



**Waweru t/a SK Arch Plans Limited v Engairo & another (Civil Appeal
E780 of 2022) [2024] KEHC 16753 (KLR) (Civ) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16753 (KLR)

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

CIVIL

CIVIL APPEAL E780 OF 2022

NIO ADAGI, J

AUGUST 12, 2024

BETWEEN

STANLEY KIBATHI WAWERU T/A SK ARCH PLANS LIMITED .. APPELLANT

AND

NOAH MWALE ALE ENGAIRO 1ST RESPONDENT

JOSEPH MBURU 2ND RESPONDENT

*(Being an Appeal from the Judgment and decree of Hon. M. W. Murage (SRM) in
Milimani Commercial Courts Nairobi in CMCC. No. 977 of 2009 delivered on 9/9/2022)*

JUDGMENT

1. the Appellant sued the Respondents in a Plaintiff filed in court on 20.2.2009 seeking special damages of Ksh.241,035/- costs of the suit and interest.
2. The Appellant averred that on 22.2.2006 he was driving motor vehicle Reg. No. KAU 195J along Ngong Road near Nakumatt supermarket when the 3rd Defendant negligently drove motor vehicle Reg No. KAL 698B along the said road thereby causing the same to collide with the Appellant's said motor vehicle as a result of which the Appellant motor vehicle was damaged.
3. The particulars of negligence are as per paragraph 5 (a-h) of the plaintiff.
The 2nd Respondent filed a defence dated 2nd July, 2009 denying the claim and averred negligence on the part of the Appellant particularly on which are as per the paragraph 6(i -iv) of the defence.
4. The 1st and 3rd Respondents filed a defence on 22.6.2009 denying the claim and averred negligence on the part of the Appellant.



5. Third party corporate insurance company limited entered appearance on 22.6.2021 and filed a statement of defence on 2.4.2012.

It denied having the insurer in motor vehicle registration number KAL 689B. It also denied that the 3rd Party Nelipa Insurance Agencies were its agents.

6. It was further averred by the 3rd Party that the 1st and 3rd Respondents breached the terms as the insurance police agreement and as such the 3rd Party is entitled to repudiate its liability pursuant to the terms of the insurance policy agreement.
7. Matter was heard on 3.3.2022.

PW1 P. C. Lucas Esokon told Court that a non injury traffic accident occurred involving KAU 195J Mercedes Benz and KAL 689B Nissan pick up. The first motor vehicle was driven by the Appellant and the second vehicle by the 2nd Respondent. He told Court that motor vehicle KAL 689B was blamed for the accident and the matter was referred to insurance. He produced the police abstract as P. Exhibit 1.

On cross examination he admitted not to have been the investigating officer and that he relied on the information in the police abstract. The investigating officer was PC Waro.

8. PW2 Godfrey Njenga told Court that he works for the First Assurance Company Limited. He relied on his witness statement dated 23.5.2014. He produced the documents in the list including items 4,5,6,7,9 and 9. He produced them as P.Exhibit 2,3,4,5,6 and 7 respectively. The document listed at 2,3,5 were produced as P.Exhibit 8,9 and 10.

On cross examination he told court that they had insured motor vehicle KAN 105J. He told court that the First Insurance paid Kshs.130,651/- for repairs.

He told court that the vehicles were repaired at Auster Services Limited. He produced a payment voucher. Further that the insured is S. K. Arch Plans Ltd. The business name used by the Appellant. He did not produce the policy in court. He did not produce the receipt for the repairs.

9. The Appellant and the Loss Assessor did not attend court to testify.
10. DW1 Joseph Mburu testified through his statement dated 7.10.2014. On cross examination he told court that he was the driver of KAL 689B. He stated that he informed the police that an unknown Matatu had caused the accident and that he didn't know the owner of the Matatu.
11. DW2 Joseph Njogu testified through a witness statement dated 7.10.2014. On cross examination he told court that the Matatu used the wrong lane to overtake. DW1 Mr. Mburu who was driving was forced to swerve to the right where there was soil, the car skidded and hit the Mercedes Benz registration number KAU 195J which was moving slowly.
12. DW3 Noah Mwale testified through his witness dated 7.10.2014. On cross examination he told court that he did not witness the accident.
13. Upon considering the evidence adduced against the pleadings filed, the trial Magistrate's issue for determination was whether the Appellant had proved the case on a balance of probability.
14. The Magistrate observed that the case was filed by the Appellant. The Appellant did not testify to corroborate the evidence by the evidence of PW2. The case does not belong to First Assurance Co. Ltd but the Appellant who did not prove the case beyond reasonable doubt. She proceeded to dismiss the case with cost to the Respondents.



15. The Appellant being aggrieved by the said judgment filed the appeal herein in which he has raised 4 grounds of appeal as follows:

1. The learned trial magistrate erred in law and fact finding that the Appellant failed to prove his case beyond reasonable doubt.
2. The learned trial magistrate erred in law and fact in failing to find that the Appellant had proved negligence on the part of the 2nd Respondent.
3. The learned trial magistrate erred in law and fact in failing to find that the suit was commenced by the Appellant's Insurer under the doctrine of subrogation.
4. The learned trial magistrate erred in law and fact in dismissed the Appellant's suit with costs to the Respondents.

16. I will consider each of the grounds of the appeal.

1. Whether the learned trial magistrate erred in law and fact in finding that the Appellant failed to prove his case beyond reasonable doubt.

On the standard of proof, the Black's Law Dictionary, (9th Edition, 2009) at page 1535 defines 'the standard of proof' as 'the degree or level of proof demanded in a specific case in order for a party to succeed.'

The standard of proof in civil cases is proof on the balance of probability while in criminal cases the standard of proof is proof beyond any reasonable doubt. In election petitions the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, the standard of proof is proof beyond reasonable doubt.

The Appellant failed to discharge his legal burden of prove.

I find this ground to be misplaced in as far as this suit is concerned.

2. Whether the Appellant had proved negligence on the part of the 2nd Respondent.

The Appellant failed to adduce any evidence to demonstrate that the 2nd Respondent was negligent. The Appellant and the Loss Assessor who were crucial witnesses for the Appellant's case failed to attend court. The Police officer who testified was not the investigating officer and the Officer from First Assurance Co. Ltd also did not produce either a copy of the insurance policy or receipts in proof of the payment they made on behalf of the Appellant in repairing his motor vehicle.

The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in Section 107(1)(2) of the *Evidence Act* that provides thus:

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



Section 112 of the *Evidence Act* provides thus:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

See the case of K N v J M T [2018] eKLR.

- (3) Whether the learned trial magistrate erred in law and fact in failing to find that the suit was commenced by the Appellant’s Insurer under the doctrine of subrogation.

The Black’s Law Dictionary, 11th Edition at page 1726, defines the word subrogation as;

“the substitution of one party for another, whose debt the party pays, entitling the paying party to rights, remedies or securities that would otherwise belong to the debtor.”

It also defines the doctrine of subrogation as follows;

“the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”

In *Kenya Power & Lighting Company Limited v Julius Wambale & another* [2019] eKLR, the high court stated as follows;

“The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party.”

17. I find that the doctrine of subrogation is not based on the terms of contract between the Insured and a Third Party.
18. Accordingly, I find that the appeal lacks merit and is dismissed with costs and interest to the Respondent.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH AUGUST 2024.

NOEL I. ADAGI

JUDGE

