



**Orango v Omuom (Civil Appeal E727 of 2021)
[2024] KEHC 9550 (KLR) (Civ) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E727 OF 2021

JM NANG'EA, J

JULY 25, 2024

BETWEEN

FRANCIS MANDERA ORANGO APPELLANT

AND

ROBERT HO OMUOM RESPONDENT

*(Being an appeal from the Judgement of the Small Claim's Court at
Nairobi (Hon. K.O. Ogwenyo- SPM) delivered on 8th October 2021)*

JUDGMENT

1. The appellant herein is challenging the said learned trial magistrate's judgement in which he granted the Claimant Kshs.248,660 together with the costs of the suit and interest at court rates.
2. The appellant's Grounds of Appeal as per Amended Memorandum of Appeal dated 13th March 2024 may be condensed as hereunder:
 - a. That the learned trial magistrate erred in law in failing to determine whether the respondent's insurer, CIC Insurance Group Limited, had locus standi to institute the suit under the doctrine of subrogation.
 - b. That the learned trial magistrate erred in law in failing to find that the respondent's failure to plead the particulars of damages claimed was fatal to the claim.
 - c. That the learned trial magistrate erred in law by determining liability against the appellant without evidence of her negligence

And



- d. That the learned trial magistrate otherwise found the appellant liable in the suit against the weight of evidence.
3. The appellant therefore prays that the appeal be allowed and the trial court's judgement set aside and substituted with an order dismissing the suit with costs to her as incurred in the appeal as well as in the lower court.
 4. The summary of the case before the trial court is that the respondent sued the appellant seeking judgement in the sum of Kshs.248,660 as compensation for alleged damage to his vehicle registration number KCK 768 Y. The respondent also sought the costs of the suit. The appellant's motor vehicle registration number KBH 051 V is said to have rammed into the respondent's motor vehicle owing to negligent driving resulting in extensive damage to the vehicle.
 5. The appellant traversed all the material averments in the suit in her response to the claim. Alternatively, the appellant contended that the respondent was responsible for any damage to his vehicle that may be proven to have been occasioned.
 6. The respondent didn't testify but called a police officer (PW1) and a Legal Officer from his vehicle insurer (PW2) to testify on his behalf. PW1 blamed the appellant for the collision saying that her vehicle failed to maintain a safe distance from the respondent's vehicle leading to the collision. The witness was not the accident Investigating Officer and didn't visit the scene of the accident.
 7. On his part PW2 told the court that C I C Group Limited (hereinafter referred to as "the insurer") had insured the respondent's vehicle. The insurer is also said to have caused repair of the respondent's vehicle on his behalf pursuant to their insurance contract. The sum of Kshs.248,660 claimed in the suit is made up of Kshs.206,000 being the vehicle's repair costs; Kshs.6,380 in Motor Vehicle Assessor's fees; Re-inspection fees of Kshs.2,320 and tracing fees of Kshs.33,960. Various supporting documents including payment vouchers and vehicle inspection reports were exhibited before the lower court. Two Motor Assessor's reports showing different estimates of the determined value of loss arising from the damage were prepared and consolidated yielding the figure of Kshs.206,000. No reason was given for the need for the two reports according to PW2. The witness indicated that the consolidated report was only a "trial" one. It was not explained why the original assessment report was not availed.
 8. The appellant didn't offer evidence.
 9. The parties filed written submissions vide the court's e-filing platform which I have perused against the record of this appeal.
 10. It is trite law that the appellate court can only interfere with the findings and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd (1997) eKLR Civil Appeal No. 198 of 1995*). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co. (1968) EA 123*.
 11. Learned Counsel for the appellant submit that the principle of subrogation only accrues to an insurer when there is a valid insurance policy under which it paid its insured client for loss occasioned by a third party. The insurance company then steps into the shoes of the insured and is entitled to seek indemnity from the third party. The action to seek indemnity must, however, be instituted in the name of the insured client and with his/her consent. Counsel cited the judicial determination in *David Gichiri & 3 Others V. Emma Kerubo Sese (2021) eKLR* in support this argument among other decisions of superior courts. The court is told that neither a copy of the insurance policy executed between the



