REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 287 OF 2015

GAHIR ENGINEERING WORKS LIMITED.....APPELLANT

VERSUS

RAPID KATE SERVICES LIMITED.....1ST RESPONDENT

JOHN MBURU NGUGI.....2ND RESPONDENT

JUDGMENT

1. The appellant, *Gahir Engineering Works Ltd* was the plaintiff in the lower court. The company instituted suit on behalf of its insurance company, *Mercantile Insurance Company Limited* under the doctrine of subrogation seeking special damages in the sum of KShs.335,799 being the cost of repairs to motor vehicle registration number KAN 333Y and incidental expenses following damage occasioned to the said motor vehicle in an accident which occurred on or about 27th July, 2005.

2. It was the appellant's case in the lower court that on 27th July, 2005, while its authorized driver was lawfully driving motor vehicle registration number KAN 333Y along Enterprise Road in Nairobi, the 2nd respondent (the 2nd defendant in the lower court) who was the 1st respondent's (1st defendant) authorized agent negligently drove, controlled and managed motor vehicle registration number KAE 370N owned by the 1st defendant thereby causing a collision with the appellant's motor vehicle. The particulars of the alleged negligence are stated in the plaint.

3. In their joint statement of defence dated 2nd July, 2008, the respondents denied any liability as alleged in the plaint and put the appellant to strict proof thereof. Without prejudice to the denial of liability, the respondents averred that if the accident involving the two vehicles occurred, it was solely caused or substantially contributed to by the negligence of the appellant's driver for which the appellant was vicariously liable.

4. After a full trial, the learned trial magistrate, *Hon. Leah W Kabaria* (RM) found that the appellant had not established its claim under the doctrine of subrogation and dismissed the suit with costs to the respondents.

5. Aggrieved by that decision, the appellant proffered this appeal through the memorandum of appeal filed on 17th February, 2017 relying on five grounds of appeal which can be summarized into three grounds as follows:

> i. That the learned trial magistrate erred in law and fact in holding that the appellant had not established its claim under the doctrine of subrogation on a balance of probabilities;
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> ii. That the learned trial magistrate erred in law in imposing a greater burden of proof than is required in civil cases; and
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> iii. That the judgment was contrary to the principles known in law and failed to consider the evidence on record.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed its submissions on 12th April, 2017 while those of the respondents were filed on 14th April, 2017.

7. This being a first appeal to the High Court, it is an appeal on both facts and the law. As the first appellate court, I am enjoined to re-evaluate all the evidence adduced before the trial court and arrive at my own independent conclusions. In so doing, I should bear in mind that I did not have the benefit of seeing and hearing the witnesses and give due allowance for that disadvantage.

See: ***Peters V Sunday Post Ltd; Selle V Associated Boat Company Limited [1968] EA 123***.

8. I have carefully considered the grounds of appeal, the parties' written submissions, the authorities cited as well as the evidence adduced before the trial court. I have also studied the judgment of the learned trial magistrate. Having done so, I find that the key issue that arises for my determination in this appeal is whether the appellant tendered sufficient evidence in the lower court to establish a claim under the doctrine of subrogation.

9. In support of its case, the appellant called two witnesses.

PW1 testified that on 27th July 2005, he was driving the appellant's vehicle registration number KAN 333Y Nissan hardbody along Enterprise Road when the vehicle was hit at the rear by motor vehicle registration number KAE 370H. The accident was reported to Industrial Area Police Station and to *Mercantile Insurance Company Limited* which had insured the motor vehicle. He confirmed that the damage occasioned to the vehicle was repaired at DT Dobie to the appellant's satisfaction and *Mercantile Insurance Company Limited* (the insurance company) paid for the total cost of that repair and all incidental expenses including the assessor's fees, cost of the police abstract and the investigation report. He also testified that the suit had been instituted by the insurance company under the principal of subrogation.

10. PW2 *Vincent Onyango* worked with the insurance company as an insurance officer. He stated that between 1st January 2005 to 31st December 2005, the insurance company had comprehensively insured the appellant's motor vehicle registration number KAN 333Y; that on 27th July 2005, the insurance company received a report that the insured vehicle had been involved in an accident; that the appellant completed a claim form and the insurance company repaired the damage sustained by the vehicle at a total cost of KShs.312,056. He produced an invoice for the amount from DT Dobie which was settled through cheque number 13280 net of 16% VAT as evidenced in a letter produced as Exhibit 9(a). There is evidence that the 16% VAT amounting to KShs.43,042 was remitted by the insurance company to the Kenya Revenue Authority vide a withholding VAT Certificate attached to Exhibit 9(a). PW2 also produced evidence of payment of assessor's fees in the sum of KShs.6,148.

11. The respondents did not offer any evidence to counter the plaintiff's case.

12. In her judgment rendered on 21st December 2012, the learned trial magistrate found the respondents 100% liable for the accident but dismissed the appellant's claim on grounds that the insurance company had failed to establish its claim under the doctrine of subrogation because it had not produced a policy document to prove the existence of an insurance contract between it and the appellant. The trial magistrate expressed herself as follows:

> ***"…While there did attend a witness from Mercantile Assurance claiming to have insured the subject motor at the time of accident no policy was produced as would enable this court determine whether the insurance company herein does as proposed have a right to indemnity by the third party. It is not a conclusion the court can arrive at in the absence of such document. The claim form in itself is not adequate. Only the terms of the policy document would distinguish a 'volunteer' as it were from a person entitled to claim under the doctrine of subrogation. The mere fact that the claimant is an insurance company is to me not adequate to qualify the said company to so claim."***

13. Under the doctrine of subrogation, when the insured risk crystalizes and the insurer pays or compensates the insured for financial loss arising from an insurance claim against a 3rd party, the insurer is in law entitled to step into the shoes and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from the 3rd party. The only qualification to this general principle is that the indemnity must be sought in the name of the insured.

14. The principle of subrogation was discussed in *Halsbury's Laws of England, 4th Edition (2003 re-issue) at paragraph 490* where the learned author stated:

> ***"..Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss. …"***

15. From the foregoing, it is evident that a claim under the doctrine of subrogation will be established if the insurance company on whose behalf suit is instituted proves to the required legal standard that it had paid its insured for the loss or damage occasioned to the subject matter of the insurance contract and was thus entitled to recover its loss from the 3rd party.

16. It is trite law that in civil cases, the burden of proof is on the plaintiff and the standard of proof is on a balance of probabilities.

The Court of Appeal in ***Ignatius Makau Mutisya V Reuben Musyoki Muli, Civil Appeal No. 192 of 2007 [2015] eKLR*** pronounced itself on the nature of evidence that would be sufficient to discharge the burden of proof on a balance of probabilities. The court borrowed from the wisdom of *Denning, J* in ***Miller V Minister of Pensions [1947] 2 ALL ER 372*** when he stated as follows:

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

17. In this case, the appellant on behalf of its insurer adduced evidence through the testimonies of PW1 and PW2 that the company had

comprehensively insured the appellant's motor vehicle at the time of the accident. The learned trail magistrate found that the 1st respondent was vicariously liable for the 2nd respondent's negligence in causing the accident.

There was both oral and documentary evidence to prove that the damage caused to the appellant's motor vehicle as a result of the accident was repaired by DT Dobie on instructions from the insurance company and that the insurer solely paid for the repairs and all incidental expenses amounting to KShs.335,799.

This is the same amount that was claimed in the suit. It is important to note that the above evidence was not challenged or controverted by any evidence to the contrary since the respondents did not adduce any evidence to support the allegations in their defence.

18. In my view, the details contained in the claim form (Exhibit 4) and the vouchers evidencing payment of the repair costs of the motor vehicle, the assessor's fees and investigation report fees by the insurance company were sufficient to prove on a balance of probabilities the existence of an insurance contract between the appellant and Mercantile Insurance Company and that the company made those payments not as a volunteer but because it was bound to do so in fulfillment of its obligations as the vehicle's insurer.

19. The fact that the appellant did not produce in evidence the policy document itself though material was not fatal to the insurer's claim since it was only required to prove its claim on a balance of probabilities not beyond reasonable doubt. If the insurance company had not insured the appellant's vehicle, it would not have taken the trouble to appoint an assessor to estimate the repair costs; appoint investigators and more importantly, it would not have shouldered the burden of financing the vehicle's repair costs and the other incidental expenses.

20. Having proved that the appellant's vehicle sustained material damage in an accident blamed on the negligence of the 2nd respondent for which the 1st respondent was vicariously liable and that the damage was repaired at its costs, the insurance company had in my view established its claim under the doctrine of subrogation on a balance of probabilities.

21. The claim by the learned trial magistrate that the insurance company required to exhibit the insurance policy itself in order to prove its claim was akin to requiring the company to prove its case beyond reasonable doubt which flew in the face of the law governing the standard of proof in civil cases. It is therefore my finding that the learned trial magistrate misdirected herself by not properly interrogating and weighing the evidence placed before her and thereby reached an erroneous conclusion that the appellant's insurer had not proved its case to the standard required by the law.

22. In view of the foregoing, I find merit in the appeal and it is hereby allowed. Consequently, the judgment of the lower court dated 21st December, 2012 is hereby set aside. It is substituted with a judgment of this court in favour of the appellant against the respondents jointly and severally in the sum of KShs.335,799. The amount shall attract interest at court rates from date of judgment of the lower court until full payment.

The appellant is awarded costs of the appeal and in the lower court.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of May, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kamau: Advocate for the Appellant

Mr Makori: Advocate for the Respondents

Mr Hillary Kibet: Court Assistant