



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**H.C. CIVIL CASE NO. 26 OF 2007**

H M..... PLAINTIFF

(Suing through her Father and next friend M O M)

VERSUS

1. PAN AFRICA INSURANCE CO. LTD

2. APA INSURANCE LTD.....DEFENDANTS

**JUDGMENT**

1. In a Plaint dated 6<sup>th</sup> September 2007, the Plaintiff seeks that the Defendants Satisfy the Decree in Mombasa HCCC No. 311 of 2002 H M (minor suing through her father and next friend) M O M Vs (1) Martin Anyange & (2) Kyalo Komu (the Mombasa Suit). The Decree is for a sum of Kshs. 1,519,218/-. The Plaintiff also seeks interest on this sum at Court rates from 16<sup>th</sup> December 2005 until payment in full and costs of the suit.
2. The Defendants filed a joint Statement of Defence in which the 2<sup>nd</sup> Defendant denied inheriting the liabilities of the 1<sup>st</sup> Defendant. It further denies being the insurers of the Defendants in the Mombasa suit. On another front, The Defendants aver that the Plaintiff did not issue the requisite Statutory Notice required by the Insurance (Motor Vehicles Third Party Risk) Act (Chapter 405 Laws of Kenya) In the premises the Defendants, take a position that they are not liable to satisfy the Decree arising from the Mombasa suit.
3. Through an Application dated 20<sup>th</sup> June 2008, the Plaintiff sought to have the Defence struck out and Judgment entered in her favour as prayed for in the Plaint. After considering that application, Onyancha, J dismissed it in a ruling delivered on 16<sup>th</sup> September 2010. The Learned Judge concluded that the,

**“filed Defence had raised valid triable issues which must go for trial.”**

4. In Directions agreed by the Parties before Muchemi, J, on 17<sup>th</sup> November 2011, the hearing of this matter was to be disposed of by way Affidavit Evidence. Those Directions were reinforced by a Consent Order dated 25<sup>th</sup> October 2013 in the following terms:-
  - i. **This matter be heard in Busia High Court for final determination.**
  - ii. **The matter be heard by way of affidavit evidence.**
  - iii. **The defendant’s further affidavit evidence dated 23<sup>rd</sup> September 2013 and Plaintiff’s further affidavit evidence dated 25<sup>th</sup> September 2013 to form part of Affidavit Evidence and be deemed as duly filed.**

This may have been because, as it will become apparent shortly, a substantial amount of the facts are not contested.

5. The Plaintiff, through her father and next friend M O M, swore an Evidence Affidavit on 21<sup>st</sup> February 2012 and filed on 22<sup>nd</sup> February 2012 and a further Affidavit sworn on 25<sup>th</sup> September 2013. For the Defendants, James Sijeny Wanyanga filed two Affidavits, one sworn on 7<sup>th</sup> May 2012 and the second on 23<sup>rd</sup> September 2013. Mr. Wanyanga was, at the time of making the Affidavits, the Legal Officer of the 2<sup>nd</sup> Defendant.
6. From the Affidavits of the Parties, some facts are agreed. On 11<sup>th</sup> January 2010, the Plaintiff was involved in a Road Traffic Accident in Kongowea, Mombasa as a consequence of which she sustained fairly serious injuries. The vehicle involved was motor vehicle Registration KAK 358A owned by one Martin Ayange (**hereinafter Martin**). At the time of the Accident the vehicle was insured by the 1<sup>st</sup> defendant under policy No. 010/089/000007/1999/07.
7. Having made a decision to sue for compensation, the Plaintiff through her then Advocate G.N. Namachanja & Co. Advocates, issued a Notice of Intention to sue pursuant to The Insurance (Motor Vehicle Insurance Third Party Risk) Act upon the 1<sup>st</sup> Defendant. Subsequently, the Plaintiff mounted the Mombasa suit vide a Plaint dated 14<sup>th</sup> September 2001. It is said that Judgment was on 16<sup>th</sup> December 2005 entered for the Plaintiff against Martin for the sum of Kshs, 1,266,708/- and costs were later taxed at Kshs. 166,000/- . In a Notice dated 17<sup>th</sup> March 2007, Counsel for the Plaintiff, now Ashioya & Co. Advocates, notified both the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants of the Judgment and Costs, and demanded payment. That was not to be, hence this suit. That Judgment and Decree have never been set aside.
8. In the Affidavits sworn on behalf of the Defendants, the issuance of the requisite notice under Chapter 405 by the Plaintiff upon the 1<sup>st</sup> Defendant was not contested. That line of Defence appears to have been abandoned. But stressed time and again in the Affidavits is that the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant are not one and the same thing. It was further stressed that the 1<sup>st</sup> Defendant did not merge with Appollo Insurance Co. Ltd to form the 2<sup>nd</sup> Defendant. The Affidavit Evidence was an attempt to demonstrate this.
9. The position of the 2<sup>nd</sup> defendant is that the Pan African General Insurance Company Ltd (not the 1<sup>st</sup> Plaintiff, Pan African Insurance Company Ltd) merged with Appollo Insurance Company Ltd to form Newco Limited. See Gazette No. No. 8126 of 6<sup>th</sup> November 2003 and Published on 14<sup>th</sup> November 2003. See also the Notice for Transfer of Business issued vide Gazette Notice No. 7928 dated 28<sup>th</sup> October 2003 and Published on 7<sup>th</sup> November 2003. Later, via a Special Resolution, Newco Ltd changed its name to APA Insurance Company Ltd (the 2<sup>nd</sup> Defendant). The Court was shown a Certificate of Change of Name (Certificate No. 100942) dated 1<sup>st</sup> December 2003 from Newco Ltd to APA Insurance Limited.
10. That is the short background to the matter. Emerging from this, the only issue for determination must surely be, whether APA Insurance Ltd is the Legal Successor of Pan African Insurance Co. Ltd in respect to the liability arising out of the Decree on the Mombasa Suit.
11. In arguing its position Counsel for the Defendant relied on two authorities being Kisumu H.C. Misc Civil Application No. 215 of 2005 **Wanga & Co. vs APA Insurance Co. Ltd** and Nairobi H.C. C 121 of 2003 **Mediplus Services Ltd Vs Pan African Insurance Co. Ltd & Another**. In the former decision Mwera J (as he then was) held-

