



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), GITHINJI & SICHALE, JJA]

Civil Appeal No. 239 Of 2018

BETWEEN

RICHARD NORMAN MUDIBO.....APPELLANT

AND

PATRICK OSOO ODHIAMBO.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nairobi (Sergon, J)

dated 2nd March, 2017 **IN NAIROBI HCCA NO. 335 OF 2014)**

JUDGMENT OF SICHALE, JA

In an amended plaint filed on **26th September, 2007**, **Richard Norman Mudibo**, (the then plaintiff and the appellant herein) filed suit against **Stephen K. Macharia** (the then 1st defendant) and **Patrick Osoo Odhiambo** (the then 2nd defendant and the respondent herein). At paragraph 3 of the amended plaint, the appellant averred that:

“At all material times to this suit, the plaintiff was the registered owner of motor vehicle registration number KAS 815 H and the 1st defendant was the registered owner of motor vehicle registration number, KAJ 389 B whereas the 2nd defendant was the beneficial owner of the said motor vehicle registration number KAJ 389 B”.

Further, the appellant alleged that on or about **20th June, 2005**, at about 8.30 p.m., the appellant was driving his motor-vehicle registration No. KAS 815 H along Uhuru Highway/Kenyatta Avenue roundabout when the defendants’ authorized driver negligently drove motor-vehicle registration No. KAJ 389 B thus, causing damage on the appellant’s motor-vehicle. The appellant contended that his motor-vehicle was excessively damaged as a result of the said accident and a sum of Kshs 229, 664.00 was expended towards repairs and incidental costs.

In a statement of defence filed on **3rd May, 2010**, the respondent denied being the beneficial and/or registered owner of motor-vehicle registration number KAJ 389 B and denied that the defendants’ driver was to blame for the accident (*if at all*). In the alternative the respondent averred that if the accident occurred (which he denied), then it was caused by the appellant’s driver, servant or agent.

The pleadings having closed, the trial was conducted by **Obulutsa**, the then Ag. Chief Magistrate, Milimani Commercial Court who in a judgment rendered on **1st July, 2014** entered judgment in favour of the appellant. He stated:

“Having considered the submissions, the court finds on a balance of probability that the plaintiff has established the Subrogation Right and that his motor vehicle was hit by the defendant’s motor vehicle and damaged. The plaintiff has proved liability in full against the 2nd defendant as owner of the motor vehicle KAJ 389 B. The plaintiff has presented the supporting documents for the material damage in terms of repairs, assessment fees, investigations. The claim has been established. Judgment will be entered for 221,664, plus costs of the suit and interest”.

The respondent was dissatisfied with the said outcome and filed a Memorandum of Appeal dated **31st July, 2014** at the High Court raising seven (7) grounds of appeal. In the appeal at the High Court, the respondent herein was the appellant and the appellant herein was the respondent. The appeal came before **Sergon, J** who in a judgment rendered on **2nd March, 2017** reversed the orders of **Hon. Obulutsa**, Ag. CM. The judge stated:

“I have examined the documents presented before the trial court and it is clear that the registered owner of the motor vehicle is the Nation Media Group Ltd. The insured is also recorded to be the Nation Media Group Ltd. The insurer can only file a compensatory suit using the doctrine of subrogation through its insured which in this case is the Nation Media group Ltd. There was no credible evidence to prove that the respondent had beneficial interest over motor vehicle registration number KAS 815 B. There was also no cogent evidence that the respondent was the insured”.

It was the appellant’s turn to be aggrieved by the outcome of the appeal filed at the High Court by the respondent, hence this appeal.

In a Memorandum of Appeal dated **19th June, 2018** in this second appeal, the appellant listed five (5) grounds of appeal, faulting the judge for:

- i. holding that a suit, in exercise of subrogation rights is maintainable only in the name of the insured;
- ii. holding that a benefit of a motor-vehicle cannot be acquired under the employer-employee relationship;
- iii. finding that the appellant had not proved his case on a balance of probability;
- iv. not finding that the trial court’s judgment was in conformity with the evidence, and finally,
- v. framing and ruling on issues not pleaded in the plaint and defence.

On **30th September, 2019**, the appeal came up for plenary hearing. Learned counsel **Ms Lwila** appeared for the appellant while learned counsel **Mr. Mutua** appeared for the respondent. In urging the appeal, reliance was placed on the appellant’s written submissions filed on **12th February, 2019** and his list of authorities filed on **13th February, 2019**. On the other hand, the respondent’s submissions and his list of authorities were both filed on **12th March, 2019**.

On behalf of the appellant, it was submitted that it was never an issue as to whether the appellant was the owner of motor-vehicle registration number KAS 815 H; that the appellant was a Media Consultant working for Nation Television and his motor-vehicle was insured by his employer, Nation Media Group Ltd under a Group Policy issued by Jubilee Insurance Company of Kenya Limited. In support of the proposition that the appellant need not be registered as the owner of motor-vehicle registration number KAS 815H, reliance was placed on this Court’s decision of

Securicor *Kenya Ltd vs. Kyumba Holdings, CA No. 73 of 2002* wherein it was held:

“Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

In opposing the appeal, it was contended on behalf of the respondent that the “copy of records” showed that motor-vehicle registration No. KAS 518 H was registered in the name of one **George Mwaura** and not the appellant and that the documents produced by **Collins Nyaema**, a Claims officer at Jubilee Insurance Company (the Insurer) all showed that the insured was Nation Media Group Ltd.

I have considered the record, the rival written and oral submissions, the authorities cited by both parties in this appeal and the law. The appeal before this Court is a second appeal. The Court’s mandate is, as has been enunciated in a long line of cases decided by the Court. See **Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007**, and **Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR**, for the holdings *inter alia* that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of **Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511** where in, it was held *inter alia* that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

As stated above, the mandate of this Court on a second appeal permits me to only consider issues of law but not matters of fact which have been tried by the trial court and re-tried or re-evaluated on first appeal.

As shown by copy of records, motor-vehicle registration No. KAS 815 H was registered in the name of **Mwaura George** as the owner. Wherein, I am in agreement that a log book is not conclusive proof of ownership of a motor-vehicle, it is important to note that in the insurance policy, Nation Media Group Ltd is the insured. The Insurer could only successfully file suit using the name of the insured, in this case, Nation Media Group Ltd. The report by Invespor, an Insurance Investigator dated **4th March, 2006** shows that the insured was Nation Media Group Ltd and the Insurance Company was Jubilee Insurance Company Ltd. There is also the letter of **20th July, 2005** from Insurance Adjustment Services (K) Ltd affirming that the insurer was Jubilee Insurance Company Ltd and the insured was Nation Media Group Ltd. The appellant was not properly suited to file the claim on behalf of the insurance company under the doctrine of subrogation as the insured was Nation Media Group Ltd. It did not matter that the appellant was an employee of Nation Media Group Ltd. In this Court’s decision of **Kenya Airfreight Handling Limited vs Indemnity Insurance Company of North America Corporation & Swiss Airport Transport**

Company Limited [2001] eKLR, it was stated:

“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.”

Similarly, in *Octagon Private Investigation Security Services vrs. Lion of Kenya Insurance Co.* [1994] eKLR this Court stated:

“the right of subrogation in a contract of insurance cannot create privity of contract between the insurance and third parties. All that it gives an insurance company is the right to take over the rights and privileges of the insured under an insurance policy but if the insurance company wishes to exercise against third parties the rights and privileges so taken over from the insured, then it (insurance company) can only do so on behalf of and in the name of the insured. We think Mr. B. J Byamugisha in his book “Elements of Insurance law in East Africa” correctly states the law when he says at page 109 under the heading “more on subrogation”

“the insurance company is not given rights against third parties. The rights must and can only be enforced by the insured personally (to whom) they are actually owed). Normally the insurance company will use its resources to prosecute the claims, but even then, it will do so on behalf of and in the name of the insured person”.

In his findings, the Judge stated:

“I have examined the documents presented before the trial court and it is clear that the registered owner of motor vehicle is the Nation Media Group Ltd. The insured is also recorded to be the Nation Media Group Ltd. The insurer can only file a compensatory suit using the doctrine of subrogation through its insured which in this case is the Nation Media Group Ltd. There is no credible evidence to prove that the respondent had beneficial interest over motor vehicle registration number KAS 815 H. There was also no cogent evident that the respondent was the insured”

In my view, I cannot fault the judge for coming to the conclusion that the appellant was a third party as he was not the insured, the insured being the Nation Media Group Ltd.

The upshot of the above is that I find no merit in this appeal. As **Ouko, JA (P)** agrees, the appeal is dismissed with costs.

This judgment has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules, **Githinji, JA** having ceased to hold office by virtue of retirement.

Dated and Delivered at Nairobi this 7th Day of February, 2020.

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF OUKO, (P)

I have read in draft the judgment of my sister, Sichale, JA and I am in agreement that the appeal has no merit, and that it should be dismissed with costs. As Githinji, JA had retired from judicial service, the judgment has been read under **Rule 32(3)** of the Court of Appeal Rules.

Dated and delivered at Nairobi this 7th day of February, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR