



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**Civil Appeal No. 47 Of 2019**

*[An appeal arising from the judgement and decree of Honourable Karimi Njeru[RM] delivered on the 20/11/2019 in PMCC no 32 of 2017]*

**SPEEDAG INTERFREIGHT[K] LIMITED.....APPELLANT**

**VERSUS**

**1. LACHEKA LUBRICANTS LIMITED**

**2. KOBE ENTERPRISES LIMITED.....RESPONDENTS**

**JUDGMENT**

1. This is an appeal emanating from the decision in Voi PMCC No 320 of 2017 delivered on 20/11/2019(Hon Karimi Njeru). The suit was instituted by the 1<sup>st</sup> Respondent on behalf of its insurance Geminia Insurance under the doctrine of subrogation. The current appeal is against the judgement issued in favour of the 1<sup>st</sup> Respondent and the same has been consolidated with Civil Appeal No 42 of 2019 which had also been lodged by the 2<sup>nd</sup> Respondent.

2. Being aggrieved by the Judgment of the trial court the Appellant and the 2<sup>nd</sup> Respondent filed a Memoranda of Appeal dated 18/12/2019 and 9/12/2019 in which they raised the following grounds:

**Appellant**

***1. THAT the learned magistrate erred in fact and law in failing to consider the material issues of fact and of law raised in the statement of defence, written submissions and the authorities filed on the part of the Appellant.***

***2. THAT the learned magistrate erred in fact and in law in failing to appreciate that the role of the Appellant in the contract entered into that was limited to that of an intermediary or agent and as to the legal obligations and liabilities arising from such a restricted contractual relationship.***

***3. THAT the learned magistrate misdirected herself on the law as relates to the determination of matters brought within the ambit of subrogation to the extent that no contract that is a policy document was produced in evidence on the nature of the relationship between the 1<sup>st</sup> Respondent and its insured.***

***4. THAT the learned magistrate erred in and in fact in finding that the 1<sup>st</sup> Respondent had standi to sue on behalf of its insured in the absence of a policy document.***

***5. THAT the learned magistrate erred in fact and in law in finding that there was proof of payment made to the 1<sup>st</sup> Respondent by its insured.***

***6. THAT the learned magistrate erred in fact and in law in finding that there was negligence on part of the 2<sup>nd</sup> Respondent and by extension on the part of the Appellant in the absence of cogent evidence to prove the assertion.***

***7. THAT the learned magistrate acted on the wrong principles of law hence arrived at a wrong decision***

**2<sup>nd</sup> Respondent**

***1. That the Learned trial magistrate erred in law and in fact by finding that the appellant was liable to pay the Respondent Kshs.***

2626,883, with costs and interest.

**2. That the Learned trial magistrate erred in law by failing to find that there was no lawful marine insurance cover to the subject matter damaged goods.**

**3. That the Learned trial magistrate erred in law and in fact by finding that the marine insurance policy covered the loss of goods from Mombasa to Nairobi.**

**4. That the Learned trial magistrate erred by failing to find that the contents of exhibit 1 expressly excluded the subject matter motor vehicle from the cover of any marine insurance policy.**

**5. The learned trial magistrate erred by failing to find that the Respondent's failure to avail any insurance policy was fatal to the Respondent's case.**

3. This being a first appeal this court has the duty to re-evaluate and reconsider evidence tendered before the trial court in order to arrive at its own independent conclusion as it did not have the benefit of seeing or hearing the witnesses. [See **Kenya Ports Authority v Kuston[Kenya] Limited [2009] eKLR**]

#### **Appellant's Case**

4. **DW1 James Muriuki Mugo** testified that he was a claims officer at the appellant firm; that the nature of business carried out was that of clearing and forwarding as intermediaries between clients and transporters and had engaged in business with the 1<sup>st</sup> Respondent on several occasions. They had engaged the 2<sup>nd</sup> Respondent to transport a container carrying oil lubricants from Mombasa to Nairobi on 17/12/2014. They later received a call informing them of an accident involving the transport vehicle, and the loss of the goods in the container. An officer was sent to confirm the same and assess the damage and the client was called and informed of the same. They asked the 1<sup>st</sup> Respondent to seek compensation from their insurer which was Geminia Insurance Company which they did. The witness testified that the matter was reported to Global Liability Insurance, the Appellant's insurer, who advised the appellant to pursue the 2<sup>nd</sup> Respondent and consequently, they issued subrogation rights to their insurer in order for them to follow up compensation with the 2<sup>nd</sup> Respondent. DW1 further testified that the claim against the appellant was unsustainable as they did not deliver the cargo an issue they insist was well known to the 1<sup>st</sup> Respondent and it was concluded that the claim was to be settled by the 2<sup>nd</sup> Respondent.

5. On cross-examination, DW1 confirmed that the 1<sup>st</sup> Respondent did not instruct the 2<sup>nd</sup> Respondent to transport the cargo and that the general conditions of carriage indicated that the forwarder had his own transport, the package was correctly packaged, and the Appellant could not be held liable. DW1 further confirmed that Article 21 of the general conditions stated that liability was to be sought from sub-contractors but that did not absolve the appellant from liability, since they had not indicated under what conditions they had been transporting the goods in terms of whether or not they would be using an intermediary.

6. On cross-examination, by counsel for the 2<sup>nd</sup> Respondent, DW1 confirmed that the delivery note showed the cargo had been delivered to the 2<sup>nd</sup> Respondent and the terms as per the face value were that goods were carried at the owners risk, the owner in this case being the 1<sup>st</sup> Respondent. Therefore, the motor vehicle was not a vessel and hence the same did not fall under what was to be compensated by the Appellant.

7. On re-examination, DW1 confirmed that the general terms in trading were provided to every person they traded with and that they assumed every trader had the knowledge of the general terms and conditions of trade.

#### **1<sup>st</sup> Respondent's Case**

8. The evidence by the 1<sup>st</sup> Respondent is that it is a company dealing in importation of base oil lubricants for use locally and that it had imported a consignment of base oil lubricants, which arrived at the port of Mombasa in container no MRKU993889-3. The consignment had been covered against risk by a policy issued by Geminia Insurance Company Limited and a contract had been entered between the 1<sup>st</sup> Respondent and the Appellant, and that the goods were to be delivered to the 1<sup>st</sup> Respondent's warehouse in Nairobi. However, unknown to the 1<sup>st</sup> Respondent, the Appellant subcontracted the 2<sup>nd</sup> Respondent to deliver the said goods to Nairobi. The 2<sup>nd</sup> Respondent's vehicle ferrying the cargo got involved in a self-involving accident that caused spillage of the goods which resulted to loss of the same. Three (3) witnesses testified on behalf of the 1<sup>st</sup> Respondent and their evidence was that the 1<sup>st</sup> Respondent had been insured by a Maritime Insurance Policy No OP/71/0900123/1. According to the evidence of **PW1 Anthony Mwangi** a legal officer at Geminia Insurance, a loss assessor was appointed after the 1<sup>st</sup> Respondent being informed of the accident. The loss was adjusted at Kshs 2,483,623/- and the 1<sup>st</sup> Respondents were paid a total of Kshs 2,483,623. That the risk assessors were paid a total of Kshs 143,260/- and Kshs 51,250 was further paid to the investigators bringing the total sum to Kshs 2,678,135. He further stated that a total of Kshs 275,958 was deducted as excess and that they were allowed to recover the same hence bringing the total amount to Kshs 2,954,091/-.

9. **Pw2 Peter Sakwa** testified that he was an employee of expert loss assessors and had visited the accident scene and confirmed its occurrence. PW2 testified that the spillage had been caused by negligence occasioned by the 2<sup>nd</sup> Respondent's driver as the oils were stored in flex bags within the container and further that the marine policy covered goods from their origin to the final premises which was the 1<sup>st</sup> Respondent's warehouse in Nairobi. That the port of Mombasa was only a point of transit.

10. **PW3 Henry Biwott** the third witness testified that he was a police officer attached to Voi Police Station who confirmed that indeed an accident occurred on 17/12/2014 occasioning the spillage of oil. It was his evidence that the accident was self-involving.

## 2<sup>nd</sup> Respondents Case

11. The 2<sup>nd</sup> Respondent had initially filed an Appeal no 42 of 2019 against the decision subject of the present Appeal before Court. The same was consolidated with the Appeal before Court. It is the 2<sup>nd</sup> Respondent's case that there was no lawful marine insurance cover to the subject matter damaged goods from Mombasa to Nairobi. The 1<sup>st</sup> Respondent testified that the certificate of marine insurance clearly stated that the same had been issued by Geminia Insurance Company in their favour. The certificate of marine insurance also stated that the insurance covered goods against any risk from the United Arab Emirates to Nairobi via the port of Mombasa. The argument brought forth by the appellant that the insurance policy only covered the sea vessel was termed illogical as the suit was filed under the doctrine of subrogation on behalf of Geminia Insurance Company Limited. Reference was made to Section 3[1] and [2] of the marine insurance Act which defined *marine insurance as follows*;

***“A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against the losses incident to marine adventure.***

***A contract of marine insurance may by its express terms, or by usage of trade be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage”.***

## Submissions

12. **Mr. Nyongesa** learned counsel for the Appellant submitted that the 1<sup>st</sup> Respondent's suit for subrogation was a non-starter since the policy document that creates the contractual relationship between the insurer and the insured was not produced and therefore the insurer lacked *locus standi*. Counsel submitted that the 1<sup>st</sup> Respondent has not proved that the insured was indemnified since vouchers and invoices are not proof of payment. Consequently, the claim for subrogation is unsustainable.

13. **Mr. Nyongesa** further submitted that the 1<sup>st</sup> Respondent at the contractual stage was aware that the Appellant did not own any vehicle of its own, and as such, it would act as an intermediary for the purposes of procuring a third party to transport the consignment and a copy of a delivery note with the said conditions was produced to corroborate that assertion. Therefore, the Appellant's obligations ended when it handed over the container to the 2<sup>nd</sup> Respondent in good condition. Therefore, the insurance taken out by the 1<sup>st</sup> Respondent ought to have also covered the 1<sup>st</sup> Respondent's agents.

14. **Mr. Kiwinda** learned counsel for the 1<sup>st</sup> Respondent reiterated its position at the trial Court and submitted that it was a stranger to the arrangement between the Appellant and the 2<sup>nd</sup> Respondent, since the quotation the Appellant is relying on and insisting to have given him subcontracting permission was not part of the Appellant's documents, and that the 1<sup>st</sup> Respondent was not liable for the loss contemplated under Article 18 of the general conditions and that the negligence of the subcontractor did not absolve the Appellant from liability.

15. Counsel submitted that indeed a certificate of marine insurance No. MAR/71/1420528/1 and Policy Number OP/71/0900123/1, which stated that the same had been issued by Gemini Insurance Company in favour of the 1<sup>st</sup> Respondent also categorically stated that the insurance covered the goods against any risk from United Arab Emirates to Nairobi via the port of Mombasa. Further, Mr. Kiwinda submitted that there was no evidence controverting the fact that a policy of insurance was issued by Gemini Insurance and that PW2 through the Marine Surveyor Report confirmed that they were contracted by Gemini Insurance to investigate on a consignment that had been involved in an accident. Counsel cited the finding in **Gahir Engineering Works Limited v Rapid Kate services limited & another [2018] eKLR** where it was held that the fact that a policy document was not produced was not fatal to the insurer's claim since the insurer was only required to prove its claim on a balance of probabilities.

16. **Mr. Kiwinda** submitted that a voucher dated 26/01/2015 was acknowledged by the 1<sup>st</sup> Respondent and thereafter proceeded to give Gemini Insurance Company right to pursue recovery of their outlay under the doctrine of subrogation and that all the documents in support of the 1<sup>st</sup> Respondent's claim were never challenged on cross-examination

17. **Mr. Atanacha** learned counsel for the 2<sup>nd</sup> Respondent relied on its submission filed in the trial court and submitted the 1<sup>st</sup> Respondent did not furnish the Court with the policy document and therefore the subrogation suit does not arise. Further, the motor vehicle used to transport the consignment to Nairobi did not fall under the definition of a sea vessel as stated on the insurance certificate.

## The Determination

18. 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 3<sup>rd</sup> party tortfeasor. The extent of the compensation is not more than what has been paid to the insured.

19. In the case of **Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69** the Court defined the subrogation doctrine 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.”*

20. In “**General Principles of Law**” 6<sup>th</sup> edition (E.R. Hardy Ivamy”, the author states as follows at page 493:

*“In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of ‘subrogation’ are entitled to be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance.*

*Thus, subrogation applies to marine insurance policies and to many non-marine policies, e.g. a fire, motor, jewelry, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to life insurance nor to personal accident insurance, for these are not contracts of indemnity.”*

21. In **Opiss v Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991** the court stated:

*“The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.”*

22. I have given due consideration to the appeal as well as the submissions and find the following issues necessary for determination:

*i. Whether there was a binding and operative contract of indemnity between the Respondent and the Insurance company in the first instance.*

*ii. Whether the appellant was the 1<sup>st</sup> Respondent’s agent/intermediary or carrier.*

*iii. Whether the 1<sup>st</sup> Respondent proved its claim to the required standards the 2<sup>nd</sup> Respondent.*

*(i) Whether there was a binding and operative contract of indemnity between the Respondent and the Insurance company in the first instance.*

23. The appellant argues that the 1<sup>st</sup> Respondent (the insurer) lacked the *locus standi* to institute the subrogation claim since it failed to furnish the court with the policy document which is the evidence that indeed there was an insurance contract between the insurer and the 1<sup>st</sup> Respondent.

24. The question this Court needs to answer in my view is whether it is necessary for the insurer to furnish a policy document in Order to support a subrogation claim.

25. In a persuasive authority in **Gahir Engineering Works Limited v Rapid Kate Services Limited (Supra)** the Court held:

*“The fact that the appellant did not produce in evidence the policy document itself though material was not fatal to the insurer’s claim since it was only required to prove its claim on a balance of probabilities not beyond reasonable doubt.”*

26. In the instant case, to prove the existence of an insurer and insured relationship, the 1<sup>st</sup> Respondent produced a certificate of marine insurance No. MAR/71/1420528/1 and Policy Number OP/71/0900123/1, which clearly stated that the same had been issued by Gemini Insurance Company in favour of the 1<sup>st</sup> Respondent and it categorically stated that the insurance covered the goods against any risk from United Arab Emirates to Nairobi via the port of Mombasa. Further, PW2 through the Marine Surveyor Report confirmed that they were contracted by Gemini Insurance to investigate on a consignment that had been involved in an accident. Consequently, I find and hold that the 1<sup>st</sup> Respondent was insured by Gemini Insurance Company and as a result, the insurance company had the *locus standi* to bring the subrogation claim in the name of the 1<sup>st</sup> Respondent.

27. I have also carefully looked at the certificate of Marine insurance and it is evident that the insured consignment from United Arab Emirates was headed to Nairobi and Mombasa was to be a transit point. Therefore, the insurer liability would have ended once the goods arrived in Nairobi. However, in this instance the cargo was lost at Kasarani in Voi when the lorry carrying the consignment got into an accident.

28. Section 3(2) of the Marine Insurance Act provides:

*“A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.”*

29. Therefore the trial court’s finding that the marine policy also covered the section of the route being Mombasa-Nairobi route was correct and the Plaintiff/1<sup>st</sup> Respondent was entitled to compensation by the insurance company.

30. From the foregoing it is the finding of this Court that the 2<sup>nd</sup> Respondent’s appeal herein lacks merit. The same is dismissed in its

entirety with costs to the 1<sup>st</sup> Respondent and the Appellant.

**(ii) Whether the Appellant was the 1<sup>st</sup> Respondent's agent/intermediary or carrier.**

31. The general conditions furnished by the Appellant do not specifically refer to the nature of engagement between the Appellant and the 1<sup>st</sup> Appellant as the conditions apply generally to the customers the defendant deals with. Under Article 1 of the said General Conditions, one can however discern that the Appellant offers the services of a freight forwarder, carrier, warehouse operator, ship agent, husbandry agent, shipbroker, clearing agent as well as additional and ancillary services. In order for this court to actually determine the nature of the engagement between the 1<sup>st</sup> Respondent and the Appellant, one must resort to the agreement entered into between the 1<sup>st</sup> Respondent and the Appellant. Unfortunately, no agreement was availed. Consequently, the averment that the Appellant was the 1<sup>st</sup> Respondent's carrier in relation to the lost consignment remains a mere allegation with no evidence to support it.

32. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law. **Section 107(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* provides:

***“107. (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.”***

33. From evidential burden see *Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016] eKLR* which captured **Sections 109 and 112** of the *Act* as follows:

***“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***112. 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”.***

34. No document was produced by the 1<sup>st</sup> Respondent to demonstrate the nature of engagement between the Appellant and the 1<sup>st</sup> Respondent. The delivery note availed by the Appellant herein could not be relied on, since the consignment never reached the destination. Nevertheless, it was the 1<sup>st</sup> Respondent's duty to prove its case against the Appellant and 2<sup>nd</sup> Respondent to the required standard. Further, looking at the Appellant's General Condition produced in evidence, it can be discerned that under Article 21 of the said General Conditions, the Appellant could act as an intermediary or agent (in accordance with Art. 2, No. 1). Further, under Article 23, of the said General Conditions, the Appellant could also act as a carrier (in accordance with Art, No. 2) and there is a limitation of liability clause under each of the aforementioned Articles of the General Conditions.

35. It is trite law that in civil cases, the burden of proof which is on a balance of probabilities, is on the Plaintiff/1<sup>st</sup> Respondent. The Court of Appeal in *Ignatius Makau Mutisya v Reuben Musyoki Muli, Civil Appeal No. 192 of 2007 [2015] eKLR* pronounced itself on the nature of evidence that would be sufficient to discharge the burden of proof on a balance of probabilities. The court borrowed from the wisdom of *Denning, J* in *Miller v Minister of Pensions [1947] 2 ALL ER 372* when he stated as follows:

***“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 probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

36. In this case, the 1<sup>st</sup> Respondent adduced evidence through the testimonies of **PW1, PW2 and PW3** that the Insurance company had insured the 1<sup>st</sup> Respondent's consignment from United Arab Emirates to Nairobi via Mombasa. The learned trial magistrate found that the Appellant was vicariously liable for the 2<sup>nd</sup> Respondent's negligence in causing the accident. However, from the foregoing, I find that the 1<sup>st</sup> Respondent did not discharge its burden of proof against the Appellant. The 1<sup>st</sup> Respondent did not furnish the Court with an invoice and/ agreement between the 1<sup>st</sup> Respondent and the Appellant so as to enable this Court to discern the nature of the clearing and forwarding relationship. Since the allegations made by the 1<sup>st</sup> Respondent were not supported by any documentary evidence, I find and hold that the trial court erred when it found that the 1<sup>st</sup> Appellant was vicariously liable for the accident caused by the 2<sup>nd</sup> Respondent.

**(iii) Whether the 1<sup>st</sup> Respondent proved its claim to the required standards the 2<sup>nd</sup> Respondent.**

37. There was both oral evidence by **PW3** and documentary evidence in the form of a police abstract dated 8/12/2015, to prove the occurrence of the accident that resulted to the loss of the consignment in the custody of the 2<sup>nd</sup> Respondent who had been sub-contracted by the Appellant to transport the subject consignment from Mombasa to Nairobi. In my considerate view, the 2<sup>nd</sup> Respondent did not provide evidence to absolve itself from the negligence that resulted to the loss of the consignment. In fact, **Henry Biwott PW3** testified that the accident that caused the loss of the 1<sup>st</sup> Respondent consignment was self-involving. The 2<sup>nd</sup> Respondent however did not call any witness to controvert the testimony of **PW3**. Consequently, **PW3** account of how the accident occurred remained uncontroverted and as a result, the 2<sup>nd</sup> Respondent was liable for the negligence that resulted to the loss of the consignment having been enjoined in the suit as a co-defendant to indemnify the Appellant against the 1<sup>st</sup> Respondent's claim. And since the 2<sup>nd</sup> Respondent never challenged the quantum awarded to the 1<sup>st</sup> Respondent, this Court will not disturb the same.

38. In the upshot I find and hold that there is merit in the Appellant's appeal which is hereby allowed.

39. Other orders are as follows:

**(i) The 2<sup>nd</sup> Respondent's appeal is dismissed with costs to the Appellant and to the 1<sup>st</sup> Respondent.**

**(ii) The judgment of the lower court dated 20/11/2019 is hereby set aside and/or varied to the extent that this Court finds that the Appellant was not vicariously liable for the negligence of the 2<sup>nd</sup> Respondent herein.**

**(iii) That the 2<sup>nd</sup> Respondent was solely to blame for the said accident and is solely liable for the judgment of the lower court aforesaid.**

**(iv) The Appellant and the 1<sup>st</sup> Respondent are awarded the costs of this appeal, as well as the costs in the trial court both to be paid by the 2<sup>nd</sup> Respondent.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF AUGUST, 2021.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Mr. Kiminga for 1<sup>st</sup> Respondent

Ms. Asewe for Appellant

Ms. Peris Court Assistant