**By the evidence of G.N. No. 8126(above) this court is satisfied that the Applicant Company was a result of Apollo Insurance Company Limited and Pan Africa General Insurance Company Limited transferring their businesses including assets and liabilities, to the Applicant. Pan Africa Insurance Company Limited was not part of this deal and whoever dealt with it when it existed e.g. Kenya Bus Services Limited should look elsewhere for accommodation.**

12. In the course of preparing my decision, I came across Legal Notice 1758 of 2003 of 25<sup>th</sup> February

2003 and published in the Kenya Gazette of 14<sup>th</sup> March 2003. Neither of the parties to this suit had brought this Notice to my attention yet I was certain that it would have a strong bearing on the outcome of this matter. For that reason I invited Counsel for both sides to address me on it. I gave a timeframe to receive such address. Only the Plaintiff's Counsel did so by filing further written submissions on 5<sup>th</sup> March 2015. At the time of writing this decision, I have not received any further submissions from the Defendants.

13. It is admitted by the Defendants that Pan African General Insurance Company Limited merged with Apollo Insurance Company Limited to form Newco Ltd whose name later changed to APA Insurance Limited. The repeated position of the Defendants is that Pan Africa Insurance Company Limited is not Pan Africa General Insurance and that APA Insurance has nothing whatsoever to do with the former (i.e. 1<sup>st</sup> Defendant). Is this really the true position?

14. To understand the fate of Pan Africa Insurance Company Ltd., one must look at the Gazette Notice No. 1758 dated 25<sup>th</sup> February 2003 and published on 14<sup>th</sup> March 2003. The Notice reads:-

## **THE INSURANCE ACT**

**(Cap 487, section 114(1)(a))**

### **TRANSFER OF GENERAL INSURANCE BUSINESS AND LONG TERM INSURANCE BUSINESS**

#### **Statutory Notice**

**NOTICE is given for and on behalf of Pan Africa Insurance Company Limited (“the Company”), and in accordance with section 114(1)(a) of the Insurance Act, Cap 487 of the Laws of Kenya, that pursuant to (1) a resolution of its members passed at an extraordinary general meeting held on 8<sup>th</sup> December, 2000, (2) a resolution of its board of directors passed on 20<sup>th</sup> August 2002, and (3) a sale and transfer of business agreement dated 30<sup>th</sup> September, 2002 (“the Sale and Transfer of business Agreement”), the Company has applied to the Minister for Finance through the Commissioner of Insurance, and pursuant to section 113(1) of the Insurance act, for approval for the transfer of-**

- a. Substantially all its general insurance business to Pan Africa General Insurance Limited, a limited liability company incorporated for the purpose ; and**
- b. Substantially all its long-term Insurance business to Pan Africa Life Assurance Limited, a limited liability company incorporated for the purpose;**

**In consideration of the issue of the shares in the capital of each of Pan Africa General Insurance Limited and Pan Africa Life Assurance Limited, respectively to the Company, in each case as at and with effect from 31<sup>st</sup> December, 2001, and in each case upon the terms and subject of the conditions of the sale and Transfer of Business Agreement.**

