



**Vugusu v APA Insurance Company Limited (Civil Appeal E112 of 2017)  
[2024] KEHC 11756 (KLR) (Civ) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11756 (KLR)

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

**CIVIL**

**CIVIL APPEAL E112 OF 2017**

**JM NANG'EA, J**

**OCTOBER 4, 2024**

**BETWEEN**

**JESSICA MUHONJA VUGUSU ..... APPELLANT**

**AND**

**APA INSURANCE COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal from the judgement of the Chief Magistrate's  
court at Nairobi Milimani Commercial Courts in Civil Suit No.  
6111of 2012 delivered by Hon. P. Muholi- RM on 15/2/2017)*

**JUDGMENT**

**Grounds of Appeal and reliefs sought.**

1. By a Memorandum of Appeal filed on 14/3/2017, the appellant faults the said trial court's judgment on grounds that may be summarized as hereunder:
  - a. That the learned trial magistrate erred in law and fact by failing to appreciate that the respondent did not raise a substantial defence to the suit before the lower court.
  - b. That the learned trial magistrate erred in law and fact by basing his decision on extraneous matters not placed before him.
  - c. That the learned trial magistrate erred in law and fact by failing to appreciate the law and principles applicable to amendment of pleadings and not taking into account consensual oral amendment of the plaint made on 26/8/2015.

And



- d. That the learned trial magistrate erred in law and fact by failing to take into account that the respondent is a successor of Pan African Insurance Company Limited.
2. The appellant therefore prays that:
    - a) The appeal be allowed and the contempt be quashed and set aside (sic).
    - b) In the alternative, the suit be heard de novo before another court.
    - c) The costs of the appeal be allowed.
    - d) Any other order (s) as the court may deem fit be granted.

### **Analysis and determination.**

3. Learned Counsel for the parties filed submissions which I have perused together with the trial court's record. In the impugned decision, the trial magistrate dismissed the appellant's claim against the respondent with costs. In the suit before the lower court as amended, the appellant sued the respondent in the above mentioned Civil Suit No. 611 of 2012 ("the declaratory suit") for among other reliefs a declaration that the latter is liable to satisfy judgement in Kapsabet RMCC NO. 350 of 2005 ("the primary suit"). She had complained of suffering bodily injuries owing to careless and/ or negligent driving of the latter's motor vehicle registration number KAM 982 C in which she was a passenger. This vehicle was at the material time allegedly insured by Pan African Insurance Company limited as per the police abstract report of the accident dated 9/12/2003 exhibited in the primary suit against third party risks under the *Insurance ( Motor Vehicle Third Party Risks) Act* vide Policy No. P/N0. 0I0/0810/1/000004/2001/04. The respondent obtained a decree in the sum of Ksh. 294,948 and a certificate of costs for Ksh. 50,480. The appellant brought the declaratory suit against the respondent as the accident vehicle's insurer to enforce the his decree and fully enjoy the fruits of his litigation.
4. The respondent filed defence dated 22/10/2012 attacking the declaratory suit as misplaced, bad in law, incompetent and otherwise an abuse of the court process. It traversed the claim of occurrence of the accident giving rise to the cause of action in the primary suit. Moreover, the respondent denies liability to compensate the appellant contending that it is a stranger to the alleged insurance policy in respect of the motor vehicle in issue and that, in any event, it was not given notice of institution of the primary suit. The sum claimed in the declaratory suit is therefore refuted and the trial court was urged to dismiss the suit with costs.
5. Upon full hearing of declaratory suit, the lower court dismissed the suit with costs for two reasons namely, that the motor vehicle registration number KAM 282 C alleged to have been insured by the respondent as averred in the primary suit is different from the motor vehicle registration number KAM 982 C alluded to in the police abstract report. Secondly, the trial court observed that the appellant had "not described the defendant (read the respondent) as a successor but as an insurer therefore what is proved is different from what has been pleaded." (sic).
6. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the lower court and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself (see case law in *Selle v Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd v Oakdale Commodities Ltd* (1997) eKLR among many other decided cases reiterating these principles. The Court of Appeal for East Africa in *Peters -v- Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:"



- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
7. The appellant’s advocates submit that the appellant in fact orally amended the suit before the lower court on 26/8/2015 to state the registration particulars of the accident vehicle as KAM 982 C instead of KAM 282 C as per the plaint. Counsel contend that the trial court thus misdirected itself on account of a typographical error which was corrected.
  8. Regarding the second reason for dismissal of the declaratory suit, the appellant’s Counsel told the court that their client had brought to the trial court’s attention that the respondent had taken over all the legal obligations and liabilities of Pan African Insurance Company Limited as confirmed in the Court of Appeal Case of APA Insurance Company Limited V. Zainabu Ali Ruwa being Civil Appeal No. 82 of 2008 relied upon by the appellant in her submissions before the lower court. The superior court in that decision held that the respondent had admitted in its defence in the case that it had assumed the legal obligations of Pan African Insurance Company Limited which include its liability to satisfy lawful decrees in respect of insurance policies issued pursuant to the *Insurance (Motor Vehicles Third Party risks) Act*. The court is therefore told that since the accident vehicle in question was insured by Pan African Insurance Company Limited, the respondent is duty bound to liquidate the decretal sum in the primary suit as prayed in the declaratory suit. Moreover, Counsel submit citing the provisions of Order 1 Rule 9 of the *Civil Procedure Rules 2010* that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.
  9. The appellant therefore asserts that the respondent’ defence in the declaratory suit does not raise triable issues in that it consists of mere denials and ought to have been struck out. I was referred to the Court of Appeal decision in the famous case of *D.T Dobie & Company (Kenya) Limited V. Joseph Mbaria Muchina & Another* ( 1980) eKLR where it was laid down that “ no suit ought to be summarily dismissed unless it appears to be so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment”. The superior court opined that if a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of Justice ought not to act without the full facts of the case before it.
  10. The respondent does not seem to have filed submissions.
  11. The Court of Appeal decision in *Blue Shield Insurance Company Ltd V. Joseph Mboya Oguttu* (2009) eKLR and *John Kagechu Muiruri T/A Muiruri Auto Parts & 5 Others V. Kibumo Property Developers (K) Ltd* (2017) among many other superior courts decisions reiterated the same principles as alluded to in the case of *D. T Dobie supra*.

### **Determination.**

12. As gleaned from the record, the appellant’s suit was indeed amended on 26/8/2015 by consent to describe the registration particulars of the accident vehicle as stated. It is also indisputable that the respondent had confirmed that it had taken up the rights and obligations of Pan African Insurance Company Limited including assuming liability to satisfy decretal sums as in the primary suit. It is thus



unfortunate that the learned trial magistrate did not carefully peruse the record of the declaratory suit before rendering himself as he did. This was a serious misdirection that led to an erroneous decision.

13. The appeal therefore succeeds. The lower court's order dismissing the declaratory suit is hereby set aside and substituted with judgement for the appellant in the sum of Kshs.294,948 and Ksh. 50,480 being the decretal amount and certified costs in the primary suit respectively. The appellant will also have the costs of this appeal.

14. Judgement accordingly.

**JUDGEMENT DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF OCTOBER 2024 IN THE PRESENCE OF :**

The Appellant's Advocate,

The Respondent's Advocate,

The Court Assistant,

.....

**J.M NANG'EA**

**JUDGE**

