The Board of Governors St Andrew'S School Turi v Johlive Builders and Fabricators Ltd (Civil Suit E013 of 2022) [2023] KEHC 22914 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22914 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT E013 OF 2022

HM NYAGA, J

SEPTEMBER 27, 2023

BETWEEN

THE BOARD OF GOVERNORS ST ANDREW'S SCHOOL TURI ..... PLAINTIFF

AND

JOHLIVE BUILDERS AND FABRICATORS LTD ..... DEFENDANT

JUDGMENT

Pleadings

1. The Plaintiff instituted the instant suit against the Defendant vide a plaint dated 22nd April, 2022 seeking for the following prayers:-

    a. Special Damages of Ksh.25,484,824.00

    b. Costs of this suit

    c. Interest on (a) above at court rates and/or bank rates whichever is higher from the date of the fire until payment in full.

    d. Interest on (b) above at court rates and/or bank rates, whichever is higher, from the time of judgement until payment in full plus 16% VAT thereon.

    e. Any other or further relief that this Honorable court may deem fit and just to grant.

2. The plaintiff averred that it has been carrying on the business of provision of education services in both a boarding and day school capacity. The defendant on the other hand carried on the business of interpreting and implementing design blueprints for buildings for purposes of constructions and assembly of the same while it was its client.

3. Consequent to the business relations, the plaintiff undertook a competitive tendering process after which the Defendant was successful and it awarded the defendant the contract for building works for purposes of renovating a multi-purpose Hall (Baden Powell Hall).

4. It was the plaintiff's averment that pursuant to the contract, the defendant was engaged to renew the roof, the ceiling, replace door furniture, renew flooring, route electric cables in conduits and cable trays, fit a lighting arrestors, and also supply and install fire hydrants and hose reels. That and on 6th April, 2021 the defendant moved onto the site and was in possession and management of the same until completion of the renovation.

5. According to the Plaintiff, on 4th July, 2021 at around 1400 hours, while the defendant's authorized employees were carrying out their duties pursuant to the contract, its employees negligently caused a fire to occur that propagated the whole of Baden Powell Hall extensively damaging the same.

6. It was the Plaintiff's case that that the subject fire was solely caused by the Defendant's negligence. The Plaintiff therefore holds the Defendant responsible.

7. Apart from the plea of negligence the plaintiff relied on the doctrine of res ipsa loquitor.

8. The Defendant denied liability through its statement of defence dated 27th May, 2022. According to the defendant the fire was caused by the plaintiff and its servants as they failed to guard the premises properly rendering it susceptible to intruders, to install surveillance measures to dissuade malicious employees, former employees/teachers, to act instantly after noticing the fire, to train its employees on fire safety and to adhere to a fire policy.

9. The defendant further averred that the plaintiff was compensated under the insurance policy but that does not translate into admission of negligence as the said policy was no-fault policy.

10. In its reply to the Defendant's Defence, the Plaintiff reiterated the contents of the plaint and averred that the defence consists of mere denials which do not disclose any reasonable defence to its claim and shall seek to strike out the same on that ground.

Plaintiff's Case

11. PW1 was Benard Osiho Oduku, the Plaintiff's security guard who in his statement stated that on 4th July, 2021 at around 14.10 hours, he was at the main gate area with the security officers stationed at the main gate when he saw smoke at the top of Baden Powell Hall that was under renovation by the Defendant. He rushed there and found the fence gate had been locked with a small padlock. He broke it and gained entry to the site.

12. On reaching the site, he confirmed there was fire on top of the roof and he rushed back to the main gate and advised the main gate security officers to sound the fire alarm then he called the security manager to inform the senior management to issue an evacuation alarm to all persons around the said hall.

13. He stated that the alarm alerted the staff, people within school compound, the workforce at the site and the police attached to the school and they responded and joined hands to fight the fire that was escalating very fast. It was his statement that the Security Manager and top management responded quickly and assisted in coordinating the people to fight fire, and around 15.20 hours, Timsales Fire engine arrived and started to fight the fire and they were later joined by fire brigade from Nakuru County Government, and they worked together to fully contain the fire although it had damaged the building considerably.

14. In cross examination, he told court that school has 8 guards during the day but none was stationed inside the site as it was restricted. He said there was a guard patrolling the surrounding area and that the site was fenced and cordoned off by the contractor. He confirmed he found no one at the site when the fire broke out.

15. In re-examination, he stated that the site was only accessible to the contractors.

16. PW2 was Francis Ndegwa Karuga, the Plaintiff's facilities manager and registered signatory. In his statement he stated that from the circumstances surrounding the fire incident, there was little to no doubt that the same was as a result of the Defendant's employees activities given their presence on site, time factors and absence of any reasonable alternative. He said the multi-purpose hall was not supplied with electricity at the material time of the incident.

17. He corroborated the evidence of PW1 in regards to how the people within the school compound and site responded to the incident and the time which the fire fighters from Timsales and Nakuru Count arrived at the scene and the extent of the damage to the said hall.

18. He stated that after assessing the damage caused by the fire, he reported the same to Molo Police Station and was issued with a police Abstract. He stated that the Nakuru County Government also issued a report of fire dated 21st July, 2021.

19. It was evidence that he also reported the incident to their insurer M/S GA Insurance Limited and it commenced the process of indemnifying the loss and retained the services of insurance loss adjustors Cunningham Lindsey Kenya Limited to carry out investigations, survey, adjust the loss and recommend avenues for recovery of the damaged multi-purpose hall. He said the defendant's Insurer M/S Monarch Insurance Company Limited accepted liability under the contractor's All Risk Policy and has since committed itself to indemnify both the plaintiff and defendant for the works undertaken before the fire by issuing a Discharge Voucher and therefore the defendant is estopped from denying and or escaping liability in the claim herein.

20. He stated that the total value of the damaged structures was Ksh.22, 456,483.00 and the said amount has been settled by the plaintiff's insurer who has caused this suit to be brought under the principle of subrogation.

21. In cross examination, he stated that the fire was related to an electric fault. He said the hall was not connected to power but the contractor was using a point of connection supplied to him to enable the operation of certain machinery. He said there was only one power point in the premises. He added that the County Government of Nakuru could not ascertain the cause of fire. That there was no reason to suspect arson as the premise was fenced off. He disputed that they declined to have the contractor hand over the work. He said that the contractors were exclusively in control of the site and that no intrusion case was ever raised.

22. PW3 was Symon K. Lariak, a legal manager from GA insurance limited. He confirmed his employer had issued the plaintiff a business combined policy cover commencing on 16th September 2020 and expiring on 16th September 2021. That during the currency of the policy his employer received a report of a fire accident that had occurred on 4th July, 2021. Upon receipt of that report, his employer and defendant's insurer M/S Monarch Insurance Company LTD retained the services of an Insurance Loss Adjuster-Cunningham Lindsey Kenya Limited to carry out investigations on the damage caused by the fire and prepare a report thereof.

23. He confirmed upon receipt of the report, the plaintiff's insurer paid Cunningham Lindsey Kenya limited Ksh.1, 028,340.00 for its report and Ksh. 24,456,483.00 to the plaintiff as the total value of the damaged structures.

24. He stated that having indemnified the Plaintiff, his employer is entitled to claim that amount under the doctrine of subrogation.

25. In support of the plaintiff's case, PW3 relied on the Plaintiff's list of documents dated 22nd April, 2023 which were produced as exhibit.

26. In cross examination, he stated that the defendant was in possession of the suit premise at the material time.

Defendant's Case

27. DW1 John Kyago King'ori, was the Defendant's director. He confirmed the existence of the construction contract between the plaintiff and the defendant. He said amongst the work assigned to the defendant did not include installing or rerouting electric cables and appliances as alleged by the plaintiff.

28. He stated that he took an insurance cover to cover the contract works as prescribed in the contract. He also stated that at the time of the incident all of the defendant's employees had left the plaintiff's premises.

29. In cross examination, he said he was not at the site on the material day. He confirmed he was interviewed by the loss adjuster and according to its report; they were installing conduits and lightening arrester. He confirmed they had not handed over the property.

30. According to him, the defendant could not be held responsible for the acts that occurred after their working hours. He stated that the plaintiff had access to the premises and they were using the boiler. He said the plaintiff was duty bound to offer security to the premise.

31. In reexamination, he stated that they were in exclusive control of the site only during working hours.

32. DW2 was Peter Waronja Gachunga. In his statement, he stated that he had been engaged as a supervisor by the defendant in its construction site. He said the main duties were repairing the roof, ceiling, & floor; extension of the ablution block; demolition of windows; plumbing work; and pipework and trunking without installing electric cables.

33. He said the only electrical tools used were hand held grinders, drills and circular saws and that the cutting of the materials was done outside the hall where the plaintiff had supplied a distribution board. He stated that at the time of the incident, there was no electricity inside the hall.

34. He said the kind of machines used at the site could not be left running.

35. He said all the employees and visitors used the register at the gate when entering the premises and leaving and that all the employees used to report to work at 8.00 am-5 p.m on weekdays and leave at 1; 00 pm on weekends.

36. He stated that on the material day, their last employee left the site at 1 p.m. It was his evidence that the period between closing their store and leaving the gate would take 20-25 minutes because there would be changing of clothes, washing of hands, being searched and clearance with the security.

37. He stated that besides the defendant's workers, there were other people working for the plaintiff and that as per the visitors book, their last employee left work at 1325 hours and the incident allegedly happened at 14:40 hours.

38. He said as per the photographs he took on 5th July, 2021, the place where they were sourcing fire was still intact.

39. In cross examination, he stated that the site was secured with a padlock and though not restricted no one should have entered without their authority. He told court that fire extinguishers were not on site and that the school staff could access the boiler which was inside the site.

Plaintiff's Submissions

40. The Plaintiff framed the following issues for determination:-

    1. Whether the Defendant was liable in negligence for causing fire

    2. Whether the Plaintiff's Insurer is entitled to compensation under the doctrine of subrogation.

41. On the first issue the , the plaintiff submitted the defendant's employees were working on the roof on that particular day based on DW1's statement and considering that the fire broke out at the ceiling, negligence can be inferred on the defendant's part. It was argued that this fact was buttressed by the N.R Evans' report and the Final Report by Cunningham Lindsey.

42. The plaintiff relied on the case of *Jeremiah Maina Kagema v Kenya Power & Lighting CO LTD*[2001] eKLR as cited in *Russel v. L. & S. W. Ry* [1908] 24 T.L.R. 548 at p. 551 on the meaning of the maxim Res ipsa Loquitor.

43. The plaintiff also placed reliance on the case of *Rylands v Fletcher* (1868) LR 3 HL 330.

44. The plaintiff further submitted that the defendant's insurer undertook to discharge the claim for damaged works and in the premises the defendant should be estopped from denying liability. To support this position reliance was placed on the case of *Bon Motors Limited v Corporate Insurance Co. Ltd* [2006] eKLR.

45. With regards to the second issue, the plaintiff submitted in the affirmative. It argued that the insurance policy was produced to demonstrate that there existed a contract of indemnity between itself and M/S G.A insurance company and payment voucher produced showed that its insurer paid a total sum of Ksh.24,431,483 being full and final settlement of claim. To support their submissions, the plaintiff relied on the Court of Appeal case of *Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited* (2018) eKLR.

46. The Plaintiff urged this court to enforce the contract between itself and the defendant. It relied on the case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR where the court held *inter alia* that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

47. The plaintiff thus prayed that this court do grant the orders sought in the plaint.

Defendant's Submissions

48. In regards to whether it was negligent, the defendant submitted that the pleaded issue that the fire was caused by electrical failure and the doctrine of res ipsa loquitor are mutually exclusive and both cannot

be logically true. To support this position reliance was placed on the case of *Jeremiah Maina Kagema v Kenya Power & Lighting Co LTD* (*supra*).

49. The defendant submitted that the pleadings are grossly inconsistent with the evidence since none of its employees were at the site and the particulars of negligence were unproved.

50. The defendant contended that PW2 admitted during cross examination that the premises were not supplied with electricity at the time and that evidence of PW1, the reports by Cunningham Lindsey and County government of Nakuru established that the cause of fire was unknown.

51. It was argued that parties are bound by their pleadings and this court was referred to plethora of cases to support this position. Namely; *Mohmed Dagane Falir v Alfonce Mutuku Muli & another* [2020] eKLR; *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* [2014] eKLR; Malawi Supreme Court of Appeal in the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3; *M N M v D N M K & 13 others* [2017] eKLR; *Kenya Commercial Bank Limited v Sheikh Osman Mohammed* [2013] eKLR; & *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

52. The defendant contended that during hearing the plaintiff maintained that the cause of fire was unknown. That PW1's evidence did not rule out arson and did not avail the list of people at the premises while PW2's evidence admitted that the defendant had no financial motive to be negligent as he had finished the assignment and the only thing pending was the handover.

53. The defendant maintained that there is no evidence direct or circumstantial adduced by the plaintiff to show that the fire was caused by electrical failure.

