



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 168 OF 2008**

**APA INSURANCE LIMITED. .... APPELLANT**  
**VERSUS**  
**THEODORA ATIENO OKAL. .... RESPONDENT**

*(From the Ruling and orders of C W Githua (Mrs), Senior Principal Magistrate in Milimani CMCC No. 8732 of 2007)*

**J U D G M E N T**

In Milimani Commercial Magistrate's Court, Civil Case No. 6539 of 2007, the Plaintiff (herein the Respondent) was awarded damages of Ksh.818,053/- arising from injuries sustained from a motor vehicle accident. Thereafter the Respondent filed another suit in the same court being Civil Case No. 8732 of 2007 against the present appellant as an authorized insurer within the meaning and provisions of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 405 of the Laws of Kenya. The said claim being a declaratory suit within the said Act was by a plaint dated 4<sup>th</sup> October, 2007.

In the said plaint, the Respondent/Plaintiff averred, inter alia, that the Appellant was duly notified of the original claim No. 6539 of 2006 after also being served with notice under section 10 of the relevant Act, both of which it acknowledged receipt and stamped. The Respondent also averred that the Appellant herein was duly served with demand notice of the lower court's declaratory suit on 23<sup>rd</sup> July 2007 which as well, it acknowledged receipt and stamped. The Respondent accordingly sought a declaration that the Appellant/Defendant was bound to pay the sum of Ksh.318,842/60, being its share payable under the said original suit No. 6539 of 2006, from the original decretal sum of Ksh818,053/-.

To the abovementioned declaratory suit the Appellant filed a defence dated 23<sup>rd</sup> October, 2007. In the defence, the Appellant denied almost everything substantive, and put the Respondent/Plaintiff to strict proof. In particular, it denied: -

- 1. That the plaintiff's suit disclosed any cause of action.***
- 2. That Pan African Insurance Company Limited issued an insurance policy to Kenya Bus Services Ltd whose bus the Plaintiff was traveling and injured in.***
- 3. That Kenya Bus Services Ltd was party in CMCC No. 6539 of 2006 aforesated.***
- 4. That the Defendant was a creation of a merger between Apollo Insurance Company and Pan Africa Insurance Company Ltd.***
- 5. That the Plaintiff/Respondent had obtained the alleged judgment under the said suit No. 6539 of 2006 aforementioned.***

**6. That the Appellant/Defendant was under legal obligation to satisfy the alleged judgment under suit No. 6539 of 2006 aforesaid pursuant to the provisions of Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act aforesaid.**

**7. That it was served with any demand notice before the suit was filed.**

Then by a Chamber Summons dated 29<sup>th</sup> October 2007 filed by the Plaintiff/Respondent, the latter sought the striking out of the abovementioned defence on the grounds that it was scandalous, frivolous and/or vexatious and that it would embarrass, prejudice and delay the fair trial of the suit and finally that it was otherwise an abuse of the court process.

The lower court, by a Ruling dated 5<sup>th</sup> March 2008, found and ruled:-

**a) That there was indeed, through the Government Gazette Notice No. 8126, a transfer of property, undertakings, assets and liabilities of the respective general insurance businesses of Apollo Insurance Company Ltd and Pan Africa General Insurance Limited to a new limited liability Company (APA Insurance Ltd) with effect from 1<sup>st</sup> January 2003 (The appellant herein).**

**b) That the liability in the original suit No. 6539 of 2006 was fully covered by the Defendant Company, APA Insurance Limited due to the merger of Apollo Insurance Company Ltd and Pan Africa Insurance Company Limited and it was accordingly payable by APA Insurance Ltd, the Appellant herein.**

**c) That APA Insurance Ltd was properly served with the relevant statutory Notice under Section 10(2) of Cap 405.**

**d) That APA Insurance Ltd failed to commence proceedings for or obtain a declaration that it was entitled to avoid the liability under the policy of Insurance issued to Kenya Bus Service by Pan Africa Insurance Company Ltd, under Section 10(4) of Cap 405 and accordingly the Defendant/Appellant was under obligation to satisfy the Plaintiff's claim.**

**e) That the Defendants/Appellant's defence failed to raise any triable issue fit to allow the defence to go to a full hearing and accordingly amounted to no defence but a sham intended to delay a fair trial.**

The trial court then proceeded to strike out the Appellant/Defendant's said defence and entered judgment in favour of the Plaintiff/Respondent. That is what provoked this appeal.

The Appellant enumerated several grounds in the Amended Memorandum of Appeal. It subdivided what should have been about three to four grounds of appeal into 13 grounds. With respect, this method of pleading is totally wasteful and unnecessary and encourages a lengthening of arguments before the court, thus causing a waste of court's and parties' time. Order 42(2) is quite clear in its provisions. A Memorandum of Appeal should set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any arguments or narrative.

