



African Ventures Advertising Ltd v Pwani Oil Products Ltd (Civil Appeal 9 of 2022) [2023] KEHC 23715 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 9 OF 2022
SM GITHINJI, J
OCTOBER 17, 2023**

BETWEEN

AFRICAN VENTURES ADVERTISING LTD APPELLANT

AND

PWANI OIL PRODUCTS LTD RESPONDENT

(Being an Appeal against the Judgment and decree of the Honourable Nelly C. Adalo SRM Mariakani Magistrates Courts in Civil Case Number 335 of 2018; Pwani Oil Products Ltd - vs- African Ventures Advertising Ltd & David Ngigi Muturi delivered on 11th January, 2022)

JUDGMENT

1. The appeal herein arises from the judgment of the trial court at Mariakani in Principal Magistrate’s Civil Suit No. 335 of 2018. In the said suit the respondent who was the plaintiff moved the court vide a plaint filed in September, 27th 2018, in which he sought judgment against the appellant following a road traffic accident that occurred on the 24th April, 2017 in Mariakani Civil Suit No. 335 of 2018 where the Plaintiff’s oil products on transit were damaged and/or lost.
2. The Appellant aggrieved by the Judgment of the learned Magistrate in Civil Suit No. 335 of 2018 dated 11th January, 2022 set forth the following grounds in the Memorandum of appeal dated 3rd February, 2022;
 1. That the Learned Trial Magistrate erred in law and in fact and failed to appreciate the principle of subrogation and apply its principles in the case.
 2. The Learned Trial Magistrate erred in law and fact in failing to hold that the plaintiff had not proved its right to subrogation had accrued.
 3. That the Learned Trial Magistrate erred in failing to consider the pleadings and evidence on record.



4. That the Learned Trial Magistrate erred in failing to consider the Appellant's submissions and legal authorities relied on.
5. The Learned Trial Magistrate erred in law and in fact by completely ignoring to look at the Appellant's pleadings and evidence generally and thereby arriving at a very erroneous decision particularly on the principle of subrogation.

Background

3. PW1 Mackinon Washe the claims officer at APA insurance told the court that Pwani Oil products is under the insurance policy number 20/204/0000031 which was a goods in transit cover. That African Ventures Advertising Limited had been contracted by their insured to transport goods to the destination. That as per the agreement, when the goods are lost in transit, the transporter is responsible.
4. He testified that on 24th April, 2017 the defendant's motor vehicle was involved in an accident where the vehicle was damaged and goods lost. According to him, the goods never reached the destination and after getting that report, he appointed a loss adjuster who prepared a report. That the loss adjuster valued the goods at Kshs. 1,699,494 which was to be paid to Pwani Oil and such amount was subsequently paid as compensation for goods damaged. His testimony was that the insured is to pay an excess of 7.5 % and that the insured informed them to pay less the excess and after recovery, they would be refunded.
5. His further testimony was that his claim was for the money paid to the loss adjuster, the amount paid to Pwani Oil and the excess. That he had brought the suit under subrogation rights as provided for under the insurance contract because he had compensated the insured and that the transporter breached the terms of the contract.
6. On Cross examination by Mr. Ogada, he told the court that he was recovering all including the excess and that the insurance informed them that since they deducted the excess, they should claim the same. That he was not aware whether the excess was paid or not. He informed the court that he had read the contract between the transporter and the insured and that it stipulated that they can deduct excess from what is owed but he was not aware whether they paid.
7. PW2 Nicholas Wanjohi a loss adjustor with Cunningham Hindsey Limited told the court that upon receipt of instructions to access a loss for Pwani oil for an accident that had happened, they visited the scene and received a police abstract in that respect. He testified that they did an assessment of goods lost and damaged and according to him, they got an inventory of goods that left the factory and what was returned and subsequently did an analysis.
8. That the entire loss was Kshs. 1,699,494/- and they recommended payment less excess which was contained in his report. That subsequently, a demand letter was done to the transporter to hold them liable for loss of Pwani oil goods as they had an agreement that if goods did not get to destination, they would be responsible. He told the court that he was aware that Pwani oil was paid and at Paragraph 1:10 of the agreement, the transporter was to pay for any loss owing out of an accident/theft and the agreement at paragraph 4:1 shows there was no need to prove negligence.
9. In addition, he informed the court that the excess was deducted from money paid by insurance which amount is between the insured and the insurance. That in contract of goods, the excess is not deducted. It was also his testimony that the excess is recoverable and that is why APA is seeking the entire sum of excess.



10. On cross examination he stated that the report was dated 23rd August, 2017 which was given to the insurance recommending settling of the claim. He also confirmed that he deducted 7.5% of damaged goods to arrive at the figure recommended for payment.
11. The appeal was heard by way of written submissions which this court has read and considered.
12. In my view, the issues for determination are:
 - i. Whether the doctrine of subrogation is applicable and whether the same had accrued.
 - ii. Whether the Respondent is liable to pay the Appellant the amount sought in the Plaintiff.

Analysis and Determination

13. This being a first appellate court, I am under a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, draw a conclusion from that analysis and bearing in mind that this court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. These principles were buttressed by the Court of Appeal in the case of Peter M. Kariuki vs. Attorney-General (2014) eKLR where court stated that;

“We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported).”
14. Essentially, the principle of subrogation applies where there is a contract of insurance. If the “insured risk” takes effect and the insurer settles the insured’s claim, then the insurer is entitled to diminish the loss suffered by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. The extent of the compensation is not more than what has been paid to the insured.
15. The appellant in this case contends that the principle of subrogation would only be applicable if the insurer would be entitled to recover the compensation from the third party in this case, the transporter who was liable to the Plaintiff. According to him, there can be no liability without fault. Having considered the entire record, I note that the occurrence of the accident which resulted to loss and damage of goods was not disputed and the issue of negligence was also abandoned by the parties.
16. Paragraph 490 of the Halsbury’s Laws of England 4th Edition 2003 Reissue Volume 25 sets out the circumstances under which the doctrine of Subrogation applies in the following terms: -

“Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss... in so far as the assured has been indemnified by that payment for the loss.”



17. In Kenya Power & Lighting Company Limited vs Julius Wambale & Another (2019) eKLR Githua J held;

“The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby, usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract insurance.”

18. Under this doctrine, the insurer APA Insurance is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party and to sue in the name of the insured as was the case herein. I find that the doctrine of subrogation applies in the present case since there was a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned by the appellant.

19. In the case of Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 the Court held as follows with regard to the doctrine of subrogation:

“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.”

20. Consequently, I find that the doctrine of subrogation was very well applicable in this case as the insurer having compensated its Insured, the insurer is put in the position of the insured and is entitled to claim compensation from the Appellant no more than amount paid by the insurer.

21. I therefore find no merit in the appeal and the same is hereby dismissed with costs to the respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF OCTOBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

Miss Njiru for the Appellant

Mr Kilonzo for the Respondent

