



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 182 OF 2011**

APA INSURANCE LIMITED.....APPELLANT

**VERSUS**

DAVID OKIKI AMAYO.....RESPONDENT

**JUDGMENT**

1. The plaintiff herein David Okiki Amayo sued the defendant herein APA Insurance Limited praying for judgment against the defendant for:-

- a. *A declaration that the defendant prays kshs.169,425.00 to the plaintiff under section 10 Cap 405 Laws of Kenya and/or in the alternative judgment for kshs.169,425.00.*
- b. *Costs of this suit.*
- c. *Any other remedy.*

2. The cause of action for the plaintiff's suit was captured at paragraph 3,4,5,6 & 7 of the plaintiff's plaint which stated:-

*'3. On or about 14<sup>th</sup> July, 2000, the plaintiff was lawfully walking off the verge of Kisii-Kisumu when motor vehicle KAM 507G being driven along aforesaid road when by negligence and/or recklessness of the defendant's insured driver/agent/servant in the course of his lawful, authorized duty in driving, managing and/or controlling motor vehicle KAM 507G owned by Joel Kerongo Nyambati t/a Travel one Bus herein after referred to as the insured, caused and/or permitted the said motor vehicle KAM 507G to loose control and violently collide with plaintiff, in consequence whereof the plaintiff sustained very severe injuries.*

*4.The defendant herein assumed liabilities of the Pan Africa General Insurance Ltd who had also assumed liabilities of the Pan Africa Insurance Co. Ltd had hitherto issued the said motor vehicle KAM 507G vide policy No. NCP 11700K covering such persons or class as specified in respect to any injury or death caused or arising out of the use of the said motor vehicle and the said accident was a liability averred by the said policy within the meaning of section 5(a).*

*5. On 26<sup>th</sup> July, 2002, the plaintiff filed Kisii SPMCC. NO. 503 of 2002 against the insured of the defendant and the owner of motor vehicle KAM 507G hereto seeking for general and special damages, costs and interest and after trial, judgment was*

*entered in the plaintiff's favour on 21<sup>st</sup> July, 2006 for kshs. 153,500 and a decree has been drawn for kshs. 169,425.00 and the said amount has attracted interest and still attracts interest to date.*

*6. The said judgment is in respect of liability covered by the said policy and has been obtained against the insured and therefore the defendant herein is bound to pay the plaintiff a total amount under section 10 Cap 405 Laws of Kenya.*

*7. The requisite notice under Section 10 cap 405 laws of Kenya was issued and served upon the defunct Pan Africa Insurance Co. Ltd on 11<sup>th</sup> June, 2002 and was duly received.*

3. The defendant on its part filed a written statement of defence and denied the plaintiff's claim in total without prejudice and in the alternative the defendant stated that they did not at anytime insure motor vehicle registration number KAM 507G, policy No. NCP.11700K was cancelled prior to the accident and the correct procedure of cancellation followed hence provisions of Cap 405 do not have any effect. Also that prior to the alleged accident the certificate of insurance was surrendered to the insurer by the insured and as such no liability can therefore attach to the defendant, that no notice as per section 10 of Cap 405 was served in it and as such no liability can therefore attach to it and finally the defendant contended Pan Africa Insurance Company Limited no longer exists in law and further that it did not at any time, assume the liabilities of pan Africa Insurance Company Limited and as such this suit cannot be maintained and should be struck out with costs.

During hearing the plaintiff (PW1) was the only one who testified on his behalf. He told the court that on 14<sup>th</sup> July, 2000 he went to sell his goods and while at it he was knocked by motor vehicle KAM 507G at Sondu market along Kisii-Kisumu road by travel one bus. On 26<sup>th</sup> July, 2002 he filed a suit against the owner of the bus one Joel Kerongo Nyambati t/a Travel one bus vide Kisii CMCC. No. 503 of 2002 which was concluded, judgment was entered in his favour for kshs. 153,000 as damages and a decree was issued in his favour. He produced the said decree as exhibit.1. Furthermore, he contended that prior to filing this suit his advocate had served Pan African Insurance Co. Ltd in accordance with section 10 of Cap 405 which notice he produced as exhibit.2.

4. However he read the daily nation on 30<sup>th</sup> October, 2003 which stated that the said Pan African Insurance Company and Apollo Insurance Limited were merged together and transferred their business to Newco Ltd and the said Newco was to be known as APA Insurance Company Limited and the said APA was to assume the liabilities and assets of the other two companies. He produced the daily nation newspaper dated 30<sup>th</sup> October, 2003 as exhibit.3. In addition to this, the same information was carried in L.N. No. 7928 of 7<sup>th</sup> November, 2003 titled Newco ltd business transfer which he produced as P.Exhibit.4. Moreover he confirmed that the said transfer of business was effected before he obtained judgment in Kisii CMCC. No. 503 of 2002.
5. On asking his advocate to carry out a search, the said search revealed that the memorandum of association for Pan Africa General in corporate and acquired the business of Pan Africa Insurance Limited. That on 16<sup>th</sup> May, 2001 the business of Pan African Insurance was acquired by Pan Africa General Insurance Limited which later merged with Apollo, transferred its business to Newco Limited which now became APA Insurance Limited. He produced the Memorandum of Association of Pan African General Insurance Limited as P.Exhibit.5.
6. In addition to this, his advocate also conducted a search and obtained the memo and article of association of Newco Limited dated 8<sup>th</sup> October, 2002. He explained that Newco was established to acquire the business of Pan African Insurance Co. Limited and Apollo Insurance Limited. He in turn produced the memo and articles of association for Newco Limited as P.Exhibit.6. he then produced the certificate of incorporation of Newco Ltd and the certificate of incorporation for Pan African General Insurance Ltd as Exhibit.7 and 8 respectively.
7. Also, his advocate confirmed that Newco Limited once incorporated changed its name to APA Insurance Limited. He produced the said notice as P.Exhibit 10 and contended that the same

- notice was published in the daily nation of 13<sup>th</sup> December, 2003 the same was marked as PExhibit.11. That the transfer of business between Apollo Insurance Company, Pan African Insurance Company and APA Insurance company were all approved by Minister Mwiraria in a special issue of the Kenya gazette supplement No. 69 dated 23<sup>rd</sup> September, 2005 which was marked as Exhibit 12. he confirmed that all these transactions were done before he obtained judgment.
8. Lastly, he contended that the allegation that APA Insurance Limited did not take the liabilities of Pan African Insurance was untrue since the defendant is liable to pay him the decretal sum and if the said Pan African had not insured the said accident causing motor vehicle, they would have not received the notice (PExhibit.2). He further reiterated that the insurance policy on the bus was NCP11700K and Pan African Insurance did not give his advocate notice of cancellation of this insurance policy thus, he is entitled to be paid the decretal sum as provided under cap 405 Laws of Kenya as he complied with section 10 of cap 405 and the owner of the accident motor vehicle did not appeal against the judgment in his favour.
  9. On cross-examination he confirmed that Pan Africa Insurance Company Limited acknowledged receipt of the statutory notice by stamping it but the said stamp is not signed by any person. This marked the close of the Plaintiff's case.
  10. DW1 was Antony Mungai Njogu a legal officer working with the defendant's company. He told the court that the defendant company came into being on 15<sup>th</sup> December, 2003 upon change of name from Newco Company Limited. He explained that the defendant company is a result of a merge between former Apollo Insurance Company Limited and Pan African General Insurance Company limited. Furthermore, he explained that these two companies transferred the general business to a company called Newco Limited and upon the transfer being effected there was a change of name from Newco Limited to APA Insurance Limited which was produced as Exhibit.5.
  11. In addition to this, he produced the certificate of Pan Africa General Insurance Limited dated 10/7/2001. He also produced an amended memorandum and article of APA Insurance dated 11<sup>th</sup> January, 2002 pursuant to a special resolution adopted by the members on 17<sup>th</sup> January, 2003 and 23<sup>rd</sup> April, 2010. He produced the same as exhibit No.7.
  12. He further reiterated that APA Insurance Limited did not have any relationship whatsoever of a succession nature with Pan African Insurance Company Limited but however there was a succession nexus between APA and Pan African General Insurance Company Limited.
  13. As a result thereof, he contended that APA Insurance Company had not insured motor vehicle KAM 507G neither was it insured by Apollo or Pan African General thus they denied the allegation that they are liable by virtue of succession as none of the predecessors and successor had issued insurance for the said motor vehicle.
  14. Lastly, he contended that the notice to insurance under section 10 dated 6<sup>th</sup> June, 2002(PExhibit.No.2) addressed to the claims managers. Pan Africa Insurance Company Limited was not received by APA, Apollo and Pan Africa General by virtue of succession. He contended that instead, it was received by Pan Africa Insurance Company Limited on 11<sup>th</sup> June, 2012 and APA Insurance is not in any way whatsoever associated with Pan Africa Insurance Company Limited. Thus he was praying that this suit be dismissed.
  15. On cross examination, DW1 confirmed that according to PExhibit.6 the purpose of incorporation of Newco Limited was to acquire and take over the general business of Pan Africa Insurance Company Limited. That PExhibit.6 does not mention Pan African General Insurance but instead mentions Pan Africa Insurance Company Limited upon which the plaintiff served the statutory notice.
  16. This marked the end of the defence's case. In his judgment the trial magistrate held that:-