54. As regards the report by Cunningham Lindsey, the defendant submitted they were appointed to quantify the losses and not to investigate the cause of fire. The defendant contended thart its personal opinion on the possible cause of fire was not founded on a proper factual foundation.

55. The defendants submitted as per the report by the police and Nakuru County Government who had the investigatory capacity to investigate the cause arrived at an inevitable conclusion that the cause of fire was unknown.

56. The defendant argued that even assuming the author of the Cunningham Lindsey report was indeed a fire expert; his opinion is not binding on courts. To support this position reliance was placed on the case of *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 February 2021) where the court quoted the cause of *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR which stated inter alia that;

> " It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof."

57. On contributory negligence, the defendant submitted that they were able to prove that the site was accessible to the plaintiff and other people and urged the court to take judicial notice that it is not uncommon for the people to burn their own premises to get insurance money.

58. On the issue of insurance compensation for the works, the defendant submitted that the fact that insurance company honoured the policy is not evidence of negligence on its part.

59. In regards to subrogation, the defendant submitted that the same to operate negligence must be proved.

Analysis & Determination

60. It is not in dispute that the plaintiff and the Defendant entered into a contract for building works for purposes of renovating Baden Powell Hall. It is also not in dispute that the fire broke out on the Plaintiff's Baden Powell Hall on 4th July, 2021 extensively damaging the same. The said damage is the basis of this suit.

61. The questions that arises for determination therefore are :-

    i. Whether the fire was attributable to negligence on the part of the Defendant and whether the plea of *res ipsa loquitor* applies to the incident.

    ii. Whether the Plaintiff is entitled to the special damages sought under the doctrine of subrogation.

    iii. Who should bear the costs of the suit?

62. The Plaintiff attributed the cause of the subject fire solely to the negligence on the Defendant's agents/ servants/ employees part. The Defendant vehemently disputes this position. According to it the cause of fire is unknown and there is no evidence to demonstrate that the same was caused as a result of its negligent acts.

63. Negligence is defined in the *Black's Law Dictionary*, 10th Edition as:

> " The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. . . . . The elements necessary to recover damages for negligence are (1) the existence of a duty on part of the defendant to protect the plaintiff from the injury complained of, and (2) an injury to the plaintiff from the defendant's failure.

64. To succeed in a claim of negligence, the Plaintiff must establish that the Defendant owed him a duty of care, that there was a breach of the duty of care and as a result of that breach, the plaintiff suffered damages. The principles in negligence claim were established in the case of *Donoghue v Stevenson* (1932) UKHL 100, where it was held:-

> " The law takes no cognisance of, carelessness in the abstract. It concerns itself with carelessness only where there is duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty."

65. The Plaintiff pleaded the following particulars of negligence of the defendant:-

    a. Failing to effectively ensure that the electric cables and related appliances on the premises were constantly maintained and repaired.

    b. Failing to contain/reduce the high flow of electricity power/voltage at the premises.

    c. Failing to act instantly after a report of fire.

    d. Installing defective electric cables and defective lighting arrestor

    e. Installing defective electric cables and defective lighting arrestor

f. Installing too many electrical appliances causing overloading and short circuits.

g. Leaving electrical appliances unattended.

h. Failing to follow instructions while suing electrical appliances.

i. Failing to switch off electricity when required and when necessary.

j. Keeping electrical appliances next to easily combustible materials like timber.

k. Failing to provide any or safe system of electric voltage to pass through the cables serving the work premises

l. Being generally negligent in the circumstances.

66. The plaintiff also pleaded that they would rely on the doctrine of re ipsa loquitor.

67. To prove the case on the cause of fire the plaintiff procured two witnesses.

68. According to PW's evidence the site was only accessible to defendant's employees, the last employee left the site at 13.29 hours shortly before the fire incident was noticed at around 14.10 hours, the site was fenced off and locked, no one was inside the site at the material time and the fire started at the roof top of the said hall. He did not know the cause of the fire.

69. PW2 corroborated the evidence of PW1. However, according to him the cause of the fire was due to electric fault. His evidence that the defendant had a point of connection where electricity would be supplied to it and that no case of intrusion has ever been reported before was uncontroverted.

