



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 681 OF 2009

PATRICIA MUMBI GATERU ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

APA INSURANCE LIMITED ::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGEMENT

1. The suit was commenced by a further amended plaint amended on 15th November 2010 in which the Plaintiff seeks the following orders:-
 1. ***An order that the Defendant should satisfy the decree in Kaerugoya PMCC No. 333 of 2003 plus costs and interest accruing from the date the judgement was read.***
 2. ***Costs of this suit and interest at court rates.***
 3. ***Relief.***
2. The Plaintiff's case is that at all material times the Defendant was an authorised insurer within the meaning of the Insurance (Moters Vehicle Third Party Risks) Act Cap 405, Laws of Kenya and the Insurance Act. The Plaintiff avers that on or about 17th August 2002 she was lawfully travelling as a passenger in motor vehicle registration number KAP 255P Toyota *matatu* when it was involved in a serious road accident. The accident was caused by the contributory negligence of the driver of the motor vehicle registration number KVM 691, owned by Virginia W. Macharia and insured agaisnt third party risks by the Defendant herein. The Plaintiff filed a suit against the owners of the motor vehicles involved in the accident being Kerugoya PMCCC No. 333 of 2003, in which she eventually obtained judgement against the owners of the vehicles. The Plaintiff further avers that the motor vehicle KVM 691 was under insurance cover issued by the Defendant, then in the name of Pan Africa Insurance Company Limited, and now APA Insurance Company Limited. The Plaintiff avers that liability of the owner of the vehicle KVM 691 was covered by the Defendant herein under the terms of the third party insurance policy. The Plaintiff further avers that the after obtaining judgement in Kerugoya PMCC No. 33 of 2003 she attempted to execute the decree against the 2nd Defendant therein who was covered by the Defendant herein and realised that he had filed for insolvency and has also absconded jurisdiction now living in the USA hence it is impossible to execute against her. The Plaintiff avers that the only avenue left to achieve the ends of justice is to file this suit against the insurers of the 2nd Defendant in PMCCC No. 333 of Kerugoya.
3. The Plaintiff's suit is controverter by the Defendant's amended statement of defence amended on 18th November 2010. In hits defence the Defendant denies the existence of any relationship with the Plaintiff, and states that it is not privy to any insurance contract or policy that may have been

in existence at any time between Pan Africa Insurance Company Limited and the owner of the motor vehicle registration number KVM 691 as implied by the Plaintiff or at all. The Defendant further denies ever assuming any liability and or any legal or statutory obligations arising from such contract or policy and or with any third parties thus Defendant denies being answerable for liability arising from such contracts or insurance policy or the alleged judgment in Kerugoya PMCC No. 333 of 2003 or at all.

4. At the hearing of the suit the Plaintiff called one witness, the Plaintiff herself. The Plaintiff adopted her witness statement filed herein in 18th September 2012 as her evidence. In her evidence PW 1 informed the court that she had obtained final judgement and got a decree in the Kerugoya Senior Principal Magistrate's court in Civil Suit No. 33 of 2003. The 2nd Defendant in the suit was insured by Pan Africa Insurance Company. The Plaintiff's contention in this suit is that under the Insurance (Motor Vehicles) third Party Risks Act (Cap 405 Law of Kenya), the Defendant herein was under statutory duty to recompense the Plaintiff in the terms of the decree issued at Kerugoya. The Plaintiff's reason for holding the Defendant liable is that Pan Africa Insurance Company is the predecessor of the Defendant herein having merged with Apollo Insurance Limited and formed the Defendant herein, and the new entity became liable for all the liabilities of its predecessors. In her evidence, both oral and written statements which the court adopted, the Plaintiff was able to demonstrate that she obtained judgement against one Virginia W. Macharia in Kerugoya PMCC No. 333 of 2003. It was also not challenged that the judgment was subsequent to a road accident and the said Virginia was the owner thereof. It was also testified that the said Virginia had insured the motor vehicle with Pan Africa Insurance Company and under the provisions of Cap 405 the Plaintiff was entitled to be paid her compensation by the insurer.
5. The Defendant also called one witness Paul Kariba Kibiko, its legal officer, who adopted his witness statement file on 67th June 2012 and testified that as a legal officer he has access to all the information and records relating to the matters in question herein. The witness testified that the Defendant has never had a relationship with the Plaintiff as alleged in the Plaint or at all. The Defendant avers that the Plaintiff's suit is speculative, bad in law and vague as it does not provide the particulars of the alleged relationship with the Defendant. The witness testified that he knows for a fact that the Defendant is/was never at any particular time gong by the name of "Pan Africa Insurance Company" as alleged by the Plaintiff or at all. The witness testified that he knows for a fact that Pan Africa Insurance Company Limited is still in existence and operating businesses. The Defendant is not privy to any insurance contract/insurance policy that may have been in existence at any time between Pan Africa Insurance Company Limited and the owner of the motor vehicle registration number KVM 691 as implied by the Plaintiff or at all. The witness denied that the Defendant had ever assumed any liability and/or any legal or statutory obligations arising from such contract(s) policy and/or with any third parties at all and as such Defendant denies being answerable for liability arising from such contract(s) insurance policy and/or the alleged judgement in Kerugoya PMCC No. 333 of 2003 or at all.
6. Parties filed written submissions which I have considered. In my view, the issues for determination are:-
 1. ***Did the Plaintiff herein obtain judgement against the owner of motor vehicle KVM 691 in Kerugoya PMCCC No. 333 of 2003?***
 2. ***Did the Defendant under the name of Pan Africa Insurance Company Limited issue a third party insurance policy cover to one Virginia W. Machaira with respect to motor vehicle KVM 691?***
 3. ***Did the Defendant under the name of Pan Africa Insurance Company Limited amalgamate its insurance business with Apollo Insurance Company to form APA Insurance Limited?***
 4. ***Did the Defendant herein take over the liabilities of is predecessor Pan Africa Insurance Company Limited***
 5. ***Is the Defendant liable to satisfy judgements arising out of accidents involving their insured's vehicle under the Motor Vehicle (Third party Risks)Insurance Act (Cap 405 – Law of Kenya)?***
 6. ***Is the Plaintiff therefore entitled to the reliefs sought against the Defendant?***

