



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 121 OF 2003
MEDIPLUS SERVICES LIMITED.....PLAINTIFF
VERSUS -
PAN AFRICA INSURANCE COMPANY LIMITED.....1ST DEFENDANT
HANNOVER LIFE REASSURANCE AFRICA LTD.....2ND DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 8th March 2011. The plaintiff seeks leave to pursue its claim against Apa Insurance Company Limited in lieu of Pan Africa Insurance Company Limited. The motion is expressed to be brought under sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Orders 24 and 51 of the Civil Procedure Rules 2010. There is annexed a deposition sworn by Lewis Nguyai on 24th March 2011. There is also a supplementary affidavit sworn by Albert Mumma on 9th March 2012.

2. The suit was filed on 10th March 2003 against the 1st defendant, Pan Africa Insurance Company Limited. In a nutshell, the plaintiff's claim arose from a general insurance contract held with the 1st defendant underwriter. The plaintiff alleges that the 1st defendant's general insurance business was transformed and sold to Apa Insurance Company Limited. The assets and liabilities of the former were transferred to the latter. As the plaintiff had a binding contract with the former, it pleads for leave to continue its claim against Apa Insurance Company Limited.

3. The motion is contested by Apa Insurance Company Limited. There is filed a replying affidavit of Rebecca Opati – Juma sworn on 14th February 2012. The motion is attacked for invoking Order 24 of the Civil Procedure Rules which is inapplicable. It was also contended that since the transfer of the 1st defendant's business occurred prior to the suit there was no assignment, creation or devolution of interest in this suit. The motion is also impugned for undue laches and for failure to lodge objections with the Minister of Finance or Commissioner of Insurance under section 114 of the Insurance Act. The respondent's position is that it would be prejudiced by being made a party to the suit this late in the day. The respondent also contended that the cause of action was not one of the liabilities transferred by the 1st defendant to the respondent. In short, liability should continue to attach to the 1st defendant. The respondent denies that the 1st defendant is defunct. Reference was also made to a settlement and compromise contained in the document marked "ANM 3". It is the respondent's case that there is thus no

subsisting dispute between it and the plaintiff. Lastly, it was submitted that the motion and suit are statute barred by dint of the Transfer of Businesses Act and the Limitation of Actions Act.

4. I have heard the rival submissions. Order 24 of the Civil Procedure Rules 2010 deals with death or bankruptcy of a party and provides for substitution of such a party. I partly agree with the submission by the intended defendant that perhaps the better platform would be Order 1 rule 10. The latter grants the court wide and unfettered discretion to enjoin or remove parties to a suit at any stage before judgment. To do so, the court must be satisfied that such a party is necessary for the effectual or final determination of the issues in the suit. But there is also rule 8 (1) in Order 24 which the plaintiff has cited. It grants the court power to order continuation of a suit against “the person to or upon whom such an interest has come or devolved”. From the replying affidavit, the material agreement transferring the business pre-dates the suit and was made on 30th September 2002. From the evidence before me, the entities were not devolving: rather there was merely a transfer of certain business under section 114 of the Insurance Act.

5. It is common ground that this suit was filed on 10th March 2003. The applicant concedes that by a sale and transfer of business agreement dated 30th September 2002, the 1st defendant transferred a substantial component of its general insurance business and long term insurance business to Pan Africa General Insurance Limited and Pan Africa Life Assurance Limited. By a gazette notice number 1758 of 14th March 2003, the public was notified of the transfer. It is thus not the whole truth for the respondent to assert that the plaintiff was aware of the transfer before it commenced suit. Pan Africa General Insurance Company and Apollo Insurance Company further transferred their insurance business to a new vehicle, Newco Limited, and subsequently to Apa Insurance Company Limited.

6. I have then looked at Gazette notice number 1758 of 14th March 2003 annexed to the motion. It was issued pursuant to section 114 of the operative Insurance Act. It was a statutory notice notifying the public of the request by the respondent to the Minister for Finance for approval to transfer its business. It stated in part as follows:

“Any person including, but not limited to, any employee, director or shareholder of the company or any policy holder, who has reasonable grounds for 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 ”.

7. There is another notice number 8125 of 7th November 2003 by Apollo Insurance to transfer its business to Newco. A similar provision to any aggrieved party is appended. Lastly there is gazette notice number 7928 of the same date by the transferee Newco, confirming the transfer of the business. That notice provided as follows;

“It is intended that the transferee will assume the debts and liabilities in respect of the assets to be transferred to the transferee by the Pan Africa Transferor and the Apollo Transferor since 1st January, 2003, being the date as of which the transfer of the said assets and liabilities will take effect pursuant to the provisions of the Insurance Act and the same will be paid and discharged by the transferee”.

8. To my mind then, and as early as 14th March 2003, the plaintiff had notice, or at the least constructive notice of the transfer of the businesses. Nearly 10 years later, the plaintiff has now made the application for leave to substitute the 1st defendant. The delay is inordinate. How does the plaintiff explain it? At paragraph 15 of the supplementary affidavit, the plaintiff says that as a result of the defendants’ actions, the plaintiff “almost went under and it was only in the year 2009 when the same was salvaged”. Even accepting that version of events, the plaintiff delayed for a further 2 years and only presented this motion on 29th March 2011. When there has been lengthy and unexplained delay, it is deemed to be inexcusable. See *Allen Vs Sir Alfred Mc Alpine & Sons Limited* [1968] 1 ALL ER 543. I would in those circumstances be disinclined to exercise my discretion in favour of the plaintiff.

9. From the gazette notice number 7928 and the provision I have set out above, the transferee was assuming the debts and liabilities since 1st January 2003 “*being the date as of which the transfer of the said assets and liabilities will take effect pursuant to the provisions of the Insurance Act and the same will be paid and discharged by the transferee*”. I have already stated that this suit was filed on 10th March 2003 subsequent to the effective date of 1st January 2003. Secondly, the cause of action in the plaint as pleaded at paragraph 4 of the plaint relates to a contract between the plaintiff and 1st defendant dated 1st day of January 1999.

10. There is then a sense in which the joinder sought against Apa Insurance Company Limited is misplaced. There is a paucity of reasons provided by the plaintiff for failing to lodge objections with the Minister for Finance or Commissioner of Insurance as required by the gazette notice and section 114 (2) of the operative Insurance Act. To be fair to the applicant, I have seen its lawyers letter marked “AM 1” dated 31st October 2003 addressed to the Commissioner of Insurance notifying him of the present claim against the 1st defendant. It is not an objection to the transfer of the business. On the face of it, it seems to be an original. There is no evidence of delivery or other correspondence. For example the applicant states in its written submissions that Apa Insurance Company “having been the beneficiary of the proceeds of the contract and the premiums paid to the 1st defendant by the plaintiff” is estopped from “expecting the plaintiff to be aware of its internal operations”. At paragraph 6 of the supplementary affidavit it is averred that the “defunct defendant and Apa Insurance were all aware of the suit herein and carried out the transfer in attempt (sic) at defeating the plaintiff’s claim”. It behoved the applicant to back up those statements with evidence of receipt of such proceeds or the collusion to defeat its claim. I am however well alive that that is the true province of the trial court and the plaintiff is not called upon to prove its claim at this stage. What I am saying is that bare statements made 10 years after institution of the suit or the publication of the gazette notices do not augur well where discretion of a court is sought. It would also prejudice the intended defendant’s rights to a fair trial.

11. I have been urged to find that the cause of action is statute barred by virtue of section 8 of the Transfer of Businesses Act and section 4 (1) (a) of the Limitations of Actions Act. I do not have evidence before me to make such a determination of fact. The less I say about it the better. But having said so, I cannot shut my eyes completely to the express provisions of section 8 of the Transfer of Businesses Act which provides:

“Notwithstanding the provisions of this Act or of any other written law, no proceedings shall be brought against a transferee in respect of any liability imposed by this Act after the expiration of six months after the date of the transfer concerned”.

The intended defendant here was the transferee. *Prima facie* and from the pleading in the plaint the liability is caught up by laches unless the court grants extension of time. In short, it is not appropriate to exercise my discretion for leave to continue proceedings against a new party whose liability appears remote at best. It will only delay the suit which is anathema to the overriding objective of the court.

12. The plaintiff claims that the 1st defendant Pan African Insurance Company is now defunct. No evidence has been provided to support that assertion. It is denied by the respondent. True, the company was transformed by virtue of transfer of components of its business. But that is not synonymous with being defunct. The contract between the plaintiff and the company dates back to January 1999. If the company is not defunct or it retained aspects of its business, it remains liable to the plaintiff. In short, it behoved the applicant to demonstrate that the 1st defendant morphed completely into the transferee Apa Insurance Company Limited and that the latter became the successor to the plaintiff’s claims. As matters stand now, there is no such concrete evidence. Furthermore, section 3 of the Transfer of Businesses Act takes care of the plaintiff’s apprehensions: The 1st defendant despite transfer of a portion of its business to the intended defendant transferee may be liable for the plaintiff’s cause of action subject to the notice referred to in the section.

13. I was implored by the respondent to find that there was a settlement and compromise. I do not wish to

comment on it because the suit is pending and I have already said enough to dispose of the present motion.

14. I am well alive to the overriding objective of the court set out at article 159 of the Constitution and sections 1A, 1B, 3A and 63 of the Civil Procedure Act. Justice is however a two way street. I cannot shut my eyes to the obvious prejudice of bringing a new party to the suit 10 years later without clear evidence of its likely liability. The plaintiff is not left empty handed as it can fall back on section 3 of the Transfer of Businesses Act and it still has two defendants in the suit including the contracting parties. To bring in the intended party so late in the day will thus engender unnecessary delays and costs that will defeat the cause of justice. The plaintiff is largely the author of its misfortune by its inordinate delay in bringing this motion.

15. For all the above reasons the plaintiff's notice of motion dated 8th March 2011 is hereby dismissed. In the interests of justice, I decline to award costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 11th day of April 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. C. Agwara for the Plaintiff.

No appearance for the Defendants.

Mr. J.K. Nyaribo for the Intended Defendant.