Mundia v Kigo (Civil Appeal 153 of 2023)
[2024] KEHC 10924 (KLR) (9 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10924 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 153 OF 2023

AC BETT, J

SEPTEMBER 9, 2024

BETWEEN

JULIAH WANGARI MUNDIA ..... APPELLANT

AND

IRENE NYAMBURA KIGO ..... RESPONDENT

(Being an appeal from the judgement of the Hon. V.A. Ogutu, Adjudicator delivered on 20th June 2022 in the Small Claims Court at Thika SCCC No. E69 of 2022)

JUDGMENT

1. The appellant filed an appeal against a judgement in the Small Claims Court at Thika. The grounds of the appeal are as follows:

    a. That the Honorable learned adjudicator erred in law in applying the wrong principles of law on standard of proof in civil cases.

    b. That the Honorable learned adjudicator erred in law and in fact in failing to consider and properly evaluate the claimant's evidence.

    c. That the Honorable learned adjudicator erred in law and in fact in failing to consider and apply some weight on the evidence tendered by the Claimant's evidence.

    d. That the Honorable learned adjudicator erred in law and in fact in dismissing the claimant's evidence and the suit with undue regard to the circumstances of the case before the Small Claims Court and the weight of the precedents in similar circumstances.

    e. That the Honorable learned adjudicator misdirected himself to failing to consider the evidence and the submissions while arriving at the judgement.

f. That the Honorable learned adjudicator erred in law and in fact in awarding costs of the suit to the Respondent.

2. The brief facts of the case are that the appellant filed a claim by way of subrogation, for a sum of Kshs.174,668/= being the amount paid to its insured for material damage caused to her motor vehicle registration number KCQ 583A on 2nd April 2019 when it was involved in a collision with motor vehicle registration number KCP 192L belonging to the respondent. The appellant attributed the accident to the sole negligence of the respondent and/or her driver. At the hearing, the appellant adduced evidence through three witnesses. PW 1 was a police officer who produced the Occurrence Book. On cross-examination, he said he was not the investigating officer, nor did he have the police file. According to him, the police officers who visited the scene blamed the driver of motor vehicle registration number KCP 192L. The second witness was the motor vehicle assessor. The third witness was the legal officer of MUA, formerly Saham who was the insurer of motor vehicle registration number KCQ 583A. Since none of the witnesses were present when the accident occurred, the appellant's claim was hinged on the Occurrence Book, and the Police Abstract where it was noted that no charges were preferred against anyone in respect to the accident but the motor vehicle registration number KCP 192L was to blame . The respondent did not adduce any evidence.

3. At the close of the case, the parties filed their written submissions. The claimant submitted that they had proven the insurer's right to file the suit under the doctrine of subrogation since the insured had reported the accident to the insurer which had settled the claim then proceeded to file the claim for compensation. The claimant further submitted that they had proven liability and special damages to the degree and standard that is required by law. On the other hand, the respondent disputed the insured's claim on the ground that the insured had not demonstrated that it had the consent of the insured to file the claim. It was the respondent's case that the claimant did not prove her case. The adjudicator dismissed the claim on the grounds that the claimant failed to prove negligence on the part of the respondent.

4. The appeal was canvassed by way of written submissions. The court has carefully considered the memorandum of appeal, the Record of Appeal, and the parties' respective submissions. Under Section 38 of The *Small Claims Court Act*, a party aggrieved by the decision or order of the court can only appeal against the decision or order on matters of law. In the circumstances, it is the duty of the court to first establish whether the appeal raises matters of law before it can proceed to dispose of the appeal. To do so, the court must resist the temptation to interrogate the facts of the case.

5. Looking at the grounds of appeal, it is my considered view that the first ground of appeal raises an issue touching on the law and therefore falls within the purview of Section 38 of The *Small Claims Court Act*.

6. Grounds (b), (c), (d) (which are repetitive), and (e) of the appeal invite this court to re-evaluate and re-analyze the finding, primarily, that the appellant did not prove negligence on the part of the respondent and that although the accident did occur, there was no direct evidence as to how it occurred. The said grounds can only be considered if ground (a) of the appeal succeeds.

7. The respondent submitted that there were two issues for determination:

   a. Whether the respondent is to blame for the accident.

   b. What quantum is payable.

   It was submitted that since PW 1, the police officer had produced the police abstract and the Occurrence Book which the police abstract emanated from, and since both documents showed that

the respondent was to blame for the accident, in absence of any evidence to the contrary from the respondent, then the claim had been proved on a balance of probabilities.

8. The appellant relied on the case of *Palace Investment Ltd -v- Geoffery Kariuki Mwenda and Another* [2015] eKLR which stated as follows :-

> " Denning J. in *Miller v. Minister of Pensions* (1947)2 ALL ER 372 discussing the burden of proof had this to say:-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not: the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties ...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

It was the appellant's case that the adjudicator applied the wrong principles of law on standard of proof in civil matters.

9. Section 107(1) of The *Evidence Act* provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See *Jennifer Nyambura Kamau -v- Humphrey Mbaka Nandi* [2013] eKLR.

10. It is trite law that the standard of proof in civil matters is on a balance of probabilities. In Hon. *Daniel Torotich Arap Moi -v- Mwangi Stephen Muriithi* [2014] eKLR the court stated that:

> " Even where the defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant and the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."

11. In dismissing the claim, the adjudicator made the following findings of facts: -

a. That the claim was brought under the doctrine of subrogation.

b. That an accident did occur on the 2nd of April 2019 involving motor vehicle registration number KCP 192L and KCQ 583A.

c. That the claimant had failed to tender sufficient evidence that the respondent was to blame for the accident.

12. The adjudicator relied on the case of *John Bwire -v- Joram Saidi Wayo and Another (Both suing on behalf of the estate of Benjamin Wayo Sailoki)* Voi HCCCA No O32 OF 2021 in which Mativo J. held:-

> " The police officer who testified in court was not at the scene and his evidence on how the accident occurred is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the

quality of evidence tendered, there was no basis at all upon which the magistrate's court can reasonably make a finding that liability had been established at 100% against the Appellant."

The adjudicator proceeded to state that in absence of direct evidence of how the accident occurred, the claimant failed to prove negligence on the part of the respondent.

13. It was the adjudicator's opinion that by failing to call the insured or the insured's driver, the appellant failed to prove causation. This was a finding of fact based on known principles of law and case law.

14. The mere fact that the police attributed the accident to the respondent's negligence is not proof of negligence on the respondent's part. The fact that motor vehicle registration number KCP 192L was said to have been on the appellant's right lane is not in itself conclusive proof of negligence in absence of any evidence from the driver of the appellant's motor vehicle. It was incumbent on the appellant to adduce direct evidence through its insured or her driver in order to establish causation. In absence of the said evidence, the court cannot on a balance of probabilities be expected to find in favor of the appellant for there could be another plausible reason altogether, for the presence of motor vehicle registration number KCP 192L on the appellant's side of the road other than its driver's negligence.

15. I find that for the appellant to meet the test laid down by Denning J in *Miller -v- Minister Of Pensions* [1947] 2 ALL ER 327(*supra*), the evidence of the driver of motor vehicle registration number KCQ 583A was vital to the appellant's case in view of the fact that the respondent's driver was not charged with any traffic offence. Section 108 of The *Evidence Act* provides that the burden of proof lies on that person who would fail if no evidence of all was given on either side. It is my finding that the appellant did not discharge the burden of proof in their case.

16. The respondent further submits that the suit should have been dismissed due to failure by the claimant to prove subrogation. She relies on the case of *Securicor Guards (K) Ltd -v- Dr. Mohammed Saleem Malik And Another* [2019] eKLR, in which the court held that where the insured's consent was not obtained prior to filing suit, the doctrine of subrogation did not apply. It is a well-established principle that where the insurer exercises his right of subrogation, he cannot sue the third party in his own name.

17. PW 3, the legal officer of MUA, formerly Saham gave evidence in which she stated that the claim was filed under the doctrine of subrogation. On cross-examination, she stated: -

> " Claimant is Juliah Wangari Mundia. She did not swear a verifying affidavit. She did not record a witness statement. She did not sign authority for me to act on her behalf. Our company filed suit as insurer under doctrine of subrogation. I have no notice by claimant allowing me to file claim in her name."

18. From the proceedings, it is evident that a representative of the insurer signed the verifying affidavit. Without consent from the insurer, an insurance company cannot successfully pursue a claim under the doctrine of subrogation.

19. The case of *Moses Mungai Njenga -v- Sarah Wanjiku Muthemba* Nairobi HCCA NO. 1019 of 2007 had facts similar to the facts in this appeal and the court in dismissing the plaintiffs suit held as follows: -

> " The result is that the suit was filed and prosecuted without the possible consent, knowledge, and participation of the plaintiff Sarah Wanjiku Muthemba. Hence it was necessary for the Insurance Company in this case to prove, on a balance of probability that the suit was filed by it in the name of the plaintiff with her consent. Knowledge and consent is intended to preserve the plaintiff's rights or additional rights which might arise together with the

insurer's subrogation rights to avoid losing a partial cause of action in the insured once the insured's joint cause of action is agitated."

20. From the foregoing, it is my finding that the adjudicator erred in law in finding that the doctrine of subrogation applied to the appellant's case.

21. In the end, and for the reasons given, the appeal lacks merit and therefore is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 9TH DAY OF SEPTEMBER, 2024.

A. C. BETT

JUDGE

In the presence of:-

Kering for appellant

Wahome holding bfief for Mege for respondent

Court Assistant: Polycap