



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Cockar, Omolo & Tunoi JJ A)

CIVIL APPEAL NO. 185 OF 1991

BETWEEN

OCTAGON PRIVATE INVESTIGATION SECURITY SERVICES.....APPELLANT

AND

LION OF KENYA INSURANCE CO.RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Eldoret (Mr Justice Khamoni) dated 17th April, 1990

in

HCCC No 158 of 1987)

JUDGMENT

On the 17th October, 1987, Lion of Kenya Insurance Company Ltd, the respondent hereinafter, filed a suit against Octagon Private Investigations and Security Services, the appellant, claiming from the latter the sum of Shs 913,781/- together with interest thereon and costs. The claim was filed in the High Court at Eldoret. The respondent is an insurance company and the appellant who was simply described in the plaint as “a business concern carrying on its business in the Republic of Kenya” appears to be some kind of a security firm. The appellant had a transportation agreement with the then Bank of Credit and Commerce (Overseas) International Ltd, the bank, and under that agreement the appellant used to carry the bank’s money from Eldoret to Kisumu. The respondent, under a separate agreement with the bank, provided insurance cover for the money so being transported.

It was alleged in the plaint that on the 15th May, 1987, the bank entrusted to the appellant the sum of Shs 3,860,000/= to be transported from Eldoret to Kisumu but that on the way to Kisumu the servants or agents of the appellant stole part of the money being transported and the sum which was alleged to have been stolen was Shs 913,780/60; that was the sum claimed by the respondent against the appellant. The respondent claimed the sum from the appellant on the basis that under the contract of insurance between it (respondent) and the bank it was obliged to and did make good the loss to the bank and that having done so it was entitled to, under its right of subrogation contained in the contract of insurance, claim the money from the appellant whose servants or agents had occasioned the loss. The appellant filed a defence denying all the claims of the respondent and in paragraph 3 of the said defence it was specifically pleaded that:

“The defence will contend as a preliminary point of law that this suit does not disclose a cause of action against the defendants and should be dismissed with costs.”

On the 27th February, 1990, the appellant filed a chamber summons under order VI rule 13(1)(a) of the Civil Procedure Rules praying for an order that:

“The respondent/plaintiff’s suit be struck out as it discloses no reasonable cause of action against the applicant/defendant there never having existed any privity of contract between the parties hereto.”

The application came for hearing before Khamoni, J on the 10th April, 1990, and in a reserved ruling delivered on the 17th April, 1990, the learned judge dismissed the application with costs. It is that order dismissing the appellant’s application which forms the subject of the appeal before us. Among the objections taken before the judge was one to the effect that as the application by way of chamber summons was not supported by any affidavit, it would seem it was being contended by counsel for the respondent that the application was incompetent. Mr Wasuna who also argued the application before the judge pointed out that they could not have filed a supporting affidavit because that was not allowed by order VI rule 13(2) of the Civil Procedure Rules. The judge was of the view that he would not decide the matter on the point and expressed no opinion on it.

On this point, Mr Wasuna was clearly right. As was pointed out in the case of *Nyagah v Nyamu & Another* [1976] KLR 73, which was one of the cases cited to the judge:

“... In dealing with a submission of no cause of action, it is trite law only the plaint is to be looked at ...” per Mustafa, JA at pg 75 letters (and D and also Law, VP at pg 76 letters H to I”

The assertion that in dealing with a submission of no cause of action under order VI rule 13(1)(a) only the plaint is to be looked at is obviously due to the fact that order VI rule 13(2) provides that:

“No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made”.

To attach a supporting affidavit to an application under rule 13(1)(a) would be to introduce evidence which is specifically barred by rule 13(2).

The appellant’s ground for asking the High Court to strike out the plaint because it disclosed no cause of action against it (appellant) was that there was no privity of contract between it and the respondent. The respondent was not a party to the contract of transportation of money between the appellant and the Bank. The respondent in turn contended that it had sued the appellant under its right of subrogation under the contract of insurance between itself and the Bank. We have no doubt that this argument by the respondent was wholly false. The right of subrogation in a contract of insurance cannot create privity of contract between the insurance company 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 (the insurance company) can only do so on behalf of and in the name of the insured. We think Mr J B Byamugisha in his book “*Elements of Insurance Law in East Africa*” correctly states the law when he says at pg 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 rich resources to prosecute the claims; but, even then, it will do so on behalf of and in the name of the insured person....”

For this proposition the old case of *Rahemtulla and Premji v Bishen Singh* 14, KLR 91 is quoted. That case, in our view, still represents good law in Kenya.

The respondent brought the case against the appellant in its own name. The appellant was a third party as

far as the contract of insurance between the respondent and the bank was concerned. The judge thought that these matters should be left to be proved by evidence which would be brought during the trial. No evidence was needed to prove any privity of contract between the appellant and the respondent; no such privity was pleaded in the plaint. In the circumstances, when the plaint was looked at fairly and squarely, it clearly disclosed no cause of action on the part of the respondent against the appellant. In those circumstances, the judge ought

to have allowed the appellant's chamber summons and struck out the plaint as disclosing no cause of action. We accordingly allow this appeal, set aside the orders made by the judge and substitute those orders with one allowing the appellant's application by way of chamber summons and strike out the plaint as disclosing no reasonable cause of action as was prayed. We award to the appellant its costs in the High Court and the costs of this appeal. These shall be our orders in the matter.

Dated and Delivered at Nakuru this 19th day of May 1994.

A.M.COCKAR

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR