



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 170 OF 2012

APA INSURANCE COMPANY LIMITED. APPELLANT

VERSUS

GEORGE MASELE. RESPONDENT

(From the judgment of L K Kandet (Mr) PM delivered on 2nd March, 2012 in CMCC No. 1674/06 at Nairobi)

J U D G M E N T

1. By a plaint dated 5th December, 2002, the Respondent sued Kenya Bus Services Ltd in respect of an accident that occurred on 11th November, 2001 whereby the Respondent had been injured while alighting from Motor vehicle registration Number KAH 096A. In that suit, the Respondent alleged that the said motor vehicle registration number KAH 096A (hereinafter “**the motor vehicle**”) was at the material time owned by the Kenya Bus Services Ltd. That suit was Civil Case No. 9774 of 2002 filed in the Chief Magistrates Court Milimani.

2. By a judgment delivered on 13th October, 2005 in the said, suit the court held in favour of the Respondent and entered judgment in his favour for ksh.435,157/- plus costs of ksh.57,315/-.

3. Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act of Chapter 405 of the Laws of Kenya (hereinafter “**the said Act**”) provides:

***“10 (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a 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 thereunder 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 judgments*”**

4. On 23rd February, 2006 the Respondent sued the Appellant in the Chief Magistrate’s Court Milimani CMCC No. 1674 of 2006 claiming that, by a policy of Insurance Number 010/081/000005/2001/04 Pan Africa Insurance had covered the Kenya Bus Services against, inter alia, any liability arising from use of the said motor vehicle. That the said policy covered the Kenya Bus Services Ltd against any liability covered under the said Act. The Respondent claimed that it had sued the Appellant in those proceedings as the successor in title to the general business of Pan Arica Insurance Company Ltd who were the insurers of the said Motor vehicle as at the time of the occurrence of the subject accident on 11th

November, 2001 and therefore claimed that the Appellant was liable to settle the sum of Ksh.492,472/- awarded in CMCC No 9774 of 2001.

5. The Appellant filed a defence on 29th March, 2006 admitting paragraph 2 of the plaint but denied that it issued any policy of insurance to the Kenya Bus Services Ltd. It denied the occurrence of the accident or that the provisions of Section 10 of Chapter 405 Laws of Kenya were applicable. In short, it denied the Respondents claim in total.

6. The suit was tried before Hon. Mr. K L Kandet (PM) who by a judgment delivered on 2nd March, 2012 held that the Respondent had proved his case against the Appellant and entered judgment accordingly.

7. Aggrieved by that decision, the Appellant has appealed to this court setting out four (4) grounds in its Memorandum of Appeal. These grounds can be summarized as follows:-

- a. **That the trial court erred in holding that the Appellant was the Successor in title of Pan African Insurance Company Ltd.**
- b. **That the trial court erred in finding the Appellant liable and entering judgment against it in the circumstances of the case yet the claim had not been proved.**

8. At the hearing of the appeal, Ms Akonga for the Appellant abandoned ground 1 and argued grounds 2, 3 and 4 of the appeal. She submitted that the suit having been a declaratory suit, it was imperative for the Respondent to produce the Certificate of Insurance to show that the Kenya Bus Services Ltd was insured by the Appellant; that having failed to produce such a certificate, it was fatal to the Respondent's case; that reliance on the Police Abstract was not adequate; that Section 10 (1) of the Insurance Motor Vehicle (third Party Risks) Cap 405, was not applicable as there was no evidence to show that the Appellant had insured the Respondent. Counsel urged that the appeal be allowed.

9. Mr. Itonga Learned Counsel for the Respondent submitted on his part that having abandoned ground 1 of the Appeal, the Appellant had confirmed the finding of the trial court that the Appellant was the Successor in title to Pan African Insurance Company; that in the circumstances, what was left was for the Respondent to prove that he had met the requirements of Chapter 405 of the Laws of Kenya that he was, therefore, entitled to the declaratory judgment. Relying on the Authority of **APA Insurance Company Vs Zainabu Ali Ruwa 2010 eKLR**, Counsel submitted that the Respondent had proved the requirements of Cap 405 to have been entitled to the judgment. He urged that the appeal be dismissed.

10. This being a first appeal, the parties are entitled to expect this court to subject the evidence on record to fresh evaluation and reach its own independent conclusions (see **Selle and Another Vs Associated Motor Boat Company Ltd & Others (1968) EA 123**). However, in so doing, this court must bear in mind the caution made by the Court of Appeal for Eastern African in the case of **Peter Vs Sunday Post Ltd (1958) EA 424** that this court did not have the advantage of hearing and seeing the witnesses to give a better judgment of their demeanor.

