African Merchant Assurance Company v Kenya Power & Lighting Company Limited (Civil Application 37 of 2018) [2019] KESC 75 (KLR) (30 April 2019) (Ruling)

African Merchant Assurance Company v Kenya Power & Lighting Company Limited [2019] eKLR

Neutral citation: [2019] KESC 75 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 37 OF 2018

MK IBRAHIM, SCJ, PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

APRIL 30, 2019

BETWEEN

AFRICAN MERCHANT ASSURANCE COMPANY ..... APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... RESPONDENT

(Being an application for review of the decision of the Court of Appeal (Visram, Karanja & Koome JJ.A)delivered in 2. Mombasa Civil Appeal No. 59 of 2017 delivered on 26th April 2018 dismissing the applicant's application for certification under Article 163(5))

RULING

A. Introduction

1. The Application before this Court is dated 12th December, 2018 and lodged on 21st December, 2018. The applicant seeks to challenge the decision of the Court of Appeal (Visram, Karanja, Koome JJ.A) sitting at Malindi, disallowing its application for certification for leave to appeal to the Supreme Court pursuant to Article 163(4)(b) of *the Constitution*. The applicant now seeks review of the learned Judges' Ruling and Orders of 6th December, 2018.

B. Litigation Summary

(i) In the High Court

2. The genesis of the suit before the trial Court was a fire incident at Kibaoni area in Malindi, where several properties were damaged. The applicant, being the insurer of the burnt properties, conducted investigations to identify the cause of the fire and thus the party responsible for the damage. Its investigations revealed that the fire was caused by a faulty electrical pole and that the respondent,

was legally responsible for the fire. Relying on this finding, the applicant settled the eight insured affected parties' claims amounting to Kshs. 76,708, 415 and the cost of investigators and loss adjusters amounting to Kshs. 5, 544, 799.

3. Anchoring its case on the doctrine of subrogation, the applicant filed a suit in the High Court Civil Case No. 92 of 2012 seeking Kshs. 82,253,214 in the form of special damages plus interest and costs against the respondent. When the original plaint was filed on 19th July, 2012, the eleven insured were joined as the 2nd to 13th defendants. The plaint was later amended to remove them as parties to the suit.

4. The respondent opposed the claim disputing the cause of the fire and further maintained, that no negligence on its part, had been proved to the required standard. It also claimed that some of the policies, were not valid and that without written authority from the alleged policy holders to file the suit, the applicant lacked capacity to institute the claim. It also disputed the special damages and claimed that no expert report had been produced in Court. It concluded that the doctrine of subrogation could not be invoked in the circumstances.

5. The issues before the High Court were: What was the cause of the fire; whether the respondent was negligent; whether the polices were valid; whether the applicant had proved its case on the amount of Kshs. 82, 253,214 being claimed; whether the suit was properly filed under the principle of subrogation; and who would bear the costs.

6. The High Court (Chitembwe, J.) in its Judgment dated 16th day of March, 2016, found that the fire was indeed caused by the electrical sparks from the electrical pole, that the applicant had proved that the respondent was negligent hence 100% liable. On the issue of special damages, it found that only eight policy documents were produced amounting to Kshs 71,527,412 and Kshs. 5,544,799/= paid to the investigators respectively. The Court entered Judgment for the applicant against the respondent for the sum of Kshs. 71, 527,412/= being the total amount incurred as a result of the fire. The applicant was awarded costs.

7. As regards the issue of whether the suit was properly filed under the principle of subrogation, the High Court found that the suit was properly instituted. The High Court outlined the principles of subrogation. It stated that under the principle of subrogation, the insurance company that settles the claim is allowed to take up the role of the insured. In this regard, the Court was guided by the decision in Simpson & Company et al v. Thomson Kburrel et al [1877] 3 App Cas, 279 or 38 L.T. Further, the High Court found that, such proceedings had to be instituted in the name of the insured but for the benefit of the insurance company. The trial Judge held that the principle precluding an insurer from directly instituting proceedings against third parties was not only well established, it also allows an insured to assign his right against a third party to the insurer. Where upon assignment, the court found, the insurer takes up the role of the insured and was at liberty to sue the third party in its own name. This, the High Court found, was done through clause 6 of the general conditions of the applicant's policy agreements entered into by the insured. Clause 6 reads:

> "... every right of the insured accrued or to accrue will by way of subrogation pass to and absolutely vest in the insurer to the extent that the loss or damage insured by this policy may be ultimately made good or diminished thereby."

(ii) At the Court of Appeal

8. Aggrieved by the High Court Judgment, the respondent appealed to the Court of Appeal, in Malindi Civil Appeal No 59 of 2017. The respondent challenged the High Court Ruling on the basis that the learned Judge erred by:

a. finding that the suit was properly before him without considering that the respondent (applicant herein) had no capacity to institute the suit;

b. misdirecting himself by treating the respondent's submissions on liability and quantum superficially thus arriving at a wrong conclusion;

c. awarding the applicant Ksh. 71,527,412 which was not just unproven, but also excessive; and

d. delving into the litigation arena and considering matters not before him.

