Devshibhai & Sons Limited v Allied Plumbers Limited (Civil Suit 47 of 2018) [2025] KEHC 13695 (KLR) (Civ) (2 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 47 OF 2018

JN MULWA, J

OCTOBER 2, 2025

BETWEEN

DEVSHIBHAI & SONS LIMITED ..... PLAINTIFF

AND

ALLIED PLUMBERS LIMITED ..... DEFENDANT

JUDGMENT

Background

1. By a Plaint dated 8th March 2018 and filed on an even date, the Plaintiff sought against the Defendant the following reliefs:
    i. Special damages in the sum of Kshs. 29,776,576/=
    ii. Costs of this suit.
    iii. Interest on (a) and (b) above.
    iv. Any other or further relief that the Honourable Court deems fit to grant.
2. The Plaintiff's claim against the Defendant that gave rise to the suit and the reliefs sought is that at the material times, the Plaintiff was contracted to build and construct a double storey residential house situated at Old Muthaiga, referred to as the suit premises, whereas the Defendant was to carry out plumbing and drainage installation works hereafter referred to as the sub-contract works.
3. It is the Plaintiffs further claim that it took out a contractor's All Risks Insurance Policy Cover with Occidental Insurance policy to cover all risks that could arise in the course of construction of the suit premises.

4. On or about 9th March 2015, the Plaintiff alleges that the suit premises was extensively damaged due to heavy water flooding caused by leakage from the water tanks occasioning loss and damage as particularized above, which loss the Plaintiff attaches to the Defendant's negligence and carelessness.

5. The Defendant filed its statement of defence dated 2nd May 2018 admitting the damage to the suit premises, but denied liability for the damage and loss as alleged as well as the computed cost of the damage and puts the plaintiff to strict proof.

   The Defendant further denied the particulars of negligence attributed to itself and or its agents and further puts the Plaintiff to strict proof.

Plaintiff's case and evidence

6. PW1 was Jennifer Solovea, an employee of Occidental Insurance Company. She adopted her witness statement dated 16/11/2023 and produced her bundle of documents dated 8/03/2018.

   Her testimony that her employer had taken a contractor's liability policy to the Plaintiff which covered the Plaintiff during the material times relevant to the suit; that on 8/3/2015 a day before the handover of the suit premises to the owner on 9th March 2015, a report of heavy overflow of water was reported at the premises upon which the defendant instructed a loss adjuster to assess the loss that was adjusted to Kshs.28,721,994.00/=

7. On cross examination by Mr. Maloba, advocate for the defendant, she testified that handover was to be on 9/03/2015 and that damage to the house was due to water overflow the previous day. She relied fully on the Loss Adjusters report.

8. Paul Otunga testified as PW2.

   He stated that he worked for Mclarens Loss Adjusters as a loss and claims adjuster and holds a Diploma that he had permission to represent his company in court and adopted his report 18/6/2025.

9. On cross-examination, PW2 stated that he had no written authority from his employer, and that it was not filed, nor did he have it in court, or the employment contract from Mclarens.

10. Advocate Maloba told the court that he would not cross examine the witness in view of the lack of written authority from Mclarens and urged that the report be expunged from court records. In re-examination, Advocate Morara for the Plaintiff told the court that they had not filed the authority or any document to show that Mr. Paul Otunga represented Mclarens and that he could supply these documents. Upon consideration of the Advocates' arguments, the Court adjourned to enable parties to put their houses in order and return for further hearing. PW2 was thus stood down.

11. On 18/3/2025 Mahesh Mavji took the witness stand as the Managing Director of Mclarens Global. He testified as PW2.

    He testified that he is a Chartered Loss Adjuster and a fellow of the Chartered Insurance Institute and that he was instructed by Occidental Insurance Co. Limited on 13/3/2015 to investigate the incident and adjust the loss and damage in the suit premises. He produced to the Court his interim report dated 21/5/2015 and a final report dated 18/6/2015.

12. He further testified that he was to establish the cause of damage and extent of the damage, and that his finding was that the policy holder had suffered loss which was within the policy and that they prepared a report and presented it to the company.

13. On cross-examination, Ms. Mahesh Mavji stated that for investigations, they relied on other documents – the policyholder and estimate presented by the contractor and services engineer of the house being

built and that they were paid for the services. He referred the court to its bundle of documents at page 57.

14. On further cross-examination, PW2 stated that he is the one who prepared the final report dated 18/6/2015 and that it shows the amount for payment by the insurance, adding that he was not able to confirm the particulars of negligence as he had relied on the report of the Engineer-Ali Seifs Report on water leakage.

