



**Kimaiyo v Andy Forwarders Service Limited (Civil Appeal
9 of 2020) [2024] KEHC 17186 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 9 OF 2020
TM MATHEKA, J
AUGUST 6, 2024**

BETWEEN

AGGREY KIPLAGAT KIMAIYO APPELLANT

AND

ANDY FORWARDERS SERVICE LIMITED RESPONDENT

JUDGMENT

1. On 16/8/2019, the learned trial magistrate C.A Mayamba PM delivered his judgment in Kilungu PMCC 110/2016 in which he found in favour of the plaintiff - as against the defendant - liability at 100%, and special damages of Ksh. 1,086,930 plus costs and interest at court rates.
2. The defendant was aggrieved and filed this appeal on the following grounds;
 1. That the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the defendant considering that the plaintiff had no locus standi to institute the suit against defendant failed to establish and prove the doctrine of subrogation in their pleadings and hearing of the suit.
 2. That the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the defendant considering that the plaintiff failed to establish and prove the doctrine of subrogation in their pleadings and hearing of the suit.
 3. That the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the defendant considering that the plaintiff completely failed to establish a nexus between the plaintiff as named in the pleadings, with the subject matter of the suit.



4. That the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the defendant considering that the plaintiff failed to produce sufficient evidence, specifically but not limited to the policy instrument and the copy of records in support of its claim.
 5. That the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the Defendant considering that the plaintiff as named in the pleadings was not called to adduce evidence either as the claimant or witness in the suit.
 6. That the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the defendant considering that the verifying affidavit was deponed by a stranger to the suit who was not called during hearing to adduce any evidence and/or support the averments in the plaint nor was his relationship to the plaintiff established.
 7. That the learned trial magistrates erred in law and in fact in failing to dismiss the suit against the defendant and relying on an expert report prepared by an unqualified layman.
 8. That the learned trial magistrate erred in law and in fact in awarding damages when no nexus had been established between the plaintiff in the pleadings and the receipts produced as evidence.
 9. That the learned trial magistrate erred in law and in fact in failing to dismiss the suit against the defendant considering that the plaintiff's suit had been filed out of time and no court order was produced allowing filing of the suit out of time despite the same having been contested during the hearing of the suit.
 10. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's submissions and authorities on record on both liability and quantum.
 11. That the learned magistrate erred in law and in fact in considering evidence that was never on record and issuing judgment on presumptions and issues not established in evidence.
 12. That the learned trial magistrate's judgment was thus unjust, against the weight of evidence, submissions and authorities relied upon by the defendant and was based upon misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
3. The suit arose out of a road traffic accident that occurred on 9/6/2013 where vehicle registration motor no. KAY 554, Iveco trucker registered in the name of the plaintiff collided with motor vehicle registration no. KBU 776G Toyota Corolla registered in the name of the defendant. It was claimed that the defendant motor vehicle was so negligently and recklessly driven that it rammed in the front of the plaintiff's motor vehicle causing it extensive damage on its fronts parts.
 4. As a result the plaintiff incurred expenses in the repair of the motor vehicle in the form of special damages to wit:-Repair charges Ksh. 1,043,212/=M/V Assessors fees Ksh. 18,220/=Investigators fees Ksh. 25,298/=Police Abstract Ksh. 200/= Total Ksh. 1,086,930/=
 5. It was the plaintiff's claim that at the material time the motor vehicle was insured by Heritage Insurance Company Ltd, which company settled the cost of the repairs at Ksh. 1,086,930. That the suit was brought under the doctrine of subrogation to seek reimbursement of the total sum of Ksh. 1,086,930 which the insurance company had incurred.
 6. The defendant filed a defence in which he denied all the claims and put the plaintiff to proof thereof.
 7. The matter was heard via viva voce evidence. The plaintiff called 5(five witnesses)Regina IreriJerimiah GachoiAlexander Meithei NukeNo. 63116 PC Andrew MaiyoDennis Kanyatta



