



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 162 OF 2011

APA INSURANCE COMPANY LIMITED APPELLANT

V E R S U S

BENADAH IRUSA 1ST RESPONDENT

PAN AFRICA INSURANCE COMPANY LIMITED ..2ND RESPONDENT

J U D G M E N T

This is an appeal from the judgment of Mr. Makori SRM Mumias Court delivered on the 18.10.2011. The grounds of appeal are:

1. **The court's finding on liability against the appellant had no legal or factual basis**
2. **The respondent did not prove her case on a balance of probabilities**
3. **The court wrongly held that the appellant was liable to compensate the 1st respondent**
4. **There was inconsistency between the plaintiff's pleadings and evidence and what was pleaded was not proved**
5. **The trial magistrate erred in law in failing to consider that the appellant had not merged with the 2nd respondent**
6. **The trial magistrate misapprehended the evidence on record as well as the exhibits produced**

Counsels for both parties agreed to argue the appeal by way of written submissions. According to the appellant the 1st respondent failed to prove her case before the trial magistrate. The appeal is grounded on the fact that the appellant was wrongly sued. Its proper name is APA INSURANCE LIMITED yet the 1st respondent sued APA INSURANCE COMPANY LIMITED. The appellant contends that those are two different companies and therefore judgment ought to have been granted to the appellant. Secondly there was no evidence that the 1st respondent had obtained judgment against the appellant's insured. It is the appellant's contention that the appellant never insured Kenya Bus Limited. Further it is submitted that the appellant never took over the liabilities of PAN AFRICAN INSURANCE COMPANY LIMITED. The appellant only took over the businesses of PAN AFRICA GENERAL INSURANCE LIMITED and APPOLO INSURANCE COMPANY LIMITED that had originated from NEWCO LIMITED. Therefore the appellant did not take over the liabilities and obligations of any other company other than those two. There is difference between PAN AFRICA GENERAL INSURANCE LIMITED and PAN AFRICAN INSURANCE COMPANY LIMITED.

The appellant also maintains that the evidence on record showed that the accident motor vehicle was insured by PAN AFRICAN INSURANCE COMPANY LIMITED. This being the case the appellant could not be called upon to compensate the 1st respondent as its liability was on PAN AFRICA

GENERAL INSURANCE LIMITED which company was not served with a statutory notice and also had not insured Kenya Bus Service Limited. It was incumbent upon the 1st respondent to have proved that the appellant had taken the liabilities of PAN AFRICAN INSURANCE COMPANY LIMITED and also to show that the said company was the insurer of the accident motor vehicle. Counsel relies on the authority of WANGA & COMPANY ADVOCATES VS APA INSURANCE COMPANY LIMITED. Kisumu HC MISC. APPLICATION NO. 215 OF 2005.

Counsel for the respondents submits that the decision of the trial magistrate was proper and that the appeal is incompetent. The appellant is liable to settle the decree as it took over the assets and liabilities of the insurer of the accident vehicle. The 2nd respondent restructured its business and created PAN AFRICA GENERAL INSURANCE LIMITED which gave birth to NEWCO COMPANY LIMITED and APA INSURANCE COMPANY LIMITED. The process was carried out lawfully and the appellant took over the liabilities and obligations of the General Insurance business. The appellant was therefore the insurer of the accident motor vehicle No. KAM 982 C ISUZU Bus. It is contended that the allegations that there is no company by the name APA INSURANCE COMPANY LIMITED is an afterthought as it was not raised before the trial court. The appellant admitted the description of the parties in its defence before the trial court. Counsel relies on the case **of APA INSURANCE COMPANY LIMITED VS ZAINABU ALI RUWA. Mombasa Court of Appeal Civil Case No. 82 of 2008.**

The background to this dispute is that the 1st respondent (BENADAH IRUSA) was involved in a road traffic accident on the 13.9.2003 involving motor vehicle registration number KAM 982 C Isuzu Bus owned by Kenya Bus Service Limited. She filed civil suit No. 88 of 2004 before the Kapsabet court and was awarded damages totaling Kshs.361,158/= inclusive of costs. Kenya Bus Company Limited filed appeal No. 32 of 2005 before the Eldoret High Court contesting the Kapsabet judgment. The appeal was dismissed with costs that were assessed at Kshs.50,000/=. The 1st respondent then filed a declaratory suit No.412 of 2008 before the Mumias Senior Resident Magistrate's Court against PAN AFRICA INSURANCE COMPANY LIMITED and the appellant, APA INSURANCE COMPANY LIMITED. The trial magistrate heard the case and held that both defendants in that case were jointly and severally liable to compensate the 1st respondent. That decision led to the current appeal.