*‘.....Pan Africa General Insurance Company by its objects was incorporated on 10<sup>th</sup> May, 2001 to acquire and take over the general insurance business of Pan Africa Insurance Company Limited and Liabilities (see P.Exhibiti No.5) hence by 16<sup>th</sup> May, 2001 the plaintiff's claim being a liability incurred by Pan Africa Insurance Company Limited was a liability acquired and taken by Pan Africa General Insurance Company Limited. By 8<sup>th</sup> October, 2002, the plaintiff's claim*

*being a liability assumed by Pan Africa General Insurance Company was taken over by Newco Limited, which by 15<sup>th</sup> February, 2003 after the merge between Apollo Insurance Limited and Pan Africa General Insurance Company Limited was acquired and taken over by APA Insurance Company Limited (see P.Exhibit.No.5). I find that the defendant did not challenge the contents of PExhibit.5 and this evidence was not controverted. It is my finding that the defendant herein APA Insurance Limited acquired the assets and liabilities of Pan Africa Insurance Company Limited.*

*.....DW1 admits that there is a decree issued in Kisii CMCC NO. 503 of 2002 against the insured of Pan Africa Insurance Company Limited. The said decree has not been against. In my view failure to produce the proceedings and judgment in Kisii CMCC No. 503 of 2002 is not fatal to the plaintiff's suit as the defendant did not challenge the decree produced herein (PExhibit No.1).*

*.....I find that sufficient evidence was adduced by the plaintiff to prove that the general business of Pan Africa insurance Company Limited was taken over by pan Africa General Insurance Company Limited (PExhibit No.5). Subsequently, pan Africa General insurance Company Limited merged with Apollo Insurance Limited to form Newco Limited. Later Newco Limited changed its name to APA Insurance Company Limited and this transaction was approved by the then Minister of Finance Mr. David Mwiraria.*

*In view of the fact that APA Insurance Company Limited assumed the assets and liabilities of Pan Africa Insurance Company Limited which had insured motor vehicle registration number KAM 507G I am satisfied that the plaintiff has proved his claim against the defendant herein the defendant is liable to pay the plaintiff's claim.*

17. Being aggrieved by the above judgment, the defendant now appellant has preferred an appeal to this court. In its Memorandum of Appeal dated 3<sup>rd</sup> September, 2011 the appellant has appealed against the above judgment on grounds that:-

1. *The learned trial magistrate erred in law by treating the Appellant's evidence and appellant's advocates submission superficially and without adequate weight and thereby grossly misdirected himself and consequently arrived at an erroneous ruling.*
2. *The learned trial magistrate excess surely relied upon the respondent's counsel's submission and paid little regard to the Appellant's counsel's submissions thereby arriving at an erroneous ruling.*
3. *The learned trial magistrate failed to appreciate the applicable principles of law.*
4. *The learned trial magistrate's decision was against the weight of the evidence.*
5. *The learned trial magistrate failed to appreciate that the plaintiff/respondent had failed to prove his case.*
6. *The learned trial magistrate erred in failing to consider that no evidence had been adduced proving that the Appellant had issued a policy to the motor vehicle.*
7. *The learned trial magistrate proceeded on wrong principles and disregarded the generally applicable principles of law.*
8. *The learned trial magistrate misapprehended the evidence adduced by the plaintiff/respondent in material degree as a result averred at a wrong conclusion.*

18. When the appeal came before me on 6<sup>th</sup> October, 2014 it was agreed that the above appeal be argued through written submissions. Both counsels representing both parties have now filed their respective written submissions and I have read them.

19. This court, being conscious of its role as the first appellate court as stated in **Selle v. Associated Motor Boat Company Limited [1968] E.A. 123**, has to re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions. The court must, however, bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.

20. I have considered the proceedings before the trial court, the judgment, the grounds raised in the memorandum of appeal and respective submissions by counsels representing both parties. The basis of this appeal is simply whether or not the appellant invariably assumed liability of Pan Africa Insurance Company Limited which company had insured the vehicle that caused the accident involving the respondent.
21. From the evidence presented during trial by the plaintiff he testified and his evidence which was not rebutted that he was involved in an accident on 14<sup>th</sup> July, 2000 whereby he was knocked down by motor vehicle KAM 507G. On 26<sup>th</sup> July, 2002 he filed a suit against the owner of the bus Joel Kerongo Nyambati t/a travel one bus vide Kisii CMCC.NO. 503 OF 2002, AND ON 21<sup>ST</sup> July, 2006, the court awarded him Kshs. 153,500 as damages.
22. Meanwhile, while his case against the defendant was ongoing, the daily nation on 30<sup>th</sup> October, 2003 published a notice that a new company gave notice of transfer of business i.e. that Pan Africa Insurance Company and Apollo Insurance Limited intended to join together and transfer their business to Newco Ltd and that the said Newco Limited was to be known as APA Insurance Company Limited. Apparently, Newco Limited was to assume the liabilities and assets of the other 2 companies. The said information was also carried in L.N. No. 7928 of 7<sup>th</sup> November, 2003 and it is to be noted that the said transfer took place before the respondent obtained judgment in Kisii CMCC. No. 503 of 2002.
23. Furthermore, the respondent also produced the Memorandum of Association of Pan Africa General Insurance Limited as Pexhibit.5 which in short stated that by 10<sup>th</sup> May, 2001 the business of Pan Africa Insurance acquired by Pan Africa General Insurance Limited which later merged with Apollo, transferred its business to Newco Limited which now became APA Insurance Limited.
24. Later by 8<sup>th</sup> October, 2002 Newco had been established to acquire the business of Pan Africa General Insurance Limited and Apollo Insurance Limited and afterwards Newco Limited changed its name to APA Insurance Limited by 15<sup>th</sup> December, 2003 and the above transfer of business were all approved by the Minister then David Mwiraria in a special issue of the Kenya Gazette supplement No. 69 dated 23<sup>rd</sup> September, 2005.
25. The appellant on the other had produced Kenya Gazette Notice No. 8126 of 14<sup>th</sup> November, 2003; a statutory notice to the members of the public to raise any contention issues or queries they had with the transfer of business to the 2 firms of advocates representing the 2 companies. He contended that APA Insurance Limited does not have any relationship whatsoever of a succession nature with Pan Africa Insurance Company Limited but however he admitted that there was a succession nexus between APA and Pan Africa General Insurance Company Limited.
26. Legal Notice 8126 which was produced by the Defendant stated:-

*“A transfer of property, undertakings, assets and liabilities of the respective general insurance business of Apollo Insurance Company Limited and Pan Africa General Insurance Limited to a new Limited liability company (APA Insurance Limited).”*

27. It is also clear from the record, and it is not denied, that the mandatory Notice to be served upon the insurance under section 10 of Cap 405, was served upon Pan Africa Insurance Company Limited. The insurance company was under a legal obligation to object to apply or avoid the claim if it had lawful reason to do so. Pan Africa Insurance Company did not however file such objection as required under the said section 10(2) within 3 months as prescribed’.
28. In my humble view, therefore the consequences of failure to file the above notice of objection would be two fold:-
  - a. That the insurance company (hereby Pan Africa insurance Company Limited) did not object or was willing to pay the respondent’s claim; or
  - b. The insurance company having failed to file the notice of objection within three months prescribed under the section was statutorily time-barred from raising such objection in the future.

29. According to the respondents evidence which was never controverted by appellants it concerned a certain exhibit namely Exhibit. No. 5 which is the Memorandum of Association of Pan Africa General Insurance Limited and at clause 1 of its objects it specifically stipulates:-.

The objects for which the company is established are:

*To acquire and take over as a going concern the general insurance business now carried in by Pan Africa insurance Company Limited, a limited liability company incorporated in the Republic of Kenya, and care of Post office Box Number 62551 Nairobi in the said Republic, and registered to, and carrying on, general insurance business and long term insurance business on each case as defined by the insurance Act chapter 487 Laws of Kenya), together with all or any part of the property and other assets comprised or; associated with such general insurance business, and to discharge all or any of the liabilities of such general insurance business, and to pay for such acquisition, either in cash or in fully paid shares or loan capital, or partly in the way and partly in the other’.*

30. Thus once the appellants witness testified that there was no succession clause between Pan Africa Insurance Company and APA but there was one between Pan Africa General Insurance Company and APA my understanding to that is simply that Pan Africa Insurance Company did not exist by the time APA was formed since Pan Africa General Insurance Company had already assumed all assets and liabilities of Pan Africa Insurance Company Limited.

31. Therefore in analyzing the defendants evidence in the lower court of course APA did not assume the assets and liabilities of Pan Africa Insurance Company since by then it did not exist but had earlier on been succeeded by Pan Africa General Insurance Company Limited which according to the defendant’s witness had a succession nexus with APA Insurance Company Limited.

32. In conclusion and in my humble view, the trial magistrate considered the above situations and came to the correct conclusion that indeed the appellant had no reasonable cause in his defence and even testimony to be stopped from paying the general damages awarded to the respondent. The trial magistrate’s judgment was correct, lawful and I see no error in his action for which I would interfere with his decision.

33. In the circumstances, this appeal has no merit. It is dismissed. The costs are to the Respondent. Orders are made accordingly.

**Judgment dated and delivered at KISII this 19<sup>th</sup> day of December, 2014.**

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Menezes- not in for the appellant

Bunde for the respondent

Edwin Mongare Court Clerk.