



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 81 OF 2010**

**APA INSURANCE LIMITED..... PLAINTIFF**

**VERSUS**

**PENINAH MBITHE DAVID.....1<sup>ST</sup> DEEFNDANT**

**TERESIAH NYOKABI NG'ANG'A.....2<sup>ND</sup> DEFENDANT**

**PAN AFRICAN INSURANCE CO. LTD .....3<sup>RD</sup> DEFENDANT**

**(Being an appeal from the original Ruling/Orders in Machakos CMCC No. 872 of 2010 by Hon. S. Mungai, SPM on 4/6/2010)**

**JUDGMENT**

1. This matter was inadvertently filed away. A letter written by the firm of Miller and Company Advocates prompted the Deputy Registrar to cause the file to be traced. It turned out that it had been pending judgment which is regrettable.
2. **Peninah Mbithe David** and **Teresiah Nyokabi Nganga** the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively obtained A decree in the sum of Kshs. 704,019/=, in CMCC No. 593 of 2004. The decree was against **Benson Ndwiga** an insured with the appellant (**APA Insurance**) **Company Ltd**.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a declaratory suit against the appellant and the 3<sup>rd</sup> respondent (**Pan African Insurance Co. Ltd**) in CMCC 872 of 2009. This was pursuant to the provision of **Section 10(1)** of the **Insurance (MotoR-vehicle Third Party Risks) Act Cap 405(k)**.
4. The appellant and the 3<sup>rd</sup> respondents filed statements of defence denying allegations set out. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a reply to the defence. They also filed an application dated 4<sup>th</sup> September, 2009 seeking to strike the statement of defences filed by the appellant and 3<sup>rd</sup> respondent for being scandalous, frivolous and vexatious and prayed for judgment to be entered in their favour.
5. The appellant raised a Preliminary Objection to the inclusion of documents it considered privileged. It also filed a replying affidavit where it deponed that the insured of the 3<sup>rd</sup> respondent and the appellant did not take over liabilities of Pan African Insurance Company Limited but those of Pan African General Insurance Company Limited which are distinct parties/persons. It attached a gazette notice to that effect.
6. The 3<sup>rd</sup> respondent filed grounds of opposition seeking to have documents presented by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as evidence expunged from the record for contravening **Sections 128 – 143** of the **Evidence Act**. They also stated that the defence raised triable issues and sought to have the supporting affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> respondents struck out for lack of compliance with **Order 18 Rule 3**.

7. The application was heard by **S. Mungai**, Senior Principal Magistrate who ruled that 1<sup>st</sup> and 2<sup>nd</sup> Respondents should not rely on privileged communication without consent. He however, found that the appellant and 3<sup>rd</sup> Respondent had the requisite notice of the suit **CMCC NO. 593 of 2004** and they had instructed the firm of advocates that defended the suit. He therefore granted the prayers as sought in the application and struck out defences.
8. Being aggrieved by the ruling, the appellant appealed on the grounds that:-
  - i. The learned magistrate erred in law and fact by striking out the defence of the Appellant when there were triable issues raised which could only have been determined at the hearing;
  - ii. The learned trial magistrate erred in law and fact in failing to find that there was no nexus established between the appellant and the third respondent.
  - iii. The learned magistrate erred in law and in fact in holding that the appellant and the third respondent were jointly and severally liable despite them being two (2) separate legal entities.
  - iv. The learned magistrate erred in law and in fact by failing to expunge from the record the privileged communication between the advocate and client.
  - v. The learned magistrate erred in law by entering judgment for the sum of Kshs. 704,019/= plus interest and costs when the same was not awardable.
9. The fact that the 1<sup>st</sup> and 2<sup>nd</sup> respondent being involved in an accident while travelling a board motor-vehicle registration number KXZ 506 that was owned by **Benson Maina Ndwiga** is not in dispute. The motor vehicle was insured by the 3<sup>rd</sup> respondent who admits the same fact save that he argues that it transferred its general business to the appellant in the year 2003. Based on that argument, it follows that the appellant ought to pay the sum awarded in the original suit.
10. The appellant on the other hand refutes the claim and states that it took over the general business of the **Pan African General Insurance Co. Ltd** and not the 3<sup>rd</sup> Respondent herein and is emphatic that the two (2) are different entities. The appellant annexed a gazette notice dated 14<sup>th</sup> November to that effect.
11. The trial magistrate did consider all these factors and concluded that the defences by the appellant and the 3<sup>rd</sup> respondent did not raise triable issues. Accordingly, he dismissed the suit objecting both parties to be jointly and severally liable to pay the sum awarded. It was argued by the appellant that whether or not there were triable issues could only be determined at the hearing. It further stated that there being no relationship between it and the 3<sup>rd</sup> respondent they could not be held jointly and severally liable.
12. In the case of **Blue Sky EPZ Limited versus Natalia Polylakova and Another [2007] eKLR** the court held that:-

