



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HCCC NO. 92 OF 2012

AFRICAN MERCHANT ASSURANCE

COMPANY LIMITED.....PLAINTIFF

=VERSUS=

KENYA POWER AND LIGHTING COMPANY LTD.....DEFENDANT

J U D G M E N T

Introduction

On 21st June 2009 at about 1.00 pm there was fire at Kibaoni area in Malindi. Several properties were burnt. The Plaintiff herein being the insurer of the affected properties filed this suit seeking Kshs.82,253,214 in form of special damages plus interest and costs. The defendant denied liability and the matter proceeded to full hearing.

Plaintiff's case

Four witnesses testified for the plaintiff. PW1 CHARO MUTETE testified that he was a watchman guarding one of the residential houses that was affected by the fire. He had been employed by C.K. Security Company. On 26th June 2009 at about 1.00 pm he heard sound abruptly and noticed fire coming from an electric post. The post was just near the gate of the house. The fire was emitting some sparks and it spread to the makuti roof of the house. His colleague, Katana had been employed as a gardener and was in the house.

It is PW1's evidence that he pressed the security alarm and the security alarm attendants went to the scene. They managed only to rescue a gas cylinder from the house. By 1.30 pm when the fire brigade went to the scene, the house had been reduced to ashes. He was later arrested together with Katana and detained at Malindi police station for one week. It is his evidence that Kenya Power Company Limited officials were alleging that the fire did not start from the electric post but from the house and they were being forced to indicate that the fire started from inside the house.

PW2 Professor MAURICE MANG'OLI is a registered electrical engineer working at the University of Nairobi. The university runs an industrial research and consultancy unit where PW2 is a Coordinator. They were retained by the Plaintiff to look at the possible cause of the fire. He visited the site and noted that there were tree branches touching on the power lines. It was his finding that the fire could have been caused by electric sparks at the pole near the entrance of one of the affected houses. The electric wires

burnt from the installation point. He saw the electric pole and noted that the fire was intense at the pole. The pole had been taken to Malindi police station. It is his evidence that due to the tree branches, the electric wires supplying the area must have come into contact and caused a short circuit. The branches of trees were touching the electricity wires. According to him, the house appliances could not have caused the fire. If that was the case then the fire could have started from within the building. However, the fire started from the roof due to the sparks from the electricity post. The internal protection electric installation of the building were intact. The electric fuses of the house were not tripped and that could have happened if the fire started from an electric fault in the house.

KENNEDY KIPROP, was the Plaintiff's third witness. He is a claims manager with the Plaintiff's company. It is his evidence that the plaintiff had insured eleven premises that were affected by the fire. He itemised the policy and payments made as follows:-

	Name of Insured	Policy Number	Amount Paid
1.	Malindi Palm tree Club	AMD/040/1/000014/2007/03	36,978,147
2.	Jambo Paluni Co. Ltd	AMD/030/1/000029/2007/02	2,950,000
3.	Masimo Rangheri	AMD/030/1/000019/2006/11	11,003,714
4.	Angelo Pennezototo	AMD/030/1/000039/2007/06	3,454,578
5.	Lupinet Mauro	AMD/030/1/000151/2009/05	3,178,800
6.	Lora Stefano	AMD/030/1/00116/2009/10	5,715,160
7.	Flavio Aliprandi	AMD/030/1/0000152/2009/5	1,878,664
8.	Cima Marcello	AMD/030/1/000150/2009/5	3,478,550
	Total		65,982,613

It is PW3's evidence that the Plaintiff retained the service of Composite Loss Adjusters Company and Universal Loss Adjusters. The former was paid Kshs.650,000 while the latter was paid Kshs.4,500,000 as their consultancy fees; they further paid Kshs.370,000 to an engineer and kshs.21,090 to an investigator. PW3 produced the records showing payments to the Plaintiff's insured as well as those engaged to investigate the cause of the fire. The plaintiff declined to sue the defendant as investigations found that the cause of fire was due to electric fault. It is his evidence that Kenya Power was negligent.

PW4 VICTOR KARAGO KAGWE is a registered insurance loss adjuster. He is the principle officer in Composite Loss Adjusters Company. He was retained by the Plaintiff to investigate the fire and make his report. He visited the site and talked to PW1. He went to the scene the same day. He recommended that an engineer be engaged to identify the cause of the fire. He never went back to the site with PW2. By then the electricity pole had been taken to Malindi police station. He took photographs at the scene. His duty entailed finding out the cause of the fire and the extent of the Plaintiff's liability. His report gives guides as to the reserve amount to be paid to an insured.

Defence case

Two witnesses testified for the defence. NELSON GAITHO GISHO was the first defence witness. He is a technician working with the defendant. On 21st June 2009 he was based in Malindi. They received a call from the emergency team and informed about the fire. He visited the scene on 22nd June 2009. He observed that most of the houses had been gutted down. He talked to PW1 and one Katana who was a house boy in one of the affected houses. Katana informed him that he heard a loud bang while inside the house. Katana went out and found one side of the Makuti (thatch) roof of the villa on fire. It is his

evidence that the electric conducts were installed. The only damage was chunning of the cable. The point of contact of the service cable was still intact. The cables had no sign of damage. He listed the affected houses and their electricity meter numbers. The chunning of the cables was due to the fire flames. He concluded that the fire did not start from the electricity pole. The house where the fire started had its circuit conductors intact. His report did not give a conclusion on the cause of the fire. It is his evidence that the residents of the area do not like the trees to be pruned that is why they use insulated conductors.

DW2 COLLINS OMONDI OKETCH is an employee of the defendant in charge of operations and maintenance. He is based in Malindi and was still working in Malindi in 2009 when the accident occurred. There was an emergency call to their team and they switched off the main line supplying electricity to the accident area. He was tasked to go and inspect the power installation in the area and make a report on the incident. He went to the site the following day 22nd June 2009 and prepared his report on that day. He made physical observation and concluded that the cause of the fire was not from the defendant's electrical installation. The spacing of the cables could not have caused any short on the power. There was an underground service line cable to the house that was the first one to be burnt. That line was intact. However, some service lines for other houses were burnt. He could not determine the cause of the fire. The cables were insulated. The burnt electricity pole was removed because the defendant wanted to restore power to its customers.

Plaintiff's submissions

The Plaintiff submitted through its counsel that the Defendant supplied electricity to the Plaintiff's insureds. It is also stated that fire broke out on 21st June 2009 at 1.00 pm. The Plaintiff settled the claims by its policy holders. A total of Kshs.76,708,415 was paid leaving a balance of Kshs.20,000,000/= due to Malindi Palm Tree Club Limited. It is also submitted that the Plaintiff incurred a further fee of Kshs.5,544,799 after the incident. According to the Plaintiff, the evidence shows that the fire was caused by the Defendant's negligence. The Defendant failed to prune tree branches that were hanging dangerously and this caused the fire. The Defendant did not properly maintain the power lines and cables.

It is further contended that since the Plaintiff paid the policy holders after the fire incident, the Plaintiff is entitled to bring this suit in its name. The Plaintiff has all the legal rights to sue the Defendant over the loss arising from the Defendant's negligence. The doctrine of foreseeability in Tort Law applies as the Defendant ought to have foreseen that its negligence could have led to the fire incident. According to counsel for the Plaintiff, the Defendant cannot escape from liability simply because the insured policy holders are not parties to the suit. The policy holders' properties were completely burnt and the Plaintiff established the extent of the loss and the total compensation paid.

Defendant's submissions

On his part, counsel for the Defendant maintains that the Plaintiff has not proved its case to the required standard. No negligence on the part of the Defendant has been proved. The evidence shows that the fire did not start from the electricity pole. None of the insured persons was called to testify. Some of the policies had expired. The power cables were insulated as the residents did not like the trees to be pruned.