9. The Court of Appeal considered the issue of whether or not the insurer had the requisite standing to bring the suit in light of the principle of subrogation. The Court held that the general rule is that an insurer that has subrogated the rights of the insured, may only pursue those rights in the name of the insured. The Court was guided by the decisions in Esso Petroleum Co. Ltd. v. Hall Russel & Co. Ltd. [1989] AC 643, [1989] 1 All ER 37 and Michael Hubert Kloss & Another v. David Seroney & 5 Others [2009] eKLR.

10. [10] The Appellate Court also held that the only exception to this general rule is where an insured formally assigns his/her rights of action to the insurer. The Court also held that 'clause 6', upon which the High Court had relied, merely set out the rights of the insurer under the doctrine of subrogation, but did not have the effect of assigning the right to institute suit as argued by the insurer. On this grounding, the Court of Appeal held that the insurer lacked the requisite standing to bring the suit before the trial Court. It further held that the fact that the insured were initially parties to the suit, did not remedy the lack of standing as the insured ceased to be parties to the suit subsequent to the amendment brought by the insurer.

11. Consequently, the Court of Appeal found in favour of the respondent herein, set aside the High Court Judgment, the effect of which, it struck out the suit with costs.

(iii) Leave to Appeal

12. Aggrieved by the Court of Appeal's decision, applicant sought leave to appeal to the Supreme Court pursuant to Article 163(4)(b) of *the Constitution* and the principles established by this Court in Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR (Hermanus case); and as applied in Malcolm Bell v. Daniel Toroitich Arap Moi & Another [2013] eKLR (Malcolm Bell case). Thus the Court of Appeal sought to determine, whether the applicant's intended appeal was one of general public importance and deserving of leave to appeal to the Supreme Court.

13. The Court of Appeal identified the following issues for determination:

a. whether the applicant or any insurance company for that matter, has capacity to institute a suit in its own name under the doctrine of subrogation where an insured by contract or assignment relinquishes his/her right to seek legal recourse to the insurer;

b. whether such capacity can arise from the standard insurance clause, in this case clause 6, which was incorporated in the insurance contract between the applicant and the insured; and

c. Whether Article 159(2)(d) of *the Constitution* could remedy the lack of capacity by an insurance company to institute a suit in its name under the doctrine of subrogation.

15. The applicant argued that the question of standing under subrogation claims was a contentious one in Kenya and internationally. Thus the Supreme Court needed to settle the matter as the South African

Supreme Court of Appeal had done in Rand Mutual Assurance Company Ltd. v. Road Accident Fund (484/07) [2008] ZASCA 114 (Rand Mutual).

16. The applicant argued that the Court of Appeal's interpretation of clause 6 necessitated the further input of the Supreme Court. It was the applicant's contention that the effect of the Court of Appeal's decision was that an insurer could not exercise a right given to it by the insured. Such a position, it was urged, would defeat the very essence of the doctrine of subrogation in insurance contracts.

17. The respondent on the other hand, argued that the intended appeal did not involve any matter of general public importance. At best, contended the respondent, the appeal should have been brought under Article 163 (4) (a) of *the Constitution*, since what was mainly at issue was whether, Article 159 (2) (d) of *the Constitution*, could remedy the technicality of lack of standing on the part of the insurer to file suit in its own name. The respondent also claimed that the intended appeal did not raise any matter of general public importance, as the question as to whether, an insurance company could sue in its own name under the doctrine of subrogation was well settled in law.

18. The Court of Appeal in its Ruling dated 6th December, 2018, held that the application for leave to appeal, was properly before it and proceeded to consider it on the merits. Applying the Hermanus Principles to the case, the Appellate Court held that, the determination of the question as to whether an insurer could sue in its own name on the basis of the doctrine of subrogation, transcended the interests of the parties. However the Court held that this question had been well settled and as such, there was no need for a further input by the Supreme Court. Regarding the applicability of Article 159 (2) (d) of *the Constitution*, the Appellate Court held that it could not consider the matter under the provisions of Article 163 (4) (a) the application had not been filed as one involving the interpretation or application of *the Constitution*.

(iv) At the Supreme Court

19. Aggrieved by the Court of Appeal's Ruling, the applicant now approaches this Court, seeking a review of the said Ruling, pursuant to Article 163(5) of *the Constitution*.

(a) Applicant's Submissions

20. The applicant submits that the Court of Appeal's Ruling will occasion huge loses in the insurance industry. It further contends that the Appellate Court erred by finding on one hand, that the question for determination transcended the interests of the parties while on the other, declining to certify the matter on grounds that the issue is well settled.

21. The applicant submits that a question of law can only be regarded as having been settled if the Supreme Court has pronounced itself on the same with finality. The applicant relies on this Court's decision in Jasbir Singh & 3 Others v. Tarlochan Singh Rai Estate & 4 Others, Petition No. 4 of 2012 and Articles 159, 259(1) and Section 3 of the *Supreme Court Act* 2011, in urging that it is in the interest of predictability, certainty and uniformity of the law that this Court should pronounce itself on the issue at hand

22. The applicant submits that it meets the Hermanas case criteria. It applies them as follows:

    a. Does the issue raised transcend the circumstances of the case and raise significant public interest?

23. The applicant submits that two questions have been raised: the locus standi of the insurer to pursue the third party in its own name, and whether Article 159(2) of *the Constitution*, can remedy the lack of capacity if a suit is brought under the doctrine of subrogation where the insurer has already

indemnified the insured. It submits that this matter implicates at least 5000 insurance agents, ten percent of the Kenyan population who are policy holders and over thirty insurance companies.

24. The applicant further submits that these questions were fully canvassed both at the High Court and Court of Appeal, both of which made specific findings on the two issues.

25. The applicant cites the cases of Leslie John Wilkins v. Buseki Enterprises Limited [2015] eKLR (Wilkins); Sharif Alwy Abar & Another v. C M (Minor suing through next friend and father G K K) [2015] eKLR; Abdul Rozak Khalfan (suing on behalf of International Air Transport Association-LATA & Another v. Pinnacle Tours & Travel Limited & Another [2006] eKLR; Leli Cahku Ndoro v. Marce Ahmed & SM Lardhib [2017] eKLR as examples of the divergent approaches by Kenyan courts on the question whose final determination by this Court is being sought.

(b) Are the questions for determination at the Supreme Court mere apprehension of miscarriage of justice?

26. Lastly, the applicant submits that the contentious and differing approaches to the question on the international plane, is a justification for the need for this Court to intervene by rendering a final pronouncement on the matter. The applicant refers to an International Bar Association Report, which shows that the position on whether an insurer may sue in its own name or the insured's name under the principle of subrogation is far from settled. The applicant therefore submits that this case meets the threshold for an Article 163(4)(b) certification.

(b) Respondent's Submissions

27. The respondents agree with the Ruling of the Court of Appeal. It submits that the question intended for appeal is whether an insurer has locus standi to institute a suit in its own name under the doctrine of subrogation. It is their submission that this question has been settled by the Court of Appeal. In their view, the High Court was aware that the issue of locus standi under the principle of subrogation had long been settled but chose to apply the provisions of Article 159(2) to salvage the applicant's case.

C. Issues For Determination

28. The issue for determination by this Court is whether the matter in respect of which certification is sought is one of general public importance.

D. Analysis

(i) On Jurisdiction

29. Having been aggrieved by the Judgment of the Court of Appeal, the applicant herein, sought certification to appeal to the Supreme Court under Article 163 (4) (b) of *the Constitution*. The application for certification was dismissed by the Appellate Court, thus prompting these proceedings. Thus the applicant has invoked, and rightly so, the provisions of Article 163 (4) (5) of *the Constitution*. What the applicant seeks is a review of the Court of Appeal's denial to certify the matter for appeal to this Court. There is no doubt therefore, that the application for review is rightly before us. This then paves the way for the Court to consider the merits of the application.

(ii) Whether the Intended Appeal involves a Matter of General Public Importance

30. The main question before us is: whether an insurer having indemnified the insured, can sue a third party in its own (the insurer's) name under the doctrine of subrogation.

31. Is this a question, the determination of which, transcends the circumstances of the case at hand? And would such determination, have a significant bearing on the public interest? Does the intended appeal raise a substantial question of law, the determination of which shall have a significant bearing on the public interest?

32. We note that in declining to certify the appeal as one involving a matter of general public importance, the Court of Appeal held that the question before it had long been settled in past decisions of the Court. The Appellate Court observed that the High Court, notwithstanding the well settled principle of law, nonetheless invoked the provisions of Article 159 (2) (d) of *the Constitution* in an attempt to cure, not a procedural technicality, but a substantive requisite of locus standi. The Court also acknowledged the fact that its decision transcended the circumstances of the case at hand in that it concerned a significant community in the insurance sector.

33. The applicant is not challenging the well settled principle, to the effect that an insurer, has no locus standi to initiate suit against a third party, under the doctrine of subrogation. Nor has the applicant demonstrated that the law on this question is in such state of flax that this Court must intervene. Apart from making reference to the International Bar Association Report, the applicant has not placed before this Court any inconsistent precedents emanating from the Court of Appeal regarding this issue. All the applicant is urging, is that this Court should pronounce itself on a question that has already been settled by other superior courts. Such an enterprise in our view, does not fall within the ambit of Article 163 (4) (b) and (5) of *the Constitution*. The Court of Appeal was not establishing a new principle in Insurance Law and Practice. It was simply affirming or restating a well-established legal principle. The decision of the Appellate Court transcended the circumstances of the case at hand, only because, it was a Judgment in rem, but not because, it was going to affect the already established legal relations between different actors in the insurance industry. Regarding the applicability of Article 159 (2) (d) of *the Constitution* to the case, all we can say, is that this Court, has already authoritatively pronounced itself, in a number of cases, as to the meaning and scope of the said Article.

34. The foregoing analysis inevitably leads us to make the following Orders.

E. Orders

i. The applicant's Notice of Motion dated 12th December 2018, is hereby disallowed.

ii. The applicant shall bear the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2019

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M. MWILU

DEPPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA