



REPUBLIC OF KENYA



KENYA LAW
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**Ongondo v APA Insurance Company Limited (Civil Case 61 of 2018)
[2023] KEHC 18780 (KLR) (Civ) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 61 OF 2018

AN ONGERI, J

JUNE 19, 2023

BETWEEN

GEOFFREY OTIENO ONGONDO PLAINTIFF

AND

APA INSURANCE COMPANY LIMITED DEFENDANT

JUDGMENT

1. The plaintiff in this case Geoffrey Otieno Ongondo (hereafter referred to as the plaintiff only) was involved in an accident on 18/8/2003 while traveling in motor vehicle registration no. KAN 821Z owned by Kenya Bus Services Limited and he sustained serious injuries.
2. The plaintiff subsequently filed HCCC No. 767 of 2004 and he was awarded damage of ksh.7.163,183 together with costs of the suit taxed at ksh.185,487 and further court fees assessed at ksh.64,150 making a total of kshs.7,412,820/=.
3. At the material time of the accident, motor vehicle registration no. KAN 821Z in which the plaintiff was travelling was insured by Pan African Insurance Company Limited *vide* policy no P/NO 010/xx0/1/000xxx/xx/0xx.
4. In his plaint filed in this case dated March 8, 2017, the plaintiff has sued APA Insurance Company Limited in its capacity as the successor in title to Pan African Insurance Company Limited following the transfer and/or merger of General Insurance Business to the defendant.
5. The plaintiff avers in the said plaint that he caused the requisite statutory notice under the provisions of the *Insurance (Motor Vehicle Third Party Risk) Act* cap 405 of the Laws of Kenya to be served upon Pan African Insurance Company Limited.
6. The defendant filed a defence dated 21/9/2008 denying the plaintiff's claim.



7. In the said defence the defendant averred that it is a total stranger to the plaintiff's claim and further that the judgment in High Court Civil Case no. 767 of 2004 entered on 21/9/2008 could have possibly been a business for transfer from Pan African Insurance Company Limited to the defendant.
8. The defendant further stated in their defence that it was never served with any statutory notice before the commencement of the primary suit and further that the claim made by the plaintiff greatly surpassed the statutory limit of ksh.3,000,000.
9. In his witness statement filed in court on 9/3/2017 dated 8/3/2017, the plaintiff stated that on 18/8/2003 he was involved in a traffic accident involving motor vehicle registration no. KAN 821Z owned by Kenya Bus Service.
10. At the material time the said motor vehicle was insured by Pan African Insurance Company.
11. The plaintiff said he caused the requisite statutory notice under the provisions of the Insurance (Motor Vehicle 3rd Party Risk) Cap 405 of the Laws of Kenya to be served upon Pan African Insurance Company who thereupon took the defence of the suit for and on behalf of the insured.
12. The plaintiff stated in his written statement that on or about 10/7/2004, he instituted Civil Suit no. 767 of 2004 and on 21/9/2008 he was awarded general damages for pain and suffering of kshs.7,163,831 plus taxed costs of kshs.185,487.70 and further court fees of ksh.64,150/=.
13. It is stated in his written statement that on 6/8/2009, he made a demand for payment of the decretal sum to the Pan African Insurance which demand was ignored.
14. The plaintiff further said that general accident business of Pan African Insurance was transferred to APA Insurance Company Limited the defendants in this case.
15. He said the defendant is under a statutory obligation to settle the said amount.
16. The case proceeded by *viva voce* evidence, the plaintiff adopted his statement as his evidence in chief. The plaintiff who testified as PW 2 said he filed this declaratory suit to compel the defendant to pay him the decretal sum he was awarded in HCCC no. 767 of 2004 amounting to ksh.7,412,820 inclusive of costs and further court fees.
17. The plaintiff's witness Wilson Wachira Ndungu (PW1), from Insurance Regulators Authority (IRA) said that Pan Africa Insurance Company originally operated as a composite insurance company separated its business in 2003 into 2 separate businesses namely;
 - i. General Insurance for short term insurance and
 - ii. Life Insurance for long term insurance.
18. Further that general insurance in 2003 was taken over by Pan Africa General Insurance which upon merger with Appolo Insurance Company transferred to a company called Newco and changed its name to APA Insurance Company Limited.
19. PW 1's evidence was that the defendant herein is the successor in title as far as general insurance which covers insurance of motor vehicles is concerned and that the defendant is liable for all claims either against Pan Africa Insurance Company Limited or Newco.
20. The Defendant called one witness, Rena Welemba, DW 1 who works with the defendant on as a legal officer who said that the defendant has never been involved in any insurance contract or merger with any 3rd party relating to motor vehicle registration no. KAN 821Z.



