REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 47 OF 2013

JOSEPH OBIERO.....APPELLANT

-Versus-

STEPHEN KOSGEI KWANBAI & 4 OTHERS.....RESPONDENTS

(An appeal from the judgment and decree of F.N. Kyambia, (PM) in Eldoret CMCC No. 1397 of 2003 delivered on 22/01/2013)

JUDGMENT

1. The appellant **(JOSEPH OBIERO)** had filed a suit against the personal representatives of the estate of the late **KWANBAI CHESIRE** who were named as **STEPHEN KOSGEI KWANBAI, REUBEN KWANBAI, BEN KWANBAI,WILSON KWANBAI and RABAN KWANBAI** (Respondents) , seeking general and special damages following a road traffic accident along **UGANDA ROAD**, which occurred on 29th October 2000, involving motor vehicle registration No KAA 251 M Toyota pick-up owned by the deceased and motor vehicle registration No KZW 637 Nissan Sunny owned by the appellant. As a result of that collision, the appellant's vehicle suffered damage which required repairs and other incidentals totaling to a sum of Kshs 159,169/65. The collision was blamed on the negligence of the deceased and/or his driver or agent

2. The respondents denied liability, saying that if the accident occurred, then it was caused solely by the negligence of the driver of motor vehicle registration number KZW 637. The trial magistrate found that the ownership of the vehicles and occurrence of the accident were not disputed. He found that both drivers contributed to the accident and apportioned liability at 50:50%.

3. On special damages, the trial magistrate held that the appellant was not entitled to the same as he had not pleaded subrogation rights and stated:

> ***"I would assume that the insurance company brought this suit in the name of the insured to claim what it has paid. However from the pleadings filed by the plaintiff, it does not seem that the plaintiff brought the suit, on behalf of his insurer ALICO… it was necessary for the plaintiff to demonstrate in his pleadings that he had brought the suit on behalf of his insurer….I would imagine that the plaintiff pleaded subrogation. It was necessary for the plaintiff and his witnesses to demonstrate that the amount to be recovered shall be paid to the insurer"***

The claim was thus dismissed with costs.

4. The appellant was aggrieved with the findings and challenged the same on the following grounds;

> ***i) That the learned trial magistrate erred in holding that the doctrine of subrogation ought to have been pleaded.***
>
> ***ii) That the learned trial magistrate erred in failing to realize that the Plaintiff/Appellant's insurer was not party to the case***
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> ***iii) That the learned trial magistrate erred in allowing himself to be persuaded by legal authorities from other jurisdictions which were not applicable in the circumstance of this case.***
>
> ***iv) That the learned trial magistrate erred in failing to Award special damages even after holding that they had been specifically proved.***
>
> ***v) That the learned trial magistrate erred in apportioning liability for the accident in the ratio of 50:50 against the weight of evidence on record.***
>
> ***vi) That the learned trial magistrate erred in failing to consider the pleadings and evidence on record.***

vii) That the learned trial magistrate erred in failing to consider the Appellants submissions and legal authorities relied on.

viii) That the trial magistrate erred in dismissing the plaintiff's claim without sufficient reasons.

5. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

6. PW 1 **(Joseph Obiero)** told the trial court that on the material date, he was travelling from **Baringo** along Uganda road (which is the highway in Eldoret) at around 1:30 a.m. in his vehicle **KZW 637** at a speed of 50Kph,when he saw the driver of **Toyota Hilux KAA 251** which was in a parking reverse into the highway. He tried to reverse, hoot and flash his lights to warn the other driver of his presence, and he even moved onto the inner lane in vain. The two vehicles collided and the other driver stopped and they even had a chat and agreed to call the police. However, suddenly, the driver of the Toyota Hilux sped off. After reporting the matter to his insurers, the incident was investigated by **SPOT INSURANCE INVESTIGATORS** and the vehicle was found to belong to **Kwambai Chesire**. The appellant's insurer paid the investigator. The appellant's vehicle was damaged at the bumper shots and bonnet, and AA carried out an assessment

PW1 blamed the Respondent for the accident and on cross-examination, he stated that he could smell alcohol on the men who were driving the vehicle in question. He indicated on re-examination that it was he who was entitled to the insurance.