15. It was his evidence that water overflow caused the damage and that they relied on the Engineers report at page 23 (Ali Seif's report) on what was material to their work and that he did not have material to dispute the findings and added that it is not his position to determine or testify that the defendant was negligent as that was not his role.

Defendant's case and Evidence

16. DW1 was Manminder Singh Jandu,a Director of the Defendant. He confirmed that the company was sub contracted by the Plaintiff to undertake building/plumbing works on the suit Property. He wrote and signed his witness statement dated 14/6/2022 and sought to rely on it as his evidence in chief together with admission of his documents as filed.

17. On Cross-examination by the Plaintiff's Advocate Mr. Morara, he stated that the incident was during the night of 9/3/2015 and that at that time he was not in Kenya, having travelled to Germany, and therefore not privy to the events of 8/3/2015. He further stated that while referring to his documents that the water pump was left on an off position and that there is no name of person who left it on off position. He also stated that testing was done in April 2014 to his satisfaction, saying that he did not produce the report, as it was an internal testing. This witness further testified that the final testing is done by the Engineer before handover but had not been done when the damage occurred.

18. DW 2 while referring to paragraph 8 of its defence stated that the incident took place due to manufacturer's defect but produced no report in court to show the manufacturer's report on the defects adding they did not take the ball valve to the manufacturer as it was taken from them, and on the adjusted loss, he did not have a position on the same.

19. On re-examination, DW1 while referring to a letter dated 14/3/2015, stated that the water overflow was due to failure of the ball valve roof tank installation, and that testing of all the valves was not done for a period of a year, and the final testing had not been done.

The Plaintiff's Submissions

20. The Plaintiff crafted its issues summarized hereof that it deemed fit for the court's determination thus; - whether the water damage to the suit premises was caused by the Defendant's negligence, and whether the Plaintiff is entitled to the reliefs sought in the plaint.

21. In a summary, the Plaintiff submitted that at the Defendants defence, paragraphs 7 and 8 the damage was caused by heavy water flooding due to an overflow from the roof water tanks, caused by reasons of force majeure event and manufacturers defect on the ball valve, relying on the Engineers report, one Ali Seif who testified for the defendant, and who testified that he was not at the site when the incident occurred, thereby making his evidence hearsay.

22. By the above, the Plaintiff submitted that there having been no challenge or rebuttal on the material presented in court by the plaintiff, in the circumstances the Defendant cannot escape liability in negligence.

23. The Plaintiff submitted that the case before the court is grounded on the principle of subrogation, on the basis that the insured was fully indemnified by its insurers Ms. Occidental Insurance Co. Ltd and the insurer is consequently exercising its subrogation rights.

24. Cited in support are several cases among them Elijah Ole Kool vs George Ikonya Thuo [2001] KEHC 648 (KLR), Parkar & another v NQ & 2 others (Civil Appeal 139 of 2020) [2023] KECA 908 (KLR) (24 July 2023) and Gabriel Mugai Njiri v Wanga Robert Hawi t/a R.H. Wanga & Co. Advocates & R.H. Wanga & Co. Advocates [2018] KEHC 8618 (KLR) for the holding generally that:

> Professional negligence will normally arise when a person does not exercise the degree of skill, duty and care of a reasonable person in that profession; It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement...." respectfully.

Defendant's submissions

25. The Defendant in its submissions dated 22/8/2025 advanced its issues as to whether it satisfactorily performed its contractual obligations and whether the damage was caused by its professional negligence while in the cause of performing its sub- contract works.

26. While addressing the issues, the defendant submitted that no defects or foreseeable risks were apparent at the time of installation or during subsequent inspections, nor were any complaints raised by the plaintiff before the incident relying on the observations at the Consulting Engineers report found at page 33 of its bundle of documents, adding that as no failure to satisfactorily perform its contractual obligations which may have led to the damage, the defendant cannot be held liable for the damage resulting from external factors beyond its control, stating that causation is a central element in establishing liability in negligence or breach of contract, and failure to prove causation and negligence cannot be actionable.

27. The defendant called to aid decisions in the cases of Elijah Ole Kool v George Ikonya Thuo (2001) eKLR, Statpark Industries v Mbithi Munyao 2005 eKlR , and Gulf Energy Ltd v Ministry of Energy & 2 others (2022) eKLR among others in support of its submissions.

28. The Defendant finally submitted that mere occurrence of damage does not prove negligence and culpability without evidence of negligent conduct on the defendants part, further submitting that the plaintiffs case is based on speculation and selective reliance on evidence , and by failure by the plaintiff of proof of breach of duty, negligence or contractual non-performance, the plaintiff's case must fail.

Re-Edition of issues for determination

a. Whether the plaintiff has established a case for professional negligence against the Defendant.

b. Whether the Plaintiff is entitled to special damages as sought.

c. Which party shall bear costs of the suit.

Analysis and determination

29. The material facts placed before the court are straightforward and need no repetition; see background alone.

The following material facts are undisputed;

a. That the suit premises were damaged by heavy water overflow from roof water tanks, as confirmed by the Defendant's Consulting Engineer Ali Seif, due to of failure of the ball valve that was controlling the floor of the water into the roof tanks.

b. The Plaintiff had taken an individual Contractors All Risks Insurance Policy cover with MS Occidental Insurance Company. The Defendant too had taken out an insurance cover with Intra Africa co. Ltd.

c. The water damage to the suit premises occurred on the night of 9/10 March 2015.

d. That plumbing works at the suit premises had not been inspected for a period of one year prior to the water damage, being April 2014.

e. That hand over of the premises to the Plaintiff was scheduled to take place one day after the water damage, 9/3/2015.

f. The Subcontractor/Defendant were professional plumbers who had taken a policy cover to insure any risks as required under the subcontract agreement between the plaintiff and the Defendant, all to the time of Kshs. 29,776, 576

g. The plaintiffs claim was a subrogation claim instituted in the Plaintiffs name on behalf of its insurer who paid the damage in the sum of Kshs. 28,721,994 as a special damage payable to the plaintiffs insurer upon the loss being adjusted by Independent Adjusters Kenya Ltd who was also paid Kshs. 1,019,535 in respect its fees...pages 8,9,10, 19 and 57 of the plaintiffs documents, as well as Kshs. 35,047 being Band Investigators charges...page 10 of the plaintiff's documents.

The disputed material and facts will therefore be interrogated simultaneously as per the issues flagged for determination.

Whether the plaintiff has established a case of professional negligence against the Defendant

30. As observed in the case of Gabriel Mugai Njiri v Wanga Robert Hawi t/a R.H. Wanga & Co. Advocates & R.H. Wanga & Co. Advocates [2018] KEHC 8618 (KLR),

> " Professional negligence will normally arise when a person does not exercise the degree of skill, duty and care of a reasonable person in that profession"
>
> Based on the above learned pronouncement, the Plaintiff had a legitimate expectation that the defendant had the necessary broad knowledge of plumbing services, including understanding behind water flow, ability to work with a variety of materials and strong grasp of building regulation in the profession of plumbers.

31. The Defendant's witness DW1 a Director of the company testified that he was not privy to the events on the night on 9/03/2015; that the water pump was left on an off position but did not name the person who did so. The reasonable deduction of his testimony, in my view, is that the Defendant's workers and or agents were responsible for the outright carelessness and negligence that caused the water damage to the suit premises.

32. Whereas DW2 testified that the damage was occasioned by a manufacture's defect, he produced no report on that aspect. Additionally, the defendant called no evidence for the proposition it advanced that it was not negligent in its professional duties as plumbers.

33. In the case of Parker & Another v. NQ & 2 Others (Civil Appeal 139 of 2020) 24/07/2023, the Court of Appeal held in regard to hearsay that:-

> 19 "...it is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement..."

34. The truth as to whether the water pump was switched off by the plumbers workers or agents of the defendant and pursuant to clause 8.0 of the sub-contract agreement, could only be established by the Defendant who was in possession of the suit premises on the fateful night of the damage.

35. The burden of proof lay squarely on the defendant. There is no doubt that upon its admission in may words that it failed to discharge the said burden, and can only blame itself for its failure to perform its duties to the expected standards of professional plumbers.

36. In summary, the Defendants evidence was clearly hearsay and inadmissible for the reasons aforestated and more particularly that:

    a. The Defendants engineers were not on site on the fateful night.

    b. They (engineers) visited the site on 20/03/2015 when the report on damage was prepared long after the damage had happened.

    c. In their own conclusion, the flooding was entirely due to failure of the ball valve, which was controlling the pump.

    In the circumstances, would the Plaintiff be held partly liable in negligence as stated in the defendant's defence?

37. On the reliance by the defendant on the defence of force Majure, Chitty on contracts volume II defined an act of God as:-

> " an operation of natural forces(as opposed to an operation of natural forces) as opposed to an act of man) which it was not reasonably possible to foresee and guard against like lighting, extraordinary weather conditions, some extraordinary natural event or a totally unexpected heart attack..."

38. By end large the defence of force majeure cannot be applicable in the circumstances herein. It is clearly a matter of professional negligence by the Defendants servants and or agents without involvement by the Plaintiff or at all.

39. In addition, the site remained uninspected for a one-year period, yet the site was to be handed over to the plaintiff the next day of the damage. Acts of God cannot be invoked to justify the obvious professional negligence by the Defendant by its agents and or servants.

40. Toward that end, the case of Ryde vs. Bushell & Another [1967] EA817, the East African Court of Appeal rendered as follows:-

    i. The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;

    ii. Nothing can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably

have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence.

41. For the foregoing, it is difficult to find that the Defendant satisfactorily performed its contractual obligations as expected of a professional plumbing contractor in the cause of performing the sub-contract works, taking guidance from the definition of negligence in the Black's law Dictionary 10th Edition as:

> " The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation... the element necessary to recover damages for negligence are 91) the existence of a duty on part of the defendant to protect the plaintiff from the injury complained of, and (2) an injury to the plaintiff from the defendant's failure.

42. It is the court's further finding that the defendant owed a duty of care to the plaintiff in the performance of the works as stated in the sub-contract agreement in the manner of the principles enunciated in the case of Donoghue v. Stevenson [1932] UKHL 100, where it was held:-

> " The law takes no cognizance of, carelessness in the abstract. It concerns itself with carelessness only where there is duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence... the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty."

43. Whereas the Defendant denies that any damage to the Plaintiffs suit property was caused as a result of its negligence, it has offered no other probable cause of the damage as stated in the case of Statpack Industreies V. James Mbithi Munya [2005] eKLR.

Consequently, the court finds and holds that the plaintiff has established a case of professional negligence against the Defendant.

Whether the plaintiff is entitled to the Special Damages as pleaded in the plaint.

44. The plaintiff's claim is based on the principle of subrogation as stated above. I need not redefine it further being an undisputed issue – see para. 27 above.

It is trite law that where an insurer has paid a claim raised by its insured, it may proceed to recover the payment by standing in the shoes of the assured, and by use of its name, claim reimbursement or payment from the party culpable for the loss and or damage.

45. The above principle was reiterated in the case of Richard Norman Mudibo v. Patrick Oloo Odhiambo [2020] KECA 887 (KLR) where it was held that:-

> " It has long been the law, where insurers have paid a claim that they stand in the shoes of the assured in order to recover anything which is relevant to that claim. The law has long been that subrogation entitles the insurers to bring an action in the name of the assured against the wrongdoer to recover anything that is recoverable. The reason for that is that the right of action is vested in the assured. The cases show that an action can be brought by the insurer in its own name where it has taken a legal assignment of the cause of action from the assured."

46. The Plaintiff produced in evidence a policy renewal advice (pages 3-7) of its buddle of documents confirming the policy No. OLG/CAR/02/63710/09 was indeed in respect of the plumbing works undertaken by the Defendant, at the Plaintiffs premises.

47. In Kenya Power & Lighting Company Limited versus Julius Wambale & Another [2019] eKLR in similar situation to the one before this court, 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."

48. The risk covered under the policy by Ms. Occidental Insurance Limited tabulates the said sum of Kshs. 29,776,576/= in line with the law that special damages must be pleaded and proved. See par. 7 above. These payments have not been challenged by the Defendant. The plaintiff however provided evidence of the loss the report of the loss adjuster, which was uncontroverted. No alternative report of the damage was provided.

49. In the case of Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] eKLR the Court of Appeal in Nairobi as it was then constituted held: -

> " 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."

50. In addition, the Defendant did not challenge the loss adjusters report by any other expert report on the loss incurred by the plaintiff by way of a counter expert report or otherwise. See also the case of Ali Mohamed Sunkar vs Diamond Trust Bank Ltd [2011] eKLR quoted in the case of John G Kamuyu & Another vs Safari 'M' Park Motors Nairobi ELC No 1013 of 1999 where the court held that an expert report can only be challenged through a counter expert report.

51. In the circumstances, nothing has been offered by the Defendant to persuade the court from holding that the claim for special damages in favour of the Plaintiff against the Defendant has been proved to the required standard.

52. Ultimately, judgment is entered for the Plaintiff against the Defendant in the sum of Kshs. 29,776,576 together with interest at court rates accruing from the date of filing the instant suit until payment in full.

The plaintiff will have costs of the suit from the Defendant.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 2ND OCTOBER, 2025.

.....

JANET MULWA.

JUDGE