Pan Africa Insurance Company Limited v Mugero & Amutamwa (Suing as the Legal Representatives of the Estate of Gladys Amutamwa) & another (Civil Appeal E004 of 2020) [2024] KEHC 7963 (KLR) (Appeals) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CIVIL APPEAL E004 OF 2020

DAS MAJANJA, J

JULY 2, 2024

BETWEEN

PAN AFRICA INSURANCE COMPANY LIMITED ..... APPELLANT

AND

PIUS AMUTAMWA MUGERO & JOYCE MINAYO AMUTAMWA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GLADYS AMUTAMWA) ..... 1ST RESPONDENT

APA INSURANCE COMPANY LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. D.W. Mburu, SPM dated 29th May 2020 at the Magistrates Court in Milimani, Nairobi in Civil Case No.642 of 2015)

JUDGMENT

Introduction and Background

1. The Appellant appeals against the ruling of the Subordinate Court dated 29.05.2020 ("the Ruling"). For context, I will highlight a brief background of the dispute. By a plaint dated 02.02.2015, the 1st Respondents filed suit and sought a declaration that the Appellant and the 2nd Respondent were liable to pay the decretal sum and interest of Kshs. 984,214.00 as per the Decree and Certificate of Costs issued in CMCC No. 8784 of 2004. The Subordinate Court, in a judgment dated 10.11.2017 entered judgement in favour of the 1st Respondents where the Appellant was ordered to satisfy the decretal sum of Kshs. 984,214.00 as per the Decree and Certificate of stated costs issued in CMCC 874 of 2004 together with interest from 18.07.2014. The Subordinate Court also held that the 2nd Respondent was

not liable to settle the decree as there was "scanty information" on whether there was in fact a transfer of liability from the Appellant to the 2nd Respondent.

2. By an application dated 08.05.2018, the 1st Respondents applied for review of the judgment so that the 2nd Respondent could be held liable to satisfy the said Decree issued in CMCC 874 of 2004 on the ground of discovery of new and important evidence. They averred that they had received a letter together with accompanying documents from the Insurance Regulatory authority (IRA) affirming the transfer of business from the Appellant to the 2nd Respondent and that the 2nd Respondent was thus liable to settle the decree. The Subordinate Court, in the Ruling, did not agree with the 1st Respondents contention that the information sought to be produced could not have been discovered before the conclusion of the trial even with exercise of due diligence. It agreed with the 2nd Respondent that the 1st Respondents did not conduct due diligence hence their failure to place before court all the relevant material. That the issue the transfer of business is a matter of public knowledge whose records have been in the public domain.

3. The Subordinate Court held that the reason why the 1st Respondents sued the 2nd Respondent was because they had information about the transfer of insurance business. It stated that it was too late in the day for the 1st Respondents to seek to introduce new evidence which they could easily have obtained before the conclusion of their case. Further, that the transfer of business which the 1st Respondents sought to rely on was between Pan Africa General Insurance Limited and the 2nd Respondent and not Pan Africa Insurance Company Limited (the Appellant) as discerned from the documents filed by both the 1st Respondents and the 2nd Respondent and that Pan Africa General Insurance Limited is a distinct and separate legal entity from the Appellant.

4. According to the Subordinate Court, the 1st Respondents appeared to have confused these two legal personalities and that even if the court were to allow the application for review, the 2nd Respondent would still not be found liable on the basis of the available documentation as it did not take over any insurance business from the Appellant. On the basis of these findings, the Subordinate Court dismissed 1st Respondents' application.

5. Being dissatisfied with the Ruling, the Appellant presents this appeal which is grounded in the memorandum of appeal dated 07.07.2020. The appeal has been canvassed by way of written submissions which I have considered and will make relevant references to in my analysis and determination below

Analysis and Determination

6. It is well established that an appellate court will not interfere with the decision of the trial court exercising its discretion unless it is satisfied that the said court in exercising its discretion has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* Nrb CA Civil Appeal No. 36 of 1983 [1985] eKLR).

7. For a party to succeed in an application for review, it must bring itself within the ambit of section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 of the *Civil Procedure Rules*. As such, it is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason. As stated, the 1st Respondents anchored their application on the discovery of new and important evidence which after due diligence was not within their knowledge and could not be produced before.

8. On the ground of discovery of new information, the Court of Appeal in *Rose Kaiza v Angelo Mpanju Kaiza* [2009] eKLR held as follows:

> The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is
>
> ".....discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed....."
>
> The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the *Indian Civil Procedure Code,* 15th Edition at page 2726, thus:
>
> "Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

9. I have gone through the record and I do not find any abuse of discretion by the Subordinate Court in dismissing the 1st Respondents' application for review for a number of reasons. First, I note that the 1st Respondents' request for the information from IRA was only sought after the judgment. This was an implied admission of lack of diligence as the 1st Respondents clearly would have sought this information before the judgment. Second, going through the response from IRA, it appears the information sought by the 1st Respondents had always been with the IRA which then again fortifies the 1st Respondents' lack of diligence. The 1st Respondents were in a position to get this information before but they failed to do so. Third, I agree with the Subordinate Court that the said information does not prove the existence of the facts alleged by the 1st Respondents. The 2nd Respondent assumed the debts and liabilities of Pan Africa General Insurance Limited and not the Appellant herein which on the face of it are two different legal entities and there was no evidence that the two are one and the same. The Appellant admits in its submissions that the two entities are not the same as the court in *Mediplus Services Limited v Pan Africa Insurance Company Limited & another* [2013] eKLR found that the Appellant transferred its general insurance business to Pan Africa General Insurance Limited. It is also important to note that the Appellant did not file any response and/or submissions before the court in respect of the 1st Respondents' application. Thus, the Subordinate Court did not have the benefit of its submission that the Appellant transferred its general insurance business to Pan-Africa General Insurance Limited which later merged with the 2nd Respondent to form NEWCO Limited and subsequently to APA Insurance Company Limited. Further still, the Appellant did not file any appeal against the judgment of 10.11.2017 where it was found liable to pay the decretal sum and that this position still remains. In all these, the Appellant can only have itself to blame.

10. I find and hold that the trial magistrate correctly applied the principles for an application for review hence this appeal must fail.

Disposition

11. The appeal is dismissed. The Appellant shall pay the 1st Respondent's' costs assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JULY 2024.

D. S. MAJANJA

JUDGE