*“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases. Whereupon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of and defence, a mere denial or a general traverse will amount to defence. A defence must raise a triable issue”.*

13. The Court of Appeal considered what a triable issue amounts to in the case of **Olympic Escort International Co. Ltd and 2 Others –versus- Parminder Singh Sandhu & Another [2009] eKLR**. It stated thus:-

*“It is trite law that a triable issue is not necessarily one that the defendant would ultimately succeed and need only be bonafide”.*

14. A consideration of averments herein, clearly suggest that both the appellant and the 3<sup>rd</sup> respondent genuinely believed they were not liable to pay the sum awarded. This was an issue the court should have determined prior to reaching an informed decision on who exactly was liable. Failure to consider the defence put up was premature and prejudicial to the appellant and the 3<sup>rd</sup> respondent. This addresses grounds 1, 2, and 3 of the appeal.
15. To determine the 4<sup>th</sup> ground the question to be answered is what amounts to privileged

information. The preliminary objection raised by the appellant was to the effect that the documents annexed to paragraph 10 of the supporting affidavit to the application be expunged from the record. Paragraph 10 of the affidavit states that;-

***“That, I also know that, after the suits were consolidated and transferred to the lower court, the 2<sup>nd</sup> defendant had taken over the said liability since it appointed the firm of Kipkorir, Titoo and Kiara Advocates to act for the insured in the said suit (annexed marked 'F' is an affidavit sworn by Donald B Kipkoror Advocate stating the same)”.***

16. Annexure 'F' is an application dated 27<sup>th</sup> September, 2007 which application seeks orders from the court to grant leave to the firm of **Kipkorir, Titoo & Kiara Advocates** of the said firm, deponed an affidavit to the effect that, its firm has been acting for **APA Insurance Ltd**, the appellant herein and their relationship has broken down and they can no longer continue to act for the appellant. This application was not only filed in court, but was served upon the 1<sup>st</sup> and 2<sup>nd</sup> respondent's advocate and the appellant herein. The application and affidavit deponed in support be privileged documents. Such a document cannot be expunged from the court record.
17. However, I wish to note that paragraph 5 of the supporting affidavit to the application dated 4<sup>th</sup> September, 2009 refers to a bundle of correspondences 'annexture B' Four (4) of the letters bear the words *“without prejudice.”* Without prejudice communication that was used meant it was an attempt to settle the claim. Such communication and its contents could not and cannot be used against a party making a statement in court proceedings. Such communication must be expunged from the record.
18. Whether the sum of Kshs. 704,019/= plus interest and costs was awardable was an issue that would have been raised if an appeal had been preferred against the award in the primary suit. At this point in time the issue would be who is obligated to compensate the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
19. From the foregoing it is apparent that there having been a transfer of General Insurance business from the appellant to **Pan African General Insurance Limited** and not **Pan African Insurance Co. Ltd**, it would have been reasonable for the learned trial magistrate to give a hearing to parties in order to establish who indeed was required to compensate the respondents.
20. In the premises the appeal has merit. I do set aside the ruling/orders striking out the appellant's defence and judgment against the appellant. The error having been made by the court, each party shall bear their own costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>th</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**