21. She stated that the documents supplied by the plaintiff demonstrate that the company with which the defendant had dealings with was Pan African General Insurance Limited and not Pan Africa Insurance Company Limited as alleged by the plaintiff.
22. DW 1 produced a certificate of change of name of Pan Africa Insurance Company Limited to Pan Africa Insurance Holding Limited.
23. DW 1 further said her assertion that the plaintiff only dealt with Pan Africa General Insurance Limited and not Pan Africa Insurance Company Limited is supported by Gazette notice no. 7928 dated 28/10/2003 which is a Notice of Business Transfer between Pan Africa General Insurance Limited and APA Insurance Limited.
24. DW 1 said the defendant is not legally or otherwise liable to settle the claim arising from HCCC no. 767 of 2008 since the defendant has never been and cannot be construed to be the insurer of the owner of motor vehicle registration no. KAN 821Z within the meaning of section 10 of the said vehicle 3rd party risk.
25. The plaintiff filed written submissions in which he stated that the defendant herein is the successor in title of Pan Africa Insurance Company.
26. The plaintiff submitted that PW 1 Wilson Wachira Ndungu from Insurance Regulators Authority (IRA) said that Pan Africa Insurance Company originally operated as a composite insurance company separated its business in 2003 into 2 separate businesses namely;
 - iii. General Insurance for short term insurance and
 - iv. Life Insurance for long term insurance.
27. Further that general insurance in 2003 was taken over by Pan Africa General Insurance which upon merger with Appolo Insurance Company transferred to a company called Newco changed its name to APA Insurance Company Limited.
28. PW 1's evidence was that the defendant herein is the successor in title as far as general insurance which covers insurance of motor vehicles is concerned and that the defendant is liable for all claims either against Pan Africa Insurance Company Limited or Newco.
29. The plaintiff relied on the case of *HM v Pan African Insurance* where the court held as follows;

“substantially all the General Insurance Business of Pan African Insurance Company Ltd (the 1st Defendant) was transferred to Pan African General Insurance Company Ltd. Now then it is admitted that the latter Company subsequently merged with Apollo Insurance Company Ltd to form Newco Limited. As already stated Newco Limited changed its name to APA Limited (The 2nd Defendant). The Notice of Transfer of Business to Newco Limited was published on 28th October 2003. I hold and find that when Pan Africa General Insurance Company Ltd merged with Apollo Insurance Co. Ltd to form the new company it took with it any General Insurance Business it had taken up from Pan African Insurance Company.”
30. The plaintiff also submitted that his claim is not subject to limitation of ksh.3,000,000. He submitted that section 5(b)(iv) of *Insurance (Motor Vehicle 3rdParty Risks) Act* was introduced through section 34 of the *Finance Act 2006* and it commenced on 1/1/2007 and that is after the cause of action in this case arose on 18/8/2003.



31. The defendant opposed the plaintiff's submissions and submitted that the plaintiff pleaded in paragraph 4 of the plaint that the defendant is sued as the successor in title of Pan Africa Insurance Limited following an alleged transfer and/or merger of General Insurance Business by Pan Africa Insurance Company Limited to the defendant and yet there is no evidence to that effect.
32. The defendant further submitted that the oral evidence of the plaintiff and his witness was completely at variance with the pleadings and that there is no evidence on which the evidence about Pan Africa General Insurance Limited can stand on.
33. The defendant also submitted that there no proper service of notice upon the defendant as required under section 10(2) of Cap 405.
34. Further that the plaintiff's claim herein is barred by the provisions of the transfer to Business Act.
35. The defendant finally submitted that the plaintiff's claim is subjected to the limit of kshs.3,000,000 of a claim by one person as set out in Section 5(b) (iv) of cap 405 Laws of Kenya.
36. The issues for determination in this case areas follows;
 - i. Whether the plaintiff is entitled to the declaratory orders he is seeking against the defendant.
 - ii. Whether the defendant is liable to pay the plaintiff the decretal sum awarded to the plaintiff in HCCC 767 of 2004.
 - iii. Who pay the costs of the suit?
37. On the issue as to whether the plaintiff is entitled to the declaratory orders he is seeking, I find that there is evidence that the defendant was called upon to pay the decretal sum for reasons that the defendant assumed the legal obligations of Pan African Insurance Company Limited.
38. The plaintiff served the requisite notice upon Pan African Insurance Limited.
39. The Defendant denied the plaintiff's claim and said that that the defendant has never been involved in any insurance contract or merger with any 3rd party relating to motor vehicle registration no. KAN 821Z.
40. I rely on the case of *H M v Pan Africa Insurance Co. Ltd & another* [2015] eKLR where the High Court held as follows;

“..substantially all the General Insurance Business of Pan African Insurance Company Ltd (the 1st Defendant) was transferred to Pan African General Insurance Company Ltd. Now then it is admitted that the latter Company subsequently merged with Apollo Insurance Company Ltd to form Newco Limited. As already stated Newco Limited changed its name to APA Limited (The 2nd Defendant). The Notice of Transfer of Business to Newco Limited was published on 28th October 2003. I hold and find that when Pan Africa General Insurance Company Ltd merged with Apollo Insurance Co. Ltd to form the new company it took with it any General Insurance Business it had taken up from Pan African Insurance Company.”
41. I find that the plaintiff is entitled to the declaratory orders. I also find that the cause of action accrued on 18th August 2003 long before Section 5(b) (iv) which limits liability came into operation on 1st January 2007 and therefore the plaintiff's claim is not subject to the limitation of Kshs. 3,000,000 per claim.



- 42. On the issue as to whether the plaintiff is entitled to the decretal sum I find that the answer is in the affirmative and I order that the same be paid to the plaintiff.
- 43. Judgment be and is hereby entered in favor of the plaintiff against the defendant in the sum of kshs.7,412,820.
- 44. On the issue as to who pays the costs of this suit, it is trite law that costs follow the event.
- 45. The defendant to pay the costs of this suit and interest from the date of filing this suit until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF JUNE, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