70. In the report by County Government of Nakuru, produced by the plaintiff, the results of the investigations were that:

> Where fire started: at the roof top of Baden Powell Hall
>
> Where Fire spread to: fire propagated to the whole building and also to the floor which was made of timber.
>
> Supposed cause: not known

71. In the said report by Cunningham Lindsey Kenya Limited , similarly produced by the plaintiff, the requisite results of the investigations were that:-

> 'Officially therefore the cause of fire remains unknown although there seems little doubt this was as a result of the contractor's activities given their presence on site, the time factors and absence of any reasonable alternative cause (res ipsa loquitor')

72. According to the defendant the cause of fire is unknown and as such it cannot be held liable. It was submitted that the fire could not be possibly caused by electric fault as the premises were not supplied with electricity at the time of the incident and particularly that DW2's evidence showed that a board where they were sourcing electrical power was intact.

73. It is indeed true that the cause of fire was unknown based on the aforesaid reports produced by the plaintiff in evidence. However, this court has a duty to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. For this proposition, I'm duly guided by the Court

of Appeal case of *Abbay Abubakar Haji & another v Marair Freight Agencies Ltd* [1984] eKLR where the court stated that:

> " There can be no doubt that it is the clear duty of a court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible. The court cannot, as Denning LJ said, wash its hands of the case and shrink from arriving at a conclusion simply because the evidence is deficient in some respects."

74. In the instant case, it is not in dispute that the defendant's employees were on the site on the material date. The last employee left the site at around 13.25 p.m. and the fire incident was noted at 1400 hours. The evidence of PW1 and PW2 was that the defendant was in exclusive control of the site and was locked at the material time. This was confirmed by DW2 during cross examination when he told court that the site was secured by a padlock and that no one should have entered without their authority.

75. There was also uncontroverted evidence that the fire broke out at the roof top of the Hall, and there was one power point used to supply electricity to the defendant. The site was fenced off by iron sheets and there was a security guard employed by the plaintiff patrolling the surrounding area.

76. The contention by the defendant that the fire may have been caused by arsonists as there were other employees within school compound, in my view, does not hold any water. There was no justification as to why that could have happened considering no intrusion case was ever reported before.

77. The defendant's witnesses also stated that the plaintiff could access site as there was a boiler inside but no evidence was led to show that the plaintiff had accessed the area on that fateful day.

78. The defendant has also challenged the report by Cunningham Lindsey Kenya Limited on grounds that it's author did not possess investigatory capacity and his/her opinion on the possible cause of fire was not based on any factual foundation. This is incorrect. A perusal of the report shows that the Defendant's director was interviewed on the work performed by defendant's servants on the fateful day prior leaving the site.

79. Standard of proof in civil matters is on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 stated that:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

80. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

> " Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other

which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

81. In view of the above and considering the work performed by the Defendant's employees on the fateful day and the time the fire broke out, I find that it can be reasonably inferred that the fire was caused by an incident within the site, that was in exclusive control of the defendant. From the evidence, the fire started on the roof, the precise section where the defendant's workers were working on at the time. The plaintiff's staff and students did not have any access to that particular area.

82. I am of the view that the plaintiff correctly invoked Clause 11.2 of the contract by the parties when it sought to hold the defendant liable for the damage to its building.

83. The plaintiff gave particulars of negligence that in my view, were not fully borne out by the evidence. For example there is an alleged use of sub-standard electrical cables. This did not come out clearly during the trial.

84. For good measure,the Plaintiff has therefore sought to rely on the doctrine of res ipsa loquitur. The Defendant has objected to this, arguing that it was unavailable to the plaintiff having pleaded that the fire was caused by electric fault.

85. The doctrine of res ipsa loquitor has been settled by legal literature and case law. I will cite a few examples. In K. M. Stanton in *The Modern Law of Tort* (1994), at p. 76 it is stated as follows:-

> "Res ipsa loquitur only operates to provide evidence of negligence in the absence of an explanation of the cause of the accident. If the facts are known, the inference is impermissible and it is the task of the court to review the facts and to decide whether they amount to the plaintiff having satisfied the burden of proof which is upon him." ...
>
> 'Since various attempts to apply res ipsa loquitur have been more confusing than helpful, the law is better served if the maxim is treated as expired and no longer a separate component in negligence actions. Its use had been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. The circumstantial evidence that the maxim attempted to deal with is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. If such a case is established, the plaintiff will succeed unless the defendant presents evidence negating that of the plaintiff.'"

86. The above doctrine was aptly discussed in *Susan Kanini Mwangangi & another v Patrick Mbithi Kavita* [2019] eKLR in which the court cited the East African Court of Appeal's decision in *Embu Public Road Services Ltd. v Riimi* [1968] EA 22 thus:

> "The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a

probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."

87. Similarly, in the case of *Nandwa...v...Kenya Kazi Limited* [1988] eKLR, the Court of Appeal (Gachuhi J. A. as he then was) cited the Judgment in the English case of *Barkway ...v... South Wales Transport Company Limited* [19560] 1 ALLER 392 at Page 393 B on the nature and application of the doctrine of res ipsa loquitur as follows:-

> " The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."

88. Reference is also made to *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR which cited the persuasive Canadian case of *Fontaine v British Columbia (Official Adminsitrator)* 1998 CanLII 814 (SCC) (1998) ISCR 424 which also considered res ipsa loquitor and stated thus :-

> " For res ipsa loquitur to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the factual circumstances of the case. As described in Canadian Tort Law (5th ed. 1993), by Allen M. Linden, at p. 233, "[t]here are situations where the facts merely whisper negligence, but there are other circumstances where they shout it aloud."

89. Lastly, I refer to the reasoning of Megaw LJ in *Lloyde v West Midlands Gas Board* [1971] 2 1240. He stated that;

> " Res ipsa loquitur is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a Plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident, but (ii) on the evidence as it stands, i.e. in the absence of evidence from the Defendant, it is more likely than not that the effective cause of the accident, whatever it may have been, was some act or omission of the Defendant or of someone for whom the Defendant was responsible, which act or omission constitutes a failure to take proper care for the Plaintiffs' safety."

90. From the above citations, it is clear that where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone.

91. I hold the view that the doctrine is applicable herein considering there was no certainty on the cause of fire. Fires are known to start and they start because of a given cause.

92. Taking into account the uncertainty as to the cause of fire and considering the presence of the defendant's employees at the site just before the fire was detected, I find that the doctrine of res ipsa loquitur was properly invoked. In the absence of satisfactory explanation from the Defendant on what caused the fire, it is more likely than not that the effective cause of fire whatever it may have been, was some act or omission of the Defendant's employees and or servants.

93. The plaintiff has sought special damages of Ksh. 24,456,483.00 being the adjusted claim. Both the plaintiff and the defendant retained Cunningham Lindsey Kenya Limited to adjust the loss of the property.

94. The plaintiff produced a payment voucher proving that its insurer, G/A Insurance Company settled the above sum and brought the suit under the doctrine of subrogation.

95. The doctrine of subrogation applies in situations where, by virtue of being an insurer, the insurance company is entitled to be placed in the position of the insured and to succeed to all their rights and remedies against third parties in respect to the subject matter of insurance. See *General Principles of Insurance Law* by E R Hardy Ivamy at page 415.

96. The plaintiff's Insurance Company, by settling the adjusted claim, stepped into shoes of the plaintiff/ insured under the doctrine of subrogation since it could not file a claim in its own name.

97. In *Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited* (2018) eKLR the Court of Appeal had this to say on this doctrine:

> " The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated....
>
> As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in *Octagon Private investigation Security Services v Lion of Kenya Insurance Co.* [1994] eKLR and *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR."

98. It was also held in *Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another* [1999] 1 EA 69 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 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."

99. It is thus my finding that the doctrine of subrogation has been appropriately applied by the Insurer in bringing this suit. It is entitled to recover all the money it used to compensate the plaintiff for the loss.

100. After analyzing the evidence adduced by both parties I find that the plaintiff has proven its case on a balance of probability.

101. It is trite that costs follow the event, unless otherwise ordered by the court. Section 27 of the *Civil Procedure Act* states:

> " --- the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court shall have full power to determine by whom--– such costs shall be paid ----

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

102. The High Court Election Petition No. 6 of 2013 – *party of Independent Candidate of Kenya and Another -v- Mutula Kilonzo & Others* stated that the Principle underlying the award of costs is twofold-

a. The award of costs is a matter of discretion of the court that ought to be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.

b. The general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.

103. The plaintiff has been successful in prosecuting this case and there is no good reason as to why the court should depart from the above principles.

104. Accordingly, I enter judgment in for the plaintiff against the defendant for;

a. Special Damages of Ksh.25,484,824.00

b. Costs of this suit.

c. On the interest to be applied I am of the view that court rates are the ideal ones. The plaintiff had sought an alternative of bank rates, whichever is higher. I am of the view that this rate would have been applicable if this was a claim by a financial institution whose business is matters finance. The plaintiff has to be content with the court rates, to be calculated from the date of filing this suit.

105. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2023.

H.M. NYAGA,

JUDGE OF THE HIGH COURT