7. **PW2** was one **Corporal Lucy Muvila** No. 66147confirmed that the accident was reported and she produced the police abstract to support the allegation. On cross-examination she confirmed that an entry had been made by the owner of the motor vehicle.

8. **PW 3** was **Dajesh Kasha** of **RAJ Panel Beaters** who repaired the motor vehicle. He stated that he bought spares worth Ksh. 69,109.65 and forwarded the receipt to Alico Insurance who received and paid. He stated that he charged Ksh. 35,400 for repairs making the total Ksh. 109,509.65. He stated that he demanded Ksh. 104,509.65 which was paid for. On cross-examination the witness stated that it was **Alico Insurance**ompany that paid him and not **Joseph Obiero**. He stated that the spares he bought were according to market prices.

9. **PW5** was **Matthew Muriuki** from **Invesport Insurance Investigations** who told he was instructed by **Alico** to obtain copy of records in respect of motor vehicle KAA 251M. They confirmed that the vehicle was registered in the name of Kwambai Chesire and found that one Kiptoo stated had been driving at the time of the accident.

10. **DW1 (Harmaton Wafumbe)** from **Automobile Association of Kenya**. He confirmed that the motor vehicle was KZW 637 insured by Joseph Obiero. He noted the repairs that had been done i.e. panel beating and bumper replacement. He produced assessment reports and testified that Ksh. 5568 was paid to them. On cross-examination, he stated that he was not present at the assessment. He stated that he did not know whether the parts sourced were at market rates but said that this was highly dependent on the source.

11. **PW5** produced the fee note and receipt for his payment as well as his first investigation report. He cited visiting other sons and a wife of the deceased owner of the vehicle to seek letters of administration of his estate which the declined to avail copies to him. PW5 produced the invoice and receipt for this also.

12. **PW6** was **Beth Njeru**, director of **Investport** who reiterated the testimony of PW5 and produced the reports she signed following the investigations.

13. **Jude Chesire** also identified as DW1 before the court, told the court that he was driving **KAA 521A** when the accident occurred. He stated that he was hit from behind by a motor vehicle as he was reversing. He blamed the plaintiff's driver for the accident saying that having seen his vehicle at a distance of 20m he was better placed to avoid the accident. He denied having ran away from the scene saying that he stopped the vehicle and waited for the police. He stated that he had a valid driving license and had not been charged with any traffic offense in respect of the accident.

14. **DW2 (John Chesang')** who told the court that he prepared an assessment in respect of accident of 29th October 2000 in regard to motor vehicle **KZW 637**. He stated that the total repair cost were **Ksh. 46,893/50**. He stated that he did not see the vehicle but only used photos to do the assessment. He stated that the accident impact was not serious enough to warrant repair costs of **Ksh. 104,509/65**. He stated that the assessment by **AAK** was exaggerated and the prices were exaggerated. He was paid **Ksh. 5000** for the report. On cross-examination, he stated that he did the evaluation according to his experience.

15. In his judgment, the learned trial magistrate indicated that the plaintiff's claim could not succeed as pleaded stating that on the issue of liability, the driver of the appellant's vehicle had seen the other vehicle at a distance of 20meters as it pulled out of the parking to join the main road, and ought to have avoided the accident, similarly, the driver of KAA 251M having heard the appellant hoot and flash his lights ought to have given way-hence the 50:50 percentage. He noted however that the special damages claimed had been strictly proved.

16. On the matter of subrogation, the trial magistrate indicated that it was necessary for the plaintiff to demonstrate in his pleadings that he had brought the suit on behalf of the insurer.

17. The appellant's counsel submitted that the appellant was not to blame for the accident as he could not have foreseen the careless reversing onto the highway by the other driver. The respondent's counsel adopted the view taken by the trial court that the appellant ought to have taken other evasive steps. This was a vehicle which was parked and begun reversing onto the main road at 1.30am…the duty of care fell on the stationary vehicle's driver to check the road and ensure there was no other traffic before reversing. In addition, there were warning signals given including hooting and flashing lights, which did not seem to signify anything to him ... There was no evidence to suggest that the appellant was driving at an excessive speed under the circumstances, and at a distance of 20 meters on a speed of 50kph, it was unreasonable to expect the appellant to take more steps than he had taken to avoid the collision. I find that from the evidence tendered, the trial court erred in apportioning liability equally, and the respondent was 100% liable.

18. **Was it necessary for the appellant to plead subrogation?**

The appellant's counsel submitted that the claim was filed by the insured because of the contract he had with the insurer, and there was no way in which the insurer would have locus in the matter, saying the doctrine simply gives an insurer the right to take over the rights and privileges of the insured under an insurance policy, but if the insurer wishes to exercise these rights against Third Parties, it can only do so on behalf of and in the name of the insured. Counsel urged this court to draw from the decision in **OCTAGON PRIVATE INVESTIGATION SECURITY SERVICE Vs LION OF KENYA INSURANCE COMPANY CIVIL APPEAL NO 185 OF 1991, (1994) at pg. 173**. The doctrine of subrogation has been discussed in the text **"Insurance Law" by** Mac Gillivay & Parkingon **at page 471:**

> **"The doctrine confers two distinct rights on insurer after payment of a loss. The first is to receive the benefit of all its and remedies of the assured against third parties which, if satisfied, extinguish or diminish the ultimate loss sustained. The insurer is thus entitled to exercise, in the name of the assured, whatever rights the assured sasses to seek compensation for the loss from third parties. This right is corollary of two fundamental principles of the common law. If a son suffers a loss for which he can recover against a third party, and is also insured against such a loss, his insurer cannot avoid liability on the ground the assured has the right to claim against the third party. Conversely, the third party, if sued by the assured, cannot avoid liability on the ground that the assured has been or will be fully indemnified for his loss."**

19. The doctrine was also discussed in local case namely **ABDUL RAZAK** (suing on behalf of the international Air transport Association – **IATA & ANOTHER –vs-PINNACLE TOURS & TRAVEL LIMITED & ANOTHER [2005] eKLR** viz:

> **"Before concluding this matter an issue has been raised as to whether the payment made by the 2nd Plaintiff to the 1st Plaintiff absolves the defendants from liability. With respect this is a misapprehension of the Law. The 2nd Plaintiff was entitled to file suit against the Defendants under the doctrine of subrogation. The claim made by the Plaintiff is one and as against the Defendants it is joint and several. The question of double enrichment does not therefore arise.**

20. In a case in **Kwazulu -Natal High Court in South Africa** namely: **NKOSI-VS- MBATHA (AR 20/10) (2010) ZAKZPHC 38** where the court stated:

> ***"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 repairs the insurer paid to her. It does not appear from the plaintiff's pleadings that she was 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 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 pleadings 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 G M 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 canvass 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 grounds 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".***

21. The above case has been cited in **KIP MELAMINE LTD & 2 OTHERS V VIOLENT WAITIRI GICHIA (2017) EKLR.** I acknowledge that there was no mention made in the plaintiff's pleadings that his motor vehicle was insured and that after collision the insurer fully indemnified him for the damage suffered and had met all the repair costs and incidentals or that the amount to be recovered from the defendant would be paid over to the insurer. I am nonetheless persuaded that the case of **LELI CHAKA NDORO Vs MAREE AHMED &S.S.LARDHIB [2017] eKLR** offers an answer to the appellant's situation as the court in a similar scenario stated:

> ***"The respondent should not be seen to benefit from arrangements between the appellants and 3rd Parties. What would have been the case had the appellant not taken the policy. The respondent's position is that it can pay the bills but the money should be claimed by Resolution Health Insurance Company. That is not logical…the respondents are simply liable due to negligence on their part. The respondents cannot take the place of…insurance company as they are not parties to the existing arrangement between the appellant and his insurer. It is up to [the insurer] to decide on its arrangement with the appellant"***

22. From the foregoing I find that there is reason to warrant setting aside the trial court's judgment and substituting it with a finding in favour of the appellant to the effect that the claim for damages was proved in the sum of **Kshs 159,169/-** plus costs and interest.

The costs of this appeal are awarded to the appellant.

Delivered and dated this 10th day of January 2019 at Eldoret

H.A.OMONDI

JUDGE