



REPUBLIC OF KENYA



KENYA LAW
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Njuguna v Thumari (Civil Appeal E464 of 2021)
[2023] KEHC 26934 (KLR) (Civ) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26934 (KLR)

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

CIVIL
CIVIL APPEAL E464 OF 2021

AN ONGERI, J

DECEMBER 15, 2023

BETWEEN

NAOMI NJUGUNA APPELLANT

AND

BENJAMIN THIONGO THUMARI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. M. W. Murage
(SRM) in Milimani CMCC No. E8083 of 2018 delivered on 30/6/2021)*

JUDGMENT

1. The appellant was the plaintiff in CMCC No 8083 of 2018 where she sued Benjamin Thiongo Thumari (the respondent) seeking special damages of ksh.220,559 with costs and interest in respect of damages to her motor vehicle registration No. KCD xxx when it was hit by the respondent's motor vehicle registration no. KAU xxxU.
2. There was interlocutory judgment entered on 3/5/2019.
3. The appellant did not testify during formal proof and the trial court dismissed the suit.
4. The trial court also noted that recovery/interim payment payment voucher dated 30/3/2016 indicated the insured as Atlas Copco East Africa Ltd.
5. The trial court said that the appellant and Atlas Copco did not testify and she dismissed the suit.
6. The appellant has appealed against the dismissal on the following grounds;
 - i. The learned trial magistrate misdirected herself and erred both in law and in fact by dismissing the appellant's case against the respondent on liability.



- ii. The learned trial magistrate misdirected herself and erred both in law and in fact by dismissing the appellant's case against the respondent on quantum.
 - iii. The learned trial magistrate misdirected herself and erred both in law and in fact by finding that the appellant had not proved that she was the insured of the suit motor vehicle when evidence on record proved otherwise.
 - iv. The learned trial magistrate misdirected herself and erred both in law and in fact in calling for a higher threshold of proof that what is required in civil cases.
 - v. The learned trial magistrate misdirected herself and erred both in law and in fact in calling for proof beyond reasonable doubt instead of proof on a balance of probabilities required in civil cases.
 - vi. The learned trial magistrate misdirected herself and erred both in law and in fact by insisting on a formal proof hearing in a material damage claim where the plaintiff had already obtained judgment against the defendant.
 - vii. The learned trial magistrate misdirected herself and erred both in law and in fact by failing to find that formal proof hearing in special damage claim where there is already default judgment was a nullity and a complete waste of precious judicial time.
 - viii. The learned trial magistrate misdirected herself and erred both in law and in fact by failing to find that the default judgment entered against the respondent should have sufficed.
 - ix. The learned trial magistrate misdirected herself and erred both in law and in fact by totally failing to consider the plaintiff's submissions on record thus arrived at an erroneous finding on liability and quantum.
7. The appellant filed submissions as follows; the appellant submitted that the trial court erred as judgment on liability had been entered in favour of the Appellant against the respondent herein with interlocutory judgment on liability having been entered at 100% in absence of the defendant entering appearance and filing defence as provided under Order 7 rule 1 which states:
- 'Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.
8. The respondent herein was duly served with summons to enter appearance as evidenced by the affidavit of Patrick Ongeri sworn on the 14/1/2019 and filed on 5/4/2019.
9. The Respondent, however failed to enter appearance and file his defence and the Court at the request of the Appellant on 5/4/2019 proceeded to enter judgment at 100% in favour of the Appellant in default of appearance on 3/5/2019.
10. The appellant further submitted that the Policy Schedule, Police Abstract and Motor claim form clearly indicates that the appellant's motor vehicle registration number KCD 931 D was insured by First Assurance Company Limited. It is from this contract of insurance that First Assurance Company Limited catered for the garage repair costs, towing fees, assessment fees, investigation fees and e-copy of motor vehicle search fees.



11. Further, that First assurance company Limited is, therefore, entitled to recover costs incurred from the owner of motor vehicle registration number KAU 488U, which was blamed by the police for the accident, under the doctrine of subrogation.
12. The appellant submitted that PW1, Geoffrey Njenga a Representative of the said insurance company testified in court that they were the insurer of the Appellant's motor vehicle registration number KCD 931 D and produced the claim form at the material time of the accident with the police blaming motor vehicle registration number KAU 488U for the accident as per the police abstract.
13. It was also indicated therein that the insurer incurred a total sum of Kshs. 132,719 in repair and other attendant costs as a result of the damage.
14. The appellant motor vehicle was assessed by Bright loss assessors who assessed the cost of repairs inclusive of replacement of damages parts, painting, labour and in their report dated 18/9/2015. The assessors were paid for their services for the sum of Kshs. 6,400.
15. The vehicle was further repaired by St.Austins Ltd who were paid the full repair costs of Kshs. 132,719. The vehicle was re-inspected by Bright loss Assessors and found to have been repaired as per the assessment report at the sum of Kshs. 1,990.
16. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
17. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally.”

18. The issues for determination in this appeal are as follows;
 - i. Whether the case seeking special damages required to proceed to formal proof.
 - ii. Whether the trial court misapprehended the law in this case and arrived at an erroneous decision.
 - iii. Whether the judgment of the trial court should be set aside and the appeal allowed.
19. On the issue as to whether this case required to proceed to formal prove, I find that the claim was a liquidated one in the form of special damages and there was no reason to proceed with formal proof.



20. Entry of default judgements is provided for under Order 10 rules 4(1) of the Civil Procedure Rules as follows;

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs”.

21. In the case of *J C Eksteen vs. Kutusi S/O Bukua* [1951] LRK 90 the Court held as follows;

“For an action to constitute a liquidated demand it is sufficient that it should state the amount demanded and give sufficient particulars of the contract to disclose its nature.”

22. On the issue as to whether the trial court misapprehended the law and arrived at an erroneous decision, I find that it was not necessary for the appellant to testify since this suit was filed on the doctrine of subrogation where an insurance company is allowed to follow up the compensation after settling the claim.

23. In the case of *Kenya Power & Lighting Company Limited v Julius Wambale & Another* (2019) eKLR, it was held 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. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance. It is not disputed that the insurance company has not yet settled the decretal amount on behalf of the applicant who is its insured. It therefore follows that its right under the doctrine of subrogation has not yet crystallized and even if it had, its recourse would only lie in the filing of a suit against the third party blamed for the occurrence of the risk in question for recovery of the sums expended on its insured”

24. I also find that the trial court applied a high standard of proof in a case that had an interlocutory judgment where liability was already settled.

25. I find that the appeal herein has merit and I allow it and set aside the order of dismissal of the suit by the trial court.

26. The Respondent is held 100% liable on account of the interlocutory judgment.

27. I enter judgment in favour of the appellant against the respondent in the sum of kshs.220,559 made up as follows;

Repair costs 132,719.00

Assessment fees 6,400.00

Re-inspection fees 1,990.00



Alternative transport 51,000.00

Investigation fees 24,450.00

Total 220,559.00

28. The respondent to pay costs of the suit and interest from the date of filing suit in the lower court until payment in full.
29. The respondent also to pay the costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

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A. N. ONGERI

JUDGE