- respondent and the insured nor a consent by the respondent to institution of the suit by the insurer was tendered in evidence despite the appellant raising these issues during cross-examination of the respondent's witnesses.
12. To further illustrate that the insured didn't obtain the consent of the respondent to bring the suit, the appellant points out that the respondent himself failed to testify and his name is not stated in full, the suit documents only indicating his name as "Robert. H.O Omuom". The court is further invited to observe that the respondent's personal details like his address, and telephone contacts are not shown in the Statement of Claim contrary to the mandatory provisions of section 24 of the [Small Claims Court Act](#). Contrary to the provisions of section 23 of the same Act the Statement of Claim is not signed by the respondent himself or his close relatives, the appellant observes. I was referred to section 2 of the [Small Claims Court Act](#) which defines an "authorized representative" allowed to sign or authenticate a claim under the Act on behalf of the Claimant to be "a next of kin or close relative" appointed in writing by the Small Claims Court's Adjudicator. As the Statement of Claim purports to have been signed by an advocate, the appellant states that this fuels more suspicion as to whether the respondent authorized filing of the suit.
 13. The appellant further contends that the respondent didn't also exhibit payment receipts evidencing payment of the respondent for the purported insured risk he was exposed to. According to the appellant, unsigned payment vouchers produced before the lower court are not proof of actual payment of the compensation sum in question.
 14. The appellant continues to submit that the respondent should have pleaded that he was bringing the suit on behalf of the insurer under the doctrine of subrogation to enable him to properly frame and present his defence. According to the appellant this omission infringes the well established legal position that parties are bound by their pleadings as reiterated in many cases including the decision in *Daniel Otieno Migore V. South Nyanza Sugar Company Limited* (2018) eKLR cited in the appellant's submissions.
 15. The appellant submits that, in any event, his liability for the subject motor vehicles' collision was not proven on the evidence. It is pointed out that no eye witness testified to explain the circumstances leading to the accident and that the burden was on the respondent to prove the appellant's negligence. Counsel for the appellant place reliance inter alia on the case of *Stephen Kanjabi Warriari V. Dennis Mutwiri Muriuki & Another* (2022) eKLR in which it was held in similar circumstances that negligence cannot be established on the basis of a police abstract report alone in the absence of eye witness account even if the opposite party does not offer evidence in rebuttal.
 16. The respondent's advocates submit in reply regarding the principle of subrogation that the fact of existence of the policy of insurance between the respondent and the insurer was not challenged at trial.
 17. Concerning the issue of negligence, the respondent contends that his evidence was not challenged as the appellant didn't offer evidence. The respondent's advocates cite the judicial determination in *Helle sejer Hansen & 2 Others V. Julius Kakungi Mokani* (2020) eKLR among other decisions which posit that where a party does not rebut the evidence of the opposite party that evidence will be accepted as probative of the facts in issue in the case. The respondent therefore impugns the appeal and wants the court to uphold the decision of the lower court.
 18. I have carefully studied the parties' submissions against the record. I concur with the appellant that the respondent was under a legal obligation to prove existence of a policy of insurance between him and the insurer and further to show that the respondent was actually paid before the right of subrogation kicks in. This legal position was also underscored in *Leli Chaka Ndoro V. Maree Ahmed & S.M Lardhib* (2017) eKLR. Subrogation presupposes existence of an insurance contract which must be



proven. Oral evidence of the facts without credible documentary evidence, for instance, the policy document and the said compensation sum payment receipts will not suffice. Secondly, there is no evidence that the requisite consent of the respondent to the subrogation suit was procured. These are conditions precedent to exercise of the right of subrogation. Thirdly, the defects in the Statement of Claim that have been flagged by the appellant including the failure to plead invocation of the principle of subrogation further dents the respondent's case as does his failure to testify.

19. The trial court is also to be faulted for adjudging the appellant liable in negligence in the absence of evidence of eye witnesses including that of the respondent himself. The case law the respondent cites in this regard is distinguishable as the claimants in those cases testified in proof of negligence. In the instant matter, the only evidence relied upon to prove negligence is that of a police officer who didn't visit the scene of the accident and /or investigate the accident. The respondent did not therefore discharge his burden of proof he shoulders by dint of sections 107, 108 and 109 of the Evidence Act.
20. It is this court's conclusion that the insurer's subrogation rights have not been shown to have accrued and the Company consequently didn't have locus standi to mount the suit. As also determined, the respondent did not prove the appellant's liability in negligence on a balance of probability.
21. In the result, the appeal succeeds. The lower court's judgement granting the respondent the sum of Kshs.248, 660 with costs and interest is set aside and substituted with an order dismissing the suit. The appellant will have the costs of this appeal as well as those incurred in the lower court.

Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 25TH DAY OF JULY 2024 IN THE PRESENCE OF:

The Appellant's Advocate, Ms Onsongo

The Respondent's Advocate, Mr Omollo

The Court Assistant, Ruth.

J. M NANG'EA

JUDGE

