



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 125 OF 2018

APA INSURANCE LTD.....APPELLANT

-VERSUS-

CARLO VASTA.....RESPONDENT

(Being an appeal from the Judgment and Order of Honourable JULIUS NANG'EA (C.M) delivered on the 19th July,2012 in MOMBASA CMCC.NO.204 OF 2016 between CARLO VASTA VRS APA INSURANCE LIMITED)

JUDGMENT

1. The Respondent herein was the Plaintiff in the Lower court suit being CMCC No. 204 of 2016 which is the subject matter of the instant appeal while the Respondent was the Defendant therein. In that suit, the Respondent vide his further amended Plaint dated 4th June, 2012 sought as against the Appellant judgment for Kshs.3,419,741.15 together with interests at court rates, costs and interest of the suit.
2. The Plaintiff's gravamen therein was that he was the insured of Pan African Insurance Company having insured his Motor Vehicle Registration number KAD 961F vide a policy of Insurance Number MPCMO2375D which was valid for a period of one year, commencing on 17th May, 1994 and expiring on 16th May 1995. That on 18th December, 1994 during the currency of the said insurance policy the Plaintiff's Motor vehicle was involved in a road traffic accident causing injuries to one Joseph Thuku.
3. It is said that the said Joseph Thuku brought an action against the Respondent herein to wit Mombasa CMCC No. 991 of 1995. Consequently Judgment was entered against the Respondent but his insurer, M/s Pan Africa Insurance Company Limited failed to indemnify him against the claim by Joseph Thuku as a result of which his insured motor vehicle Registration Number KAD 480N was sold and or auctioned to recover the decretal sum of over Kshs.400,000/=.
4. The Respondent then instituted a declaratory suit against his insurers Pan African Insurance Company Ltd vide Mombasa CMCC No. 2922 of 2003. After hearing the parties the court granted *inter alia* the following orders; a declaration that M/s Pan African Insurance Ltd was statutorily bound to indemnify the Respondent against the claim brought against him by the third party; a declaration that failure by his insurers to indemnify him was in breach of its statutory duty. The Respondent was further awarded Kshs.1,200,000/= being the value of his auctioned motor vehicle, Kshs.200,000/= for loss of use and Kshs.250,000/= exemplary damages. Costs and interests of the suit were also awarded to the Respondent.
5. According to the Respondent, M/s Pan Africa General Insurance Limited took over as a going concern the general insurance business of Pan Africa Insurance Company Limited. Further that in 2003, Pan Africa General Insurance Limited merged with Apollo Insurance Company Limited to form APA Insurance Limited. In a nutshell, the Respondent alleges that the Appellant herein assumed liabilities of Pan Africa General Insurance Ltd who had also assumed liabilities of his insurers, Pan Africa Insurance Co. Ltd.
6. The Appellant, also the defendant in CMCC No. 204 of 2016 on its part filed a written statement of defence and denied the Plaintiff's claim in total without prejudice and contended that it did not assume the liabilities of Pan Africa Insurance Company Limited who were the Plaintiff's insurers and as such the Plaintiff's suit cannot be maintained and should be struck out with costs.
7. During the hearing ,the Plaintiff had two witnesses in support of his case. The Plaintiff testified as PW1. He adopted his witness statement as his evidence in chief which reiterates the contents of the Plaint as elucidated above.
8. PW2 ,was Wilson Wachira Ndung's, an officer of the Insurance Regulatory Authority in Nairobi. He told the court that he was head of Composite Insurance supervision. It was his evidence that Pan Africa Insurance Company ceased its operations in 2001 after it split into two. That is, Pan Africa General Insurance Ltd and Pan Africa Life Assurance Ltd. That the former took over the assets and liabilities of its predecessor's general business and further that the changes were effected vide Gazette Notice No. 1758 of 2003. Pw2 further testified that Pan Africa General Insurance Ltd merged with Apollo Insurance Co. Ltd to form a company Known as Newco which later changed its names to APA Insurance Ltd, the Appellant herein. When cross examined, he told the court that his department was not in existence when the said merger happened in 2001 and 2003.

9. Paul Kibet testified as the only Defence witness. He is the Appellant's legal officer. He also relied on his statement of defence dated 30/6/2017 as evidence in chief. He conceded that the Appellant herein was formed as a result of merger between Pan Africa General Insurance Company and Apollo Insurance Company. However, his bone contention was that Pan Africa General Insurance Company is a separate and distinct entity from the Respondent's former insurers Pan Africa Insurance Company. He averred that the latter is a stranger to the Appellant whence it never transferred its assets and/or liabilities to the Appellants.

10. After hearing both sides and considering the evidence presented before it, the trial court held in favour of the Plaintiff in his Judgment. The trial magistrate held that:-

...From the evidence of PW2, the Defendant Company has taken over all the liabilities of Pan Africa Insurance Company Limited which previously insured the Plaintiff. The liabilities must include the decretal sum in the enforcement suit.

...it follows that the Defendant is liable to settle the decree in the enforcement suit on a balance of probability. Prayers (a) (b) and (c) of the further amended plaint are granted. Interest shall be computed at court rates from the date of filing suit. Judgment entered accordingly.

11. Being aggrieved by the above Judgment, the Defendant now the Appellant, has preferred an appeal to this court. In its Memorandum of Appeal dated 24th July, 2018, the Appellant has appealed against the above Judgment on grounds that:-

a) That the learned trial magistrate erred in law and in fact by failing to appreciate the inherent duty of a court to administer and ensure that justice is done to parties when seized of jurisdiction to hear and determine a matter before it regardless of other considerations.

b) That the learned trial magistrate erred in law and in fact by failing to appreciate the cardinal principal of the law that a judgment issued against a non-existent party at law is null and void and unenforceable.

c) That the learned trial magistrate erred in law and in fact by reaching a determination that it had no jurisdiction to interfere with the decision of the court that heard and determined the enforcement suit and issued the decree thereof, when to all intents and purposes the same was null and void and unenforceable.

d) That the learned trial magistrate erred in law and in fact by failing to determine that the Respondent was at fault for maintaining the enforcement suit against a party whom it knew had ceased to exist at law and thus literally obtaining judgment through back door, to the detriment of the Appellant who did not have the benefit of defending herself.

e) That the learned trial magistrate erred in law and in fact by finding for the Respondent and by assuming that the Respondent had satisfied the decree in the original suit filed against him to warrant compensation when no evidence to that effect had been led nor adduced, thus effectively descended into arena of litigation and further by misapprehending the fact that our system of jurisprudence is adversarial in nature.

f) That the learned trial magistrate erred in law and in fact by not clearly setting out the issues for determination before court, the decision thereon and the reasons for this decision and thereby failed the test set out under the law for defended judgments.

g) That the learned trial magistrate erred in law and in fact by treating PW2'S evidence as that of an expert witness and thereafter erred in determining that the Appellant had taken over all the liabilities of Pan Africa Insurance Company Limited which had initially insured the Respondent and thus reaching an erroneous decision.

h) That the learned trial magistrate erred in law and in fact by finally determining that the Appellant is liable to settle the decree in the enforcement suit on a balance of probability when the test to be applied required a higher standard in the circumstance of the case which could only be determined in favour of the Respondent upon roving all alleged material facts.

i) That the learned trial magistrate erred in law and in fact by allowing the Appellant's suit in its entirety with attendant costs and interest in the light of insufficient evidence tendered by the respondent before the trial court.

12. When the appeal came before court on 20th September, 2019 ,it was agreed that the same be argued through written submissions. On 25/11/2019, both counsels representing the both parties confirmed filing their submissions which I have read and considered together with the authorities cited therein.

Analysis and Determination

13. It is the duty of this court as a first appellate court to evaluate afresh the evidence adduced at the lower court and draw its own conclusions albeit always bearing in mind that it neither saw nor heard the witnesses and should therefore make due allowance in that respect (see **Selle & Another Vs Associated Motor Boat Co. Limited & Others (1968) EA 123**).

14. It is also the position of the law that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial court is shown, demonstrably, to have acted on wrong principles in reaching its findings (See A.R.W. Hanox **JA in Ephantus Mwangi & another Vs Duncan Wambugu (1983) 2 KCA 100** (also reported in (1982=88)

15. I have considered the proceedings before the lower court, the judgment, the grounds raised in the Memorandum of Appeal and respective submissions by counsel representing both parties. The issues which stand out for determination are as follows;

a) *whether the trial Magistrate was correct in finding that the Appellant invariably assumed liabilities of Pan Africa Insurance Company Limited; the Respondent erstwhile insurers*

b) *Whether the trial court could interfere with the decision in the enforcement suit*

c) *Who should bear the cost of the appeal*

16. In this court's opinion, there was no substantial dispute that the Respondent had insured his motor vehicle registration number KAD 961F with Pan Africa Insurance Company vide policy number MPCMO2375D. There was no further dispute that the insurance cover had not yet expired at the time of the said accident. The said insurer failed to indemnify the Respondent when his motor vehicle was involved in a road accident and subsequently the Respondent sued. I agree with the trial magistrate's opinion that had the insurer indemnified the Respondent, his motor vehicle could not have been auctioned to settle the decree obtained against him.

17. I say this because the said Insurance Company was obliged to satisfy the decree issued against the Respondent in Mombasa CMCC No. 991 of 1995 in terms of Section 10 of the Insurance (Motor Vehicles third party risks) Act (Cap 405 LOK) as long as the necessary statutory notice was issued to the insurer and the policy was valid.

18. There was no dispute or substantial dispute that a statutory notice was issued to Pan African Insurance Co. Ltd and that the existing policy was valid. I find in the affirmative that the trial court in the enforcement suit was right in finding that all the misfortunes that befell the Respondent was as a result of his insurers breach of duty and ought to recompense him all the consequential loss thereon.

19. I also find the allegations by the Appellant that the enforcement suit was not defended because upon perusal of the court record, it is evident that the firm of Degwa & Associates Advocates was on record for the defendant which firm had filed a statement of defence on 18/9/2002.

20. I also find in the affirmative that the trial court was not ceased with jurisdiction to interfere with the Judgment of 29/8/2008 in the enforcement suit because the only way the Judgment could be reconsidered is by appeal to the superior court.

21. However, the Respondent sued the Appellant for purposes of satisfying the judgment entered in his favour in the enforcement suit against his erstwhile insurer, Pan African Insurance Co. Ltd arguing that the Appellant took over the liabilities and obligation of Pan African Insurance Co. Ltd., an allegation which was vehemently denied by the appellant arguing that it took over the liabilities and obligations of a company known as Pan African General Insurance Ltd and a company known as Apollo Insurance Co. Ltd which merged to create APA Insurance Ltd.

22. The sole issue for determination by the trial court was therefore whether Pan African Insurance Co. Ltd. was succeeded or taken over by the appellant company so that the appellant be obliged to satisfy the decree obtained by the respondent in the enforcement suit.

23. This is also the bone of contention in this appeal. The learned trial magistrate considered the point and observed that the Respondent's witness (PW2) stated that Pan Africa Insurance Company was the predecessor of Pan Africa General Company after the former had split into two. The latter then took over the operations, assets and liabilities of the former and as such the liabilities were transferred to the Appellant. The learned trial magistrate further observed that the copies of Gazette Notices produced by the Respondent more especially Gazette Notice no. 1758, produced as exhibit 2, which stated that the Pan Africa Insurance Company transferred its general business to Pan African General Company. The respondent further produced a Gazette Notice No 8126 of 14th November 2003 as proof that Pan African General Company had its business transferred to a newly formed company called NEWCO which then changed name to APA insurance company.

24. Further in the case of *APA Insurance Company Limited v Benadah Irusa & another [2014] eKLR* the court held:

I am satisfied that the appellant took over the liabilities of PAN AFRICAN INSURANCE COMPANY LIMITED. PAN AFRICA GENERAL INSURANCE LIMITED is not different from PAN AFRICAN INSURANCE COMPANY LIMITED. There were no registration certificates that were produced to differentiate the two companies. The appellant is simply relying on technicalities that were already dealt with in the case of APA Insurance Company Limited Vs Zainabu Ali Ruwa. In that case the appellant admitted having taken over the legal obligations of PAN AFRICA INSURANCE COMPANY LIMITED. The issue of PAN AFRICA GENERAL INSURANCE LIMITED did not arise.

25. It therefore follows that the appellant merged with Pan Africa General Company and consequently inherited the liabilities of Pan African Insurance Company. The foregoing observations were made on the basis of the evidence presented before the trial court and this court, having re-visited that evidence finds no good reason to disagree with the observations and findings reached by the learned trial magistrate.

26. Consequently, this appeal is devoid of merit and is hereby dismissed with costs to the Respondent

It is so order.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2020.

D.O CHEPKWONY.

JUDGE.

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes