REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 278 OF 2015

PAUL MAKATU.....1ST APPELLANT

VEKARIA CONSTRUCTION LIMITED.....2ND APPELLANT

VERSUS

QUADRANT SERVICES LIMITED.....RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court

at Nairobi Milimani Commercial Court Hon. Leah W. Kabaria

(Ms.), Resident Magistrate on 15th may 2015)

JUDGEMENT

1. Quadrant Services Limited was the plaintiff before the lower court and the respondent herein. The 1st and 2nd appellants were the 1st and 2nd defendants before the trial court. I shall refer to the parties in their capacities before the trial court for ease of reference unless the context otherwise admits.

2. On 21stJuly 1998the plaintiff's motor vehicle KAG 070N was parked along Waiyaki Way when the 1st Defendant negligently drove motor vehicle registration number KAG 414Q owned by the 2nd Defendant causing the 2nd Defendant's motor vehicle to collide with the plaintiff's motor vehicle. The plaintiff suffered loss and claimed for damages of Kshs. 1,232,745/=. The defendants filed a joint defence and counter claim on 19th September 2005 denying the plaintiff's claim. They denied that the plaintiff's vehicle was lawfully parked along Waiyaki Way. In their counterclaim they aver that on 21st July 1998 the 1st defendant was driving motor vehicle registration number KAG 414Q Iveco Lorry along Waiyaki Way Nairobi when the plaintiff recklessly and negligently drove motor vehicle KAG 070N thus driving into the defendant's path causing an accident. It pleaded in the alternative that if the plaintiff's vehicle was stationed at the designated point, such stoppage was negligent thus the plaintiff was solely responsible for the accident. The defendant sought Kshs 1,200,643/= made up of Kshs 500,000/- on its suffered net loss on its motor vehicle, work shed-cost of rebuilding Kshs 79,000/-, damage to motor vehicle KMV 721 Kshs 243,543/-, and cost of repair to a perimeter wall at Kshs 378,100/=.

3. At the hearing the plaintiff called two witnesses to support its case. Fred Nkuba Ojiambo (PW 1) testified that he is an advocate at Kaplan and Stratton Advocates and the plaintiff was incorporated for the firm's administration and has the partners as the shareholders and the directors. He recalled that on the material day he noticed an accident had occurred involving a saloon car and he stopped his vehicle off the main road on an isolated lane and turned on hazard lights. As they stood by the road side they saw a lorry from Westlands, then it suddenly veered off the road from the left hand side lane to the right hand side lane, continued past them and directly went and hit his parked vehicle from the back. He testified that the impact was so great that it propelled his car 30 meters from the point of impact. He further recalled that the lorry then deflected back to the road and at that point it hit another vehicle before going across the road, hitting the wall of a house and again knocking a vehicle parked in the compound. He testified that his vehicle was completely damaged. He told court that he was insured by Heritage Insurance Company and that his motor vehicle was caused to be repaired at St. Austin's garage. He told court he was giving his evidence under the right of subrogation.

4. Fredrick Njeru Njau (PW 2) told court that he is a director and senior associate of Motech Associates & Valuers. He recalled that on 23rd July 1998 he received instructions to inspect and assess accident damages on motor vehicle KAG 070N. He observed that the car had been crushed from the rear and the cost of repair was estimated at Kshs 1,224,295/=. Gibson Kamau (PW 3) was a legal manager at Heritage

insurance and testified that they insured Motor Vehicle KAG 070N and the figures being claimed are under the right of subrogation.

5. At the close of the plaintiff's case, Sarabjit Singh Sehmi (DW 1), Richard Kilome (DW 2), Michael Kikuvi Wambua (DW 3) and Japheth Natse (DW 4) testified for the defence. DW 1 testified that he works for the 2nd defendant and adopted his witness statement dated 11th August 2014 as his evidence. He testified that he quantified the cost of repairing the wall and the total cost was Kshs 378,000/- plus Kshs 79,000/- for the workshed.

6. DW 2 told court that he was employed by Occidental Insurance and the 2nd defendant took out insurance with them. He testified that the assessors found it uneconomical to repair motor vehicle registration no. KAG 414Q. The insured was thus paid Kshs 460,000/-, excess of Kshs 40,000/- was paid and they returned the salvage at Kshs 300,000/-. Dw3 adopted his witness statement as his evidence in chief. His version of events was very different from that of Pw1. He claimed that on the material day as they approached a foot bridge a few meters from Westlands they noticed that an accident had occurred. They also noticed a security company vehicle parked at the stage and had its lights flashing. He claimed that suddenly the driver of the vehicle in which he was in applied brakes and hit a vehicle which was joining the main highway from the right side. The driver lost control and drove onto the perimeter wall of the right left side. Dw4 adopted his witness statement dated 1st August 2014. On cross examination he testified that the plaintiff's car was hit as it entered a turn off on the left rear side.

7. The trial court proceeded to apportion liability in the ratio of 95:5 in favour of the plaintiff, awarded the plaintiff special damages of Kshs 1,232,645/- (subject to liability), interest and the cost of the suit. The defendant's counter claim was dismissed.

8. It is this holding that has led to the filing of the memorandum of appeal dated 8th June 2015 by the defendant. The memorandum of appeal has 11 elaborate grounds. The defendant in his appeal is contesting the finding on liability; took issue with the principle of subrogation and claim that it should similarly apply to their claim; and pointed out that the plaintiff failed to file a defence to counterclaim thus their claim was admitted.

9. The appeal was disposed off by written submissions and both parties filed their rival submissions. Being the first appellate court, I am required to re-evaluate the evidence independently and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify (See ***Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348***).

10. I propose to address ground 3 in the memorandum of appeal first as, in my understanding, based on the finding thereon, that ground would dispose off the appeal. I set out the ground here below;

> ***"3: The Learned Honourable Magistrate erred in law in holding that the Respondent's suit was filed for the insurer under the doctrine of subrogation, a finding which was inaccurate but ominously and gravely erred when she failed to reach a similar and consistent finding that the counterclaim was equally filed for the Appellants insurer under the same doctrine of subrogation if at all."***

11. Was the claim before the trial magistrate one under the doctrine of subrogation? A cursory look at the pleadings (the plaint and even the counterclaim) shows no indication that the claim was based on the doctrine of subrogation.

12. In ***Leslie John Wilkins v Buseki Enterprises Limited [2015] eKLR*** Kasango J cited with approval the holding of Kwazulu–Natal High Court in the case ***NKOSI – Vs – MBATHA (AR 20/10 (2010) ZAKZPHC 38 (6 July 2010)*** where she observed as follows;

> *Kwazulu – Natal High Court was confronted with an appeal just as I am in this appeal in the case NKOSI – Vs – MBATHA (AR 20/10 (2010) ZAKZPHC 38 (6 July 2010). The facts in that appeal were similar to the facts that confront me here. The Plaintiff in the lower court for the first time while being cross examined stated that her claim was under the doctrine of subrogation. That doctrine had not been pleaded. The Magistrate's dismiss the claim. The Kwazulu-Natal High Court in considering the appeal against that dismissal stated thus:*
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> > *"However, the plaintiff said it for the first time under cross-examination that she was proceeding against the defendant on behalf of the insurer for the recovery of the costs of so suing. I am of the view that a subrogation claim is something which must clearly be proved and specifically pleaded. Nor had any mention been made in the plaintiff's pleadings that her motor vehicle was insured and that after the collision the insurer fully indemnified the plaintiff for the loss she had suffered. Nor did the plaintiff plead that the amount to be recovered from the defendant would be paid over to the insurer. The object of pleading is to define the issues between the parties and the parties must be kept strictly to their pleas where any departure could cause prejudice. See Robinson v Randfontein Estates GM Co. Ltd 1925 AD 173 at 178 as per Rose-Innes CJ. The party is therefore not allowed to direct the attention of the other party to one issue and at the trial attempt to canvas another. Nyandeni v Natal motor Industries Ltd 1974 (2) SA 274(D). In the request for further particulars the plaintiff was specifically asked whether the motor vehicle was at the time of the collision insured, and whether she had personally paid for the repairs. The Plaintiff refused to answer the questions posed to her on the ground that the information requested was not required for pleading. In, my view, the Plaintiff had thereby misled the Defendant as to the time and correct state of events and as to the nature of her claim."*

13. The principle that parties are bound by their pleadings was the subject of a decision at the Court of Appeal in **Independent Boundaries Commission & Another –vs- Stephen Mutinda Mule & 8 Others [2014]eKLR** where the court stated;

> ***"Support its contention, the appellant cited the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD VS. NYASULU [1998]MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The present importance of pleadings". The same was published in [1960] Current legal problems, at P174 whereof the author had stated;***

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading …. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieve; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…***
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> > ***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called: Any other business" in the sense that points other than those specific may be raised without notice."***

14. The failure to plead subrogation was fatal to the respondent's case and to the appellants' counter claim. The words of Kasango J in Leslie John Wilkins Case (Supra) at paragraph 13 of the judgement capture the effect of the failure to plead. The Judge said;

> *"13: In this case however, the appellant did not plead the doctrine and it was not until appellant's learned counsels filed their written submissions at the conclusion of the trial before the learned trial magistrate that there was attempt to invoke that doctrine. Upto that stage appellant had not pleaded that his claim was under the doctrine of subrogation and nor had his pleadings shown that he was insured and had received payment from his insurance. It is in my view because of that that the learned trial magistrate in her reasoned judgment reached the conclusion that she did.*

15. Consequently, I make a finding that neither the plaint nor the counterclaim clearly pleaded that the respective claims were brought under the doctrine of subrogation and neither of the parties specifically proved the same. The finding of the trial court was thus in error.

16. I therefore set aside the finding by the trial court, dismiss the claim by the plaintiff and similarly dismiss the defendant's counter claim. As this finding disposes off the appeal I do not find it necessary to consider other grounds raised.

Each party is to bear its own costs.

Dated, Signed and Delivered at Nairobi this 20th day of January, 2020.

A. K. NDUNG'U

JUDGE