REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 78 OF 2013

LESLIE JOHN WILKINS……..……APPELLANT

VERSUS

BUSEKI ENTERPRISES LIMITED…….....…..…RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. J. Gandani the Senior principal magistrate in Mombasa SRMCC No. 3038 of 2009)

J U D G M E N T

1. This is an appeal against the decision of 28th June, 2013 in Mombasa SRMCC No. 3038 of 2009. By the judgment in that matter the Appellant's case (who was the Plaintiff in that case) was dismissed.

2. The Appellant in the Lower Court claimed for damages of his car KAM 392 (KAM) which was involved in a collision with Motor Vehicle registration number KAX 378 S (KAX). Appellant alleged the accident was caused by the negligence of the driver of vehicle KAX. His claim was Kshs 746,502 in special damages.

3. The Respondent denied the allegations of negligence attributed to him and instead attributed the accident to Appellant's negligence.

4. The only evidence at the hearing was by the Appellant, a police officer who produced the police abstract and by a Loss assessor who produced his report of the damages and the cost of repair of vehicle KAM. He estimated that the total repair would cost Appellant Kshs 812,439/= but opined that in view of the pre-accident value of that car it was uneconomical to undertake its repair.

5. The Appellant closed his case after calling that evidence. The Respondent closed its case without calling evidence.

6. Appellant in giving evidence stated in his evidence in chief that he had been paid by his insurer Kshs 1 million which was the insured value of vehicle KAM.

7. The Learned trial Magistrate in her considered judgment said thus

"The defence in this case closed their case without calling any witness.

This is a material damage.

In normal cases this court would have just gone (sic) to determine on the issues of liability and quantum possible (sic).

However after considering the evidence and the defence filed and submissions here, it is an established fact that the plaintiff here has been fully paid by his Insurance for the loss he incurred.

It is a fundamental principle of Insurance that contracts of insurance are, except for life and personal accident insurance contracts of indemnity. It is for replacement of actual loss.

The purpose of insurance is to replace the loss and is not a contract of making profit.

The Plaintiff here in his testimony stated he was fully been compensated by his insurer. The Plaintiff here cannot therefore claim for the same amount from the Defendant as this would be double compensation. Only the plaintiff's insurer can have a claim against the Defendant.

In this suit there was no claim that it was subrogation claim on the material loss. This was not pleaded in the pleadings nor was their (sic) evidence led suggests (sic) it is a subrogation claim. No witness from Jubilee Insurance Company came to give evidence to prove their claim against the Defendant.

Under the doctrine of subrogation after the insurer has replaced the loss, they can step into the shoes of the insured and can recover any claims that they have against the 3rd party. This rule was intended to prevent the insured from receiving a double benefit through recovering from the 3rd party therefore making a profit from the unfortunate event.

As aforesaid, this suit is not brought on the basis that the insurers were exercising subrogation rights. In this regard therefore I find that since the Plaintiff has already received compensation from his motor vehicle on account of the accident here, he cannot receive any further payment. I therefore dismiss this suit with costs to the Defendant."

8. Although the Appellant has set out 12 grounds of appeal in his memorandum of appeal the only issue really for determination before me in this appeal is one, that is; was the Appellant's claim in the lower court one under the doctrine of subrogation?

9. Appellant by his written submissions has relied on various authorities which discuss the doctrine of subrogation.

10. The Learned author Mac Gillivay & Parkingon **"Insurance Law" at page 471 had this to say in regard to that doctrine:**

"Nature of the doctine. The doctrine conferns two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured, whatever rights the assured sasses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a son suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party, if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss."

11. That doctrine was also discussed in local case namely ABDUL RAZAK (suing on behalf of the international Air transport Association – **IATA & ANOTHER –vs-PINNACLE TOURS & TRAVEL**

LIMITED & ANOTHER [2005] eKLR viz:

"Before concluding this matter an issue has been raised as to whether the payment made by the 2nd Plaintiff to the 1st Plaintiff absolves the defendants from liability. With respect this is a misapprehension of the Law. The 2nd Plaintiff was entitled to file suit against the Defendants under the doctrine of subrogation. The claim made by the Plaintiff is one and as against the Defendants it is joint and several. The question of double enrichment does not therefore arise."

12. From the above discussion it becomes clear that indeed the doctrine does exist and can be invoked by an insurance company as provided above.

13. In this case however, the Appellant did not plead the doctrine and it was not until Appellant's Learned Counsels filed their Written Submissions at the conclusion of the trial before the Learned Trial Magistrate that there was attempt to invoke that doctrine. Upto that stage Appellant had not pleaded that his claim was under the doctrine of subrogation and nor had his pleadings shown that he was insured and had received payment from his insurance. It is in my view because of that that the Learned Trial Magistrate in her reasoned judgment reached the conclusions that she did.

14. Courts of law make determination of issues raised in pleading or issues brought by the parties for determination. This principle, that parties are bound by their pleadings was the subject of a court of Appeal decision in:

Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 8 others [2014] eKLR viz:

"Support its contention, the appellant cited the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD Vs. NYASULU [1998] MWSC 3, in which the learned judges quoted with apporval from an article by Sir jack Jacob entitled "The present importance of pleadings". The same was published in [1960] Current legal problems, at P174 whereof the author had stated;

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieve; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....**
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> **In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called: Any other business" in the sense that points other than those specific may be raised without notice."**

15. Kwazulu – Natal High Court was confronted with an appeal just as I am in this appeal in the case **NKOSI – Vs – MBATHA (AR 20/10 (2010) ZAKZPHC 38** (6 July 2010). The facts in that appeal were similar to the facts that confront me here. The Plaintiff in the lower court for the first time while being cross examined stated that her claim was under the doctrine of subrogation. That doctrine had not been pleaded. The Magistrate's dismiss the claim. The Kwazulu-Natal High Court in considering the appeal against that dismissal stated thus:

"However, the plaintiff said it for the first time under cross-examination that she was proceeding against the defendant on behalf of the insurer for the recovery of the costs of so suing. I am of the view that a subrogation claim is something which must clearly be proved and specifically pleaded. Nor had any mention been made in the plaintiff's pleadings that her motor vehicle was insured and that after the collision the insurer fully indemnified the plaintiff for the loss she had suffered. Nor did the plaintiff plead that the amount to be recovered from the defendant would be paid over to the insurer. The object of pleading is to define the issues between the parties and the parties must be kept strictly to their pleas where any departure could cause prejudice. See *Robinson v Randfontein Estates GM Co. Ltd 1925 AD 173 at 178 as per Rose-Innes CJ.* The party is therefore not allowed to direct the attention of the other party to one issue and at the trial attempt to canvas another. *Nyandeni v Natal motor Industries ltd 1974 (2) SA 274(D).* In the request for further particulars the plaintiff was specifically asked whether the motor vehicle was at the time of the collision insured, and whether she had personally paid for the repairs. The Plaintiff refused to answer the questions posed to her on the ground that the information requested was not required for pleading. In, my view, the Plaintiff had thereby misled the Defendant as to the time and correct state of events and as to the nature of her claim."

16. I am wholly persuaded by the above decision and similarly hold in this appeal that Appellant's dismissal of his suit is in contestable. In response to the issue identified above I respond in the negative. The Appellant claim in the Lower Court was not one brought under the doctrine of subrogation. It was as rightfully submitted by Respondent that the Appellant was seeking to be double compensated. It is for that reason that this appeal fails.

CONCLUSION

For the above reasons this appeal is hereby dismissed with costs to the Respondent.

Dated and delivered this 25th day of June, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Kasango

C/A - Kavuku

For Appellant

For Respondent

Court

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE