



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. 142 OF 2005

WANGA & CO. ADVOCATES.....RESPONDENT

VERSUS

APA INSURANCE COMPANY LTD.....APPLICANT

RULING

1). By its application dated 12-8-2008 and filed on 13-8-2008 the applicant/respondent prayed for the following reliefs:

- a. **that there be an order of consolidation of all the matters and related matters herein in respect to the accident involving motor vehicle registration number KAN 439 E and KAK 125 F on the 22nd July 2003 and the submissions and ruling made in this case do apply to miscellaneous case number 141, 140, 138, 147, 207, 220, 195, 223, 206, 166 and 142 all of 2005.**
- b. **that the Honourable court do find that the applicant is not liable to the respondent in respect of payments of the respondent's fees and that Kenya Bus Services Limited is liable to settle the said respondent's fees.**
- c. **Costs.**

2). The application is supported by the annexed affidavit of Elizabeth Koskei and further affidavits of Gerald Mutiso and Wilson Kalya. The gist of the application is that M/S Pan African General Insurance Company Limited and Apolo Insurance Company Limited Merged to form APA Insurance Company Limited vide a gazette notice No. 8126 dated 6-1-2003.

Apparently the respondent had acted on behalf of Kenya Bus Services Ltd who had been insured by Pan African Insurance Company Limited. The respondent from the replying affidavit of one Francis Omondi had defended the said bus company in several matters which are enumerated in the notice of motion. Subsequently after the aforesaid merger the respondent demanded its fees from the applicant, hence giving rise to this application.

3). From the parties pleadings it appears that there was a similar application Kisumu Miscellaneous Application No. 215 of 2005 where Justice Mwera (as he then was) ruled that the respondent was not liable to pay the applicant's fees. The matter went to the court of appeal where the learned Judges upheld Judge Mwera's decision.

4). What is not in dispute is that Pan African Insurance Company Limited insured Kenya Bus Services Ltd. What is not in dispute also is that the applicant received instructions from Kenya Bus Services Ltd

and it acted on it. Can it therefore be argued that the applicant herein is liable for the settlement of the respondent's fees? The gazette notice clearly was a merger between Apollo Insurance Company Ltd and Pan African General Insurance Company Limited. The said merger sought approval for the **“transfer of the property, undertaking, assets and liabilities of their respective general insurance business to a new limited liability company incorporated for the purpose under the Companies Act cap (486) laws of Kenya.....”**

5). I do not see how the new entity APA Insurance Company Ltd comes in. It never at any time gave instruction to the respondent. All the attachments in the replying affidavit of Mr. Omondi does not point to the applicant herein.

6). This position is buttressed by the decision by the Court of Appeal in upholding Judge Mwera's finding in **Civil Appeal No. 78 of 2009 Wanga & Co. Advocates -VS- APA Insurance Company Ltd** where it stated that:

“The other grounds of appeal argued before us in our view, relate to the finding by the High Court that the respondent was the product of a merger between Pan African General Insurance Company Limited and Apolo Insurance Company Ltd which had no relationship with Pan African Insurance Company Ltd which had previously offered Insurance cover to Kenya Bus Services Ltd. The learned Judge of the High Court held that Pan African Insurance Company and Pan African General Insurance Limited were separate legal entities. The learned Judge cannot be faulted on that finding as he, in our view, correctly applied a basic principle of Company Law. Liability of the respondent could not be implied by previous payments which as the respondent submitted could have been made in error. There was in legal parlance no privity of conflict between the appellants and the respondent and the respondent could not therefore be liable for the appellants fees”.

In light of the above observations I do not think that the applicant is liable to settle the respondents liabilities with Kenya Bus Services or Pan African Insurance Company Limited. Consequently, I do allow the application as prayed with cost to the applicant/respondent.

Dated, signed and delivered at Kisumu this 12th day of March, 2015.

H.K. CHEMITEI

JUDGE