



APA Insurance Limited v United (E.A) Warehouses Limited (Civil Appeal E086 of 2021) [2024] KEHC 5644 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E086 OF 2021
DAS MAJANJA, J
MAY 22, 2024**

BETWEEN

APA INSURANCE LIMITED APPELLANT

AND

UNITED (E.A) WAREHOUSES LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. Nabibya, PM dated 10th June 2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 1877 of 2015)

JUDGMENT

Introduction and Background

1. This is an appeal against the judgment of the Subordinate Court where the Appellant’s suit was dismissed for being time barred. In its case before that court, the Appellant claimed Kshs. 2,577,216.20 being the outstanding premium for a Transshipment Bond and a Transit Bond (“the Bonds”) the Respondent took out with Appellant sometime in 2007 to enable the Respondent enter 14,292,338 Metric Tonnes of Care Somalia’s Sorghum for transit to Somalia for relief food supply. The Appellant claimed that the Respondent had applied for a Particular Bond that was to lapse or be cancelled after 3 months but that the Respondent lodged it with the Customs Service Department as a General Bond which ordinarily runs for 3 years and is subject to automatic renewal until and unless the same is cancelled by the Respondent and the original bonds returned to the Appellant with a covering letter from the Customs Department or the same stands valid and in force. The Appellant claimed that the Respondent cancelled the Bonds in the year 2013 and returned the originals back to the Appellant as required but that upto the said cancellation, the premiums had accrued to the claimed sum of Kshs. 2,577,216.20.
2. In its response, the Respondent denied being indebted to the Appellant as claimed. The Appellant averred that it requested for a Particular Bond which was for a specific consignment while the Appellant



issued General Bond and thereby there was no consensus ad idem between the parties which led to disagreement and confusion leading to the present state of affairs. Thus, the Respondent stated that the Appellant was estopped by conduct from attempting to commercially and economically benefit from issuing the wrong Bond and charging premiums that were not due and payable. The Respondent further pleaded that even if the sum claimed was payable, the claim was time barred by dint of section 4 of the Limitation of Actions Act (Chapter 22 of the Laws of Kenya) and that the suit against it ought to have been dismissed in limine as it was bad in law.

3. The matter was set down for hearing where the Appellant called its Mombasa Branch Manager, Simon Ebichondo Ndika (PW 1) while the Respondent called its General Manager, Edward Asena (DW 1) as witnesses. In its judgment rendered on 10.06.2021, the Subordinate Court found that there was no evidence that the Respondent participated in the renewal of the Bonds and that there was no basis of extending the known 3 months of the issued Bonds. Thus, the claim for additional premiums was unsubstantiated. It held that since the suit was filed in 2015, more than 6 years after the Particular Bond lapsed, the suit was time barred.
4. The Appellant appeals the judgment on the basis of its memorandum of appeal dated 01.07.2021. The appeal has canvassed by way of written submissions but only those of the Respondent are on record. Since the submissions on record rehash the positions taken by the parties that I have already summarized above, I will not highlight the same but only make relevant references to in my analysis and determination below.

Analysis and Determination

5. In determining this appeal, I am cognizant of the role of the first appellate court which is to re-evaluate and re-assess the evidence before the court of first instance and at the same time, keep in mind the fact that the trial court interacted first hand with the parties (see *Selle v. Associated Motor Boat Co.* [1968] EA 123).
6. The Appellant's suit was in respect of premiums it claimed were outstanding from the Respondent in respect of the Bonds issued in 2007. The Appellant rebutted this position by assailing the suit on technical and substantive grounds. Technically, it averred that the suit was time barred, having been filed in 2015, more than 6 years from 2007 when the Bonds were issued. The Respondent submits that section 4(1)(a) of the Limitation of Actions Act requires that actions for breach of contract ought to be brought within 6 years from the time the cause of action arose. That the six-year period from October 2007, when the Particular Bond was supposed to be cancelled, lapsed in October 2013.
7. The Appellant stated that a Particular Bond is supposed to be cancelled after 3 months whereas a General Bond is to run for 3 years. The Appellant did not dispute that whereas the Respondent requested for a Particular Bond, the Appellant issued a General Bond. The subject Bonds were issued on 30.07.2007 and 28.11.2007. In its letter of 15.11.2008, the Appellant admitted that these bonds were meant to be Particular Bonds meaning that they ought to have been cancelled by the Respondent in October 2007 and February 2008 respectively. I am in agreement with the Respondent's submission that failure to cancel the Bonds meant that the Respondent was in breach of contract and the cause of action arose at that point. The Appellant therefore had to file any claim it had against the Respondent based on the Bonds by February 2014 latest.
8. It is my further finding and I am in agreement with the Respondent that for the Appellant to convert the Bonds to General Bonds and apply a different premium rate on the same simply because the Respondent had not cancelled the Bonds as required by the Appellant was a unilateral decision taken by the Appellant and was an introduction of terms which constituted a variation of contract without



the involvement of the Respondent. The position regarding variation of an agreement was explained succinctly by Gicheru JA., in *Kenya Breweries v Kiambu General Transport Agency Limited* [2000] eKLR as follows:

" A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration. If the agreement for the variation is mere nudum pactum it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement..."

9. By applying a new premium rate and converting the Bonds from Particular to General when the Respondent had specifically requested for Particular Bonds, the Appellant was in effect making a fresh offer. In order for it to be effective, there had to be a meeting of minds which is an essential component for the formation of an enforceable contract. In addition, the variation ought to have been supported by fresh consideration (see *Gimalu Estates Ltd & 4 Others v International Finance Corporation & Another* [2006] eKLR, *County Government of Migori v Hope Self Help Group* [2020] eKLR and *Toyota Kenya Limited v Vehicle & Equipment Leasing Limited* [2021] eKLR).
10. It is for the above reasons that I agree with the Subordinate Court that there was no involvement of the Respondent in converting the Bonds to General Bonds and that the Appellant unilaterally renewed the Bonds and applied a premium rate unbeknown to the Respondent. There was therefore no basis for the Appellant to claim for outstanding premiums that the Respondent had not signed up for as there was no meeting of minds of the parties for the same.
11. I therefore find and hold that the Subordinate Court did not err in dismissing the suit on the technical ground that it was time barred as the cause of action arose in February 2008 and the Appellant had to file the suit by February 2014 but the suit was filed in September 2015, more than six years as required by the *Limitation of Actions Act*. The Subordinate Court properly dismissed the suit on its merits as there was no basis for the Appellant to demand for outstanding premiums for Bonds that the Respondent did not apply for and that the Appellant renewed without the involvement of the Respondent.

Disposition

12. This appeal lacks merit. It is dismissed with costs to the Respondent assessed at Kshs. 30,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MAY 2024.

OLGA SEWE

JUDGE

