



**James Bichage Kenyariri v Mayega & another (Civil Appeal  
E003 of 2023) [2024] KEHC 4617 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4617 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E003 OF 2023**

**F GIKONYO, J  
APRIL 30, 2024**

**BETWEEN**

**JAMES BICHAGE KENYARIRI ..... APPELLANT**

**AND**

**VINCENT ONGEKA MAYEGA ..... 1<sup>ST</sup> RESPONDENT**

**JACKSON OMANGA RAGORI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon. D. Ngayo (R.M.)  
in Narok CMCC No. 102 of 2020 delivered on 05/04/2023)*

**JUDGMENT**

**Ruling under appeal**

1. This appeal was provoked by the ruling in the Resident Magistrate's Court at Narok in Civil Suit No. 102 of 2020 delivered on 05/04/2023 in which the trial court declined to strike out the name of then appellant from the suit.
2. His memorandum of appeal dated 17/04/2023, cited the following 9 grounds of appeal;
  - i. That the learned magistrate erred in law and fact by misdirecting himself on the provision of order 1 rule 10(2) and order 1 rule 9 of the Civil Procedure Rules.
  - ii. That the learned magistrate erred in law by failing to consider the grounds and the evidence in support of the appellant's application dated 28<sup>th</sup> September 2022 and in particular the repossession order by Norean Auctioneers annexed therewith.
  - iii. That the learned magistrate erred in law by failing to consider and to make a finding on the appellant's submissions in support of the application dated 28<sup>th</sup> September 2022.



- iv. That the learned magistrate erred, in fact, and law and further misdirected himself in failing to appreciate that at the material time of the accident giving rise to these proceedings, the subject motor vehicle was not in the custody, possession, and /or in control of the appellant/or agents/ or driver but equity bank and therefore liability could not attach to the appellant in any manner whatsoever or at all thus the suit against him ought to have been struck out.
  - v. That the learned magistrate erred in fact and law and further misdirected himself by completely disregarding the appellant's submissions on record filed more particularly that when the vehicle was repossessed by Norean auctioneers, it was immediately; removed from transline classic ltd Sacco.
  - vi. That the learned magistrate erred in law and further misdirected himself in disregarding the numerous provisions of law cited by the applicant and thereby basing the ruling on erroneous principles.
  - vii. That the learned magistrate erred in law and fact and misdirected himself by disregarding a very vital point of the police abstract which on the face of it is very clear that the owner of the motor vehicle as per the police records is John Kenyarii and not James Bichange.
  - viii. That the learned magistrate in his ruling didn't consider his submissions dated 13<sup>th</sup> March 2023 which he clearly deposed two police abstracts from the plaintiff which the court has assumed to be correct. The abstract are having different information which was marked but the learned magistrate ignored.
  - ix. That the learned magistrate erred in law and fact by not considering that the motor vehicle was removed from the Sacco of transline classic limited by NTSA when it was reposed by the bank and that one is indicated in his submissions.
3. In the end, the appellant urged this court to allow the appeal, vary, and or set aside the order refusing to strike out the name of the appellant.

### **Brief facts**

4. The 1<sup>st</sup> respondent seeks in the plaint dated 10/08/2020 for general damages and special damages for injuries sustained in a road traffic accident which occurred on 18/03/2020 along Narok- Bomet road.
5. The said accident is alleged to have been caused by the negligence of the driver of motor vehicle registration number KCB 154P Scania bus sued as the 2<sup>nd</sup> defendant and now the 2<sup>nd</sup> respondent herein.
6. The appellant was sued on the basis of vicarious liability for eth negligence of the 2<sup>nd</sup> respondent who was his authorized driver, servant, agent, and /or employee at the time of the accident.
7. The appellant filed an application dated 28/09/2022 seeking to be struck out from the suit. The appellant argued that he had been improperly joined to the suit. He argued that he was jointly registered owner of motor vehicle registration no. KCB 154P Scania bus together with Equity Bank, but the vehicle had been repossessed at the time of the accident herein.
8. The said application was opposed by the 1<sup>st</sup> respondent vide replying affidavit dated 14/10/2022.the 1<sup>st</sup> respondent deponed that the copy of motor vehicle records from NTSA and the police abstract issued to him indicate the appellant as the owner of the subject motor vehicle. He further contended that the issue of ownership and liability can only be determined if the suit is set down for hearing.



## **Appellant's Submissions**

9. The appellant submitted that he was wrongly sued as there was no basis for retaining his name in the suit since he was not liable in any manner. The appellant relied on order 1 rule 10(2) of the Civil Procedure Rules, Securicor(K) Ltd Vs Kyumba Holdings (Ltd) [2005] eKLR, and Ramadhani Ali Ruwa Vs Private Safaris EA Ltd CMCC 191/2012, Investment And Mortgages Bank Limited Vs Nanacy Thumari & 3 Others [2005] eKLR, certificate of incorporation of Transline Classic Ltd, a letter from Transline classic ltd to NTSA on page 64 of the record of appeal, different police abstract in page 62 and 63 of the record of appeal and notification of sale Noream auctioneers on page 28 of the record of appeal.
10. The appellant in his supplementary submissions submitted that 1<sup>st</sup> respondent should seek leave of the court to amend the plaint to include Equity Bank Limited which repossessed the motor vehicle owing to hire purchase agreement terms. Further, the 1<sup>st</sup> respondent has not given any explanation as to the repossession which was done on 12/02/2019 by Norem auctioneers on instructions from Equity Bank Limited. The appellant has relied on order 8 rule 3(3), 5, and 8 of the civil procedure rules and article 59 of the constitution.
11. The appellant urged this court to hold that the abstract is not an actual copy of the police report and is not a guarantee of the accuracy of the names and addresses tendered by the parties and witnesses. further that a logbook or certificate of search is not conclusive proof of ownership and though such a document may purport to show the registered owner, it may not be conclusive proof of actual ownership of a motor vehicle. the appellant relied on section 8 of the Traffic Act, the cases of Samwel Mukunya Kamunge Vs John Mwangi Kamuru Civil Application No. 34 of 2002, Wellington Nganga Muthiora Vs Akamba Public Road Services Ltd & Another [2010] eKLR, Ibrahim Wandera Vs P N Mashru Civil Appeal No. 333 of 2003, Jotham Mugalo Vs Telkom(K) Ltd, Kisumu HCC NO. 166 of 2001.

## **The 1<sup>st</sup> Respondent's Submissions**

12. The 1<sup>st</sup> respondent submitted that the appellant was not wrongly enjoined to the suit and striking him from the suit would be detrimental to the 1<sup>st</sup> respondent. To determine the real issue of ownership the case ought to go for full trial and not to be determined at interlocutory stage. The 1<sup>st</sup> respondent relied on the cases of D.T. Dobie & Company (Kenya) Limited V Joseph Mbaria Muchina & Another [1980] eKLR, Victor Mabachi & Another V Nurtun Bates Limited [2013] eKLR, and Kidbrooke Investment Limited V Isaac Mwangi & 2 Others [2019] eKLR.
13. The 1<sup>st</sup> respondent submitted that the copy of records is not the only document that can be used to prove ownership since the respondent also attached the police abstract as part of his evidence. Ownership can only be proven if the case proceeds to a full hearing and the investigating officer appears before the court to testify and corroborate the said evidence. The appellant is trying to prosecute this suit through the application dated 28/09/2022 when he would have enjoined Equity Bank Kenya Limited and Noream auctioneers as third parties as enshrined in order 1 rule 15 of the civil procedure rules, 2010. The 1<sup>st</sup> respondent has relied on the cases of Simon Omukubi Sakwa V Gerald W Kibogo [2021] Eklr, Benard Muia Kilovoo V Kenya Fresh Produce Exporters [2020] Eklr, And Anthony Njirwa & Another V Martha Ngonyo Waithaka [2018] Eklr.
14. The 1<sup>st</sup> respondent submitted that the appellant has introduced new facts to the case vide a new document marked as JBK-1 which has been attached and they are strangers to it hence should be expunged from the record.



### **The 2<sup>nd</sup> respondent's submissions.**

15. The 2<sup>nd</sup> respondent did not file any written submissions.

### **Directions of the court**

16. The appeal was canvassed by way of written submissions. The appellant and the 1<sup>st</sup> respondent have filed. The 2<sup>nd</sup> respondent has not filed.

### **Analysis and Determination**

#### **Duty of court**

17. This is an interlocutory appeal. Nevertheless, a first appeal, and this court will evaluate evidence relative to the application in question. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
18. This court has considered the record of appeal, as well as the respective submissions of the appellant, and 1<sup>st</sup> respondent.

#### **Issues**

19. The issue in controversy is: -  

Whether the trial court erred in declining to strike out the name of the appellant from the suit-effectively, sustaining the suit against the appellant.
20. In essence, the appellant is saying that he ought not to be a party in the suit before the trial court, thus, is improperly joined in the suit. He also makes another argument on non-joinder of relevant party-Equity Bank. His claim is, therefore, a twinning of misjoinder, and non-joinder of parties. The 1<sup>st</sup> respondent added another element in the mix; that the appellant ought to have joined Equity Bank and Noream Auctioneers as third parties, thereby giving the court an opportunity to resolve the question of ownership of the motor vehicle as well liability between the parties and completely.
21. The foundational logic of joinder, non-joinder and misjoinder of parties in order 1 of the Civil Procedure Rules, is two-fold: i) to ensure that. only necessary parties are before the court ‘...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’ (Order 1 rule 10(2) of the CPR); ii) to avoid multiplicity of suits.
22. In the language of the civil procedure rule, ‘No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it’ (Order 1 rule 9 of the CPR), ascribes to the philosophy that, the failure to join a necessary party or misjoinder of a party in a suit, is a directory omission or commission, respectively.
23. The general rule on joinder of parties is that, all necessary parties should be joined in a suit where feasible. Thus, those, ‘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’. But, those, whose interests in the subject matter of the controversy are separable, and whose absence would not prevent the granting of the proper relief to the parties actually joined; should be made



parties, if their joinder is feasible, to avoid a multiplicity of actions and to effect a complete adjudication of the controversy<sup>1</sup>.

### **Misjoinder and addition of parties**

24. 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.
25. It is not in dispute that the Motor Vehicle in question was registered in the joint names of the Appellant and Equity Bank. Except, the appellant claims that, at the time of the accident, the said vehicle had already been repossessed by the auctioneers on instructions by Equity Bank. The appellant proposes that the 1<sup>st</sup> respondent ought to apply for joinder of Equity Bank in the suit. The 1<sup>st</sup> respondent takes the view that, the appellant should have joined Equity and the auctioneers as third parties.
26. Without making any determination on any real issues in or may become in controversy in the suit, arguments of joinder of Equity Bank as a party in these kinds of proceedings will have to contend with court pronouncements on the position of, and registration of a financier as a joint owner of the chattel as a way of securing their financial interest, which will become matters of great significance. See *Ali Abdi Dere v Hash Hauliers Limited & Another* MKS HCCC No. 16 of 2014 [2018] eKLR where the court held that the position of a financier was merely to protect its interest in the motor vehicle it had financed and could not be held vicariously liable for the actions of its driver. See also *Justus Kavisi Kilonzo v Coast Broadway Company Limited* MSA HCCC No. 169 of 2007 [2008] eKLR that a financier who had been registered as a co-owner of a motor vehicle did not mean that it was a necessary party to proceedings. And, similarly, the position taken by the Court of Appeal in *Mohammed Hassan Musa and Another v Peter Mailanyi and Another* NYR CA Civil Appeal No. 243 of 1998 [2000] eKLR where it stated as follows:

There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realise the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd, which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached.
27. Be that as it may, after due consideration of the application, the learned magistrate took the view that it was necessary to hear the matter to determine the issues of ownership and liability which the appellant raised in his application as a basis for his request to have his name struck out of the suit.
28. It is this court's finding that, the presence of the appellant in the proceedings necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The trial court did not err in its finding or exercise of discretion in that respect. See *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* [1985] EA and *Mbogo v Shah* [1968] EA 93).
29. Issues on ownership (or repossession) of the motor vehicle involved in, as well as liability-vicarious or otherwise- for the accident, are live and the main issues in controversy in the suit herein. The issues

<sup>1</sup> 1 Henry G. McMahon, *The Joinder of Parties in Louisiana*, Louisiana Law Review, Volume 1/Number 1, Legislative Symposium: The 1958 Regular Session, December 1958



should be determined in the trial and not through an interlocutory application as proposed by the appellant. Joinder or non-joinder or otherwise of Equity Bank in the trial should also be dealt with in the trial, if at all the question is properly laid before the trial court,

30. Given the view taken of the substance of the appeal, other than the pronouncement that the presence of the appellant is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, the court has deliberately avoided to make any distinctive determination on ownership or repossession of the vehicle as well as liability amongst the parties for the accident herein, as those issues constitute the core business of the trial court. Suit remitted for trial,
31. In the upshot, the appeal is hereby dismissed with costs to the 1<sup>st</sup> respondent.
32. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

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**HON. F. GIKONYO M.**

**JUDGE**

In the presence of: -

The Appellant

Ms. Mutengo holding brief for Keboyo for Respondent

Mr. Otolu - C/A

