



**Tausi Assurance Company Limited v Vegpro Limited (Civil Appeal  
E1205 of 2023) [2025] KEHC 5685 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E1205 OF 2023**

**AC MRIMA, J**

**MAY 8, 2025**

**BETWEEN**

**TAUSI ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**VEGPRO LIMITED ..... RESPONDENT**

*((Being an appeal from the judgment and decree of Hon. G.M Gitonga (Principal  
Magistrate) delivered on 13th October 2023 in Nairobi CMCC No.8302 of 2016))*

**JUDGMENT**

1. This judgment relates to the liability of an insurer to an insured in respect of a policy issued under the Workman’s Compensation Act. There is no dispute that the Appellant herein, Tausi Assurance Company Limited, insured the Respondent herein, Vegpro Limited, employees and undertook to compensate any of them for any bodily injuries or harm incurred in the course of their employment and to further settle any claims arising from such incidences thereby wholly shielding the Respondent against any attendant liabilities.
2. It was the alleged breach of the said policy that necessitated the Respondent to institute Nairobi [Milimani] Chief Magistrates Commercial Court Civil Suit No. 8302 of 2016 [hereinafter referred to as ‘the suit’] against the Appellant praying for the following reliefs:
  - a. A declaration that the defendant has an obligation to reimburse the plaintiff per the judgement entered on 23<sup>rd</sup> August 2011 herein for the sum of Kshs.152,125 broken down as follows, general damages Kshs.100,000, Kshs.5,000 as special damages (less 5% contribution), court fees for Kshs.5,425, service of summons Kshs.1,000, Doctor attendance fee Kshs.5,000, court attendance of Kshs.18,000 and party and party cost of Kshs.25,200 and the sum of Kshs.35,457 and Kshs.112,366 being Advocates fees.





7. The learned trial magistrate erred in fact and in law by irregularly and illegally making the subject matter a test suit post judgement and applying the judgement therein to several other suits not before court.
8. The learned trial magistrate erred in fact and in law by failing to appreciate that he became functus officio upon delivery of judgement and should not have entertained and allowed the subsequent oral application in the said matter.
6. The appeal was heard by way of written submissions where both parties duly filed and referred to several decisions. The contents thereof shall be ingrained in the latter part of this judgment.
7. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123). This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni vs. Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga vs. Kiruga & Another* (1988) KLR 348).
8. Having carefully perused the record, the written submissions and the decisions referred to, two main issues arise for determination. They are whether the suit was time barred and if not, whether the suit was proved.
9. The parties were at variance on whether the suit was statute barred. According to the Appellant, time started running from the 1<sup>st</sup> April 2008 when it served the Respondent with its letter declining liability such that the time to file the suit lapsed 6 years thereafter. The Respondent agreed with the trial Court that the suit was based on the doctrine of subrogation and not on a breach of contract and as such the Respondent had up to 12 years within which to file the suit.
10. This Court has perused the Plaint. Paragraph 4 illuminates the policy contract between the parties and in paragraph 6 the Respondent pleaded as follows: -

In accordance with the terms of the contract/policy, the Plaintiff notified the Defendant of the said accident and also filed and forwarded the accident report to the Defendant.
11. Paragraph 13 of the Plaint stated as follows: -

Pursuant to the policy and the provisions of the law, the defendant is liable to reimburse the plaintiff the amount settled in the Judgment entered on the 23<sup>rd</sup> August 2011 together with costs incurred in defending the said suit but wrongfully and in breach of the contract/provisions of the law the Defendant has refused to reimburse the Plaintiff and accordingly the Plaintiff has suffered loss and damage in those amounts hence the presence suit.
12. In the end, the Respondent sought for the prayers captured above. In the judgment, the trial Court found that the suit was based on the doctrine of subrogation. Generally, in the insurance world, subrogation refers to the process where an insurer, upon paying out a claim to their insured, steps into the shoes of that insured and seeks reimbursement from the party who caused the loss. In essence, subrogation is a legal right allowing the insurance company to pursue a third party for damages it covered for its policyholder.



13. Courts have also rendered on the doctrine of subrogation. In *Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited* (2018) eKLR the Court of Appeal had the following to say on the doctrine: -

26. 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....

28. 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 vs. Lion of Kenya Insurance Co.* [1994] eKLR and *Michael Hubert Kloss & another vs. David Seroney & 5 others* [2009] eKLR.

14. In the case of *Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another* [1999] 1 EA 69 the Court defined the basis of the doctrine of subrogation 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. (emphasis added)

15. In *Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991*, the Court stated as follows: -

... 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. (emphasis added)

16. In this matter, there is no doubt that the Appellant declined to make good the Respondent's claim which arose from the primary suit. Therefore, the invocation of the doctrine of subrogation by the trial Court was premature and in error. This issue was well captured in *Kenya Power & Lighting Company Limited v Julius Wambale & Another* (2019) eKLR, where the Court rendered 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....

17. This Court, therefore, affirms the position that the doctrine of subrogation was inapplicable in this matter. As such, the suit was based on a contract and it was to be instituted within 6 years from 1<sup>st</sup> April 2008, that was on 31<sup>st</sup> March 2014, pursuant to Section 4[1] of the Limitation of Actions Act. Deriving from that finding, since the suit was instead filed on 7<sup>th</sup> December 2016, the suit was time-barred and it could only be sustained upon enlargement of time. As the Respondent did not seek and obtain any further extension of time, the trial Court's jurisdiction was improperly invoked and the suit did not have any legal leg to stand on.
18. Even if the suit was filed within time, which was not, still the Respondent was under a legal duty to prove it. In this case, the Appellant pleaded and stated in its witness statement that several policy terms were not complied with. Paragraphs 11 to 17 inclusive of the Amended Statement of Defence stated as much. It was, therefore, incumbent upon the Respondent to disprove the contents of the defence. A look at the evidence of PW1 reveals that the Respondent failed to discharge its burden of proof as required in law since none of the issues raised by the Appellant were proved in the negative. For instance, even the contents of paragraph 6 the Plea that alluded to the fact that the Respondent notified the Appellant of the subject accident and also filed and forwarded the accident report to the Respondent was not proved.
19. The suit was, hence, not proved and, respectfully, the decision by the Learned trial Court was in error.
20. It is, hence, this Court's finding and holding that the suit suffered a false start and hereby makes the following final orders: -
  - (a) The finding by the Learned trial Magistrate allowing the suit, Nairobi [Milimani] Chief Magistrates Commercial Court Civil Suit No. 8302 of 2016, be and is hereby set-aside and quashed.
  - (b) The suit is hereby struck out with costs on account of being time-barred. This order shall apply in all other matters in which the suit served as a test suit.
  - (c) The Respondent shall bear the costs of the appeal.
  - (d) The sums of money deposited in an interest earning account in the joint names of the parties' Advocates, if any, as per the Order of the Court made on 28<sup>th</sup> February 2024, or on any other date, shall be released to the Appellant's Advocates on record.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY, 2025.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Mege, Learned Counsel for the Appellant.

Mr. Maina, Learned Counsel for the Respondent.

Amina – Court Assistant.