The Plaintiff is claiming special damages but the claim has not been proved. There is no report from an expert showing how the amount being claimed was arrived at. P4 informed the court that his figures were only the reserve amount. The policy numbers in the Plaintiff's do not match with the ones on the policy documents. There is discrepancy in the policy number from the documents. The documents produced by the Plaintiff, these include the policies for Massino Ragheri, Marialuisa Rabeshi, Agnesse and Partesi Osuoldo and Lora Stephano. The policy for Malindi Palm Tree Hotel had expired.

It is submitted by counsel for the Defendant that since some of the policies were not valid, the Plaintiff lacked capacity at all to institute this claim. There is no written authority from the alleged policy holders to file the suit. The doctrine of subrogation cannot be invoked in the circumstances.

The record show that parties did not agree on the issues for determination. Given the pleadings herein and the evidence on record, the issues for determination by the court are:-

- (i) What was the cause of the fire.
- (ii) Was the defendant negligent
- (iii) Were the polices valid
- (iv) Has the Plaintiff proved its case on the amount of Kshs.82,253,214 being claimed.
- (v) Is the suit properly filed under the principle of subrogation
- (vi) Who should pay the costs.

(i) The cause of the fire

It is the evidence of PW2, Professor Maurice Mang'oli, that the internal electrical installations of the house where the fire started were intact. PW2 produced his report dated 17th December 2009. PW2 indicated in his report that although the actual power line conductors were insulated, the straps were bare and were capable to cause a short circuit between the phases. The hanging tree branches were hanging over the cable straps. It is further indicated that the fire could not have started from the nearby home-Rajo house- as its electrical installations were intact. The initial event was sparking from the top of the power pole and the conductors at the power line poles melted. It is PW2's position that if the fire was started by a malfunctioning of any electrical appliance in the house, then that cause has to be explained in line with the sparking at the electricity pole. Photographs of the burnt out electricity pole and exposed (naked) straps are annexed to PW2's report. Some photos showing the burnt cable are also annexed with some having melted out.

DW1, Nelson Gaitho Gichu prepared a report dated 14th July 2007. The report noted that Mr. Mwatete confirmed that the air conditioners and fridges at Raggio (Rajo) house were on and did not go off. The house boy, Mr. Katana switched the consumer unit off. The circuits were still sound. The electricity pole was burnt midway upwards. The report gave a list of the burnt houses and their meter numbers. It concluded as follows:-

Other observations

“Although the witness claims the sparks fell from KP&LC pole, the shrubs on the perimeter wall were not burnt at all. Block B which was completely burnt down had signs of smoke billowing from inside. Only one of the houses (B) was completely burnt. The wind direction can be used to identify the source of the fire as it cant flow against the wind.”

Conclusion

“The source of fire could not be immediately established. However, more detailed investigations was still going on by the time of writing the report. More to note is a confirmation by a witness who chose anonymity that the explosion started from RAGGIO house block B.”

Similarly, DW2 Collins Aketch prepared his report dated 22nd June 2009. This report was done before that of DW1. The report simply indicate that power to the area was switched off once the fire was reported. Power to the other unaffected customers was restored at 3.00 pm. The report concluded that **“the cause of the fire could not be immediately established.”**

The most crucial evidence is that of PW1 Charo Mwathethe. He was at the scene guarding the first house that was burnt. He switched on the security alarm. He was quite categorical that he saw sparks on the

power pole and the roof of the house caught fire. According to his statement, a white man went to the scene and asked him to indicate that the fire started from inside the house. PW1 called Katana, the house boy mentioned in DW1's report.

According to PW1, they were arrested and kept at the police station for one week. They were released together with Katana without being charged. The report by DW2 Collins Omondi Oketch does not give the cause of the fire. It is merely a ground report as to what happened. The report by DW1 Nelson Gichu indicate that more detailed investigations were still going on by the time the report was prepared on 14th July 2007. The Defendant did not provide any further report or evidence in relation to its further investigations.

From the evidence on record, I am satisfied that the fire was caused by sparks coming from the electricity pole. Although it is claimed that the cables to the pole were insulated, the photographs show naked straps hanging together on tree branches. The electricity pole was burnt as described by DW1 in his report. It was burnt on its upper part. According to PW1 there were sparks coming from the pole. There is no evidence that PW1 was compromised or made to accuse the defendant. Indeed he testified that they were arrested and asked to attribute the source of the fire as the house where Katana was working.

Given the evidence herein, I do find that the fire was caused by sparks coming from the electricity pole. I do agree with the opinion of PW2. The report by DW1 only recommended further investigations that were not done. The cables were burnt out. Since the power lines were immediately put off as per DW2, it is not clear why the pole was burnt. The explanation that the power lines were burnt by the fire from the house is not convincing. I do conclude that there was no electricity short circuit as explained by PW2. The only eye witness, PW1 saw the fire sparks coming from the top of the electricity pole. I find PW1 to be a credible witness. The fire was caused by the sparks from the electricity pole.

(ii) Was the Defendant negligent?

The evidence by PW2 shows that naked power straps were hanging in between the branches. The photos taken at the site clearly show that the power lines passed in between branches of trees. The fact that some of the cables were insulated cannot be a good ground for not trimming the trees. The wayleaves belong to the defendant and it was its duty to clear the trees. The area residents can have trees planted in their respective compounds, but not along the wayleaves. The defendant compromised safety with convenience of the residents. This was negligence on the part of the defendant. The power could have been caused by an electric surge which led to the sparks or could have been caused by the electric wires touching each other as per the evidence of PW2. It is established that had the fire started from one of the houses, then the electrical fittings could have tripped. I believe this in simple terms mean that the fuses in the houses would have switched themselves off automatically. That was not the case. PW1 was there when the fire started. He is a reliable eye witness. The fire started from the electric pole and then spread to the houses. I do find that the defendant is 100% liable.

iii. Were the Insurance Policies valid

PW3 produced the respective policies of their insured. The evidence on this aspect is as follows: -

	Name of Insured	Policy Number	Period
1.	Malindi Palm tree Club	AMD/040/1/000014/2007/03	15.03.2007-15.03.2008
2.	Jambo Paluni Co. Ltd	AMD/030/1/000029/2007/02	11.02.2009-10.02.2010
3.	Masimo Rangheri	AMD/030/1/000019/2006/11	8.11.2008-7.11.2009
4.	Angelo Pennezototo	AMD/030/1/000039/2007/06	22.06.2008-2.06.2009
5.	Lupinet Mauro	AMD/030/1/000151/2009/05	29.05.2009-29.05.2010

6.	Lora Stefano	AMD/030/1/00116/2009/10	2.10.2008-2.10.2009
7.	Flavio Aliprandi	AMD/030/1/0000152/2009/5	29.05.2009-28.05.2-10
8.	Cima Marcello	AMD/030/1/000150/2009/5	3,478,550

The policy for Malindi Palm Tree Club was renewable. PW3 produced documents indicating that the plaintiff paid the insured the loss suffered. The policy, according to the plaintiff, had been renewed. Paragraph 11 of the amended plaint indicate that Kshs.30 million had been paid to the insured by the time the suit was filed. The plaintiff's bundle of documents filed on 16.2.2015 show payments to Malindi Palm Tree Club as follows: -

15.01.2010	Malindi Palm Club Ltd	5,000,000/=
02.02.2010	Malindi Palm Club Ltd	5,000,000/=
29.06.2011	Malindi Palm Club Ltd	3,000,000/=
11.07.2011	Malindi Palm Club Ltd	5,000,000/=
5.09.2012	Malindi Palm Club Ltd	2,000,000/=
18.10.2012	Malindi Palm Club Ltd	1,000,000/=
16.07.2013	Malindi Palm Club Ltd	2,000,000/=
13.08.2009	Malindi Palm Club Ltd	12,000,000/=

Given the evidence on record, I do find that the policy for Malindi Palm Tree Club was running. I do also find that the policies for the other insureds listed herein above were also running.

iv. Did the plaintiff prove that it paid the amount being claimed?

The prayers in the amended plaint are for Kshs.82,253,214/=. That is the amount being claimed. Paragraph 5 of the amended plaint gives nine policy holders. PW3 testified that Lora Stephano was the same as Zawadi house. In his evidence in chief, PW3 the plaintiff's claims manager referred to eight policy documents marked as (a) to (h). The policy for Fronda Agnesse and Partesi Osualdo is not included in paragraph 5 of the amended plaint. PW3 testified that there were twelve policy holders who were paid. PW3's evidence indicate that eleven policy holders were paid as follows: -

follows:-

	Name of Insured	Policy Number	Amount Paid
1.	Malindi Palm tree Club	AMD/040/1/000014/2007/03	36,978,147
2.	Jambo Paluni Co. Ltd	AMD/030/1/000029/2007/02	2,950,000
3.	Masimo Rangheri	AMD/030/1/000019/2006/11	11,003,714
4.	Angelo Pennezototo	AMD/030/1/000039/2007/06	3,454,578
5.	Lupinet Mauro	AMD/030/1/000151/2009/05	3,178,800
6.	Lora Stefano	AMD/030/1/00116/2009/10	5,715,160

7.	Flavio Aliprandi	AMD/030/1/0000152/2009/5	1,878,664
8.	Cima Marcello	AMD/030/1/000150/2009/5	3,478,550
	Total		65,982,613

The plaintiff further adduced evidence to the effect that it paid composite loss adjusters Kshs.650,000/= universal loss adjusters Kshs.4,503,709/=, Electrical engineer, Kshs.370,000/= and Trinex Investigators, Kshs.21,090/=. Receipts showing proof of payment were produced in the bundle of documents dated 12.2.2015. I do find that the plaintiff paid a total sum of Kshs.65,982,613/= to the policy holders and Kshs.5,544,799/= to the investigators and loss adjusters. The report by PW4 given the reserve amount payable for each claim. The payments are lower than the reserve price. The plaintiff is simply claiming what it paid to its insured policy holders. I am satisfied that the plaintiff has proved that it paid a total of Kshs.71,527,412/= as a result of the fire.

v. Is the suit properly filed under the principle of subrogation?

Counsel for the defendant submitted that the suit is not properly filed. Under the principle of subrogation the suit had to be brought under the names of the insured. The suit is in the name of the insurance company. On his part, counsel for the plaintiff maintains that the plaintiff has all the legal rights to sue the defendant over the loss arising from the defendant's negligence. The defendant cannot escape liability simply because the insured are not parties to this suit. Since the insured have already been compensated by the time the suit was filed, the defendant has to indemnify the plaintiff for the loss suffered.

The case herein is a claim by an insurance company that had insured some properties. The properties were burnt on 21.6.2009. The plaintiff maintains it paid its insured and would like to be indemnified by the defendant.

The doctrine of indemnity is to the effect that the insured should be restored to the position he was before the loss attached. There should be no over payment or under payment. Under the principle of subrogation, the insurance company that has settled the claim is allowed to take up the role of the insured. In the case of **SIMPSON & COMPANY et al -V- THOMSON KBURREL et al [1877] 3 App Cas, 279 or 38 L.T: 1**(cited in Insurance Law in East Africa by Joseph B. Byamugisha at page 103), Lord Carns stated as follows on the right of the insurance company: -

“The insurance company should be entitled to succeed to the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.”

When the original plaint was filed on 19.6.2012, the eleven insured were made to be the 2nd to 13th defendants. The plaint was later amended and their names were deleted. The usual practice in indemnity cases under the doctrine of subrogation is for the suit to be instituted in the name of the insured. It is the insured who is seeking reimbursement from the negligent party. The insurance company is left behind the scene and will only appear to ask the insured to pay it what has been recovered to the extent of the amount it had paid the insured. The insurance company's rights of subrogation are therefore enforced through the insured. The proceedings have to be instituted in the name of the insured but for the benefit of the insurance company.

CHALMERS on Marine Insurance Act, 1906, 6th edition at page 126 states as follows: -

“Speaking broadly the insurer in the absence of special contract must exercise all remedies arising from subrogation in the name of the assured. It follows that the insurer is entitled to the use of the assured's name , but if the insurer wishes to bring an action he must, of course be prepared to indemnify the assured as regards costs.”

Halsbury's Laws of England, Volume 22, 3rd edition(1958) at page 263 states as follows: -

“In the absence of formal assignment of the right of action, the insurers cannot sue the third party in their own names; they must bring the action in the name of the assured. It is his duty, on receiving a proper indemnity against costs, to permit his name to be used in such action.”

It is therefore a well established principle that the insurer should not be a direct party to the proceedings against third parties. The insured is at liberty to assign his right against a third party to the insurer. When this happens, it is clear that the insurer will take up the role of the insured and is at liberty to sue the third party in its own name.

In the case of CALEDONIA NORTH SEA LTD -V- BRITISH TELECOMMUNICATIONS PLC (SCOTLAND) & OTHERS (2002) UKHL, Lord Bingham stated as follows: -

“I am in full agreement with the conclusions expressed by Lord Mackay on the second (subrogation) issue. The law has long been settled in England and Wales, as (I understand) in Scotland, that an insurer who has fully indemnified an insured against a loss covered by a contract of insurance between them may ordinarily enforce, in the insured's own name, any right of recourse available to the insured.”

I have read the policies issued by the plaintiff. In each of the policies there are general conditions of the policy. Clause 6 thereof states as follows: -

“Every right of the insured accrued or to accrue will by way of subrogation pass to and absolutely vest in the insurer to the extent that the loss or damage insured by this policy may be ultimately made good or diminished thereby.”

It is therefore clear to me that the assured's right to institute proceedings against the defendant vested in the plaintiff. The fact that the suit has been instituted in the name of the insurance Company should not be a good reason to dismiss the suit. All that that would mean is that the plaintiff would still come back to court and institute afresh suit in the names of the insured. The court will have to hear the case afresh and come to the same conclusion. Under our new constitution, justice should be administered without undue regard to procedural technicalities. The policies contain a subrogation clause. I have found that the defendant was negligent and therefore liable. The assured policy holders were duly paid and were initially parties to this suit. I do find that the suit is properly instituted.

Final Determination

From the evidence on record, I do find that the fire was caused by electrical sparks from the electrical post. The plaintiff has proved that the defendant is entirely to blame for the cause of the fire. I do hold that the defendant is 100% liable. Although the plaintiff is seeking Kshs.82,253,214/= as pleaded in the plaint, only eight policy documents were produced. The total amount as per those documents is Kshs.65,982,613/=. PW3 informed the court that Malindi Palm tree Club, one of the assured, had an outstanding balance of Kshs.20,000,000/=. The court cannot grant that amount as this is a claim for indemnity. The plaintiff is only entitled to recover what it actually paid. There are other payments totaling Kshs.5,544,799/= paid to the investigators after the fire. There is evidence that that amount was actually paid to the service providers. In total therefore the plaintiff has proved a claim for Kshs.71,527,412/=. I do hereby enter judgement for the plaintiff against the defendant for the sum of Kshs.71,527,412/= being the total amount incurred by the plaintiff as a result of the fire. The plaintiff is hereby awarded costs of this suit.

Dated, signed and delivered at Malindi this 16th day of March, 2016.

SAID J. CHITEMBWE

JUDGE