**Copies of the Sale and Transfer of Business Agreement, as well as of a statement setting out particulars of the transfers aforesaid including, in the case of the long-term insurance business, a report of an actually pursuant to section 113(3) of the Insurance Act, have been made available for Inspection at the registered office of the Company at Pan Africa House, Kenyatta Avenue, Nairobi, in accordance with section 114(1)(c ) of the Insurance Act, as well as the offices of the Commissioner of Insurance at Anniversary Towers, Monrovia Street, Nairobi, and at each of the following places of business of the Company.**

**Ambalal House, Nkuruma Road Mombasa. NDCU House Nyeri. Mache Plaza, Nakuru. Shabana Building, Kisii. Giddo Plaza, Nairobi-Eldoret Highway, Nakuru. Kenya Finance House, Tom Mboya Street, Meru. Al-Imran Plaza, Oginga Odinga Road, Kisumu. Red cross Building, Machakos. KVD Plaza, Oloo/Utalii Street, Eldoret. Mugo Gatungo Building, Embu. Thika Arcade, Kenyatta Highway, Thika.**

Any person including but not limited to, any employee, director or shareholder of the Company or any policy holder, who has reasonable grounds of believing that he might be adversely affected by the carrying out of the aforesaid scheme of transfer is invited, in accordance with section 114(2) of the Insurance Act, within thirty (30) days of the date of this notice, to make written or oral representations to the Minister for Finance, stating the grounds upon which he believes he would be adversely affected by the carrying out of the scheme of transfer.

Any queries may be directed to Mboya, Advocates, 7<sup>th</sup> Floor Nation Centre, Kimathi Street, Nairobi, P.O. Box 10818, Nairobi facsimile: 254(2) 342390, E-mail: Mboya@Mboya.co.ke

Dated the 25<sup>th</sup> February 2003.

CAROLE AYUGI

*For Mboya advocates*

15. That Notice was published under the provisions of Section 114(1)(a) of The Insurance Act (Chapter 487 Laws of Kenya) which provides that:-

1. **The Authority shall not determine an application under this Part unless-**
  - a. **Notice of the intention to apply for amalgamation or transfer, approved by the Authority for the purpose, has been published in the *Gazette* and in at least two newspapers published and circulating in Kenya;**

The part referred to in this section is part XI of the Act. An application under part XI of the Act is for Amalgamation of Two or more Insurers (Section 113(1)(a)) or where (section 113(1)(b),

**“an Insurer intends to transfer Insurance business of any claim to another Insurer and at least one of those insurers is registered under this Act”**

16. The Gazette Notice dated 25<sup>th</sup> February 2003 was a Notice that Pan African Insurance Company Ltd had applied, in part, for approval from the Minister of Finance through the Commission of Insurance to transfer substantially all its General Insurance Business to Pan Africa General Insurance Ltd. The application was made following (a) a Resolution of members of the company passed at an Extraordinary General Meeting held on 8<sup>th</sup> December 2000, (b) a Resolution of the Board of Directors passed on 20<sup>th</sup> August 2002 and (c) a Sale and Transfer of Business Agreement dated 30<sup>th</sup> September 2002.

17. The Defendants did not deny that the transfer happened and I hold that, on a balance of probabilities, substantially all the General Insurance Business of Pan African Insurance Company Ltd (the 1<sup>st</sup> 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 2<sup>nd</sup> Defendant**). The Notice of Transfer of Business to Newco Limited was published on 28<sup>th</sup> 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.

18. The claim that the Plaintiff seeks to enforce in these proceedings is a Third Party claim arising from a Motor Vehicle Road accident. That claim would have arisen under the General Insurance Business of the 1<sup>st</sup> Defendant prior to the transfer. Any doubt that the claim is one in General Insurance Business is removed by the definition of General Insurance Business assigned to it by section 2 of The Insurance Act. There, General Insurance Business means,

**“Insurance Business of any claim or classes not being Long Term Insurance Business.”**

19.. In the end, I reach a result that the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendant are liable to satisfy the Judgment and Decree in favour of the Plaintiff in the Mombasa suit. I enter judgment against the Defendants as prayed for in the Plaint dated 6<sup>th</sup> September 2007 with costs.

**F. TUIYOTT**

**JUDGE**

**DATED, SIGNED AND DELIVERED THIS 7<sup>TH</sup> DAY OF JULY 2015**

**IN THE PRESENCE OF:**

**OILE.....COURT CLERK**

**ASHIOYA..... FOR PLAINTIFF**

**OKUTTA H/B FOR KAMAU KIPLANGAT & CO.....FOR DEFENDANTS**