Nairobi City Water and Sewerage Limited v Kahore & another (Civil Appeal 10 of 2020) [2023] KEHC 20752 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL 10 OF 2020

CM KARIUKI, J

JULY 27, 2023

BETWEEN

NAIROBI CITY WATER AND SEWERAGE LIMITED ..... APPELLANT

AND

NAFTALI WAITITU KAHORE ..... 1ST RESPONDENT

VISION IN CHRIST (SUED THROUGH PAUL MBOTE KAMAU (CHAIRMAN) JOHN GACHURA WANENE (SECRETARY) AND SAMUEL KAMUA THAGANA (TREASURER) ..... 2ND RESPONDENT

JUDGMENT

1. By plaint dated 24/11/2017, the plaintiff, the Appellant herein, sought reliefs that it be paid Kshs. 1,224,670.00 costs and interest. The claim was based on the doctrine of subrogation by the defense dated and amended on 11/2/2019. The defendants denied the claim.

2. The suit was heard, and the claim was dismissed on the ground that same was instituted without authority to do so from the Plaintiff/Appellant, a corporation being aggrieved by the trial court's verdict; the Appellant lodged the instant appeal and raised six (6) grounds. The appeal seeks orders: -

    i. That this Appeal be allowed.

    ii. That this honourable court sets aside the judgment of the subordinate court and substitutes it with an order acknowledging the Appellant's claim against the Respondents with costs.

    iii. Without prejudice to prayer (b) above, this honourable court re-assesses and issues an award on liability and quantum.

iv. That the costs of this Appeal and that of the trial court be awarded to the Appellant.

3. Parties were given directions to canvass the appeal via submissions.

4. Appellant Submissions

5. The suit proceeded for a full trial in the lower court, and the Plaintiff/Appellant called three witnesses supporting his case. In comparison, the Defendants/Respondents called two witnesses in defence, and at no point did the Defendant raise the issue that the Plaintiff/Appellant did not have the legal capacity to sue as no resolution was filed other than in their submissions which the trial court considered as the biblical truth and proceeded to dismiss the Appellant despite them proving their case on a balance of probability.

6. Having been aggrieved by the judgment, the Appellant appealed to this honourable court through a Memorandum of Appeal dated 28th July 2020 under the following grounds: -

i. That the Learned Trial Magistrate's Judgment was unjust and unfair given the weight of evidence and was based on misguided points of fact and wrong principles of law, and has occasioned a miscarriage of justice.

ii. That the Learned Trial Magistrate erred in law and fact in finding the Appellant did not prove liability against the Respondents herein in view of the evidence produced before the trial court.

iii. That the Learned Trial Magistrate's erred in law in finding the suit by the Appellant was not properly instituted in total disregard to the fact that this is a subrogation claim and not purely a company's claim against the Respondents herein;

iv. That the Learned Trial Magistrate erred in law and in fact, in relying on the authorities cited by the Respondents, which were unrelated to the case herein and failed to consider the evidence and submissions of the Appellant;

v. That the Learned Trial Magistrate erred in dismissing the Appellant's claim against the Respondents herein.

vi. That the learned Trial Magistrate erred in awarding costs of the suit to the Respondents.

7. The Appellant contended that it is not in dispute that at the time of filing suit in the lower court, the resolution institute suit was not filed. As a result of this, the suit was dismissed, and it is important to establish whether the lack of a resolution was fatal to the Appellant's suit to warrant its dismissal. Justice demands that the matter be heard on merits, and no party should be hindered from accessing justice on the basis of technicalities.

8. Order 4 Rule 1(4) of the Civil Procedure Rules provide as follows:

> " It is settled law that where a suit is to be instituted for and on behalf of company there should be a company resolution to that effect..... As regard litigation by an incorporated company, the directors are as a rule, the person who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the Company are entitled to decide even to the extent of overruling the director

whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the Company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

9. It was stated that there is no doubt a resolution is required and it is intended to address situation where some person drag the company to court and bind the company on issue litigated yet members of the Company have not sanctioned their action. The requirement is therefore intended to protect the companies from unauthorised court processes. It is evident that the omission can be ratified after the suit has been filed. The authorization is to assure court that the company is properly in court and it is not an action of unauthorised members/individuals.

10. PW1 testified he was an employee of the Appellant and he was driving the motor vehicle in his line of duty when the accident occurred. The suit was brought under the doctrine of subrogation where the Insurer to the Appellant in seeking to get compensation from the Respondents herein who were blamed for the accident. The Appellant was fully compensated for the loss herein and therefore they were not seeking to be compensated again, but the insurance was seeking was and PW3 confirmed they had insured the Appellant and were seeking to recover the expenses incurred as a result of the accident between the Appellant motor vehicle and the Defendants' motor vehicle on 25th November, 2014.

11. Reliance was placed on the case of Leo Investment Ltd v Trident Insurance Company Ltd [2014] eKLR where Odunga J. found that the mere failure to file the resolution of the Corporation together with the plaint did not invalidate the suit and the associated himself with the decision of Kimaru J. In the case of Republic Vs. Registrar General and 13 others, Misc. Application No. 67 of 2005 [2005] eKLR where the court held as follows: -

> " ... such a resolution by the Board of Directors of a Company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit."

12. In the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR the Court of Appeal stated as follows:

> " ...it is essential to appreciate that the intention behind Order 4 Rule 1(4) was to safeguard the corporate entity by ensuring that only an authorised officer could institute proceedings on its behalf. This was to address the mischief of unauthorised persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's see that is affixed under the hand of the Directors ensured that they were aware of and had authorised such proceedings together with the persons enlisted conduct them. And where evidence was produced to demonstrate that a person was unauthorised, the burden shifted to such officer to demonstrate that the were authorised under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorised."

13. The Appellant argued that in view of the above, it is clear that it was sufficient for the authorised person depose that he or she was duly authorised, but in the event of a complaint that such person was unauthorised, it was up to the disputing party demonstrate with evidence that the deponent did not have the requisite authority.

14. Further, it is worth noting the trial magistrate relied on failure to file authority in dismissing the suit a ground that had not been raised by the defendants in their defence or amended defence dated 8th October, 2018 and 11th February, 2019 respectively. The issue was only raised in Defendant's submissions after the suit was heard and it was the determination stage and the plaintiff were not given an opportunity to address the court on it and even a preliminary objection was not raised at all.

15. They Urged the court to find the parties should be bound by their pleadings and that the trial magistrate misdirected himself in dismissing the suit on technicality not raised in parties' pleadings as was held in the case of Eye Company (K) Limited v Erastus Rotich t/a Vision Express [2021] eKLR.

16. They submitted that the Court should be guided by Article 159 of *the Constitution* of Kenya, 2010 which provides that justice shall be administered without undue regard to procedural technicalities. The lower court judgment should be overturned and/or set aside and substituted by a judgment of this Honourable court.

17. Further reliance was placed on the holding of Justice Azangalala in Geology Investments Ltd. versus Rogonyo Njuguna and others in HCCC No. 1067 of 2002 (unreported) cited in Jackline Ombongi v Agnes Nyanchama & Another [2016] eKLR where it was held: -

> " From the authorities, I see a trend to sustain suits rather than strike them out. This is as it should be as courts lean in favour of doing substantial justice to parties rather than straight jacket adherence to rules of procedure."

18. Respondent Submissions

19. The Respondent submitted that there are two issues arising from this appeal i.e.: -

    a. Whether the Appellant proved liability against the two Respondents?

    b. Whether the suit was properly instituted?

Whether the Appellant proved liability against the two Respondents?

20. It was stated that during the trial the 1st Respondent expressly disavowed that he was the insured of motor vehicle registration KAE 134X at the time of the accident or at any other time. The Appellant did not adduce any evidence in court to prove ownership of the said vehicle by the 1st Respondent, however, it sought to rely on police abstract which has been time and again stated in various courts not to be evidence of ownership.

21. That the copy of police abstract is not sufficient evidence of ownership of a motor vehicle. To support our submission that police abstract should not be relied upon we would like to rely on the case of Richard Makau Ngumbi & Another v Cannon Assurance Company Limited [2016] eKLR where the Appellate Court sitting in Nairobi correctly noted the insufficiency of a police abstract to determine the existence of a policy of insurance at pages 3 and 4 of its decision as follows: -

> " I have perused the affidavits filed by both parties in support of the application dated 27th day of May, 2014 and there is no evidence by way of a certificate of Insurance or a policy document to support the assertion by the Appellants that the Respondent was the insurer of motor vehicle KBA 682E at the material time when the accident occurred. It is only a copy of the police abstract that was annexed which to me is not conclusive."

22. Lady Justice Kasango in Kenya Orient Insurance Co. Ltd vs. Farida Hemed [2015] eKLR also frowned upon reliance on police abstract when determining the issue of existence of policy of Insurance over a motor vehicle. At paragraph 16 of her decision, she cited with approval the averments of the court in Kasereka vs Gateway Insurance Co. Ltd [2003] 2EA which stated;

> " It follows that for the purpose of this application, on a balance of probability, the court finds that the Gateway Insurance Company Limited appears to be the insurer of motor vehicle registration number KAB 405K. I say "appears" because the contents of a police abstract are rebuttable and is not conclusive..... This means the denial by the defendant that there was a contract of insurance between itself and Hoe Engineering Works Limited is strictly a triable issue.

23. The Respondent asserted that the above precedents emanating from superior courts clearly delineate that a police abstract is not to be taken as evidence of the existence of a policy of insurance over a motor vehicle or even ownership. During cross examination PW-2 also confirmed that the 1st Respondent was not the owner of the said vehicle (page 187 of the Record).

24. It was argued that according to Section 107 and 109 of the *Evidence Act*, a cardinal principle of the law is that he who alleges must prove. That at the hearing, the Appellant did not bother to call a police officer to even testify on the said abstract and as such, its allegations against the 1st Respondent remains as stated 'mere allegations' which have no backing by any law of the land. They prayed that the court finds as such and upholds the decision of the trial court on this issue.

25. The Appellant contended that during trial the Respondents denied liability and without prejudice attributed blame on the Appellant as stated in their defence (Page 92 par 92 of the record of appeal)

26. It is a well-established principle that there are two elements in the assessment of liability, namely causation and blameworthiness, see Baker v Willoughby [1970] AC 467. That from the evidence before the court from both parties, it is clear that PW1, (page 10 of the record of appeal) who was the driver of the Appellant, on cross-examination could not clearly state the steps that he took to avoid the accident, which vehicle was equally avoiding to hit a donkey cart.

27. He further confirmed that the police abstract produced in court indicated that the matter was pending investigations and no one was to be blamed for the said accident. It was pointed out that during the hearing of this matter, the Appellant failed to discharge its duty as he failed to give evidence to show negligence on the part of the Respondents nor did it establish any nexus to impute vicarious liability.

28. That there is no indication that the Respondents were blamed for the accident. The affixing of the initials P.U.I only under item 7 of the police abstract dated 15th December, 2014 (results of the investigations) means the police were not able to tell who was liable for the accident at the scene as nobody was blamed at the initial stage. The police abstract only confirmed the occurrence of the accident. No document was also produced to indicate that the Respondent's driver was ever charged with any traffic offence.

29. Precautions as to his own safety by driving at an excessive speed, and in the circumstance, could not swerve or apply brakes so as to avoid the accident is a confirmation that the Appellant was the sole cause of the accident

30. Further to this, the Appellant failed to call an eye witness to give an account of the accident as evidence in its records. The end result is that the Appellant's burden of proof was not discharged and the Respondents' liability was not proved.

31. Further reliance was made on Civil Appeal No. 102 of 2005 Sally Kibii & Another versus Francis Ogare [2012] eKLR.

32. The Respondents maintain that the Appellant failed to provide prima facie evidence against the them. They relied on the High Court decision in the case of Quest Resources Limited v Japan Port Consultants Limited [2015] eKLR and Winfred Nyawira Maina Vs. Peterson Onyiego Gichana

33. The Respondents maintain that the Appellant is the author of its misfortune as he failed to take precautions as to his own safety by driving at an excessive speed, and in the circumstance could not swerve or apply brakes so as to avoid the accident, this clearly shows outright negligence on its part.

Whether the suit was properly instituted?

34. The Respondents reiterated the trial court's submissions on this issue. The plaintiff is a limited liability company duly incorporated in Kenya. One Stanley Karani sore the verifying affidavit on the company's behalf (see page 14 of the record). He states as follows in paragraph1;

> " That I am the Transport Co-ordinator of the plaintiff Company fully seized with the facts of this matter hence competent to swear the affidavit."

35. It is settled law that any incorporated company that wishes to institute a suit must have the company's resolution, and anyone who so wishes to swear an affidavit on its behalf must be duly authorised to do so. The said deponent in this case is neither a director nor is he duly authorised.

36. Reliance was placed on the case of Kenya Commercial Bank Limited v Stage Coach Management Limited [2004] eKLR. Justice Havelock, while striking out the suit filed by the Plaintiff, cited the decision of Odunga J. In his judgment in the Leo Investments and Republic Registrar General case with regards the necessity of a company Resolution to back the institution of a suit, in which he referenced to holding of Hewett J. in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCC No. 391 of 2000 as follows;

> "It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect ..... As regards litigation by an incorporated company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

37. The Respondent asserted that the Verifying Affidavit needs to be more competent since the deponent needed to have the authority to swear it. The deponent who is not a director in the company, also should have mentioned whether he is even duly authorized to swear the said Affidavit on behalf of the said company who brought the suit in court. A claim cannot be sustained with a defective Verifying Affidavit sworn by a party not authorized to swear it and prayed that the court finds it as such.

Analysis and Determination

38. Having considered the pleadings, the evidence, and the submissions herein, the issues that fall for determination are in respect to liability and quantum for the accident that occurred on or about 25th November 2014.

39. This being the first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

40. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it, and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

41. The trial court suit was correctly brought under the doctrine of subrogation. 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.

42. The doctrine of subrogation was defined in the case of Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 as follows: -

> " 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 that 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."

43. I take note that from the trial court magistrate's judgment, contrary to the Appellant's assertion that the suit was dismissed because the Appellant did not have the legal capacity to sue as no resolution was filed, the trial magistrate determined the suit on its merits. It appears to me that the suit was not merely dismissed for lack of a resolution. Still, the trial court analyzed and considered the Appellant's allegations and determined the suit on its merits.

44. I have perused the trial court proceedings, and according to PW1, he was driving KAY 311A on a fateful day. That he was coming from Nairobi heading to Ol Kalou. As he was taking a turn, he met two vehicles, and one was overtaking. It was a short distance, and the overtaking driver tried to return to his lane. That something happened, and the vehicle rolled and skidded. It was at a high speed and lying on one side. That they met, and the vehicle hit him with its roof. It hit the driver's side. He was in shock and saw people being removed as they were hit before being taken to Kijabe Hospital as he was slightly hurt.

45. On the other hand, DW1 testified that they were coming from Othaya at 7.00 pm when the accident occurred. At Njabini, he saw the vehicle had fallen, and he stopped and found people outside; another vehicle had come from the engineer, and there was also a donkey car. He stated that the church vehicle was swerving from a donkey cart, but he was unable then the vehicle fell down. When the vehicle for water came and found the other lying and hit it, and removed the roof, those inside died. It was his testimony that the Nairobi Water vehicle was speeding and that he could have evaded if he swerved, then the accident would not have happened.

46. From the foregoing, PW1 and DW1 appear to have been the only eye witnesses to the accident who testified in court. They had conflicting accounts of what happened on the fateful evening when the accident occurred, claiming nine lives. Whilst PW1 insisted that KAE 134X was overtaking and, in the process, hit his car with its roof, DW1 averred that KAE 134X had already fallen down when the Respondent's vehicle came and hit it and removed the roof, killing those who were inside.

47. Accordingly, it was the Appellant's duty to prove their case on a balance of probabilities. Section 107 of the *Evidence Act* states that: -

> 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 109 further provides that:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless any law proves that the proof of that fact shall lie on any particular person."

47. The provisions under Sections 107,109 and 112 of the *Evidence Act* were extensively dealt with in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that: -

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is, however, the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

48. In her analysis, the trial magistrate stated that the Appellant heavily relied on the report of PW2 produced as Exhibit 10. PW2 is the Private Investigator instructed by Amaco Insurance to investigate the accident. The report by PW2 indicated that the third-party vehicle was blamed for causing the tragic fatal accident. From the record, the police abstract attached established the results of the investigation to the accident as PUI i.e., pending under investigation. Additionally, the trial magistrate noted that at the bottom right corner, "KAE 134X to blame" was indicated. I agree with the trial magistrate's sentiments that the aforementioned information is not countersigned, which makes it hard to decipher the author. Therefore, the information is unsubstantiated and does not form part of an abstract. That the accurate and reliable information from the police, as per paragraph 7 of the abstract, is that the case is still under investigation.

49. In any case, the plaintiff could have called on the author of the abstract or the police to testify on the investigations of the accident and who was to blame for the accident, but as observed by the trial court, they did not. Notably, proof of negligence, being on a balance of probabilities, does not solely depend on the evidence of the investigating officer or report of the accident to the police. However, such report may corroborate the other available evidence.

50. The learned trial magistrate went on to state that: -

> " Faced with the situation if the existence of two probabilities of how the accident could have occurred, and failure by the plaintiff to call additional evidence to strengthen their case., this court is guided by A.G. Ringera J in Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR where he stated as follows: -
>
> "Without an advantage of divine omniscience, I cannot know which of the probabilities herein coincide with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probability if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partially contributed to the accident....."

51. Consequently, I agree with the trial magistrate that, given the evidence presented by the plaintiff and having gone through the record and re-evaluated the evidence, I am unable to conclusively determine who was liable for the accident.

I. In the premises, I do not find any merit in the Appellant's appeal, which is hereby dismissed

II. Parties to bear their costs.

DATED AND DELIVERED IN NYAHURURU THIS2 27TH DAY OF JULY 2023

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CHARLES KARIUKI

JUDGE