Mulili & another v Mohammed & another (Civil Appeal E263 of 2022)
[2024] KEHC 14888 (KLR) (Civ) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E263 OF 2022

H NAMISI, J

NOVEMBER 28, 2024

BETWEEN

STELLAMARIS MULILI ..... 1ST APPELLANT

MARY MWENDE MULILI ..... 2ND APPELLANT

AND

MOHAMMED ABDUKADIR MOHAMMED ..... 1ST RESPONDENT

INTRA AFRICA ASSURANCE LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Judgement of Hon. Keyne G. Odhiambo, Adjudicator delivered on 25 April 2022 in SCCC No. E619 of 2021)

JUDGMENT

1. This is an appeal against the judgement of Hon. Keyne G. Odhiambo, Adjudicator, in which the Appellants have raised the following grounds:

    i. That the Learned Hon. Adjudicator erred in law in failing to recognise and appreciate that the Respondents had a duty to discharge the burden of proof required to prove in a claim for special damages;

    ii. That the Learned Adjudicator erred in law in failing to recognise and appreciate the law on subrogation claims;

    iii. That the Learned Adjudicator erred in law in awarding the Respondent a sum of Kshs 133,400/= for repair costs.

2. Parties canvassed the Appeal by way of written submissions.

3. In their submissions dated 13 September 2024, the Appellants contended that it is trite law that special damages must be particularly pleaded and strictly proved as noted by Lord Goddard C.J in the case of Bonham Carter -vs- Hyde Park Ltd [1948] 64 TLR 177 as quoted by the Court of Appeal in Theta Tea Company Ltd & Another -vs- Florence Njau Njambi [2002] eKLR. The Appellants argued that the failure by the Respondents to produce the Credit Note meant that the repair costs of Kshs 133,400/ = had not been proved to the required standard in law. In their Further Submissions dated 9 October 2024, the Appellants focussed on the second limb of their appeal, the doctrine of subrogation. They submitted that the claim for subrogation by the 1st Respondent was a non-starter since neither the policy document or certificate of insurance that created the contractual relationship between the 1st Respondent and the 2nd Respondent was filed or produced. They contended that in the absence of any corroboration of the testimony of CW1, the 1st Respondent and/ or the policy document, the claim for subrogation was unsustainable.

4. On their part, the Respondents filed submissions dated 3 June 2024. They relied on several authorities as well as the provisions of Rule 5 of the Small Claims Court Rules.

5. 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.

6. 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)."

7. 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."

8. The duty of this Court in this instance is similar to that stated herein above, which is essentially limited to points of law. In the case of J N & 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."

9. Turning to the grounds of appeal, the Appellants have raised two issues. Firstly, that the special damages awarded were not pleaded and proved by the Respondents; and secondly, that the claim for subrogation was unsustainable.

10. In the trial court, the Respondents produced the Assessment Report by Reflex Ins Assessors and Investigators Ltd dated 4 December 2018. The same indicated net costs of repairs as Kshs 219,569/=. Also produced was an Invoice number 2480 from Xtreme Centre Ltd for repair work amounting to Kshs 133,400/=. There is a payment Voucher dated 12 march 2019 issued by the 2nd Respondent for payment of Kshs 126,500/- to Xtreme Centre Ltd. The Assessor produced a payment voucher for Kshs 6,650/= for his assessment and report.

11. The trial court relied on the case of Nkuene Dairy Farmers Co-op Society Ltd & Another -vs- Ngacha Ndeiya [2010] eKLR, in finding that the Assessment Report was sufficient to prove the claim for Kshs 133,400/=. In the said case, the Court of Appeal took the position that:

> " Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counterchecked and either accepted or disproved. The Appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged...The Respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to. Indeed the decision of *David Bagine vs. Martin Bundi Civil Appeal No. 283 of 1996* which Mr. Kaburu cited to us, does state that a motor vehicle Assessor's report would provide acceptable evidence to prove the value of material damage to a motor vehicle...We agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim..."

12. I find that the said case is very relevant in this particular instance. Based on the foregoing, I find no reason to interfere with the judgement of the trial court in its finding on special damages.

13. Turning to the second limb of the appeal, the Appellants have submitted extensively on the applicability of 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."

14. 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."

15. In Kenya Power & Lighting Company Limited v Julius Wambale & another [2019] eKLR, the 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."

16. The Appellants submitted that the said doctrine is not sustainable in this instance because no evidence was adduced to establish a contractual relationship between the Respondents. The Appellants took issue with the inclusion of the 2nd Respondent, the insurer, as a party to the suit. They contended that the 2nd Respondent ought to have been struck off as a party because they lacked the capacity to file this claim against the Appellants.

17. In my considered view, this line of argument does very little to advance the Appellants' case herein. Even if the 2nd Respondent were to be struck out, the same does not in any way affect the claim by the 1st Respondent against the Appellants. In fact, it has very little effect. The outcome of the case by the 1st Respondent against the Appellants would be the same.

18. The upshot of the foregoing is that the Appeal fails. The same is dismissed with costs to the Respondents assessed at Kshs 40,000/=.

DATED AND DELIVERED AT NAIROBI THIS 28 DAY OF NOVEMBER 2024.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

.Ogutu h/b Ms. Wanjiku Kingori..... for the Appellants

...N/A..... for the Respondents