



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 26 OF 2008

APA INSURANCE COMPANY.....APPELLANT

VERSUS

DOLPHINE ATEMBA OPANDA.....RESPONDENT

(An appeal arising from the ruling and decree of Mrs. A. Mongare the Learned Resident Magistrate delivered on the 19th November 2007 in Eldoret CMCC No. 443 of 2007).

JUDGMENT

1. Two appeals arose from the decision and judgment of the Resident Magistrate at Eldoret, in Eldoret CMCC No. 443 of 2007 and Eldoret CMCC No. 442 of 2007 respectively. The two appeals were consolidated by the order of the court on 10th April, 2018. The orders herein will therefore also abide in Civil Appeal No. 28 of 2008.
2. The two Respondents herein, **Dolphine Atemba Opanda and Janerose Wamunyolo Kasangaki**, had sued the Appellant, **APA Insurance Co. Ltd seeking** a declaration that the Appellant was liable to satisfy the decree in Eldoret CMCC No. 442 and 443 both of 2007. In the two cases, the Respondents were awarded damages against Kenya Bus Services Ltd in the sum of Kshs. 208,500/- and Kshs. 148,500/- respectively. The damages were awarded as a result of injuries suffered in a road traffic accident which occurred on 26th October, 2002 along the Eldoret/Webuye road.
3. The Learned trial magistrate ruled in favour of the Respondents in the declaratory suit thereby prompting this appeal by the Appellant. The appeal is premised on the grounds contained in the memorandum of appeal dated 13th March, 2008.
4. I have considered the grounds of appeal in light of the submissions filed by both sides. I have also reconsidered the evidence afresh as required of me as the first appellate court to arrive at my own conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses, which I did not.
5. From the evidence, there was no substantial dispute that the Respondents were passengers in a bus belonging to Kenya Bus Services Ltd, which was involved in a road traffic accident thereby occasioning bodily injuries to the Respondents. It is also not in dispute that the Respondents successfully instituted a suit for damages against the said bus company and were indeed awarded damages by the court.
6. At the material time of the accident, the bus company had taken a policy of invariance with a company known as Pan Africa Insurance Company Ltd. This was not disputed in the trial.
7. The Insurance Company was therefore obliged to satisfy the decree issued in favour of the Respondent in Eldoret CMCC No. 443 of 2007 in terms of **section 10** of the **Insurance (Motor Vehicles third party risks) Act (Cap 405 LOK)** so long as the necessary statutory notice was issued to the insurer and the policy was valid. There was no substantial dispute that a statutory notice was issued to Pan African Insurance Co. Ltd and that the existing policy was valid.
8. The Respondents sued the Appellant for purposes of satisfying the judgment entered in their favour against Kenya Bus Services Ltd. They argued that the Appellant took over the liabilities and obligations of Pan African Insurance Co. Ltd. This allegation was vehemently denied by the Appellant which argued that it took over the liabilities and obligations of a company known as Pan Africa General Insurance Ltd and a company known as Apollo Insurance Co. Ltd which merged to create APA Insurance Ltd.
9. The issue for determination by the trial court was therefore, whether Pan Africa Insurance Co. Ltd. was succeeded, or taken over by the Appellant Company, so that the Appellant was obliged to satisfy the decree obtained by the Respondent against Kenya Bus Services Ltd. This is also the bone of contention in this appeal.
10. The learned trial magistrate considered the point and observed that from the Appellant's documentary evidence, APA Insurance Ltd arose

out of a merger between Apollo Insurance Co. Ltd and Pan Africa General Insurance Company Ltd. This, they have argued was not similar to Pan Africa Insurance Co. Ltd.

11. The Appellant however failed to produce documentary evidence to prove that Pan Africa Insurance Co. Ltd and Pan Africa General Insurance Co. Ltd were separate and distinct legal entities from each other. The copies of gazette notices produced by the Appellant failed to demonstrate the difference between the aforementioned entities, and were indeed not conclusive proof that the two entities were distinct from each other.

12. In the instant case, the Appellant is obligated under **section 10(1)** of the **Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** to settle the Respondents' claims. The section provides thus:

“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

13. A copy of the Gazette Notice No. 8126 of 14th November, 2003 through which the Appellant herein took over the liability and obligations of Pan Africa General Insurance Co. Limited states in part:

“...the Companies have applied jointly to the Minister for Finance, through the Commissioner of Insurance, pursuant to section 113(1) of the Insurance Act, for approval for the transfer of the property, undertaking, assets and liabilities of their respective general insurance businesses to a new limited liability company...”

From the gazette notice, it is evident that the Appellant took over the property, undertaking, assets and liabilities of Pan Africa General Insurance Limited.

14. From the evidence presented before the trial court and which I have reevaluated, I find no good reason to disagree with the observations and findings reached by the learned trial magistrate that the Appellant is under an obligation to satisfy the decree in favour of the Respondent.

Consequently, I find that this appeal is devoid of merit and dismiss it with costs to the Respondents.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 1ST DAY OF OCTOBER 2018.

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H. A. OMONDI

HIGH COURT JUDGE