



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 135 OF 2007

BETWEEN

APA INSURANCE COMPANY LIMITED APPELLANT

AND

EUNICE AKINYI ODAWO RESPONDENT

(Being an appeal from the Ruling and Order of Hon. L. N. Mbugua, SRM at the Senior

Resident Magistrates Court at Nyando in Civil Case No. 49 of 2006 dated 14th November 2007)

JUDGMENT

1. This is an appeal against an order striking out the appellant's statement of defence under **Order 6 rule 13(1)(a),(b) and (c)** of the *Civil Procedure Rules* on the ground that it was scandalous, frivolous and vexatious, that it would embarrass or delay the fair trial of the suit or was otherwise an abuse of the court process.

2. The respondent's claim before the trial court was that she was the decree holder in *Nyando SRMCC No. 28 of 2004, Eunice Akinyi Odawo v Kenya Bus Services* having been awarded damages arising from a road accident. As neither the judgment debtor nor the insured had settled the claim, the respondent filed a suit seeking a declaration that the appellant ought to satisfy the decree under **section 10** of the *Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)*.

3. In its statement of defence, the appellant denied, inter alia, that at the time of the accident giving rise to the primary claim, it had insured the motor vehicle. It averred that the motor vehicle in the primary suit was insured by Pan African Insurance Company Limited vide Policy Number 010/810/1/000004/2001/04 as a result the respondent contended that it could not be compelled to satisfy the decree.

4. In the application to strike out the defence dated 19th April 2007, the respondent deponed that the subject motor vehicle was insured by Pan African Insurance Company Limited vide Policy number 010/810/1/000004/2001/04 and that the Pan Africa Insurance Company Limited had, "*transformed itself into APA Insurance Company the defendant which company thereby assumed the assets and liabilities of the said Pan Africa Insurance Company Limited.*" In support of this averment, the respondent relied on Gazette Notice No. 8126 which is a statutory notice titled, "*Transfer of General Insurance Business.*" According to the notice, Apollo Insurance Company Limited and Pan Africa General Insurance Company expressed the intention to transfer their general insurance business to a new company. The respondent's advocate further deponed that there was a merger between Apollo Insurance Company Limited and Pan Africa Insurance Company which resulted in a holding company by the name

of NEWCO Limited which was ultimately transformed to APA Insurance Company Limited which took over the assets and liabilities of Pan Africa Insurance Company. It was the respondent's position APA Insurance Company was therefore liable to satisfy the judgment.

5. In response to the application to strike out the defendant, the appellant's legal officer deponed that the Gazette Notice No. 8126 was in respect of transfer of the general insurance business of Apollo Insurance Company Limited and Pan Africa General Insurance Company Limited and not Pan Africa Insurance Company Limited. Consequently, the trial court was wrong to strike out the claim as there was a triable issue as to whether the company referred to was Pan Africa General Insurance Company Limited or Pan Africa Insurance Company Limited.

6. The trial court appreciated the fact that that crucial matter for determination was whether the motor vehicle that knocked down the respondent in the primary suit was insured by the appellant. The court found as a fact that the motor vehicle was insured by Pan Africa Insurance Company Limited and that on the basis of the documents presented by the respondent, Pan Africa Insurance Company Limited was transformed to APA Insurance Company Limited.

7. Counsel for the appellant, Mr Nyamweya, submitted that the learned magistrate failed to appreciate the nature of the documents presented and had the learned magistrate analysed them she would have concluded that there was a triable issue. Counsel relied on the *Mediplus Services Limited v Pan Africa Insurance Company Limited Nairobi HCCC No. 121 of 2003(UR)* and *Wanga and Company Advocates v APA Insurance Company Limited KSM CA Civil Appeal No. 78 of 2009 (UR)* where, in both cases, the respective courts held that Gazette Notice No. 8126 was in respect of Pan Africa General Insurance Limited and not Pan Africa Insurance Company Limited.

8. The respondent supported the decision of the trial court and relied on *APA Insurance Company Limited v Benadah Irusa & Pan Africa Insurance Company Limited KKG HCCC No. 162 of 2011 [2014]eKLR* where the court held that APA Insurance Company Limited took over the liabilities of Pan Africa Insurance Company Limited and that Pan Africa Insurance Company Limited and Pan Africa General Insurance Company Limited were the same company. Counsel for the respondent, Ms Nannungi, also relied on **section 3(1) and (2)** of the *Transfer of Business Act (Chapter 500 of Laws of Kenya)* which provides that whenever the business of one company is transferred to another, notwithstanding anything to the contrary in the agreement, the transferee shall become liable for all liabilities unless due notice had been given in accordance with the Act.

9. In an application to strike out a defence under **Order 6 rule 13(1)(b)(c) and (d)** of the *Civil Procedure Rules*, the general principle is that court should exercise its power to strike out a defence with great circumspection. In the case of *D. T. Dobie and Company Limited v Muchina and Another [1982] KLR 1,9*, Madam JA., summarized the applicable as follows;

The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.

10. It was common ground that the motor vehicle that knocked the respondent was insured by Pan Africa Insurance Company Limited. The issue in dispute was whether the assets and liabilities of Pan Africa

Insurance Company Limited were transferred to APA Insurance Company Limited. This resolution of this issue turns on the interpretation of the notice of transfer of business of Apollo Insurance Company Limited and Pan Africa General Insurance Company Limited contained in Gazette Notice No. 8126. In addition, the question raised by the notice is whether Pan Africa Insurance Company Limited and Pan Africa General Insurance Company Limited are one and the same company. Although in *APA Insurance Company Limited v Benadah Irusa and Pan Africa Insurance Company Limited (Supra)*, the learned judge held that the two companies were the same, there was no basis to conclude as such particularly in light of a Court of Appeal decision on the matter. The learned trial magistrate failed to consider the distinction between the two companies and whether in fact APA Insurance Company was the successor of the Pan Africa Insurance Company Limited. In my view this was a triable issue which disentitled the respondent to an order striking out the appellant's defence.

11. This appeal is allowed. The order striking out the appellant's defence is set aside and substituted with an order dismissing the respondent's application dated 19th April 2007.

12. The appellant shall have the costs of the application.

DATED and DELIVERED at KISUMU this 30th day of September 2016.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed by L. G. Menezes and Company Advocates for the appellant.

Ms Nannungi instructed by Odero Okoyo and Company Advocates for the respondent.