REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 209 OF 2016

SECURICOR GUARDS (K) LIMITED.....APPELLANT

VERSUS

DR. MOHAMED SALEEM MALIK.....1ST RESPONDENT

RAMJI RATNA & COMPANY LIMITED .....2ND RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of *Hon. Rachel Ngetich* (CM) dated 6th November 2018. The judgment was delivered in a suit filed by *Dr. Mohamed Saleem Malik* the 1st respondent in this appeal (then the plaintiff) against the 2nd respondent (then the 1st defendant) and the appellant (then the 2nd defendant).

2. Though it is not expressly pleaded in the plaint dated 1st November 1996, from the evidence adduced before the trial court, it is clear that the suit was instituted by *Jubilee Insurance Company Limited* (hereinafter the company) under the doctrine of subrogation through the 1st respondent who was its insured. The company was seeking recovery of compensation paid to the 1st respondent for loss of household goods valued at KShs.106,000 which had been stolen from his rented premises on the night of 2nd and 3rd November 1993 by unknown persons together with fees in the sum of KShs.13,924 paid to loss adjusters who had been contracted by the company to assess the value of the goods lost by the 1st respondent. The 1st respondent was one of the tenants in the premises owned by the 2nd respondent who had contracted the appellant to provide guards to offer security services to all its tenants.

3. In their respective statements of defence, the appellant and the 2nd respondent denied the company's claim stating that neither of them was liable for the loss of the 1st respondent's property. The 2nd respondent claimed that its obligations under the lease agreement between it and the 1st respondent were limited and specific and they did not extend to provision of security guards or security services as alleged by the plaintiff.

4. On its part, the appellant pleaded that there was no privity of contract between it and the 1st respondent and that therefore, it could not be held liable under the contract for theft of goods in the plaintiff's rented premises; that in the alternative, if the court were to find that its guards were either wholly or partly to blame for the theft of the goods which was denied, its liability was limited to a maximum of KShs.25,000 as set out in the terms of its contract with the 2nd respondent.

5. After a full trial, the learned trial magistrate found both defendants liable for the plaintiff's loss as pleaded in the plaint and apportioned liability between them in the ratio of 50:50. Judgment was then entered against each of the defendants in the sum of KShs.59,962 together with costs and interest.

6. The appellant was dissatisfied with the trial court's judgment. In its memorandum of appeal dated 26th April 2016, it raised nine grounds of appeal which can be summarized into three main grounds as follows:

i. That the learned trial magistrate's findings were not supported by the evidence tendered in the trial;

ii. That the learned trial magistrate erred in both fact and law by failing to appreciate that the appellant was not in law liable to settle the 1st respondent's claim since there was no privity of contract between it and the 1st respondent; and

iii. That the learned trial magistrate erred in law by failing to appreciate that the company's claim under the doctrine of subrogation was unsustainable in view of the 1st respondent's admission that he had not consented to the institution of the suit.

7. When the appeal came up for hearing, the parties agreed to have the appeal prosecuted by way of written submissions which they duly

filed. The parties also informed the court that the appeal was between the appellant and the 1st respondent as the 2nd respondent was satisfied with the trial court's judgment and had already settled its share of the decretal amount.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am acutely aware of my duty as the first appellate court which is to re-evaluate and to reconsider the pleadings and the evidence tendered before the trial court to arrive at my own independent conclusions bearing in mind that I did not have the benefit of seeing or hearing the witnesses. See: ***Selle & Another V Associated Motor Boat Company Limited & Others, [1968] EA 123; Kenya Ports Authority V Kuston (Kenya) Limited [2009] 2EA 212***.

9. It may be important to point out that though the appellate court in the exercise of its appellate jurisdiction has power to interfere with the findings of the lower court, this power is not unlimited. It is limited to the existence of certain circumstances. As a general rule, an appellate court should not interfere with the findings of the lower court unless it is satisfied that the court in reaching its findings considered extraneous factors or failed to take into account relevant factors or that it misinterpreted the evidence or applied the wrong legal principles.

10. In this appeal, after carefully considering the lower court's record, the written submissions filed by counsel on record for the appellant and the 1st respondent as well as all the authorities cited, I find that the main issue that emerges for my determination is whether or not the trial court erred in finding the appellant partially liable to indemnify the company for the loss it incurred following the burglary in the 1st respondent's premises. Here, loss refers to the compensation paid by the company to the 1st respondent under the policy of insurance issued to him by the company.

11. In her judgment, the learned trial magistrate held as follows:

> ***"There is doubt from evidence adduced that the rear of the building was not properly fenced. On the other hand the 2nd defendant had duty of guarding the premises. From evidence adduced the security guards did not even know that theft had taken place. They learnt it from the plaintiff in the morning. This meant they slept on their job. Plaintiff said he discharged 1st defendant but the money compensating him was paid by insurance. The insurance need to be compensated by parties liable if their insured was not to blame. I find that the 1st and 2nd defendants share the blame and I do apportion liability at 50:50%."***

12. From the above passage, it is evident that the learned trial magistrate was fully alive to the fact that the suit had been instituted by the insurance company in the name of its insured under the doctrine of subrogation but she did not seek to answer the question whether the said doctrine applied to the facts disclosed in the evidence adduced in the case before her.

13. The parameters in 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 of insurance.

14. The above position is reiterated in *Halsbury's Laws of England 4th Edition 2003 Reissue Volume 25 at Paragraph 490* where the learned author set out the circumstances under which the doctrine applies in the following terms :

> ***"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….in so far as the assured has been indemnified by that payment for the loss."***

15. The learned author while examining the extent of the right of subrogation opined as follows:

> ***"…In short, the insurer, on payment of the loss, is entitled to the advantage of every right of the assured, whether it consists in contract or in remedy for tort, or to anything he has received or is entitled to receive in diminution of the loss. The insurer is not entitled to sue a third party in the name of the assured unless the assured has assigned to the insurer his right of action."***

16. From the foregoing, it is clear that the doctrine of subrogation allows an insurer to exercise only those rights or remedies that accrue to the insured or assured which means that the insurer cannot have any greater right than the insured. Put differently, this means that the insurer can only exercise the rights and have access to only those remedies available to the insured and nothing else.

17. Applying the above principles to the case that was before the trial court, it is not disputed that the contract for provision of guards to offer security services to the premises owned by the 2nd respondent which had several houses leased to various tenants including the 1st respondent was between the 2nd respondent and its management agents namely *Lotus Estate Agents*. It is also not disputed that a burglary occurred in the 1st respondent's house on the night in question and several household goods which had been insured with jubilee insurance company were stolen. The company subsequently compensated the 1st respondent by paying him the value of the stolen goods.

18. The question that this court is required to answer is whether given the above undisputed facts, the trial magistrate erred by holding that the appellant was partially liable in an action that was based on the doctrine of subrogation. The appellant has argued in its submissions that the doctrine of subrogation was not applicable in this case as the insurer did not have any right of indemnity against the appellant since the contract for provision of security services was between the 2nd respondent through its agents and the appellant; that the 1st respondent was a stranger to the contract and in view of the doctrine of privity of contract, he did not have any rights under the contract which his insurer was

entitled to enforce against the appellant under the aforesaid doctrine.

19. The 1st respondent on its part denied this proposition and relying on the Court of Appeal decision in ***Savings & Loan (K) Limited V Kanyenje Karangaita Gakombe & Another, [2015] eKLR***, the 1st respondent contended that the doctrine of privity of contract had evolved and where a contract confers benefits to a third party who is not privy to the same, the said party can sue or benefit from such a contract.

20. What constitutes privity of contract has been described by *Chitty on Contracts, 2004 Edition* as follows:

> ***"The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it."***

This basically means that a contract cannot confer rights or impose obligations on any person other than the contracting parties; that a contract cannot be enforced by or against a 3rd party. The effect of this legal principle is that only parties who are privy to a contract can sue to enforce its terms. This position was reinforced by the court in ***Agricultural Finance Corporation V Lengitia Limited, (1985) KLR 765*** where the court held *inter alia* that:

> ***"As general rule a contract affects only the parties to it and it cannot be enforced by or against a person not a party even if the contract is made for his benefit and purports to give the right to sue or to make him liable upon it."***

21. In his evidence before the trial court, the 1st respondent admitted that he was not a party to the contract for security services executed by the appellant and the agents of the 2nd respondent. When cross examined by the appellant's counsel, he stated as follows:

> ***"I did not have direct agreement with the 2nd defendant. I had indirect agreement through my agents. … there was no privity of contract between me and the 2nd defendant. …"***

22. Given the foregoing, it is my finding that since there was no privity of contract between the appellant and the 1st respondent, though he was benefiting from the security services offered through the 2nd respondent, the 1st respondent could not in law maintain an action against the appellant based on the contract since being a third party, he did not have any rights under the contract which he could lawfully enforce.

Given that *Jubilee Insurance Company* being his insurer could only exercise those rights and remedies which were possessed by him at the material time and the 1st respondent did not have any rights against the appellant under the contract, it is my finding that the company could not maintain an action against the appellant under the doctrine of subrogation.

23. I have studied the authority cited by the 1st respondent namely ***Savings & Loan (K) Limited V Kanyenje Karangaita Gakombe & Another, [2015] eKLR***, in support of the proposition that the doctrine of privity of contract has evolved and that a 3rd party who derives some benefit from a contract can enforce terms of that contract. My reading of that authority shows that in that case, the Court of Appeal was determining an interlocutory appeal that arose from orders of the High Court issued at Nairobi. One of the main issues that arose for determination was whether a party who claims a benefit under a contract to which he was not a party could enforce that contract. The Court of Appeal did not make any final finding on that issue and left it for determination by the trial court at the end of the trial. I am therefore unable to agree with the 1st respondent's submissions that the Court of Appeal in that case made a finding that the doctrine of privity of contract had evolved to allow third parties who derive a benefit from the terms of a contract to enforce terms of such a contract although they were strangers to the same.

24. In view of the foregoing, I find that the doctrine of subrogation did not apply in this case and the learned trial magistrate erred in failing to appreciate this fact as a consequence of which she arrived at the erroneous conclusion that the appellant was partially liable to indemnify the company for its loss. There was no basis in law for such a finding and the same must be set aside.

25. Consequently, I find merit in the appeal and it is hereby allowed. The judgment of the trial court is set aside and it is substituted by a judgment of this court dismissing the 1st respondent's suit against the appellant with costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 28th day of March, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ndegwa holding brief for Mr. Mege for the Appellant

Mr. Githua holding brief for Ms Weru for the 1st respondent

Mr. Salach: Court Assistant