim by the 1st respondent against the 2nd and 3rd respondents. It is submitted that the appellant was joined as third party, for the purpose of indemnifying the 3rd respondent, since the appellant was a purchaser of the suit motorcycle from the 3rd respondent, as at the time of the accident. It is argued that the issue of vicarious liability did not arise. It is submitted that there was a nexus between the appellant and the 2nd respondent. *Birmingham and District Land Company vs. London and North Western Railway Company* [1887] 34 Ch. 261 is cited. It is submitted that the 3rd respondent was entitled to be indemnified by the appellant. On vicarious liability, *Vyas Industries vs. Diocese of Meru* [1976] eKLR [1976] KECA 18 (KLR) (Law VP, Mustafa & Musoke, JJA) and *Hewitt vs. Borwin* [1940] KB 188 are cited.
 12. The third issue is on whether the appellant had established that it had sold the motorcycle to the 4th respondent. The reasons given by the trial court, for finding that the sale was not proved, are highlighted, and *James Ngugi vs. Patrick Kungu* [2019] eKLR [2019] KEHC 548 (KLR) (Mwita, J) is cited.
 13. The principal issue, in this appeal, is on the nature of third-party proceedings. It has nothing to do with whether or not the accident in question was proved, nor whether there was a valid sale transaction between the appellant and the 3rd respondent. The issue, as to whether there was a valid sale between the appellant and the 4th respondent, is secondary.
 14. The factual background is that the 1st respondent was knocked down by a motorcycle. The police records only disclosed the name of the rider, 2nd respondent herein, and not the owner. So, the 1st respondent conducted a search on the ownership of the motorcycle, at the relevant registry, which yielded the name of the 3rd respondent as owner. He then sued the 2nd and 3rd respondents. The 2nd respondent responded to the suit, the 1st respondent did not. The 2nd respondent denied owning the accident motorcycle, and alleged that he had sold it to another party, the appellant, who it successfully



- joined to the proceedings as a third party. The appellant in turn claimed it had also sold the vehicle to another party, the 4th respondent herein, who it joined to the proceedings as another third party.
15. After hearing the appellant, the 1st and 3rd respondents, the court ruled that an accident had happened, occasioned by the negligence of the rider of the motorcycle, the 2nd respondent herein. On ownership of the motorcycle, the trial court found that it initially belonged to the 3rd respondent, who subsequently sold it to the appellant. The court was unable to find that the appellant had in turn sold the accident motorcycle to the 4th respondent, for reasons set out in the judgement. As there was a valid sale transaction between the 3rd respondent and the appellant, the court found ownership had validly passed, from the 3rd respondent to the appellant, and, as at the time of the accident, the person vicariously liable, for the acts or conduct of the 2nd respondent, was the appellant, as owner of the accident vehicle at the material time. Based on that, the trial court dismissed the case against the 3rd respondent, on both quantum and liability, and found against the appellant instead.
 16. The principal argument, by the appellant, is that upon the trial court dismissing the claim by the 1st respondent, there was no foundation, thereafter, for it to be found liable as a third party. The argument, as I understand it, is that the third party is brought into the suit by the defendant, and not the plaintiff, for the purpose of the third party indemnifying the defendant, should a decree be passed against the defendant, or contributing to that decree. Should a decree be not passed against the defendant, the issue of indemnity or contribution would not arise.
 17. Proceedings, where a third party has been joined or added, are unique. It is a fusion of two or more proceedings in one. There are proceedings between the plaintiff and the defendant, and the proceedings between the defendant and the third party or third parties, with the possibility of proceedings between the third parties themselves. The plaintiff claims against the defendant, but not against the third party. The third-party proceedings are, really, a case between the defendant and the third party. The logic is that the decree, obtained against the defendant, ought to be settled by the third party, either wholly, by way indemnity, or partially, by contribution. The plaintiff establishes a case against the defendant, while the defendant establishes that that case ought to be met by the third party. The case against the third party is not independent of that against the defendant. The third party is liable only in circumstances where a case is established against the defendant. Where the case against the defendant collapses, then the third-party proceedings ought to collapse with it, given that the third party is brought into the suit for the purpose of settling the decree against the defendant, either by contribution or indemnity. Where no decree is pronounced against the defendant, there would be nothing for the third party to contribute to, or to indemnify the defendant for. The plaintiff does not claim against the third party, and no decree can be passed, in favour of the plaintiff, against the third party, for the two have no suit between them.
 18. The judgment by the trial court represents a misapprehension of the concept of third-party proceedings. The trial court dismissed the case against the 2nd defendant, the 3rd respondent herein, who had brought the third-party proceedings against the appellant herein and then proceeded to find in favour of the plaintiff, the 1st respondent herein, against the appellant.
 19. As discussed above, there were two levels of proceedings. There was the claim by the plaintiff against the defendant, that is the 1st respondent herein against the 3rd respondent herein; and the other level of proceedings are the two third party proceedings. The first third party proceedings are by the 2nd defendant, the 3rd respondent herein, against the 1st respondent, the appellant. The second third party proceedings is the claim by the appellant, as 1st third party, against the 2nd third party. The trial court should have resolved the dispute at the first level first, before moving to the second level. It should be resolved whether there was liability as between the 1st respondent, as plaintiff, and the 3rd respondent,



as 2nd defendant. A resolution against the 3rd respondent would have meant that there was a case to be determined between the 3rd respondent and the appellant, at the first instance, and the appellant and the 4th respondent, at the next instance. A determination in favour of the 3rd respondent, by way of dismissal of the claim by the 1st respondent, would have meant that there would be no case to be met by the third parties, the appellant and the 4th respondent herein.

20. Third party proceedings should not be confused with a counter claim. A counter claim is a claim raised by a defendant, in addition to the defence, against the plaintiff. A counter claim is a suit on its own. It is independent of the claim in the plaint. Should the case, presented by way of plaint, collapse, that would not affect the counter claim, which the defendant should be able to prosecute against the plaintiff, and in respect of which the defendant can obtain an executable decree against the plaintiff, despite the suit by plaint having been dismissed.
21. It is not so with third party proceedings. They have no life of their own. They are not independent of the suit by the plaintiff. Indeed, there is no nexus between the plaintiff and the third party, for the plaintiff claims nothing against the third party. Should the claim by the plaintiff fail; the third-party proceedings would die a natural death. The lifeline of the third-party proceedings is the successful prosecution of the plaint. The life of the third-party proceedings is dependent on the outcome of the suit by plaint.
22. The trial court dismissed the main suit between the plaintiff and the 2nd defendant, the 1st respondent and 3rd respondent herein, respectively, after which the court proceeded to determine liability between the plaintiff and the 1st third party, the 1st respondent and the appellant herein, respectively. That was a misconception. There was no suit to be determined between the plaintiff and the third party. The plaintiff had no claim to be determined against the third party. The claim against the third party was by the 2nd defendant. That claim could only hold upon the court finding against the defendant; so that the decree in favour of defendant would be available for contribution or indemnity by the third party. The case against the 2nd defendant was dismissed. There was no decree, therefore, to which the appellant could be called upon to contribute or indemnify the 3rd respondent for.
23. One may ask, what about the 1st defendant, the 2nd respondent herein? The case by the plaintiff, the 1st respondent herein, against the 2nd respondent, was allowed. The 2nd respondent did not defend the suit. However, there was no relationship between the appellant and the 2nd respondent. The third-party proceedings were brought by the 3rd respondent. It was the 3rd respondent that was seeking contribution and indemnity from the appellant. The 2nd respondent was not seeking any contribution or indemnity from the appellant. The 2nd respondent had no claim against the appellant. The appellant could not, in the circumstances, be called upon to contribute to the decree obtained against the 2nd respondent, or to indemnify the 2nd respondent with respect to it. I reiterate, that there was no nexus between the appellant and the 2nd respondent, to the extent that the 2nd respondent had not initiated any third-party proceedings against the appellant, and, therefore, the issue of contribution or indemnity could not arise as between the two of them.
24. I further reiterate that contribution and indemnity will only arise where a decree is pronounced in favour of a plaintiff and against a defendant, where third parties have been added or joined to the suit. Contribution usually arises where liability has to be resolved between a defendant and a third party, where liability is caused by both of them. Indemnity would be the case where the defendant settles the decree fully and looks up to the third party to indemnify it to the extent of their contribution. In a judgement, in favour of a plaintiff and against a defendant, where there are third party proceedings, the court should, after passing the decree, order the third party to contribute to the decree, up to the



- degree of contribution assessed, or to indemnify the defendant, should the defendant choose to settle the decree in full, to the extent of the assessed contribution.
25. The trial court got it wrong. Once the case against the 3rd respondent was determined, the third-party proceedings ought to have also been dismissed, leaving the 2nd respondent to bear the burden of the decree alone. Liability could only attach on the appellant, through a decree being passed against the 3rd respondent, which was not the case here, and which did not happen.
 26. A third party is not at the same level with a defendant. A third party would stand on the same ground with a defendant where a suit is brought against it by the plaintiff, where prayers are sought against it by the plaintiff. The 1st respondent did not sue the appellant, and, therefore, the appellant was not a defendant. No orders could be obtained by the 1st respondent against the appellant. The appellant was brought into the suit by the 3rd respondent, not as a defendant, but a third party. Joinder did not make the appellant answerable to the claims in the plaint, or to the plaintiff. Orders were sought against the appellant, by the 3rd respondent, not by the 1st respondent. No orders could be made in favour of the 1st respondent against the appellant, as the appellant was not a defendant in the suit filed by the 1st respondent.
 27. The parties argued about vicarious liability. Vicarious liability is, of course, relevant, for the purposes of the matter that was before the trial court. However, it is not at the core or heart of the dispute on appeal. The 2nd respondent was the rider of the accident motorcycle. It was obvious, from the proceedings, that he was not the owner of the motorcycle. Ownership of that motorcycle was attributed to the appellant, the 3rd respondent and the 4th respondent. The 3rd respondent appears to have been the initial owner. It was not disputed that he sold the motorcycle to the appellant. The appellant claimed that it in turn sold the motorcycle to the 4th respondent. The issue of vicarious liability would arise as between the rider, the 2nd respondent herein, and whoever was the owner of the motorcycle at the material time of the accident, that is as between the appellant, the 3rd respondent and the 4th respondent. The issue of vicarious liability is not critical at this appeal. The appeal is largely on whether the appellant could be held liable, following the dismissal of the case against the 3rd respondent. Since my conclusion is that the appellant could not be held liable, in the circumstances of the case, meant that the issue of vicarious liability becomes irrelevant. In any event, nor evidence emerged, establishing that the 2nd respondent was an employee, or servant, or agent of the appellant.
 28. The issue as to whether the trial court erred in dismissing the appellant's case against the 4th respondent is also rendered moot, by my conclusion that the third-party proceedings lost their foundation, once the suit against the 3rd respondent, who prompted them in the first place, was dismissed. It would be academic for me to venture into examining whether or not the trial court was right or wrong with regard to the matter of the 4th respondent.
 29. I believe what I have discussed above demonstrates that the appeal herein is merited. I allow it, in terms that the finding, in Milimani CMCC No. E5447 of 2020, that the appellant was 100% liable for the accident, the subject of the suit, is hereby set aside, and substituted with an order dismissing the claim, in that cause, against the appellant. There shall be no order on costs.

DELIVERED, VIA EMAIL, DATED AND SIGNED, IN CHAMBERS, AT BUSIA ON THIS 30TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.



Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Miss Wairimu, instructed by H Kago & Company, Advocates for the appellant.

Mr. Kamwendwa, instructed by NM Kamwendwa & Company, Advocates for the 1st respondent.

