



Pan Africa Insurance Company Limited v Tamre & another (Suing as the Legal Representative of Wycliff Cavine Omondi) (Civil Appeal 585 of 2019) [2024] KEHC 9738 (KLR) (Civ) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 585 OF 2019

WM MUSYOKA, J

JULY 31, 2024

BETWEEN

PAN AFRICA INSURANCE COMPANY LIMITED APPELLANT

AND

JACOB WAMBAYE TAMRE 1ST RESPONDENT

APA INSURANCE COMPANY LIMITED 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF WYCLIFF CAVINE OMONDI

(An appeal arising from orders in the ruling of Hon. DW Mburu, Senior Resident Magistrate, SRM, delivered on 11th October 2019, in Milimani CMCCC No. 7673 of 2014)

JUDGMENT

1. The suit at the primary court was initiated by the 1st respondent, against the appellant and the 2nd respondent, for a declaration that they were bound to pay to him a sum of Kshs. 4,199,455.00. The case, by the 1st respondent, was that he had obtained judgment, in Milimani CMCCC No. 1998 of 2006, for a total of Kshs. 4,199,455.00, against a party who had been insured by the appellant, who indicated that it had ceded the business relating to that insurance to the 2nd respondent. The appellant and the 2nd respondent filed separate statements of defence, in which they largely denied liability. A trial was conducted, where 1 witness testified for the 1st respondent, with the appellant and the 2nd respondent not calling any. Judgment was delivered on 14th December 2018, in favour of the 1st respondent, against the appellant, for the amount sought.
2. The appeal herein does not arise from the said judgment of 14th December 2018, but from a ruling delivered subsequently, on 11th October 2019. That ruling emanated from an application by the



appellant, vide a Motion, dated 17th May 2019, which substantially sought for review of the judgment of 14th December 2018, on grounds that the trial had been conducted by Advocates instructed by the 2nd respondent, in a manner that was skewed against the interests of the appellant. The other principal prayer was for change of Advocates for the appellant. In the end, the prayer for review and consequential orders was dismissed, but the prayer for change of Advocates was allowed.

3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 14th October 2019, revolve around the trial court erring in the conclusion that it came to; erring in finding that the review application was brought after unreasonable delay; failing to find that a just or sufficient cause existed; failing to find that the letter of 28th January 2015 was a forgery, despite a forensic report being exhibited; failing to find that the ceiling of what an insurer could pay was capped at Kshs. 3,000,000.00; and misapprehending the law and the facts.
4. Directions were given on 8th November 2023, for disposal of the appeal, by way of written submissions. Both sides have filed written submissions.
5. The appellant has collapsed all its 7 grounds into 2: whether the respondent was lawfully represented at the trial, and whether there were sufficient grounds for review. On the first issue, it is submitted that the Advocates who acted for the appellant had admitted that they had been instructed by the 2nd respondent, and the letter purported to have authorised the 2nd respondent to do so was a forgery, and the trial court made a negative inference in failing to find that the said letter was a forgery. On the second ground, it is submitted that the trial court did not consider the review application from the perspective of any other sufficient reason. Section 80 of the *Civil Procedure Act*, Cap 21, Laws of Kenya; Order 45 rule 1 of the *Civil Procedure Rules*, *Pancras T. Swai vs. Kenya Breweries Limited* [2014] eKLR (GBM Kariuki, Kiage & Mohammed, JJA), *Shanzu Investments Limited vs. Commissioner of Lands* [1993] eKLR (Kwach, Muli & Tunoi, JJA) and *Registered Trustees of the Archdioceses of Dar es Salaam vs. Chairman of Bunju Village Government & others Civil Appeal No. 147 of 2006* are cited.
6. The 1st respondent largely supports the findings and holdings of the trial court, and cited Order 45 rule 1(b) of the Civil Procedure Rules, section 80 of the *civil Procedure Act*, *Republic vs. Public Procurement Administrative Review Board & 2 others* [2018] eKLR (Mativo, J), *Pancras T. Swai vs. Kenya Breweries Limited* [2014] eKLR (GBM Kariuki, Kiage & Mohammed, JJA) and *Stephen Gitbua Kimani vs. Nancy Wanjiru Waruingi t/a Providence Auctioneers* [2016] eKLR (Mativo, J). Similarly, the 2nd respondent supports the decision of the trial court, and relies on Order 45 rule 1 of the *Civil Procedure Rules*, *Anwar Ali & another vs. Monica Muthoni & another* [2021] eKLR (Chepkwony, J), *Turbo Highway Eldoret Limited vs. Synergy Industrial Credit Limited* [2016] eKLR, *DJ Lowe & Company Limited vs. Banquo Indosuez* Nairobi Civil Application No. 217 of 1998, Eliud Michael Sichei vs. Tuti Holdings Limited Company [2021] eKLR (Olaogun, J) and *Karanja vs. Ndirangu & another* [2021] KECA 57 (KLR)(Okwengu, Warsame & Kantai, JJA).
7. The appellant had collapsed his appeal to 2 grounds, and I shall determine this appeal along those 2.
8. Was the appellant lawfully represented at the trial? The answer to that question would lie with whether the appellant had been served with the court process, which had initiated the suit, for whichever law firm ended up representing it, at those proceedings, would have to be traced to the steps taken by the appellant, after it was served with that process. There is process, in the original trial court records, indicating that the plaint and summons to enter appearance were served on Pan Africa Life Assurance Limited, on 28th January 2015, and both documents are embossed with the official stamp of Pan Africa Life Assurance Limited, and thereafter the appellant entered appearance. The appellant has countered that by stating that the service was effected on the wrong entity, for the appellant is Pan Africa Insurance Company Limited, and the entity served was, therefore, not the right one, hence the right entity was



- unaware of the proceedings until the auctioneers pounced. Secondly, it argues that it had ceded its business, relating to the insurance policy in question, to the 2nd respondent, inclusive of the liability in question, and it would appear that it was on that basis that the 2nd respondent allegedly instructed the Advocates who defended the suit on behalf of the appellant.
9. Did the trial court go wrong in holding that the appellant had been properly served with the process that initiated the suit? Yes, on the face of it. The appellant is Pan Africa Insurance Company Limited, although it has since changed name, and it handles general insurance business, while Pan Africa Life Assurance Limited is a totally another entity, handling life insurance business. A service on Pan Africa Life Assurance Limited could not, possibly and conceivably, be effective service on the appellant. It would appear that the appearance filed on behalf of the appellant was not based on that service, but on the arrangements that appear to be in place between the appellant and the 2nd respondent, which the appellant is contesting. It would appear that the 2nd respondent, upon being served, decided to instruct separate law firms to represent it and the appellant, its co-defendant in that suit, based on those arrangements that the appellant is contesting.
 10. Was there credence in the argument by the 2nd respondent that it did no wrong in instructing the Advocates in question? I believe there was not. The appellant alluded to those arrangements in its review application, and throughout in all its filings, that there was a nexus between it and the 2nd respondent, arising from transfer of business. I have seen one of the affidavits in reply to that application, by an official from the 2nd respondent, which displays correspondence, supporting the argument that the 2nd respondent had been instructing Advocates to come on record for the appellant, whenever the appellant was sued, with respect to the policies it had issued under the business that it transferred to the 2nd respondent. However, I have not seen any document, in the filings by both sides, which authorised that.
 11. The principal contest between the 2 revolves around the letter of 28th January 2015, which the trial court partially relied on to dismiss the review application, and which the appellant argues was a forgery, in respect of which it has attached a report by a forensics expert. It would appear that the letter was the basis upon which instructions were given to the Advocates in question. Was that letter a forgery? The allegation that it was a forgery came from the appellant, and it presented a forensics report to support it. However, the report of a forensics expert or document examiner is not of binding effect on the court. It would be mere opinion. It was presented in interlocutory proceedings, and the respondents did not get a chance to cross-examine the maker of the report on its contents. The court could not possibly rely on untested evidence.
 12. The appellant has also made a lot of play about its change of names and transfer of business. These were matters internal to the appellant. The insurance policy, the subject of the suit, was issued by the appellant, and the suit against its insurer was commenced in the name of the entity in the documents that the 1st respondent had access to, the police abstract. I understand that the appellant is arguing that the arrangements it had with the 2nd respondent was that it ceded its business to it, inclusive of the liabilities, and the 2nd respondent should have shouldered that liability, instead of pushing it to the appellant, as that was contrary to the terms of the transfer of the business.
 13. That argument would be formidable, for the filings by the 2nd respondent carry the argument that the transfer did not have the effect of transferring the liability to it, and the judgment in question was to be settled by the appellant. So, if the argument by the 1st respondent was true, then the more the reason the appellant should have been served properly with the suit papers, and the more the reason it should have been allowed to instruct Advocates of its own choice, to defend its interests, instead of relying on



- Advocates instructed by the 2nd respondent, which, in its view did not have an interest in the matter, as liability did not attach to it.
14. On the matter of review, the court determined the review application on the ground of discovery of new and important evidence, and not on the other grounds, that is to say error apparent on the face of the record, and other sufficient reason or cause. Parties are bound by their pleadings. The way the review application was framed, appeared to suggest that it was premised on the ground of discovery of new and important matter. That was that the Advocates who represented it at the trial had been instructed by the 2nd respondent, and the appellant went on to detail the relationship between it and the 2nd respondent, which provided background for the alleged mischief. However, was this new matter which had just been discovered? No, it did not fall under that. The case by the appellant was that it was not served with the court process, and it did not participate in the proceedings. It explained that, although it appeared to participate, through representation by a firm of Advocates, it had not appointed those Advocates, for the instructions came from elsewhere, and what was articulated in the proceedings was not based on its instructions, and was not in its favour. Clearly, it was not an issue of new evidence, and the review application ought not have been determined from that perspective.
 15. I would agree with the appellant, it was the case of other sufficient cause, quite separate from the other 2. I also agree, something which the respondents have not disputed, that the “other sufficient” cause or reason or ground need not be analogous to the other 2. Would its consideration, as another sufficient cause, have changed the matrix? I think so. The material on record is clear that the appellant was not served with the suit papers. The material is also clear that the Advocates who acted for it at the trial were not instructed by the appellant, but by the 2nd respondent. It is also clear that the appellant and the 2nd respondent had a transaction where they exchanged business. According to the appellant, that transfer of business included transfer of liability, and liability had shifted from it to the 2nd respondent, something which the 2nd respondent does not agree with. Given that scenario, it was not in the best interests of the appellant, that the Advocates, acting for it in the suit, would be appointed by a party with whom it was not in agreement, on who was to bear the liability, the subject of the suit.
 16. About the cap of what is payable by insurers, at Kshs. 3,000,000.00, I note that that matter was not one of the issues in the review application, and it did not arise during argument of the review application. It cannot be made an issue on appeal, in the circumstances. In any event, it is an issue within the jurisdiction of the trial court, by way of review, should the appellant be minded to invite that court to deal with it.
 17. In view of everything said above, it is my conclusion that there is merit in the appeal herein. I shall, accordingly, review the decision of the trial court, of 11th October 2019, to the extent of the dismissal of the review prayer, so that that prayer is allowed. Given that some of the issues raised point to the impugned judgment having been arrived at while the matter was being handled by Advocates that the appellant had not appointed, and given that an issue has arisen, with respect to where the liability should fall, as between the 2 insurance companies, I shall not substitute the said decision with my own, but I shall remit the matter back to the trial court, for hearing afresh, by a magistrate other than Hon. DW Mburu, SRM. The appeal herein is determined in those terms. Each party shall bear its own costs.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 31ST DAY OF JULY 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.



Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Ms. Matasi, instructed by Simba & Simba, Advocates for the appellant.

Ms. Elijah, instructed by Nyaberi & Company, Advocates for the 1st respondent.

Mr. Ochieng, instructed by Ochieng K. & Associates, Advocates for the 2nd respondent.

