



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 141 OF 2012

APA INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

GRACE MUTHONI WAINAINA..... 1ST RESPONDENT

PETER MAINA..... 2ND RESPONDENT

(Being an appeal from the judgment of Honourable Thomas Thyaka Nzioki, Principal Magistrate delivered on 27th November, 2012 in Eldoret CMCC No. 958 of 2009).

JUDGMENT

The appeal arises from the judgment of the trial court in Eldoret CMCC No. 958 of 2009 delivered on 27th November 2012. The suit was based on a claim that the defendant was liable to satisfy judgment and the subsequent decree against the insured in Eldoret CMCC 49 of 2004 where the plaintiffs sued Checkers trading company in a claim for damages in respect to the estate of the late George Kang'ethe Kinyanjui. The husband of the plaintiff

was fatally wounded in an accident involving a vehicle insured by the defendant insurance company. Judgment was entered in favour of the deceased's estate on 5th April 2008 in the sum of Kshs. 756,000/- being general damages and costs assessed at Kshs. 57,438/- plus interest at court rates. The defendant denied the claim and claimed that the vehicle had been insured by a different entity altogether. The trial court found that the defendant was under obligation imposed by *Section 10 Cap 405* to satisfy the judgment in the suit against Pan African Insurance Ltd and entered judgement for the Plaintiff.

APPELLANT'S CASE

The appellant submitted that the defendants in Eldoret CMCC 49/2004 were Solomon Willy Kasina and Checkers Trading Company. They were insured by Pan African Insurance Ltd. In civil suit 958/2009, the defendant in the declaratory suit is APA Insurance Company Limited.

The appellant submitted that the respondent sued APA insurance alleging that they took over the liabilities of Pan African Insurance as a result of a merger with Apollo Insurance Limited which was unfounded and vague. The appellant further submitted that the Plaintiff sued Pan African General Insurance Co. Ltd and not Pan African Insurance Co. Limited and that the two are separate entities.

The appellant submitted that the plaintiff stated that the merger of the companies was between Apollo Insurance Company Limited and Pan African General Insurance Company Limited and that consequently APA Insurance Company had no connection to Pan African Insurance Ltd and was not obligated to settle liabilities incurred by the latter.

The appellant submitted that the difference between the two companies was clearly shown on pages 125 to 127 of the record of appeal. The appellants' witness testified that the defendant is a distinct company registered as Pan African Insurance Holdings Limited and produced a certificate of change of names found on page 56 of the record.

The appellant through his witness told the court that Pan African General Insurance Co. Ltd was different and distinct from Pan African Insurance Co. Ltd and produced a certificate of incorporation on page 57. The witness further testified that Apollo Insurance Company Limited merged with Pan African General Insurance Co. Ltd to form NEWCO Ltd. The certificate of registration is at page 58 of the appeal.

Pan Africa Insurance Company changed its name to P.A securities Ltd evidenced at pg. 59 of the record of appeal. Further, that NEWCO LTD changed to APA Insurance Company as per page 60 of the record. The upshot of the foregoing according to the appellant is that Apollo Insurance Company Ltd merged with Pan African General Insurance Company Ltd to form NEWCO which formed APA Insurance Company Ltd. The newly formed APA Insurance has no relationship with Pan African Insurance Company Ltd.

The appellant submitted that the parties are bound by their pleadings and that at pgs. 3-4 of the record the Plaintiff stated that Pan African Insurance Company Ltd transferred its general business division to APA Insurance but from the documentation the respondent indicated that there was no relationship between Pan African Insurance Company Ltd and APA Insurance.

The appellant submitted that the respondents should have gone after Pan African Holdings Ltd as the vehicle was insured by Pan African Insurance Company Ltd which has nothing to do with APA insurance Company Ltd.

The appellant submitted that the respondent made allegations about a letter dated 8/7/2008 which does not indicate that the appellant was a party to CMCC 49/2004 and that the case resultant to this cause is not 49/2003 as indicated in the said letter.

The appellant further submitted that there was no statutory notice issued to APA insurance and *Cap 405* requires the notice be issued to the insurance company one seeks compensation from.

The respondent failed to establish that there existed a relationship between APA Insurance Company Ltd, and Pan Africa Insurance Company Ltd. And therefore the judgment in the CMs' court should be set aside.

RESPONDENTS' CASE

The respondents submitted that they pleaded that the appellant was established pursuant to a resolution of former boards of directors and a subsequent sale and transfer of business agreement between Apollo Insurance Co. Ltd. and Pan African Insurance Ltd. On the strength of the merger APA was liable to satisfy any decree arising under *Section 10 of Cap 405*, which notice was duly served on Pan Africa Insurance Co. Ltd.

The appellant filed a defence where in paragraph 4 it denied a merger but admitted there was a merger in paragraph 5 and said the same did not give rise to liability.

The legal officer who testified on behalf of the appellant had not been involved in the incorporating APA and did not produce the details of the merger. The court referred to 2 cases placed before it *Mombasa Civil Appeal no. 82 of 2008, APA vs Zainabu Ali Ruwa and Kisumu Misc. Civil Appl. No 215 of 2005* the upshot of which was that APA was bound by the judgment and pleadings in the Mombasa case and thus liable. The court found that it was not in dispute that the statutory notice was served under *Section 10* and that pan Africa Insurance was the insurer.

The respondent submitted that the trial court relied on the decision in *Shell and BP Kenya vs Kings Motor Ltd* to the effect that a change of name by a company does not affect the right or obligations of the company or render defective any legal proceeding by or against the company.

The defence filed in court contradicted the evidence of the appellant's witness who testified in court and the trial magistrate never shifted the burden of proof. The respondent had discharged the burden of proof required showing that a notice of institution of suit had been served. The burden of proof of showing the liabilities never shifted to the new company fell to the appellant. The appellant refused to avail evidence relating to the merger to show to the satisfaction of the court the terms thereof. The presumption is that the evidence was never availed as it was adverse to the appellant.

The respondents produced evidence that a letter had been served upon Kalya & Co. Advocates then acting for APA insurance who indicated that they had advised APA insurance to pay the same, the reference letter is APA/18/1265/2014 dated 8/7/2008 and was annexed. The appellant is estopped under *Section 120* of the evidence act from denying it made the respondents believe the matter was to be settled.

The appellant cited 3 authorities, Nairobi HCC 53 of 2014; *F.O & Another (2015) eKLR, Busia HCCC no. 26 of 2007 H.M vs Pan Africa Insurance Co. Ltd & APA Insurance and Nairobi HCCCA No. 168 of 2008 APA Insurance Ltd v Theodora Otieno Okal (2012) eKLR* where the courts found that APA inherited the liabilities by virtue of the merger.

The defence did not raise any issue of filing declaratory proceedings or issuing of an objection. A defence was filed in which the appellant did not raise any issues regarding the notice issued or plead that they had filed a declaratory judgment against the award.

ISSUES FOR DETERMINATION

- a) Whether the Respondent was entitled to judgment and decree to be settled by Pan Africa Insurance Company Limited
- b) Whether the Appellant was liable to settle claims arising from pan Africa Insurance Company Limited

WHETHER THE RESPONDENT WAS ENTITLED TO JUDGMENT AND DECREE TO BE SETTLED BY PAN AFRICA INSURANCE COMPANY LIMITED

In order for the respondent to be entitled to judgment and decree to be settled by Pan African Insurance it would have to be established whether there was a valid insurance policy covering the vehicle by Pan African Insurance as the insurer. PW1 produced copies of a certificate of insurance No. B. 1890063 as PEXH WAOB as proof of insurance. PEXH 9 which was a police abstract indicated that the accident motor vehicle was insured under

Pan African Insurance under policy No. 020/080/1/00708/1999/07. The plaintiff's exhibits included an insurance certificate No. 1B890077

and B1890063 which were proof that KAJ 991N was insured by Pan African Insurance Ltd.

WHETHER THE APPELLANT MERGED WITH PAN AFRICAN INSURANCE LIMITED

The respondent produced a gazette notice as proof that Pan African Insurance Ltd had its business transferred to a newly formed company called NEWCO which then formed APA insurance company and Apollo Insurance Company. The same was done vide gazette notice 8126 of 14th November 2003. The same refers to Pan African General Insurance Company. The difference in the two names was not pleaded in the defence and the trial court found that there was no evidence to prove that the two were different entities. However, on pages 56 and 57 of the record of appeal there is a certificate of change of name and a certificate of incorporation. These were marked as D-EXH No. 1 and 2. The defence witness, DW1 did not produce the Memorandum of Articles of Association to show how the entities came up and there was only one certificate of incorporation produced.

In the case of *APA Insurance Company Limited v Benadah Irusa & another [2014] eKLR* the court held:

I am satisfied that the appellant took over the liabilities of PAN AFRICAN INSURANCE COMPANY LIMITED. PAN AFRICA GENERAL INSURANCE LIMITED is not different from PAN AFRICAN INSURANCE COMPANY LIMITED. There were no registration certificates that were produced to differentiate the two companies. The appellant is simply relying on technicalities that were already dealt with in the case of APA INSURANCE COMPANY LIMITED VS ZAINABU ALI RUWA. In that case the appellant admitted having taken over the legal obligations of PAN AFRICA INSURANCE COMPANY LIMITED. The issue of PAN AFRICA GENERAL INSURANCE LIMITED did not arise.

It therefore follows that the appellant merged with Pan African Insurance company and consequently inherited the liabilities. The trial court was correct in so finding. The respondent being entitled to the decree and judgment sum to be settled by Pan African Insurance Ltd, the appellant is to satisfy the judgment in the primary suit as per *Section 10 of Cap 405*. The appeal fails in its entirety with costs to the Respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 21st day of November, 2019

In the absence of:

Mr. Kiplagat for the appellant

Mr. Momanyi for the respondent

Ms Abigael – Court assistant