



**Muchiri v Mega Importers Company Limited & another (Civil Appeal  
E090 of 2022) [2024] KEHC 10497 (KLR) (Civ) (29 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10497 (KLR)

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

**CIVIL**

**CIVIL APPEAL E090 OF 2022**

**H NAMISI, J**

**AUGUST 29, 2024**

**BETWEEN**

**MOSES GITHAIGA MUCHIRI ..... APPELLANT**

**AND**

**MEGA IMPORTERS COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE MWANIKI KARIUKI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgement of Hon. V. N. Mochache (RM), in  
Nairobi Small Claims SCCC No. E231 of 2021 delivered on 9th February 2022)*

**JUDGMENT**

**Introduction**

1. This appeal arises from a suit in the Small Claims Court for loss or damage to the 1st Respondent's motor vehicle registration number KBC 560G amounting to Kshs 450,039/=. The said damage was as a result of a road traffic accident that occurred on 3rd August 2018 along Dunga Road, involving the 1st Respondent's motor vehicle and the 2nd Respondent's motor vehicle registration number KBG 192L. The claim was brought under the doctrine of subrogation, on behalf of the Claimant's insurer.
2. To support his claim, the 1st Respondent produced several documents, including Motor Vehicle Copy of Records as at 3 March 2021, showing the Appellant as the registered owner of motor vehicle registration number KBG 192L.
3. The 2nd Respondent herein (1st Respondent) entered appearance and filed a Response to the Statement of Claim dated 14th September 2021. The 2nd Respondent denied being the owner, beneficial or otherwise, of the motor vehicle KBG 192L. In his Witness Statement, an insurance agent working with Clareh Insurance Agency, stated that the insurance policy for the subject motor vehicle



was applied for though their offices by one George King Okemwa. The 2nd Respondent did not handle the transaction directly.

4. The Appellant herein (2nd Respondent) entered appearance and filed his Response to Statement of Claim dated 8th October 2021, in which he averred that the subject motor vehicle registration number KBG 192L was involved in an accident some time in 2013. Upon filing the claim with his insurer, the motor vehicle was written off and the Appellant duly paid. Thereafter, the motor vehicle was sold to Maurice Otieno Odembe, as per the records of the insurance company. To support his defence, the Appellant produced the Police Abstract dated 23 September 2013, Breakdown Payment Receipt dated 25 September 2013, Claim Form, Payment Voucher dated 28 February 2014 and Agreement for Sale of Salvage to Maurice Otieno Odembe dated 26 April 2014.
5. On 6th October 2021, the 1st Respondent filed a Notice of Withdrawal of Suit against the 2nd Respondent.
6. On 16th December 2021, the 1st Respondent and Appellant herein signed a consent that the hearing proceeds by way of documents only as provided in section 30 of the *Small Claims Court Act*. Each party then filed their respective submissions.
7. In its judgement dated 9th February 2022, the trial court found in favor of the 1st Respondent as against the Appellant and awarded a sum of Kshs 450,039/=, costs and interest at court rates from the date of filing the suit until payment in full. It was the trial court's finding that the Appellant had not produced any cogent evidence to show that the motor vehicle was sold and/or transferred to a third party. The court opined thus:

“If indeed the respondent wanted this court to believe that the motor vehicle had been sold, then I don't see the reason why he didn't apply to enjoin the insurance and/or the said third party to whom he claims the motor vehicle KBG 192 L was sold to shed light to this court on the ownership of the said motor vehicle. The copy of records from NTSA as at the time of the accident shows that the respondent was the registered owner of KBG 192 L and nothing precludes him from being such a registered owner.”

8. Aggrieved by this decision, the Appellant lodged this appeal on the following grounds:
  - i. That the Learned Magistrate erred in finding that the Appellant has failed to prove that he was not the owner of the Motor Vehicle KBG 192L at the time of the accident;
  - ii. That the Learned Magistrate erred in finding that the Appellant had failed to establish on a balance of probability that he no longer had possession of the motor vehicle registration KBG 192L;
  - iii. That the Learned Magistrate erred in failing to find that the person who had insured the motor vehicle registration KBG 192L at the time of the accident was the beneficial owner;
  - iv. That the Learned Magistrate erred in failing to adhere to stare decisis and failing to give reasons for the same;
  - v. That the Learned Magistrate erred in finding that only a sale agreement can prove that the appellant is no longer the owner of the motor vehicle registration KBG 192L;
  - vi. That the Learned Magistrate erred in law and fact in failing to consider the appellant's defence and the evidence on record;



- vii. That the Learned Magistrate erred in law in failing to find that the Respondent had failed to prove agency-servant relationship between the Appellant and the driver hence the Appellant cannot be held liable for the driver's negligence.
9. Parties canvassed the appeal by way of written submissions. The Appellant's submissions are dated 3rd June 2024 while the Respondent filed their submissions dated 19th June 2024.

### Analysis and Disposition

10. Section 38 of the *Small Claims Court Act* provides as follows:
1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
  2. An appeal from any decision or order referred to in sub section (1) shall be final.
11. In the case of *Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd* [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).”

12. Similarly, in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

13. The duty of this Court, in this instance, is similar to that stated herein above, which is essentially on points of law. In the case of *JN & 5 Others -vs- Board of Management, St. G School Nairobi & Another* [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

“In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant



legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

14. Turning to the grounds of appeal, the issue herein is whether or not the Appellant proved to the required standard that he was not the owner, registered or beneficial, of the motor vehicle KBG 192L at the time of the accident. In the alternative, that the 1st Respondent did not prove that there was an existing agent-servant relationship between the Appellant and the driver of the motor vehicle.
15. In his submissions, the Appellant relied on section 8 of the *Traffic Act*, as well as several cases, including *Jared Magwaro Bundi & anor -vs- Primarosa Flowers Ltd* [2018] eKLR and *Nancy Ayemba Ngana -vs- Abdi Ali* [2010] eKLR.
16. The Appellant submitted that this being a first appeal, the Court ought to re-evaluate and reconsider the evidence afresh and give its determination, with reasons for the same. In other words, a first appeal is by way of retrial. It would seem, however, that the Appellant is not alive to the provisions of Section 38 of the Act. This appeal, therefore, is limited to points of law.
17. The 1st Respondent, on their part, submitted that the Appellant failed to produce either a sale agreement or a transfer form to support his claim that he had transferred ownership of the motor vehicle prior to the accident. They relied on the case of *Jotham Mugalo -vs- Telkom (K) Ltd, Kisumu HCCC NO. 166 of 2001* (unreported) in which the trial judge held thus:

“Where the Appellant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the Respondent as required by section 106 and 107 of the *Evidence Act*. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence”
18. Turning to the law, it is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

107.

  - (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

107.

  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side
19. Section 8 of the *Traffic Act* provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. (emphasis mine). There are numerous decided cases, including Court of Appeal decisions, in which this provision has been held to be a rebuttable presumption. Where there exists other compelling evidence to prove otherwise, then the court can make a finding of ownership that is different from that contained in the log book.
20. Tying the two legal principles, in this instance the burden of proof lay on the 1st Respondent, who claimed that the motor vehicle KBG 192L was registered to the Appellant. The 1st Respondent



produced the copy of motor vehicle records from the National Transport and Safety Authority, showing the Appellant as the registered owner at the time of the accident, thus discharging the burden of proof and shifting the same to the Appellant.

21. On his part, the Appellant's defence was that the subject motor vehicle was involved in an accident in 2013, and subsequently written off by his insurer. The salvage was then sold off to a third party by the insurance company. The Appellant produced a Police Abstract of the said accident in 2013, a receipt for the towing charges of the motor vehicle, Claim Form, Payment Requisition Voucher as well as Sale of Salvage dated 26 May 2014. In short, the Appellant provided sufficient evidence to prove that he was neither the owner, nor in possession of the subject motor vehicle at the time of the accident, thus effectively discharging his burden of proof.

22. In *Securicor Kenya Ltd -vs- Kyumba Holdings Ltd* {2005} 1KLR 748 at p.750, the Court of Appeal observed as follows:

“It was apparent, therefore, that though the appellant remained the registered owner of the motor vehicle its actual possession had passed to a third party. In view of this finding, the trial judge cannot be right under section 8 of the *Traffic Act* when she states that the true owner of the motor vehicle was the appellant.”

23. The Appellant having discharged his burden of proof, the question then remains, who was the registered owner of the motor vehicle? Burden of proof is not stagnant and continues to shift depending on the success in discharging the same. Similar to a tennis match, the Appellant successfully returned the 1st Respondent's serve and the ball fell back in the 1st Respondent's court.

24. The Appellant relied on the case of *Nancy Ayemba Ngaira -vs- Abdi Ali* [2010] eKLR, in which the Court opined thus:

There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1<sup>st</sup> defendant was one of the owners of the matatu in question.

25. On its part, the 1st Respondent submitted that in any event, if indeed it is true that another party was the owner of the vehicle at the time of the accident, nothing would have stopped the Appellant from taking out third party notice as is required by law. Furthermore, nothing stops the Appellant from pursuing his former insurer for breach of the policy terms.

26. In the case of *Al Husnain Motors Ltd -vs- Rose Abondo* [2017] eKLR, the Court opined thus:

In my humble view, if indeed the appellant had already sold the suit motor vehicle to the third party as he wanted the court to believe, then it was incumbent upon it, as was held in the Nancy Ayemba Ngaira case (supra) to not only plead the fact of the said sale in



its defence, but also to enjoin the said Antony Okoth Onyango (the beneficial owner of KAR 358J) to this suit as a third party since there is no way the respondent would have known of the alleged change of ownership unless the appellant made the said disclosure. The appellant chose to introduce the issue of the alleged beneficial owner/purchaser of the suit motor vehicle during its evidence which, to my mind, was too late in the proceedings when both the pleadings and the respondent's case had already been closed. I find that the respondent proved that the appellant was the owner of the suit motor vehicle on a balance of probabilities and having failed to enjoin the alleged buyer of the said vehicle to the suit, the only remedy open to the appellant is to sue the third party in a separate suit for compensation should it deem it necessary.

27. One distinction I note between the Al Husnain Motors Ltd case (*supra*) and the instant case is that in this case, the Appellant not only pleaded that he was not the registered owner of the motor vehicle at the time of the accident, but went on to provide the name, telephone number and identity card number of the person to whom the salvage of the motor vehicle was sold. This information was available to the 1st Respondent from the very moment that the Appellant entered appearance and filed his Response to the Statement of Claim. The 1st Respondent, therefore, went to trial, with full knowledge that the despite the copy of records in his possession, the Appellant was not in possession nor control of the motor vehicle and had not been for several years. In the same way the 1st Respondent made a conscious decision to withdraw the suit as against the 2nd Respondent, nothing stopped him from pursuing the buyer of the salvage.
28. The Court of Appeal in the case of *Mubambi Hoja -vs- Said Mbwana Abdi* [2015] eKLR stated as follows:
- “In a nutshell, police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if demonstrated that the person named in the registration (log) book has since transferred and directed himself of its ownership to the person named in the abstract report or in that other form of evidence.”
29. In view of the foregoing, I find that the appeal succeeds. The judgement of the trial court is hereby set aside and the suit against the Appellant is dismissed with costs.
30. The costs of this Appeal, assessed at Kshs 40,000/-, are awarded to the Appellant.

**DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2024.**

**HELENE R. NAMISI**

**JUDGE**

Delivered on a virtual platform in the presence of:

Mukamani h/b Ms. Kariuki..... for the Appellant

Ms. Sigei.... for the Respondents

