Kibe & 2 others v Martin (Civil Appeal E182 of 2021)
[2024] KEHC 12961 (KLR) (Civ) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E182 OF 2021

JN NJAGI, J

OCTOBER 24, 2024

BETWEEN

JOHN NJOROGE KIBE ..... 1ST APPELLANT

ERIC WAINAINA ERANUS MUTURI (WRONGLY SUED AS ERIC WAINAINA ERANUS MUTURI) ..... 2ND APPELLANT

ISSAC KIMANI KIIRU ..... 3RD APPELLANT

AND

PRISCILLAH WAMBUI MARTIN ..... RESPONDENT

JUDGMENT

1. The Respondent herein brought suit against the Appellants on behalf of ICEA Lion Insurance Company Limited who were claiming recovery of a sum of Ksh.279,209/= under the principle of subrogation which sum was paid to the respondent in compensation in special damages incurred in repairing her motor vehicle after the same was damaged in a road traffic accident involving the appellants` motor vehicle. The trial court found the claim to have been proved and entered judgment in favour of the respondent to the sum of Ksh,251,309/=. The appellants were dissatisfied with the decision of the trial court and lodged the instant appeal.

2. The grounds of appeal are that:

    1. The learned Magistrate erred in law and in fact in entering judgment in favour of the Plaintiff and in the process

        a. Failed to appreciate that this suit was brought under the doctrine of subrogation

b. Failed to appreciate that the claim was therefore indeed brought by ICEA Lion General Insurance Company Limited.

c. Failed to appreciate that the right of subrogation was effectively denied by the defendants in paragraph 1 and 5 of their Statement of Defence

d. Failed to appreciate that the said Insurance Company had the burden of proof to show they had indeed insured the Plaintiff's motor vehicle as a prerequisite to proving the loss they allegedly incurred.

e. Failed to consider the defence advanced in paragraphs 1 and 5 of the Statement of Defence.

f. Failed to consider the Defendant's Submissions on the Doctrine of Subrogation.

g. Failed to make any finding or judgment on the material issue of the right or applicability of the Doctrine of Subrogation

2. The learned Magistrate erred in law and in fact in entering judgment for the Plaintiff for special damages in respect of towing charges, repair charges and assessor's fees when there was no evidence that the same were incurred by the Plaintiff or were paid out at all.

3. The appeal was disposed of by way of written submissions of counsels representing the parties.

Appellants` Submissions

4. The Appellants main contention is that the learned trial magistrate entered judgment in favour of the Respondent on the basis of the doctrine of subrogation yet the yardsticks for the invocation of the doctrine had not been met which are: There must be a contract of insurance; the risk must have crystallized and the insurer must have compensated the insured for the loss occasioned by a third party, as stated in the case of Kenya Power & Lighting Company Ltd v Julius Wambale & another (2019) eKLR as cited in Mwalimu David v Teachers Service Commission (2022)eKLR. The same was stated in the case of Egypt Air Corporation v Suffish International Food Processors (u) Ltd and another (1999) 1 EA.

5. It was submitted that the Insurance company failed to prove the existence of a contract of insurance between it and the respondent. The appellants faulted the witness called by the insurance company, PW,3 for not placing before the court any document that would show the existence of a contract of insurance such as the proposal form, evidence of payment of premiums, a certificate of insurance, the policy number and the signed contract. It was submitted that failure to prove the existence of the contract was fatal to the respondent`s case.

6. The appellants submitted that there was no evidence that the risk insured had crystalized as there was no proof of negligence on the part of the appellants` driver.

7. It was further submitted that there was no evidence that the insurer had indemnified the insured as there was no evidence of payment of the sum claimed. It was submitted that the payment vouchers adduced by the respondent in the case could not be taken to signify confirmation of payment as they were not countersigned or endorsed by the payee to confirm payment. The appellants in this respect placed reliance in the case of Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] eKLR where it was held that payment by voucher must be countersigned to signify payment.

8. It was submitted that though the vouchers are stamped "paid", the payee has not endorsed the payment and as such it cannot be construed to mean confirmation of payment. The appellant relied on the

case of Yunis Noor Mohamed Mangia v The Attorney General (2004) eKLR where the court stated that a rubber stamp stating "paid" by the payee is not sufficient proof that the amount has been paid. The appellant further cited the case of Mariam Sensalire v African Institute of Capacity Development (2021) eKLR where the court stated that:

> ...Other than an office document showing the schedule of payments and stamped 'Paid' the Respondent did not avail any additional document such as bank statement to show that the intention to pay was actually executed. As such the sum is considered as unpaid in the absence of proof that it was actually paid.

9. It was submitted that the payees in the matter did not testify to confirm payment. That the vouchers produced could not qualify as receipt vouchers as they were not utilized to signify confirmation of payment but were used as internal documents authorizing payment or disbursement of money.

10. It was submitted that it was erroneous for the trial court to allow the claim on the basis of the doctrine of subrogation in the absence of evidence of payment by the insurance company.

11. The appellant submitted that PW3 told the trial court that the insurance company had paid Ksh.229,409.50 at the time of instituting the subrogation claim which showed that the respondent had not been fully indemnified. It was submitted that this was fatal to the claim. The Appellants urged this court to allow the appeal.

Respondent`s Submissions

12. The Respondent on the other hand submitted that there was a contract of insurance between her and ICEA Lion General Insurance Company Limited. The Respondent submitted that the said accident occurred on 4th April 2013. She proceeded to fill a Motor Vehicle Claim Form dated 5th April 2013. It was received by ICEA Lion on 8th April 2013. The Respondent maintains that there is no way ICEA Lion would have proceeded to accept the Motor Vehicle Claim Form if she was not insured under it.

13. The Respondent further submitted that she was a policy holder as indicated in the Policy Number 970A011776712 which is well captured in the payment vouchers adduced to signify payment and indemnification. That the Assessor PW2 confirmed in his evidence that the subject motor vehicle was assessed after he received instructions to do so from ICEEA after which he prepared an Assessment Report dated 22nd May 2013. That PW3 confirmed that the payment vouchers all bore the Respondent`s Policy Number. The Respondent relied on the case of Gahir Engineering Works Limited v Rapid Kate Services Limited & Another [2018] eKLR wherein the court held that where a policy document had not been produced, that was not fatal to the claim as the insurer was only required to prove its claim on a balance of probabilities. The Respondent maintained that there was in existence a contract of insurance between her and ICEA Lion.

14. It was submitted that the documents produced by the respondent proved that there was in existence a contract of insurance between the respondent and ICEA.

15. On indemnification, the Respondent submitted that there was sufficient evidence that she was properly indemnified of the claim by ICEA Lion as to warrant the insurance company invoking its rights of subrogation against the appellant. That payment vouchers were produced that signified that payment was effected for assessment, towing charges and repair charges of the suit motor vehicle. That they were stamped as "paid". The respondent relied on the Court of Appeal decision in Abdi Ali Dere v Firoz Hussein Tundal & 2 Others (2013) eKLR wherein the court held that a voucher can also mean confirmation of payment and that a voucher is not any different from a receipt.

16. The Appellant submitted that the details on the payment vouchers signified payment and to whom the money was paid to and for what purpose. That PW3 confirmed the payment. Therefore, that it was proved that the company fully indemnified the respondent for the loss occasioned by the third party.

17. It was the Respondent's submission that the trial court did not in any way err in arriving at the decision that is the subject of this appeal. The respondent urged the court to dismissed the appeal.

Analysis and Determination

18. This being a first appeal, I am guided by the decision of the Court of Appeal in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, wherein the court stated as doth:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

19. Therefore, it is my duty to re-evaluate the evidence afresh taking into account that I did not have the opportunity of seeing or hearing the witnesses testify.

20. The doctrine of subrogation is a principle in insurance law that enables an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. The Court of Appeal in Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR held as follows with regards to the doctrine of subrogation:

> " 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. 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."

21. For the doctrine of subrogation to be invoked properly, there are conditions precedent. First, there must be in existence a contract of insurance, risk must have crystallized and there must be actual payments made in order to indemnify the insured. This was held in the case of Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 where 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."

22. From the pleadings and submissions, the issues for determination are

    1. Whether there existed a contract of insurance between the Respondent and ICEA Lion General Insurance Limited;

2. Whether the claim had crystalized; and

3. Whether the insurer indemnified the respondent for the financial loss occasioned by a third party.

Whether there existed a contract of insurance between the Respondent and ICEA Lion General Insurance Limited

23. The Appellants` position is that it was not proved that there existed a contract of insurance between the Respondent and ICEA Lion General Insurance Limited. The Respondent on the other hand maintained that she was registered under Policy Number 970A011776712 hence she was duly insured by ICEA Lion.

24. In order to receive compensation from an insurance company, an insured person must demonstrate to the court that he had an existing contract (Insurance policy) with the insurance company. This was the position of the court in AIG Insurance Company Limited v Benard Kiprotich Kirui [2022] eKLR.

25. The trial magistrate in her judgment did not make a finding on whether or not there was a contract of insurance between the Respondent and ICEA Lion. I have considered the issue. The respondent did not produce a signed contract of insurance between it and ICEA Lion. It is however my view that the existence of any such contract could be inferred from the material placed before the court.

26. The respondent called a witness from ICEA Lion PW3 who testified that the vouchers produced by the respondent had a Policy Number for their insured – No. 970A011776712. He said that the same was proof of insurance. It was his evidence that when the accident took place, the respondent filled the necessary claim form and the necessary payments were made through payment vouchers. During his evidence in court, he identified the claim forms and the payment vouchers.

27. It is clear to me that the respondent had a policy number with ICEA. The policy number, in my view, proved existence of a contract between the respondent and ICEA as one cannot be issued with a policy number if a contract of Insurance is not in existence. The appellant did not in any way challenge the existence of that policy number.

28. In the case of *Richard v Njeru (Civil Appeal 181 of 2021)* [2022] KEHC 17083 (KLR) (14 October 2022) (Judgment), the court while citing APA Insurance Co Ltd vs George Masele [2014] eKLR, relied on a police abstract to hold that there was a valid insurance policy in place issued between the insured and the insurance company. The court in that case said that requiring production of an insurance policy document to prove existence of an insurance contract would be raising the standard of proof to that of beyond reasonable doubt. In Gahir Engineering Works Limited v Rapid Kate Services Limited & another [2018] eKLR, Githua J. held that:

> 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 importantly, it would not have shouldered the burden of financing the vehicle's repair costs and the other incidental expenses.

29. I entirely agree with the above holding. In the premises, I find that in the instant case, there was a contract of insurance between the respondent and ICEA Lion. The first issue is therefore determined in the affirmative.

Whether the claim had crystalized

30. It is a general proposition of the law that the legal burden of proof lies upon the party who invokes the aid of the law. Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

31. Sections 109 and 112 of the same provide that:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him".

32. The driver for the respondent who was driving the motor vehicle at the time of the accident, PW1 testified that the driver for the appellant was trying to overtake him in face of an oncoming vehicle from the opposite direction. That he tried to return to his lane and hit the appellant`s motor vehicle from behind. The driver of the appellant on his part stated in his evidence in court that it is the respondent who overtook him and then suddenly stopped ahead of him and thus caused the accident.

33. The appellant`s driver pleaded in his written statement of defence that the accident occurred when the respondent stopped suddenly in the middle of the road for no apparent reason thus causing the appellant`s motor vehicle to smash into her vehicle. The driver of the appellant thus never pleaded that it is the respondent who overtook him and suddenly stopped ahead of him. The issue having not been pleaded in the written statement of defence must, in my view, have been an afterthought. It is clear from the photographs produced by the motor vehicle assessor that the respondent`s motor vehicle was damaged at the front and at the rear. The respondent`s witness PW1 explained that the appellant`s driver hit his vehicle from the rear whereby he pushed it forward and as a result he hit the motor vehicle that was in front of him. The trial court believed the evidence by the respondent`s driver and dismissed the defence by the appellant`s driver. I find the evidence of the respondent`s driver to have been more convincing. The trial court was correct in finding the appellant`s driver liable for the accident. The claim for subrogation had thus crystallized.

Whether the insurer indemnified the respondent for the financial loss occasioned by a third party

34. It is the principle of insurance that the insurer can only be subrogated where it has made payment to the respondent. In the case of Indemnity Insurance Co. of North America and Another vs Kenya Airfreight Handling Ltd and Another [2004] 1 EA 52 where it was held that-

> " Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured."

35. The Appellants submitted that the vouchers tendered as evidence in the case did not prove payment. The Respondent on the other end submitted that a voucher serves the same purposes as any other receipt in that it proves the payment of money.

36. In in Abdi Ali Dere v Firoz Hussein Tundal & 2 Others (2013) eKLR, the Court of Appeal held that it is not correct to assert that a payment voucher cannot be evidence of payment:

> " In our opinion it is not correct to say, as the trial court did, that in all and sundry cases a payment voucher cannot be evidence of payment. The term "voucher" derives from the word "vouch", meaning "to confirm or assure". The term "voucher", in regard to payment, has at least two distinct meanings. It can mean a written authorization to pay or disburse money. It can also mean confirmation of payment. In the latter sense, a payment voucher is not any different from a receipt. In many daily and official transactions, payees do not walk around with receipts to issue in acknowledgement of payment. They merely counter sign the payment voucher to signify payment.
>
> This is particularly the case where the payees are casual workers engage to undertake short term assignments. In the present appeal, some of the payment vouchers that the court rejected related to payment to watchmen and other providers of labour hired after the accident."

37. In the case under consideration, there is no dispute that the respondent`s motor vehicle was damaged during the accident. The appellant`s driver DW1 admitted as much in his evidence.

38. Upon examining the evidence adduced before the trial court, I find sufficient evidence to prove that the respondent`s motor vehicle was repaired. The report of the motor vehicle assessor PW2 indicated the work that was required to be done on the vehicle and the estimated cost of repair of Ksh.230,258.50. The witness from the insurance company PW3 produced vouchers showing what was paid for each of the services rendered in returning the motor vehicle to its pre-accident state. He produced a satisfactory note from the respondent indicating that the motor vehicle had been repaired to her satisfaction. The money paid for repair of the motor vehicle was supported by the report of the motor vehicle assessor. In my view the vouchers were sufficient proof of payment. The vouchers indicated the company/person the money was paid to and the services rendered. The towing charges of Ksh.15,000/= were reimbursed to the respondent who through PW1 produced a receipt of the money paid to the company that towed the motor vehicle. The assessor`s fees of Ksh.6,900/= was supported by the motor vehicle assessor`s report.

39. The trial court considered the vouchers tendered in court in proof of the claim and awarded Ksh.251,309/= made up as follows: cost of repairing the motor vehicle at Ksh.229,409, assessment fees at Ksh.6,900= and towing charges at Ksh.15,000/=. I find the claim for the respondent to have been proved with some degree of certainty. In arriving at that decision, I take guidance in the case of Nkuene Dairy Farmers Cooperative Society Ltd & another V Ngacha Ndeiya [2010] e KLR, where the Court of Appeal in considering a material damage claim stated as follows:

> " In our view special damages in a material damage claim need not be shown to have been actually incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty.".

40. I find the payments herein to have been proved on a balance of probabilities. The respondent was accordingly indemnified for the financial loss occasioned by a third party. The appellant did not adduce any evidence to suggest that the money awarded by the trial court was not paid to the entities/persons stated in the vouchers.

41. The upshot is that the doctrine of subrogation was properly invoked in this case. I find no merit in the appeal and the same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Odek for Appellants

No appearance for Respondent

Court Assistant – Amina

30 days Right of Appeal.