Mukabi v Odongo & another (Civil Appeal E045 of 2023)
[2024] KEHC 16829 (KLR) (31 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E045 OF 2023

BM MUSYOKI, J

JULY 31, 2024

BETWEEN

GEOFFREY MAINA MUKABI ..... APPELLANT

AND

JAMES ODONGO ..... 1ST RESPONDENT

CECILIA KILALO ..... 2ND RESPONDENT

JUDGMENT

1. The appellant herein filed a claim in the Small Claims Court at Machakos vide claim number E629 of 2022. The claim was filed by Occidental Insurance Company Ltd (hereinafter referred to as 'the insurance company') in the name of the appellant under the principle of subrogation. It was claiming a sum of Kshs 423,390.00 being cost of repairs and other related expences in respect of damage caused to motor vehicle registration number KCX 931U which was owned by the appellant. The damage was said to have been as a result of an accident which occurred on 20-01-2021 involving the said vehicle and motor vehicle registration number KBH 295S which was owned by the 1st respondent and driven by 2nd respondent.

2. Before the case could go on trial, the respondents brought an application dated 21-12-2022 asking the court to strike out the claim for being Res Judicata Millimani Small Claims Court case number E161 of 2021 (hereinafter referred to as 'the former claim'). The the former claim was filed by one Gideon Ireri Nyagah asking for loss of use of the same motor vehicle as a result of the same accident.

3. The court found that the claim before it (Smccc number E629 of 2021 which is hereinafter referred to as 'the current suit') was res judicata the former claim and struck it out. It is against the said ruling that the appellant has filed this appeal raising five grounds.

4. Section 38(1) of the *Small Claims Court Act* restricts appeals from the Small Claims Court to this court to matters of law only. I have gone through the memorandum of appeal and the submissions by the

parties and concluded that the only issue in this appeal is whether the matter before the current suit was res judicata the former claim. It is clear to me that this is a matter of law and I have jurisdiction to entertain this appeal.

5. The following are not in dispute;

   a. The former claim was heard on merit and determined by a competent court.

   b. The causes of action in both claims arose from an accident involving motor vehicles registration numbers KCX 931U and KBH 295S.

   c. The claim in the current suit was filed by the insurance company through the appellant under the principle of subrogation.

   d. The claim in the former suit was by one Gideon Ireri Nyagah and was for loss of use.

6. The ingredients of the doctrine of Res Judicata is well settled. For the doctrine to apply, all the following conditions must be met;

   a. The suit or issue was directly and substantially an issue in the former suit.

   b. The former suit was between the same parties or parties under whom they or any of them claim;

   c. The parties must have been litigating under the same title.

   d. The issue or former suit must have been heard and determined on merit.

   e. The former suit must have been determined by a competent court.

7. The cause of action in the former claim was the same as in the current suit. The issues in the former claim were similar to the current suit except that the former suit claim was for loss of use while the current suit claims damages for cost of repairs and related expences under the principle of subrogation.

8. It is common ground that the current suit is based on the principle of subrogation. The principle of subrogation applies as between an insurance company and the owner of the property insured. It arises where the insurance company compensates its insured for the loss or damage incurred then the insurer steps into the shoes of the owner of the owner of the property to recover the compensation from a third party who is found liable for the incident. In real sense, the litigator in the suit is the insurance company although it sues in the name of the owner of the property. In Fredrick Odowa Abungu vs Collins Ondigo & Another (2021) eKLR the court held that;

> 'The principle of subrogation applies where there is a contract of insurance. If the 'insured risk' takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. The extent of the compensation is not more than what has been paid to the insured.'

K.I. Laibuta in his Principals of Commercial Law at page 254 states;

> 'Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal and equitable rights and remedies that the insured has or might have enforced against such third party whether in contract or in tort. To enforce such rights, the insurer brings the action in the name of the insured who must lend his name in return of an undertaking that

> he will not be personally liable for the costs in the action. The insurer is said to 'step into the shoes' (stands in the place of the insured) and is subrogated to his rights. Subrogation is the substitution of one person for another so that the person substituted succeeds to and assumes the rights of another.'

9. The question to ask here is whether the insurance company could possibly have claimed compensation under the principle of subrogation in the former claim. I do not think so. The basis of right to subrogation is the existence of the insurance contract between the person in whose name the suit is brought and the insurance company. The documents availed to the court in the current suit showed that the Occidental Insurance Company had insured the appellant and not Gideon Ireri Nyagah who had sued in the former claim. The appellant was not the claimant in former claim and in the circumstances, the insurance company had no capacity or right to claim in that suit. The loss of user which was claimed in the former suit was not an insured interest. Although the cause of action arose from the same accident, the remedy and beneficiaries in the two claims were different. In my opinion, the insurance company had no cause of action based on the principle of subrogation in the former claim.

10. It is the position in law that any issue or claim which should or could have formed part of claim in the former suit is considered as having been an issue in such former suit hence res judicata if a fresh claim is brought based on the same facts or chain of events. I agree with that position. However, it is my finding that the claim under the principle of subrogation could not be sustainable in the former claim. The claimant in the former claim was a driver of the motor vehicle and not the owner or the insured of the insurance company. The two claims were distinct and could not be joined.

12. The right to subrogation arises where the insurance company has fully compensated the insured. I have looked at the statement of claim in the former claim. The same was filed on 15-07-2021 at which time the insurance company had not paid for the loss. In the current suit, there are letters dated 7-09-2021 which were forwarding cheques to Mercantile Enterprises Limited who repaired the appellant's motor vehicle and Fineline Motor Assessors who assessed the vehicle before repairs. That is the date the insurance company's right to subrogation accrued which is long after the former claim was filed. To make it worse, the former claim was filed by a person who was not the insurance company's insured.

13. I find support of my above position in Egypt Air Corporation vs Suffish International Food Processors (U) Ltd and Another (1999) 1EA 69 where it was held that;

> 'The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under the contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation.'

14. The same position restated in Indemnity Insurance Company of North America & Another vs Kenya Airfreight Handling Limited & Another (2004) 1 EA 52 where the court stated;

> 'Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured.'

15. From the above it is clear to me that the insurance company's right to bring a suit crystalised on 7-09-2021 when it completed paying for the repairs and related costs. As at this time, the former claim had been filed and the insurance company was not aware of it and it had not been filed by its insured. In those circumstances, it cannot be said that the parties in the former claim were the same or were claiming under the same title as in the current suit.

16. The Honourable Adjudicator held that the issue in the former claim was brought by parties who claim under the claimant in the current suit and under the same title. I do not agree. The claim in the current suit is by the insurance company under the title of the appellant. The insurance company was not at all involved in the former claim and could not be involved because it was not filed under the name of its insured. It may not have been clear to the court neither to this court under which title the claimant in the former claim was claiming. The Adjudicator stated so and held that the claimant's capacity in the former claim was merely described as a taxi driver. The Adjudicator on one hand held that the title under which the current suit was brought was different from the former claim but he went on to say that he was still persuaded that the claim fell rightly under the five corners of the doctrine of res judicata. I make a finding that the Honourable Adjudicator mixed up issues and did not appreciate what the claim under the doctrine of subrogation portends.

17. I have seen the replying affidavit which was filed in opposition to the notice of motion. The same is sworn by Gideon Ireri Nyagah who was the claimant in the former claim. He states that he had been authorised by the claimant in the current suit to swear the affidavit. I have gone through the affidavit and I have not seen anywhere where he states that he filed the former claim under instructions of or consultation with the appellant or the insurance company. It would be unfair and against the rules of natural justice to lock out the appellant and the insurance company from the seat of justice because a third party filed a suit without their knowledge or consent. The claimant in the former suit may have been on frolics of his own in making the claim. That claim made no reference to the ownership of the vehicle or the insurance company.

18. In view of the above I find that the application dated 21-12-2022 failed the test of similarity of parties and issues. The two claims were not between the same parties or parties under whose titles they were claiming. The only common issue I find in the two claims is the issue of liability. The other issues in the former suit were personal to the claimant in that claim and did not relate to the appellant herein or the insurance company.

19. The case does not end there. It is trite that the doctrine of res judicata is meant to prevent the courts from revisiting matters which have already been adjudicated upon by other competent or the same court. It is aimed at ensuring that litigation come to an end and protecting parties from suffering double jeopardy. I take the position taken by the court in Kennedy Mokua Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende (2022) eKLR, where it stated;

> 'To this end, it is helpful to refer back to the reason for the principle of finality including that the decision of the court, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict.'

20. I note that the appellant has admitted that the claimant in the former claim was driving his motor vehicle. This is so because he has relied on an affidavit sworn by the said claimant on 10th January 2023 which he used in the lower court to oppose the application for striking out the current suit.

21. I have gone through the judgement of the court in the former claim and I am satisfied that the court pronounced itself on the issue of liability. It is therefore my finding that the issue of liability in respect of the accident was competently and properly addressed in the former claim and it shall be prejudicial and

double jeopardy to the respondents to be taken through a trial on a similar issue. In the circumstances, I hold that the issue of liability is res judicata and the same should not be relitigated.

22. In conclusion, I make the following orders;

    1. The ruling in Machakos Small Claims Court case number E629 dated 13th February 2023 is hereby set aside and subject to order '2' below, the matter is reinstated for hearing on merit.

    2. The issue of liability in Machakos Small Claims Court case number E629 is res judicata Miliamni Small Claims Court case number E161 of 2021 and the same shall not be an issue in the re-trial of the former.

    3. The matter is remitted to the trial court for hearing and determination.

    4. I make no orders as to costs in this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of Miss Koech holding brief for Mr. Muema for the appellant and in absence of the Counsel for the respondent.