8. The defendant did not call any witnesses.
9. The facts of the case were aptly summarized by the learned trial magistrate's judgment; PW1 Regina Ireri stated that she was the legal officer with Heritage Insurance Company Limited; that the plaintiff was the registered owner of motor vehicle registration number KAY 554H Iveco tracker; that the same had been insured under police number NP12V00059; that the motor vehicle was involved in a road traffic accident on the 9th June , 2013 at about 5. 45am; that the plaintiff was driving from Mombasa to Nairobi and that the accident happened on the lawful lane of their insured; that the salon car had veered off its lane into the lane of their insured vehicle causing the accident and hat the driver of the salon car died on the spot. The estate of the deceased driver sued their client in Kilungu PMCC No. 147 of 2014 and 148 of 2014 which were dismissed as their insured was not found liable. She testified that after the accident their insured's motor vehicle was extensively damaged; that the damage was assessed and repair costs put at Ksh. 1,046,065; that the motor vehicle was repaired and released to their insured on the 19/8/2023, with insurance settling the amount at Ksh. 1,043,212; that the assessor charged Ksh. 28,220 for the work that he did while the investigator charged Ksh. 25,298. She produced the claim form, the receipts for the money paid to the investigator as PEX1 and PEX3 respectively; that the defendant settled the amount raised in the fee note letter from Auto Fine Ltd and via receipt dated 3/9/2023 and produced the same as PEX4(a) and the receipt of payment of Ksh. 1,043,212 as PEX4(b). She testified further that the 3rd party motor vehicle was blamed for the accident and that they hired investigators whose fee was settled the invoice was PEX5(a) and the payment voucher as PEX5(b). She also produced a demand letter by their advocates as PEX9.
10. PW2 Jerimiah Gachoi testified that he worked at Heritage Insurance as an assessor. He was instructed to assess motor vehicle registration number KAY 554H Iveco Euro Tracker Prime Mover. His repair estimates were Ksh. 1,084,066. He produced the estimate report as PEX7 and the re inspection report as PEX8.
11. Alexander Meithei Nuke was PW3 and stated that he was the driver of motor vehicle registration number KAY 554/ZD 3805. On the material day he was coming from Mombasa port and was headed to Nairobi, and was moving at 40km per hour. He stated that on reaching Kiongwani area between Kiongwani matatu stage and Kiima stage towards Salama, he noticed Motor Vehicle KBU776G a Toyota Corolla moving at a high speed. It was his testimony that the motor vehicle veered off its lane into his lane. He stopped his motor vehicle hoping that the other motor vehicle would pass in front of his to its rightful lane to avoid any collision. There was a head on collision which prompted the other vehicle to be hauled to the right side whereas his motor vehicle did not move an inch. The driver of the salon car died on the spot with the lady passenger escaping with slight injuries. It was his position that the driver of the other motor vehicle was to blame for the accident. He stated that the motor vehicle was towed to Auto Fine Garage for repair.
12. PW4 was No. 63116 PC Andrew Maiyo who stated that an accident was reported at Kiongwani area via OB No3/9/2013. It involved two motor vehicles registration number KAY 554/ZD 3805 driven by Alexander Meithei Nuke and KBU 776U driven by Abednego Muuo. It was his testimony that the saloon car was headed towards Mombasa direction when it rammmed into the lorry which was coming from Mombasa direction. The driver of the Salon car died on the spot. According to the sketch map, the prime mover was on its lane though the salon car was found off the road about 6 meters facing Mombasa on the left side. He stated that the driver of the lorry Alex Nuke recorded his statement and blamed the driver of the Salon car. He produced the police abstract as PEX2.
13. Dennis Kanyatta was PW5. He was the investigator instructed by the insurance company to look into circumstances leading to the accident. He testified that he contacted the driver of the suit motor vehicle



- and also visited the scene as well as the O.B report. He managed to get the driver's statement which formed part of his report. He noted that the owner of the 3rd party motor vehicle was to blame for the accident. He produced his report as PEX6 and stated that he had charged Ksh. 25,298 to prepare the report.
14. Parties agreed to canvass the appeal by way of written submissions which I have carefully read together with the authorities cited. As the first appellate court I am aware of my duty to review the evidence and draw my own conclusions, keeping in mind that the witnesses were heard and seen by the learned trial court. Further, that I cannot overturn the decision of the trial court unless it was made on wrong principles.
 15. From the submissions it is evident that a number of key issues arise,
 - i. Whether the suit was filed out of time
 - ii. Whether the suit complies with the doctrine of subrogation.
 - iii. Whether the plaintiff was established a nexus between itself and the motor vehicle registration No. KAY 554H and the Insurance Company.
 - iv. Whether the investigation report was credible.
 - v. Whether the defendant/appellant was liable.
 16. On the 1st issue - it was submitted for the appellant that the respondent did not file any order to prove that there was an extension of time to file the suit out of time and that in any event the suit was not covered by Section 27(1) of the *Limitation of Actions Act* because it was not a personal injury claim. The appellant also relied on Rosemary Wanjiru Kingu – vs - Elija Machara Githinji & Anor NRB HCC No. 145 of 2010 where the honorable judge relied on the Court of Appeal finding in Mary Osundwa vs Nzoia Sugar Company Ltd *CA 224 of 2000* where it was held;