In this case, the appellant had unnecessarily over-split his grounds of appeal which it should have made concise, so much so that during the hearing, Mr. Sijeni had to request court to allow him to argue all the thirteen grounds together. He must have realized that if he argued each ground separately he would not only find himself repeating his arguments, but would also take unnecessarily long time! That said, I now turn to the main issues raised in the appeal. They can be summarized as follows: -

**a) Was the Appellant, APA Insurance Ltd, created out of the merger of Apollo Insurance Company Ltd and Pan Africa Insurance Company Ltd and if so from which date?**

**b) Did APA Insurance Ltd inherit the insurance liabilities of the two merged insurance companies and in particular, did it inherit the relevant liability arising from motor vehicle accidents claims of which the Plaintiff's claim in suit No. 8126 of 2006 was one?**

**c) Was the Respondent entitled to damages and if so, was the Ksh.318,842/60 the correct award?**

**d) Did the trial magistrate err in awarding the Respondent damages?**

It can however, clearly be observed that what the grievance of the Appellant is, is that the trial magistrate erred in striking out its defence and entering a judgment for Respondent.

I have perused the records carefully. The facts established are that Kenya Bus Services against whom the Respondent had sued and obtained judgment at 30% liability, were under an insurance cover by Pan Africa Insurance Company Limited. It is not denied and it is clear from the facts on record, that Pan Africa Insurance Company Limited merged with Apollo Insurance Company Limited to form APA Insurance Limited. That was by Legal Notice No. 8126 which, inter alia, declared: -

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

That the above Legal Notice was published and authorized was not denied by the Appellant, APA Insurance Limited. The transfer took effect from 1<sup>st</sup> January 2003, according to the Gazette Notice. The motor accident under discussion occurred in 2004 a period after APA Insurance Ltd had taken over the general insurance described in the Legal Notice.

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 the Appellant, APA Insurance Ltd. The Insurance Company was under a legal obligation to object to pay or avoid the claim if it had lawful reason to do so. The Appellant Company did not however, file such objection as required under the said Section 10(2) with 3 months prescribed.

In my view, the consequence of failure to file the above notice of objection would be two-fold: -

**a) That the Insurance Company (here the Appellant) did not object to 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.**

Since the position which existed was that either or both of the above possibilities existed, the Respondent filed this declaratory suit as provided under Cap 405, to realize the sum of the decree earlier obtained and apportioned against Kenya Bus Services. That being unacceptable to the Appellant, it filed the defence eventually struck out, thereby provoking this appeal.

The trial magistrate found, as a matter of fact, that the 30% liability in the original lower court Civil Suit No. 6539 of 2006, against Kenya Bus Services and another, was fully covered by Pan Africa Insurance Company Ltd whose businesses, inclusive of liabilities and properties had been transferred and taken over on 1<sup>st</sup> January 2003 by APA Insurance Ltd, the appellant herein. I have independently considered the said trial magistrate conclusion and I find that the same was proper and sound. It was based on the Official Legal Gazette Notice No. 8126 which the Appellant has not challenged. The contents of the Legal Notice as to the merger of the two insurance companies and of transfer of the property, assets and liabilities are clear.

I further see no reasonable ground to interfere with the magistrate's other finding, that the Appellant, having been served with a Notice under Section 10(4) of Cap 405, but having failed to file a relevant objection as prescribed therein, was thereafter, statutorily barred from raising the same objection whether under the Act or thereafter, in court in this suit. Indeed, it is my further view and finding, that where the Insurance Company has failed to file an objection within three months after being served with notice to satisfy such a decree it cannot have the benefit of the envisaged declaration to avoid the liability. It cannot

later also have a viable defence even if it obtained the declaration to avoid, under Section 10(4) of the said Act unless it had served the plaintiff with a Notice of disclaimer with reasons for the disclaimer within 14 days of service of the summons to enter appearance to a declaratory suit filed by the insured to recover on a decree already obtained in an original suit as aforesaid.

In this case before me, there is another factor which is relevant. Not only had the Appellant, APA Insurance Ltd, failed to file the Notice of Objection to avoid satisfying the decree notified on it by the Respondent, but it had also failed to obtain the declaration to avoid to pay under Section 10(4) of Cap 405, which states thus: -

***“No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of material fact or by a representation of fact which was false in some material particular, or, if he has avoided the policy on the ground, that he was entitled so to do apart from any provision contained in it.***

***Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.”***

It is also observed that the Appellant in this case did not plead in its struck-out defence that it had already sued the insured for a declaration that it was entitled to avoid the policy or that such suit was either pending or successfully concluded with a declaration being issued in its favour. Nor indeed had the Appellant pleaded in the defence that it had served on the Plaintiff/Respondent with the notice required to be served within 14 days of service of summons to enter appearance as required under the proviso of Section 10(4) aforequoted.

In conclusion accordingly, the trial magistrate considered the above situations and came to the correct conclusion that the Appellant had no reasonable defence in its filed statement of defence. That is why he struck out the defence. He did so rightly and lawfully. I see no error in his action for which I would interfere with his decision.

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

Dated and delivered at Nairobi this 2nd day of March 2012.

.....  
**D A ONYANCHA**  
**JUDGE**