The appellant contends that it never took over the liabilities of PAN AFRICAN INSURANCE COMPANY LIMITED but took over the liabilities of PAN AFRICA GENERAL INSURANCE LIMITED and APPOLO INSURANCE COMPANY LIMITED. It also contends that it was wrongly sued as its name APA INSURANCE LIMITED and not APA INSURANCE COMPANY LIMITED. Further it is alleged that the case was not proved before the trial court.

The 1st respondent filed the suit before the Kapsabet court and proved her case. That is why judgment was held in her favour. The appeal by Kenya Bus Company Limited was dismissed by the Eldoret High Court. The only issue for determination before the trial magistrate was whether the two defendants were liable to compensate the 1st respondent. The trial magistrate held that indeed they were. In its amended defence dated 20.4.2009 before the Mumias court the appellant herein admitted the description of the parties as per the plaint. The description of the appellant was given as APA INSURANCE COMPANY LIMITED. The contention that APA INSURANCE LIMITED is different from APA INSURANCE COMPANY LIMITED cannot stand. A company has the option of including the word Company Limited or only Limited after the name and omitting the word Company in its title. Therefore the fact that the appellant was sued as APA INSURANCE COMPANY LIMITED does not change the fact that it was the appellant that was sued. The contention that the appellant could have opted not to participate in the suit as it was not a proper party is misplaced. Having admitted the description of the parties before the trial magistrate the appellant cannot turn around and deny its description before the trial magistrate. I do find that APA INSURANCE COMPANY LIMITED is the same as APA INSURANCE LIMITED. Indeed the appeal herein is by APA INSURANCE COMPANY LIMITED which is described as the appellant and it is the same company that was sued before the trial court.

Before the trial magistrate the 1st respondent simply narrated what he had done in the earlier two suits. That is the Kapsabet and the Eldoret suit. The accident was self-involved as the bus overturned along the

Kapsabet-Kisumu road. It is not clear to me how the declaratory suit ended being filed before the Mumias court but that is not an issue for determination in this appeal. The appellant called one witness, ANTHONY MUNGAI NJOGU. His evidence was that the appellant was formed as a result of merger between APPOLO INSURANCE COMPANY and PAN AFRICAN GENERAL INSURANCE LIMITED. Previously the company was called NEWCO LIMITED. He produced the relevant gazette notices for that change. That evidence is the grounds of appeal by the appellant which is to the effect that the appellant is not liable to meet the liabilities of PAN AFRICAN INSURANCE COMPANY LIMITED.

The main issue in this appeal is whether the appellant is liable to compensate the 1st respondent as per the finding of the trial magistrate. The 2nd respondent filed before the Mumias court a notice of claim for indemnity or contribution dated 10.6.2009. The record shows that there was a combined defence filed by the firm of Kalya & Company Advocates on 10.11.2008. Later on the defendants before the Mumias court appointed different advocates. According to the Notice of Indemnity by the 2nd respondent the 2nd appellant contends that it is the appellant that took over the assets and liabilities of the 2nd respondent's general insurance business. The 2nd respondent maintains that the appellant is liable to meet the decree.

Having gone through all the pleadings as well as the submissions by the parties herein, 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 was 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. I do find that the current submissions to create two different companies is an afterthought. The appellant is not telling the court how the two companies are different and who are the directors of those companies. The statutory notice was duly served on PAN AFRICA INSURANCE COMPANY that had insured the accident vehicle as per the policy number which is cited as 010/810/1/00004/2001/4. There has been no denial that indeed that policy existed and it covered the accident vehicle. The 2nd appellant has not made reference to PAN AFRICA GENERAL INSURANCE LIMITED but maintains that its general insurance business was taken over by the appellant. The appellant has not proved that it never had any arrangement with the 2nd respondent.

I do find that the 1st respondent proved her case before the trial magistrate. The trial magistrate correctly found in favour of the 1st respondent. APA INSURANCE LIMITED is the same as APA INSURANCE COMPANY LIMITED. As per the findings in the ZAINABU ALI RUWA case I do agree that the appellant took over the liabilities of PAN AFRICAN INSURANCE COMPANY LIMITED which I find to be the same as PAN AFRICA GENERAL INSURANCE LIMITED. The appellant is liable to compensate the 1st respondent. The appeal lacks merit and is hereby dismissed with costs to the respondents.

Delivered, dated and signed at Kakamega this 16th day of October 2014

SAID J. CHITEMBWE

J U D G E