



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 325 OF 2009

CARLO VASTA.....PLAINTIFF

VERSUS

APA INSURANCE LIMITED.....DEFENDANT

R U L I N G

INTRODUCTION

1. The application before court is the plaintiff's Notice of Motion dated 10th October 2013 brought under section 3 and 3A of the Civil Procedure Act. By it the plaintiff seeks the following orders:

(i) That this court be pleased to grant leave to the plaintiff to deliver the interrogatories annexed to the supporting affidavit to any of the directors or officer of the defendant company.

(ii) That the Director or officer of the defendant company be required to answer to the interrogatories on affidavit to the best of his knowledge, information and belief.

(iii) That the affidavit? In prayer 2 above be filed and served within 21 days from the date the order is granted.

(iv) That the costs of the application be in the cause.

PLAINTIFF'S CASE.

2. Briefly the plaintiff's case is that judgment was delivered in his favour on 29th October 2008 in CMCC No. 2922 of 2003: Carlo Vasta -vs- Pan Africa Insurance Company Limited. That Pan Africa General Insurance Limited took over as a going concern the general insurance business of Pan Africa Insurance Company Limited. That subsequent to the said takeover, Pan Africa General Insurance Limited merged with Apollo Insurance Company Limited to form the defendant company. The plaintiff therefore claims in his plaint that the defendant is obligated to satisfy the judgment entered against Pan African Insurance company limited.

3. The interrogatories annexed to the supporting affidavit are couched in the following terms:

i) Was APA Insurance formed as a result of a merger between pan Africa general insurance limited and Apollo insurance limited?

ii) State the date of incorporation of Pan Africa General insurance limited.

iii) Did not Pan Africa general Insurance limited acquire and take over as a going concern the general insurance business carried out by pan Africa Insurance company limited at the time of the take over, together with all or any part of the property and other assets comprised or associated with general insurance business and to discharge all or any of the liabilities of such insurance business?

iv) Please identify whether a copy of a memorandum and articles of association of Pan Africa General Insurance limited is in your possession.

v) Please state specifically all documentary evidence in your possession which support your responses to these interrogatories.

DEFENDANT'S CASE.

4. The defendant opposed the application. The gist of the defendant's opposition is that the approach adopted by the plaintiff was only applicable under Order X of the Repealed Civil Procedure Rules. That presently, order 11 of the Civil Procedure Rules makes provision for what happens once pleadings have closed and plaintiff has not complied with the said Order 11 which requires the court within 30 days after close of pleadings to convene a case conference.

THE ISSUES FOR DETERMINATION.

5. The main issue that presents itself for court's determination is whether the court should allow the application and order a director or officer of the defendant to answer to the interrogatories.

ANALYSIS.

6. This suit was filed on 18th September 2009. It was filed at the time the now revoked Civil Procedure Rules applied. Those rules were revoked as stated in order 54 rule 1 of the Civil Procedure Rules of 2010.

7. Under the Rules of 2010 a new procedure was introduced under Order 11 which gave wide powers to guide the trial of a suit. That order is entitled Pre- Trial Directions. Under that order Rule 7 (3) (b) it is provided:

“The court may make such orders as it considers necessary with respect to the conduct of the suit.”

8. It is clear that the parties in this case have not complied with the requirements of order 11, more particularly because they have not yet filed their witness statements or their documents. If they had filed those it may have made the plaintiff application for interrogatories unnecessary.

9. I am of the view that even if Order 11 does not specifically provide that a party may be ordered to respond to interrogatories the court under that Order can require a party to respond to interrogatories. The court is mandated under section 1A and 1B of the Civil Procedure Act to ensure that cases are expeditiously disposed. If ordering the response to interrogatories would achieve an expeditious disposal of a case the court ought to order the same. Further the need of interrogatories is recognized when the court is considering the issue in a case as stated in order 15 Rule 2 (b). That rule provides that issues of a suit can be settled on:-

“allegations made in the pleadings or in answer to interrogations delivered in the suit.”
(Underling mine)

10. In view of the above should the court allow the plaintiff's application for interrogatories? To answer

that question it is necessary to look closely at the parties pleading.

11. The plaintiff as stated before pleads that he was insured by Pan African Insurance Company Limited. The plaintiff further pleaded in paragraph 8 of the further Amended plaint, that Pan African General Insurance limited took over as a going concern the general insurance business of Pan African Insurance company Limited. Further that Pan African General Insurance Limited merged with AP Insurance Limited.

12. The defendant by its Amened Defence did not deny that Pan African General Insurance Company Limited took over as a going concern the general insurance business of Pan African Insurance company Limited. That alleged take over by Pan African General Insurance company Limited of Pan African Insurance Company Limited shall not, in my view, be an issue to be determined at trial because it is not denied by the defendant. An issue as stated in Order 15 rule 1(1) is

“issues arise when a material proposition of fact or Law is affirmed by the one party and denied by the other”.

From that definition it becomes clear that the stated take over is not an issue to be determined at trial.

13. Further by that Amended Defence the defendant admits that there was a merger between Apollo Insurance Company Limited and Pan African General Insurance Company Limited which merger transferred the businesses of those two insurance firms into APA Insurance Limited. This fact is borne out by the affidavit in this matter sworn by defendant’s legal officer, on 19th August 2011, by the name of Carline Njeri where she deponed:-

“That I know of my own knowledge that the defendant company herein was as a result of a merger between Apollo Insurance company and Pan African General Insurance company Limited as evidenced by legal Notice 8120 of 2003.”

That legal Notice did indeed evidence that merger.

14. It follows that bearing in mind the need to expeditiously dispose off this suit will not be aided by ordering the defendant to respond to any of the interrogatories sought by the plaintiff. This is particularly because those interrogatories are not specifically denied by defendant, that is that Pan African General Insurance Limited acquired and took over as a going concern the insurance business of Pan African Insurance company Limited; and it is admitted that the defendant Company was formed as a result of the merger of Pan African General Insurance Limited with Apollo Insurance Limited.

15. Interrogatories number 2,4 and 5 are not borne out of the pleadings and cannot be ordered. They also cannot be ordered because the court operates under the adversarial system which system requires the opposing parties to bear the primary responsibility of finding and presenting their facts.

CONCLUSION

16. Following the above discussion it follows that the Notice of Motion dated 10th October 2013 fails. It is dismissed with costs to the defendant.

17. In order to ensure that parties do prepare for trial I do order the following.

a) That parties do file and serve each other within 30 days from the date of this Ruling with their witness statements and their documents.

b) Parties shall take a pre- trial conference date at the registry after the period of 30 days.

It is so ordered.

Dated and delivered at Mombasa this 25th day of June 2015

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For the plaintiff:

For the defendant:

Court

The Ruling is delivered in their presence/absence in open court.

MARY KASANGO

JUDGE