“Section 27(1) of the Limitation of Action Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort.”
 17. For the respondent it was submitted that the suit was filed within time and the application to extend time was a cautionary measure. That in any event though the accident happened on 9/6/2016 and the suit filed on 8/6/2016, the year 2016 was a leap year and there was an extra day to it hence - the filing of the suit on 9/6/2016 was not out of time. The learned trial court also put forth the position that three years would end after midnight on 9/6/2016.
 18. Counsel for the appellant argues that the appellant could only have challenged the issue of time at the hearing of the suit because applications for extension of time are always ex parte.
 19. Time is of the essence - a suit filed out of the prescribed time would be a non-starter unless the court, on powers donated to it by statute extends that time. Otherwise such a suit would raise the issue of the jurisdiction of the court to hear and determine it before the issue of time is dealt with.
 20. I have perused the defence dated 23/8/2016 and it is evident that defendant did not raise the issue of time in the defence. In addition, if indeed there was an issue with time there is a procedure for dealing with the issue before the hearing of the suit. Be that as it may I have looked at the plaint. It was filed on 9/6/2016 which was the last day for filing and I will find that this ground fails .



21. On the doctrine of subrogation, it was argued for the appellant that for it to apply the respondent ought to have established liability on the part of the appellant, the ownership of motor vehicles, and to have produced the Policy Document between it and the Insurance.

22. Each party cited authorities on what the doctrine of subrogation is -

The appellant cited *Thomas Muoka Muthoka & anor - Vs Ernest Jacob Kisaka NRB HCCC No. 1453 of 2005* where the judge held that:-

“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 materials loss. 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.”

23. The respondent cited from *The Black Law Dictionary Edition 11th* at page 1726 on the definition of the word subrogation as;

“The substitution of one party of another, whose debt the party pays, entitling the paying party to rights, remedies or securities that would otherwise belong to the debtor.”

And that of the doctrine of subrogation as follows,

“The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”

24. It is argued for the appellant that the 1st step in establishing the applicability of the doctrine of subrogation would be to avail the evidence that would create the nexus between the plaintiff and the insurance company through the production of the policy document; - otherwise how else would anyone know that indeed that there was a relationship to give a basis to the claim?.

25. The respondent relied on *Gahir Engineering Works Ltd Vs Rapid Kate Service Ltd & Another [2018] eKLR* where the court stated:-

“19. The fact that the appellant did not produce in evidence the policy document itself though material was not fatal to the insurer’s claim since it was only required to prove its claim on a balance of probabilities not beyond reasonable doubt. If the insurance company had not insured the appellant’s vehicle it would not have taken the trouble to appoint an assessor to estimate the repair costs, appoint investigators and more important it would not have shouldered the burden of financing the vehicles’ repair costs and the other incidental expenses.”

“The claim by the learned trial magistrate that the insurance company required to exhibit the insurance policy itself in order to prove its claim was a kin to require the company to prove its case beyond reasonable doubt which flew in the face of the law governing the standard of proof in civil cases. It is therefore my findings that the learned trial magistrate misdirected herself by not properly interrogating and weighing the evidence placed before her and thereby reached



an erroneous conclusion that the appellant's insurer had not proved its case to the standard required by the law.”

26. It is argued that in the pleadings the plaintiff did not plead any policy number that would be corroborated by any the other evidence that was produced by the plaintiff including the police abstract.
27. It is not in dispute that the police abstract that was produced clearly set out the insurance companies that had insured the motor vehicles that were involved in the road traffic accident - for KBU 776G it is Kenya Alliance Insurance Co. Ltd P/No. ML/01/MC/47007 for the 2nd Motor Vehicle which would KAY 554H - it is NP12V0059/Comp issued by Heritage Insurance Co. Ltd.
28. In the pleadings the respondent does clearly state that it was insured by Heritage Insurance Company. Other than the police abstract, there were other documents produced i.e the Motor Accident Report Form made by the plaintiff/respondent received by Heritage Insurance Co. on 2/7/2013 which bears the policy number and the registration number of the m/v as indicated in the Police Abstract.
29. However other than that there is no other document produced by the plaintiff/respondent that bears the registration number of the motor vehicle or the Insurance Policy Number – issued or made by Heritage Insurance Company.
30. The plaintiff produced the police abstract which simply states that the 2nd motor vehicle was insured by Heritage Insurance Company , but where is the evidence that the motor vehicle was actually registered in the name of the plaintiff or respondent?. The Police Abstract PEX1 does not say so, the registration number of the motor vehicle KAY 554H appears in the payment documents issued by Heritage Insurance Company in PEX5(a) motor vehicle registration no KAH 554H policy no. 101278001000059. It states that the client is - Acceler Global Logistics Limited and/or Trans global Cargo Centre and /or Standard Chartered Bank (K) Ltd - the name Andy Forwarders Ltd does not appear anywhere on that document.
31. In PEX 7 the estimates and report form, one can see that it bears the letter head of Heritage Insurance Company there is no policy number but the registration number of the motor vehicle is there and name of the plaintiff/respondent as insured . The common number in all these documents is a claim no. 501378000089.
32. With respect to the ownership of the motor vehicles, the learned trial magistrate found that the ownership of the motor vehicles was established by the production of the police abstract . But is that so? I scrutinized the Police abstract. It is not in doubt that it shows clearly who the insurance company was for each m/vehicle. No evidence was placed before the court to establish that indeed KAY 554H was registered in the name of the Plaintiff/Respondent. In fact, this also applies to the other m/vehicle. The respondent did not place any evidence before the court to establish that the motor vehicle registration no KBU 776 G was registered in the name of the appellant. .
33. The police abstract was PEX 1. The ownership of the motor vehicles was not indicated . Therefore the trial court was not right in finding that the ownership was established by evidence in the Police Abstract. While the principle is correct, the trial court did not have the evidence of the police abstract upon which it would have based its finding. There was no other evidence placed before the court to prove ownership of the two m/vehicles. Had those details appeared in the Police abstract PEx 1, that evidence would have been acceptable as per the authorities available. But without that the court only had evidence of insurance but no proof of who were the registered owners of the m/vehicles.
34. Having failed to establish that the motor vehicle KAY 554H was registered in the name of the plaintiff how then could the respondent have established any nexus between itself and insurance companion



whose behalf the claim is brought? How then would have the appellant been found liable for the accident?

35. It is my view that the ownership of the motor vehicle was KAY 554H was at the centre of this claim - and without proof that the plaintiff respondent was the registered owner of the said m/v the claim has no leg to stand on. This takes care of the issue no. (ii) and issue no. (iv).
36. It was argued for the appellant that the plaintiff's case could not be established as the plaintiff did not testify. It was argued that only the plaintiff would have established the claim to enable Heritage Insurance recoup its expenses. From the record the plaintiff did not testify. None of the witnesses who testified represented the plaintiff, not even the person who swore the verifying affidavit to the plaint. It was noteworthy that that deponent was unknown to all the witnesses. So, if the deponent to the verifying affidavit was unknown to all the witnesses, and the plaintiff Andy Forwarders did not testify, and no representative of Andy Forwarders testified, and there was no evidence that Andy Forwarders was the registered owner of the m/vehicle, only one conclusion can be drawn from that scenario; The case for the plaintiff could not have been established. The failure by the plaintiff to testify, the absence of the plaintiff's name as the registered owner of the motor vehicle in the police abstract or any other document that would support that claim, the failure to produce the policy document by the PW1, the failure by the investigation report to contain the policy document, the absence of the policy number in the pleadings left a gaping gap in the case for the plaintiff that could not be filled on a balance of probability. This is the evidence that stands between the Insurance company and its money.
37. Why was it so hard to establish the ownership of the motor vehicle by the plaintiff? I have seen that the respondent through a supplementary record of appeal attempted to produce a Police abstract dated 3/7/2013 showing details of the owners of the 2 motor vehicles. All I can say is that this document does not form the part of the record. It was not produced as evidence during the trial. If this document was available in 2013 - why was it not produced at the hearing by the police officer? Why was it not part of the annexures to the plaint with the other documents? Its source is unknown, it is a photocopy which is not even certified. The only police abstract that was in the record is marked as PEX 1 and does not bear that evidence that the respondent is trying to introduce through the backdoor. It unacceptable. The best this court can do is to expunge that abstract from the record.
38. The last issue is about credibility of the investigation report. I have perused the report. Other than the information obtained from the police- the rest is hearsay from an unverified source and cannot be relied on. Evidently it was obtained from an unqualified person who did not establish his qualification as an investigator.
39. In the end, I have taken guidance from; Fred Ben Okoth – Vs Equator Bottlers Limited [2015] eKLR thus where the court stated that the duty of the court on a first appeal was well stated by this court in Selle – vs - Associated Motor Boat Company Limited [1968] E.A 123 that

“An appeal to this court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demean our of a witness is inconsistent with the evidence in the case general.”



40. Having done so, I find that the appeal has merit and is allowed, the judgment of the subordinate court in its entirety is set aside on both liability and quantum with costs to the appellant.

DATED, SIGNED AND DELIVERED VIA CTS UPON NOTICE THIS 6TH DAY OF AUGUST 2024

MUMBUA T MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-08-06 14:45:46