11. This court is of the view that ground one (1) of the Memorandum of Appeal was properly abandoned by Ms Akonga. That ground had faulted the trial court for finding that the Appellant was the Successor in title of Pan African Insurance Company. That ground was properly abandoned because; in paragraph 2 of the plaint dated 23rd February, 2006 the Respondent had pleaded thus: -

"2. The Defendant is a limited liability company duly incorporated in Kenya under Cap 486 laws of Kenya having its registered offices at Nairobi and carrying on Insurance business within the meaning of the Insurance (motor Vehicle Third Party Risks) Act Cap 405 of the Laws of Kenya and is sued as the Successor in title and for general business of Pan Africa Insurance Company Ltd (hereinafter referred to as "the Insurer") (Underlining mine)

12. In its defence filed in court on 29th March, 2006, the Appellant pleaded: -

“2B. the Defendant admits the contents of paragraph 2 of the Plaint. Its address for service for the purpose of this suit is care of Messers Archer & Silcock Advocates, Elgeyo Marakwet Close on Elgeyo Marakwet Road, off Arwings Kodhek Road, P O Box 10201 – 00400 Nairobi.” (Underlining supplied).

13. In the case of **APA Insurance company Ltd Vs Zainabu Ali Ruwa** (supra) the Court of Appeal held that: -

“We repeat that the only basis upon which the Respondent was calling upon the Appellant to satisfy the decree obtained in HCCC no.12 of 1997 was that the Appellant had assumed the legal obligations of Pan Africa Insurance Co. Ltd which obligations of Pan Africa Insurance Co. Ltd which obligations were imposed upon Pan Africa Insurance Co. Ltd by Section 10 of Cap 405. Having expressly admitted in its defence and the amended defence that it had assumed those obligations, it was ideal for the Appellant to again raise these complaints” (underlining mine)

14. In this regard, there could be no issue that the Appellant was the Successor in title to the Pan Africa Insurance Co. Ltd. In any event, the evidence to that effect was overwhelming. That being the case, the only issue is whether, the Plaintiff had proved that Pan Africa Insurance was the insurer of Motor Vehicle Reg. No. KAH 096A and whether he had complied with the relevant provisions of Cap 405. This in effect is the gist of the second ground of appeal.

15. It was the submissions of the Appellant that there was no acceptable evidence that had been produced in the trial court to prove the Respondent’s claim. This court has considered the record. There was no dispute that the Respondent was a decree holder for Ksh.492,472/- in respect of **CMCC No. 9774 of 2002 George Masele Vs APA Insurance Company Ltd.**

16. At the trial, the Respondent testified. He produced a demand letter dated 11th June, 2002 addressed to the Kenya Bus Services Ltd and copied to Pan Africa Insurance Ltd (P Exhibit 1). The letter set out the details of the occurrence of the accident, the motor vehicle involved and the details of the Policy Number involved, i.e. Policy No. 010/810/1/000005/2001/04. He also produced a Statutory Notice under Section 10(2) of Cap 405 that was served upon Pan Africa Insurance co. Ltd on 19th December, 2002 which was within 14 days of filing of CMCC No. 9774 of 2001 (the original suit). The two exhibits were never denied or challenged. Accordingly, the Respondent had proved that he was entitled to bring the proceedings against the insurer of the motor vehicle in question. Further, the Respondent produced a letter of demand dated 6th December, 2005 made upon the Appellant to settle the sum decreed in CMCC No. 9774 of 2001. The letter as well as the original demand letter of 11th June, 2002 were never responded to.

17. The question therefore, was whether the Respondent proved had that motor vehicle registration number KAH 096A was insured by Pan Africa Insurance Company. Indeed Ms Akonga submitted that the Respondent should have produced a Certificate of Insurance and not just rely on the Police Abstract.

18. In the Police Abstract No. A491478 dated 10th June, 2002, the report showed that on 11th November, 2001 at about 7.30 a.m. along Landhies Road an accident occurred involving the Respondent and motor vehicle Reg. No. KAH 096A make Leyland. The said motor vehicle was shown to be owned by Kenya Bus Services ltd and was insured under policy No. 010/810/000005/2001/04 issued by Pan Africa Insurance Ltd. That Police Abstract was admitted in evidence in both the original suit (CMCC No. 9774 of 2001) as well as in the declaratory suit (CMCC No. 1674/2006). That abstract was an official record as contained and kept by the Kenya Police at Shauri Moyo Police Station vide Occurrence Book number IAR 219/2002. This document was neither objected to nor denied. The details therein were never challenged. The evidence of the Respondent was unchallenged and uncontroverted.

19. The foregoing, coupled with the fact that neither Pan African Ltd nor the Appellant denied nor responded to the demand letters of 11th June, 2002 and 6th December, 2005, respectively gives credence to the trial court’s holding that the Respondent had proved his case on a balance of probability.

20. As to the Certificate of Insurance which Ms Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the Police Abstract as to the details of insurance are in the ordinary cause of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured. In this regard, I am unable to agree with Ms. Akonga that the Respondent should have produced the Certificate of Insurance for Policy No. 010/810/000005/2001/04 in order to prove who the insurer was.

21. In this regard, I am satisfied that from the evidence on record, the trial court was entitled to hold as it did, that the Appellant was the successor in title to Pan Africa Insurance Ltd; that Pan Africa Insurance Ltd was the insurer of Motor Vehicle Registration No. KAH 096A owned by the Kenya Bus Services Ltd and that the Appellant was liable to compensate the Respondent. I see no reason to fault that court.

22. In the circumstances, I find the appeal to be without merit and the same is hereby dismissed with costs to the Respondent.

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A. MABEYA

JUDGE

Dated, signed and delivered at Nairobi this 26th day of November 2014.

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J. SERGON

JUDGE