Kilonzo & another v Muthaka (Civil Appeal 603 of 2018)
[2024] KEHC 1497 (KLR) (Civ) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 603 OF 2018

JN NJAGI, J

FEBRUARY 8, 2024

BETWEEN

BONIFACE KIILUKI KILONZO ..... 1ST APPELLANT

RADHESHHYAM TRANSPORT LIMITED ..... 2ND APPELLANT

AND

MARY GATHONI WAINAINA MUTHAKA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. A.M. Obura, SPM, in Milimani CMCC No.295 of 2016 delivered on 22/11/2018)

JUDGMENT

1. The Respondent brought suit against the Appellants claiming damages in the sum of Ksh.199,504/= being the costs of repairing her vehicle after it was damaged in a road traffic accident by a vehicle belonging to the Appellants. The trial court found the Appellants liable and awarded the respondent a sum of Ksh.172,840/= in damages. The appellants were aggrieved by the judgment and lodged the instant appeal.

2. The grounds of appeal are that:

   (1) The trial court erred in law and fact by finding that the respondent had *locus standi* to institute the suit.

   (2) The trial magistrate erred in law and fact by holding that the suit was properly brought in the respondent`s name.

3. The brief facts of the case are that the respondent is an employee of a company known as Wangu Investments Co. Ltd. The company had taken out a group insurance cover with First Assurance Co.

Ltd for its workers` private motor vehicles, among them the vehicle of respondent. On the 27th July 2013, the respondent`s motor vehicle was hit and damaged by the motor vehicle of the appellants. The insurance company paid the costs of repair in the sum of Ksh.199,504/=. The respondent sued the appellants to recover the said sum on behalf of the insurance company under the principle of subrogation. The trial magistrate dismissed the appellant`s argument that the respondent did not have *locus standi* to institute the suit and consequently entered judgment for the respondent in the sum of Ksh.172,840/=, which action provoked the instant appeal.

4. The appeal was canvassed by way of written submissions.

Appellant`s submissions

5. The appellants submitted that the insured/policy holder in the matter was Wangu Investments Co. Ltd. That the claim was instituted under the principle of subrogation. That since the respondent was not the insured/policy holder, the insurer could not exercise its right of subrogation through a stranger and could only do it through Wangu Investments Co. Ltd which was its insured and not through the respondent who was a stranger in the proceedings. In this respect the appellant relied on the Court of Appeal decision in Nairobi Civil Appeal No.185 of 1991, *Octagon Private Investigation Security Services v Lion of Kenya Insurance Co. Ltd* (1994) eKLR where it was held that:

> The right of subrogation in a contract of insurance cannot create privity of contract between the insurance company and third parties. All that it gives an insurance company is the right to take over the rights and privileges of the insured under an insurance policy but if the insurance company wishes to exercise against third parties the rights and privileges so taken over from the insured, then it (the insurance company) can only do so on behalf of and in the name of the insured.

6. In the same case, the learned judges cited with approval Mr. J.B. Byanugisha in his book "*Elements of Insurance Law in East Africa*", where the writer stated:

> " The insurance company is not given rights against third parties. The rights must and can only be enforced by the insured personally (to whom they are actually owed). Normally, the insurance company will use its rich resources to prosecute the claims; but, even then, it will do so on behalf of and in the name of the insured person...."

7. It was submitted that the fact that the respondent was employed by the insurance company did not entitle her to institute the suit when she was not the policy holder. The appellant urged the court to allow the appeal and strike out the respondent`s suit with costs.

Respondent`s submissions

8. The respondent referred to the principle of subrogation as stated in Nairobi HCCC No. 1453 of 2005, *Thomas Muoka Muthoka & another v Ernest Jacob Kisaka* (2007) eKLR that:

> The insurance company is not made a party to the claim in the suit. It is normal practice for the insurance company to engage advocates to represent the insured. A subrogation claim within a trial would arise in cases of material loss claim whereby the insurance company seeks to have a refund from a defendant for damages caused to their insured/plaintiff's material loss. A claim of subrogation does not mention the insurance company as a party. The party is the plaintiff who must come to give evidence to court, supported by a witness from the insurance company to prove payments that had been duly paid to the said plaintiff.

9. The respondent also referred to the elaboration by Bret LJ on the doctrine of subrogation in the case of *Castellain v Presto* (1883) QBD 380 as quoted in *Vinu K. Patel v Shiva Carriers Ltd*, Msa HCCA No. 94 of 2008 that:

> " Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of insurance must be carried to the extent to which I am now about to endeavor to express, namely, the underwriter is entitled to every right of the assured whether such right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been excercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured...

10. The respondent further cited the case of Kenya Airfreight Handling Ltd v Indemnity Insurance Company of North America & 3 others, Nairobi Civil Appeal No. 217 of 2000, where the Judges of Appeal cited the case of Smith (Plant Hire) v Mainwaring {1986} 2 Lloyds Reports 244 where it was held:

> " It has long been the law, where insurers have paid a claim, that they stand in the shoes of the assured in order to recover anything which is relevant to that claim. The law has long been that subrogation entitles the insurers to bring an action in the name of the assured against the wrongdoer to recover anything that is recoverable. The reason for that is that the right of action is vested in the assured. The cases show that an action can be brought by the insurer in its own name where it has taken a legal assignment of the cause of action from the assured."

11. They also cited the case of *Monica M. Musyimi v Richard Macheru Irungu*, HCCCNo.13 of 2009, where Justice Sergon referred to the treatise by K.L. Laibuta; Principles of Commercial Law at pg 254 where the author states as follows:

> " Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal and equitable rights and remedies that the insured has or might have enforced against such third party whether in contract or in tort. To enforce such rights, the insurer brings the action in the name of the insured who must lend his name in return of an undertaking that he will not be personally liable for the costs in the action. The insurer is said to "step into the shoes" (stands in the place of the insured) and is subrogated to his rights. Subrogation is the substitution of one person for another so that the person substituted succeeds to and assumes the rights of the other."