7. In its submission, the Defendant submitted that the Plaintiff had failed to discharge the burden of proof that APA Insurance Company Limited and Pan Africa Insurance Company Limited are one and the same thing, or that the Defendant Company took over the liabilities of Pan Africa Insurance Company Limited.
8. On her part, the Plaintiff submitted that there was a merger of Pan Africa Insurance Company Limited to from APA and that APA took over the liability of the former. It is indeed true that the Plaintiff herein obtained judgement against the owner of Motor Vehicle KVM 691 in Kerugoya PMCC No. 333 of 2003. It is also true that an insurance Thrid Party Policy was issued by Pan Africa Insurance Company Limited to one Virginia W. Macharia with respect to motor vehicle KVM 691. The above disposes off the first two issues raised herein for determination. The remaining issues are whether Pan Africa Insurance Company Limited amalgamates its insurance business with Apollo Insurance Company to from APA Insurance Limited, and whether the Defendant herein took over liabilities of its predecessor pan Africa Insurance Company Limited and if so, whether the Defendant is liable to satisfy judgement arising out of the Kerugoya court.
9. I have considered the bundle of documents on which both parties rely. It is a matter of public knowledge that Pan Africa Insurance Company Limited is partly what is today known as APA Insurance Company Limited. However, that public knowledge is not enough. Any party who has come to court must prove its case on a balance of probabilities. The proof of this kind of merger is done by way of evidence which is largely documentary. The Plaintiff knew that she could only prove her case by way of documentary evidence. To that extent the Plaintiff did on 22nd June 2010 issue the Defendant with Notice to Produce Documents, and Notice to admit documents. The said required documents to be produced and to be admitted are set out in those notices. If these documents were produced, and admitted as it were, the Plaintiff would have proved its case that Pan Africa Insurance Company Limited is what is now known as APA Insurance Company Limited.
10. The Defendants' witness Paul Kariba Kibiko admitted in cross-examination that they received the said notices but wilfully failed to comply thereto. The witness also admitted in cross-examination that the Defendant instructed an advocate to represent it in the Kerugoya matter. If that is correct, which it is, then the question that arises is why was the Defendant interested in defending the matter in Kerugoya when there was no existing relationship between the Defendant and Pan Africa Insurance Company Limited. In my view, there was a clear legal nexus between the two Insurance Companies, and one having taken over the liability of the other, the Defendant is liable to compensate the Plaintiff and to satisfy the decree arising from the Kerugoya case.
11. Further failure by the Defendant to produce the documents it was notified to produce only shows that if the same were produced, they would have prejudiced the Defendant's defence in this matter. Section 10 of the Insurance (Motor Vehicles) Third Party, Risks Act states:-

“Duty of insurer to satisfy judgements against persons insured

1. ***If, after a policy of insurance has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgements.”***
12. From the foregoing, all the issues raised herein are answered in the affirmative and in favour of the Plaintiff, who in my finding has proved her case on a balance of probabilities and is entitled to the judgement as prayed in the Plaintiff. Costs shall be for the Plaintiff.
13. In the upshot, Judgement is given in favour of the Plaintiff as prayed for in the Plaintiff.

That is the Judgement of the court.

READ, DELIVERED AND DATED AT NAIROBI

THIS 23RD DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Waweru for the Plaintiff

Mr. Ohenga holding brief for Deya for the Respondent

Teresia – Court Clerk