12. The respondent submitted that Wangu Investments Co. Ltd was named in the policy contract as the policy holder on behalf of the group members but it was not the insured. That it is the individual members of the group who were the insured. That in this case it is the respondent who was the insured. Therefore, that the suit was properly brought in the name of the plaintiff.

13. It was submitted that paragraph 7 of the plaint indicates that the claim was based on the principle of subrogation. That the insured is the proper plaintiff in a subrogation claim. That the respondent tendered evidence during trial demonstrating that she was the owner and insured of the motor vehicle in issue that was insured by First Assurance Company Ltd. That being the owner and insured of the motor vehicle she had the requisite locus standi to be the plaintiff in a claim under the principle of subrogation brought by the First Assurance Company Ltd who were the insurer of her motor vehicle. Therefore, that the judgment of the lower court was merited. The respondent urged the court to dismiss the appeal with costs.

Analysis and Determination

14. This being the first appellate court in the matter, the duty of the court is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own independent conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand – see *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123.

15. The appeal in this matter involves the right of an insurer under the doctrine of subrogation. It is not in dispute that an insurer can only exercise its rights of subrogation through its insured. Those rights have ably been brought out in the cases cited above by both sides.

16. It is not in dispute that the policy holder in this matter was Wangu Investments Co Ltd. It is also not in dispute that the vehicle that was covered under the policy was registered in the name of the respondent. It is further not in dispute that the insurance company settled the costs of repair of the respondent`s motor vehicle after it was involved in an accident with the appellant`s motor vehicle.

17. The appellants argued in this appeal that the insured in the case was Wangu Investments Co. Ltd. That it is them who should have filed the suit on behalf of the insurance company. They argued that the respondent was a stranger in the matter and could not bring the suit on behalf of the insurance company.

18. The respondent on the other hand argued that Wangu Investments Co. Ltd was only a policy holder and the insured was the respondent. They consequently argued that the suit was properly brought by the respondent on their behalf.

19. Arising from the above arguments, the issue for determination is whether the respondent had the locus standi to bring the suit on behalf of the insurance company under the doctrine of subrogation. It is apparent that the appeal boils down as to who was the insured between Wangu Investments Co.Ltd and the respondent.

20. In finding for the respondent, the trial magistrate stated as follows:

> In this case, the dispute is whether the plaintiff was the insured or whether Wangu Investments Ltd was the proper party to bring the suit. There was no evidence to controvert the fact that under the group policy the plaintiff`s vehicle was insured by Wangu Investments Ltd...
>
> There was also no rebuttal that First Assurance Company Ltd paid for the repair charges, assessment of loss and damage as well as the incidental charges. If the insurance company did not recognize the plaintiff herein as the insured, I doubt whether they could have taken the trouble to have the motor vehicle assessed and repaired at their expense. In my view the plaintiff had an insurable interest in the subject motor vehicle. The fact that the employer was indicated as the insured and policy holder is not fatal to the claim....I find that the claim was properly brought in the name of.... the plaintiff.

21. The respondent called 3 witnesses in the case who were the motor vehicle assessor PW1, the respondent who was PW2 in the case and the Insurance company`s Claims manager PW3. The witnesses produced documents to support their case which included the motor vehicle Assessment Report, the Valuation Report, invoice from the repairer and Tracing Report of the appellant`s motor vehicle. All these documents showed the insured as Wangu Investments Company Ltd. This was further confirmed by PW3 who told the court that their insured was Wangu Investment Co. Ltd. He explained that their company had insured vehicles for members of staff of Wangu Investment Co. that included the

respondent`s motor vehicle. He however did not produce the policy document in court but said that the respondent had an insurable interest in the matter.

22. It is then clear from the evidence adduced before the trial court that the insured in the case was Wangu Investments Co. Ltd. The argument by the respondent`s advocate that Wangu Investments was only a policy holder and that the insured was the respondent is not supported by the documents produced before the court which indicated the insured as Wangu Investments Co. Ltd. Since the policy document between the said company and the insurance company was not produced in court, the terms under which the respondent`s motor vehicle was covered were not made known to the court. Her rights under the contract were not disclosed to the court. The court could not discern as to whether there was any privity of contract between the insurance company and the respondent. The fact that the respondent had an insurable interest did not make her the insured. The respondent therefore remained a stranger in the contract between Wangu Investments Co.Ltd and the Insurance Company. In fact, if she were to sue the insurance company she could only do so through her employer who was the insured, unless the contract of insurance stated otherwise.

23. In the premises, it is my finding that the rights of subrogation of the insurance company in this matter lay with Wangu Investments Co. Ltd. It is the said company who were the client to the insurance company and not the respondent. I therefore hold that the insurance company could not exercise their rights of subrogation through the respondent who was not their insured. It is Wangu Investments Co. Ltd who could bring up the suit in court on behalf of the insurance company based on the principle of subrogation. I hold that the respondent did not have locus standi to bring up the suit on behalf of *First Assurance Company Ltd. In Opiss v Lion of Kenya Insurance Company* Civil Appeal No. 185 of 1991, the court stated that:

> " 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."

24. The respondent herein did not have any rights to be taken over by the insurance company as she was not the insured.

25. The upshot is that the appeal herein is merited and is thereby upheld. Consequently, the judgment of the lower court is set aside and the respondent`s suit therein dismissed with costs to the appellant, both in this appeal and the suit in the lower court.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

No appearance for Respondent

Court Assistant –Amina