



REPUBLIC OF KENYA



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**Mwaura v Apa Insurance Co. Ltd (Civil Case 654 of 2007)
[2025] KEHC 13368 (KLR) (Civ) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 654 OF 2007

JN MULWA, J

SEPTEMBER 25, 2025

BETWEEN

JAMES KAMAU MWAURA PLAINTIFF

AND

APA INSURANCE CO. LTD DEFENDANT

JUDGMENT

Pleadings

1. By way of a plaint dated 14/09/2007 and amended on 18/11/2010, James Kamau Mwaura (hereafter the Plaintiff) filed suit against APA Insurance Co. Ltd (hereafter Defendant) seeking judgment in terms of -;
 - a. Spent.
 - b. A declaration that the Defendant is liable to compensate the Plaintiff for any loss out of policy No. 0887/MCV/N4435.
 - c. Spent.
 - d. General damages for various executions resulting from breach of contract by the Defendant.
 - e. Special damages in the sum of Kshs. 2,926,400/- and interest thereon.
 - f. Costs of the suit and interest thereon.
 - g. Such other or further relief this Court may grant.
2. It is the plaintiff's claim that by a merger between Apollo Insurance Co. Ltd and Pan Africa Insurance Co. Ltd under some arrangement between the said Apollo Insurance Co. Ltd and APA Insurance,



- APA Insurance took over all the claims and liabilities from Apollo Insurance Co. which the Plaintiff was, and or would be a party to, particularly those arising from contract of insurance between the said Apollo Insurance Co. Ltd and the Plaintiff as per Policy No. 0887/MCV/N4435.
3. That at all material times the Plaintiff owned motor vehicle registration Number b (hereafter suit motor vehicle) which at the relevant period was insured by Apollo Insurance Company Ltd, the predecessor of the Defendant under a comprehensive contract of insurance contained in Policy No. 0887/MCV/N4435.
 4. It was averred that it was a term of the said contract of insurance that in the event of an accident occurring during the pendency of the said policy and involving the suit motor vehicle, which either caused injury or damage, the Defendant's predecessor would compensate both the injured person, damage to property or suit motor vehicle registration Number KXR 801. It was further averred that the obligation imposed on Apollo Insurance Co. Ltd were taken over by the Defendant when it took over the assets and liabilities of Apollo Insurance Co. Ltd.
 5. The Plaintiff went on to aver that on 05/08/1990, during the pendency of the policy of insurance, motor vehicle registration Number KJD 174 collided with KXR 801 the suit motor vehicle leading to total damage to the latter vehicle which Apollo Insurance Co. Ltd compensated the Plaintiff by paying a sum of Kshs. 176,500/- being the then value of the suit motor vehicle.
 6. Thereafter, Apollo Insurance Co. Ltd sued the owner of motor vehicle KJD 174 in Nairobi *CMCC No. 9785 of 1993* (hereafter subrogation Suit) under the doctrine of subrogation, to recoup its payout to the Plaintiff, from which the defendant's motor vehicle in the subrogation suit was attached and sold. The judgment and decree obtained by Apollo Insurance Co. Ltd in the subrogation suit was later dismissed with costs, with the latter being paid by the Defendant or its predecessor as it was obligated to pay.
 7. It was further averred that the defendant in the subrogation suit then sued the Plaintiff together with the advocate who prosecuted the suit and the auctioneer who executed the decree against him, vide *HCCC No. 3204 of 1994* wherein judgment was entered against the Plaintiff for a decree that stood at Kshs. 625,028.70/- as at 19/07/2007, which the Defendant failed or refused to pay despite the Plaintiff's goods being attached in execution thereby breaching the contract of insurance thus causing the Plaintiff to incur great loss and damage.
 8. The Defendant filed a statement of defence dated 29/10/2007 and amended on 29/11/2010 denying the key averments in the amended plaint meanwhile averred in the alternative and without prejudice to its earlier averments that even if there was any "merger" between Apollo Insurance Co. Ltd and Pan Africa Insurance Co. Ltd, which is denied, and or there was any take-over of assets and or liabilities by the Defendant, which is also denied, such "merger" did not give rise to the Defendant and or the take-over of assets and or liabilities by the Defendant, if at all, does not entitle the Plaintiff to the claim made in the suit or at all.
 9. The foregoing, thus formed the state of pleadings prior to hearing of the suit.

Plaintiff's Case and Evidence

10. During the trial, the Plaintiff testified as PW1. It was his evidence that he sued the Defendant who had insured his vehicle for failing to pay him damages incurred on accord of an accident involving another vehicle and the suit motor vehicle that he had insured. The suit motor vehicle was insured with Apollo Insurance Co. Ltd before the latter merged with the Defendant. He went on to state that as a result of the accident, the suit motor vehicle was declared a right off, to wit, his claim was paid out by Apollo



Insurance Co. Ltd whereas the latter pursued its claim as against the other vehicle that collided with the suit motor vehicle. In summation, he adopted his witness statement dated 07/06/2023 alongside his affidavit sworn on 28/02/2020 as his evidence in chief meanwhile adduced into evidence the documents appearing in his bundle of documents dated 15/02/2023 and 09/06/2023 respectively as PExh.1.

11. Under cross-examination, he confirmed that the suit motor vehicle was insured by Apollo Insurance Co. Ltd however, as at the time the Defendant never existed. He reiterated that the policy of insurance in respect of the suit motor vehicle was issued by Apollo Insurance Co. Ltd and that he signed a discharge voucher about a year after the accident occurred having been fully compensated.
12. It was his evidence that there was a merger between Apollo Insurance Co. Ltd and the Defendant wherein Newco Ltd changed its name to APA Insurance Ltd. and the Defendant assumed debts and liabilities of Pan Africa Insurance Ltd and Apollo Insurance Co. Ltd. He maintained that his vehicle was insured by Apollo Insurance Co. Ltd as at the occurrence of the accident and after the merger, the latter's liabilities were taken over by the Defendant.
13. He stated that a variety of his items were attached by auctioneers as a result of a decree originating in *HCCC No. 3204 of 1994* adding that the Defendant failed to comply with the terms of the policy and as a consequence he seeks damages for breach of contract to the tune of Kshs. 2,926,400/-.
14. In re-examination, he stated that the motion filed by the Defendant in *HCCC No. 3204 of 1994* sought stay of execution given that it was dissatisfied with the decision emanating therein and intended to appeal the same. He asserted that the Defendant's legal officer in his affidavit agreed to settle all liabilities on behalf of the Defendant; That *CMCC No. 9785 of 1993* was founded on subrogation rights whereas *HCCC No. 3204 of 1994* was filed after his goods had been carted away.
15. He stated that he was never served with Court papers and only managed to obtain them from the auctioneer, upon which he proceeded to Apollo Insurance Co. Ltd to ascertain the position. That the latter intimated that they would take up the matter by filing an appeal however, he is unaware whether an appeal was filed. He concluded by iterating that the receipts appearing in his bundle of documents bore his name.
16. Wilson Wachira Ndung'u testified as PW2. He identified himself as an employee of Insurance Regulatory Authority (IRA) meanwhile proceeded to adopt his witness statement dated 11/11/2021 as his evidence-in-chief. The gist of his evidence per his witness statement was that Pan Africa Insurance Company Limited operated as a composite insurer meanwhile separated its general and long-term insurance business in the year 2003 to form Pan Africa General Insurance Ltd and Pan Africa Life Assurance Ltd. He stated that Pan Africa General Insurance Ltd and Apollo Insurance Company Ltd both transferred to a new company called Newco Ltd through Gazette Notice No. 7928 and 8126.
17. He testified that after acquiring the general insurance business, Newco Ltd changed its name to APA Insurance Company Ltd in December 2003 through a change of name certificate number C.100942 dated 15/12/2003. He asserted that Section 113 to 118 of the *Insurance Act* guides on how transfer of assets and liabilities of an insurance company is done and does not accord room for omitting any of the liabilities.
18. Under cross examination, he confirmed that whenever there is a change or merger, the IRA would be aware and in the instant matter there was a merger between Apollo Insurance Company and Pan Africa Insurance Company, reiterating that the Defendant's origin was a result of the fact that it was initially registered as Newco Ltd and later changed its name as APA Insurance Co. Ltd, to wit, Newco Ltd and APA Insurance being one and the same company.



19. He further testified that Pan Africa General Insurance Ltd is the one that merged with Apollo Insurance to form Newco Ltd, which assumed the debts, business and liabilities of Apollo and Pan Africa Insurance Co. upon transfer of their business. That there was no merger of companies by only transfer of business. He stated that when the transfer of business occurred in 2003 there was no policy cover of the business however if the Plaintiff's claim was unpaid, it was transferrable and not transferable if paid on 03/08/1987.
20. He stated that the transfer of business included unpaid claims and running business whereas there is normally a schedule of transferrable business given to IRA. He concluded that notwithstanding the provisions of Section 113 to 118 of the Insurance Act, it is possible for some liabilities to be omitted.
21. In re-examination, he reiterated that Pan Africa and Apollo joined to form Newco Ltd and later transformed to APA Insurance Co. Ltd. In summation he stated that in a transfer there is no room for omission of liabilities whereas the insurance company to which a transfer of business occurs automatically assumes the same therefore in the instant matter Newco's liabilities were transferred to the Defendant whether reported before or after.

Defendant's Case and Evidence

22. On behalf of the Defendant, Rovina Koskei testified as DW1. She identified herself as a legal officer with the Defendant meanwhile proceeded to adopt her witness statement dated 26/02/2020 as her evidence in chief. The gist of her evidence per her witness statement, was that as a separate legal entity and independent from Apollo Insurance Co. Ltd, the Defendant is a stranger to the claim herein given that it was not privy to any terms of the insurance contract between Apollo Insurance Co. Ltd and the Plaintiff whereas the Defendant was not a party to the suits whose judgments have caused the Plaintiff the misfortunes outlined in his plaint.
23. That the Defendant is not a product of a merger between Apollo Insurance Company Ltd and Pan Africa Insurance Co. Ltd as alleged and therefore any obligation and or liabilities that are legally imposed on Apollo Insurance Co. Ltd under contract should be shouldered by the said Apollo Insurance Co. Ltd. She concluded in her statement that Section 8 of the Transfer of Business Act specifically limits a claimant from making claims against the transferee of such business, as in the instant matter, by reason of limitation of six (6) months from the date of the publication of the notice of the transfer of the relevant business. That the publication of the transfer of business that is relied on by the Plaintiff was on 07/11/2003 which makes the claim herein time barred as at filing.
24. Under cross examination, she confirmed that the judgment in *HCCC No. 3204 of 1994* led to the attachment of the Plaintiff's property stating that no premiums had ever been paid to the Defendant. She maintained that the Defendant was not privy to the Insurance Contract between Apollo and the Plaintiff, to wit, the Defendant has nothing to do with the claim in *HCCC No. 3204 of 1994*. That any liabilities imposed on Apollo ought to be shouldered by it therefore the Defendant is a stranger to the Plaintiff's claim.
25. The witness further reiterated that the Defendant never admitted and or agreed to settle the claim in *HCCC No. 3204 of 1994*; That the Plaintiff's claim had been fully settled by the time the business of Apollo was transferred to the Defendant.
26. In re-examination, she stated that the Defendant was not in possession of any decree in *HCCC No. 3204 of 1994* or *CMCC No. 9785 of 1993* whereas the deposition in the affidavit of one E. Kosgei cannot impose a contract between the parties herein.

At the close of the trial, parties filed submissions.



Plaintiff's Submissions

27. The Plaintiff by counsel restating history of the matter, pleadings and evidence by the respective parties. The kernel of the Plaintiffs submission was that in the absence of any particular document prepared by the Defendant and used when the insurance business in issue was transferred to the Defendant exonerating it from the reliefs sought in the amended plaint, the Defendant ought to be entirely held liable in the matter.

While calling to aid the decisions in High Court Civil Appeal No. E102 of 2020 - [*Kenya Orient Insurance Co. Ltd v Ruth Mutua & John Mbinjiwe t/a Bealine Auctioneers*](#), High Court Civil Appeal No. E846 of 2022 - [*UAP Old Mutual Ltd v Fredrick Nzioka*](#) and High Court Civil Appeal No. 2 of 2003 - [*C.Y.O Owayo v George Hannington, Zephania Aduda t/a Aduda Auctioneers & G.S Okoth t/a G. S. Okoth & Co. Advocates*](#), the Plaintiff submit that whatever loss or damage the Plaintiff suffered as a consequence of his name being used in the subrogation suit ought to be met by the Defendant.

28. The plaintiff added that having proved his case on a balance of probabilities an award to the tune of Kshs. 1,500,000/- in general damages would be sufficient consolation for the suffering the Plaintiff he underwent on accord of attachment and the Defendant's inaction.

Defendant's Submissions

29. On the part of the Defendant, counsel condensed his submissions into six (6) cogent issues. On whether an order of injunction can issue, it was summarily argued that the Plaintiff had already settled the decretal amount from the goods that had been attached as such there is no need for an order of injunction to issue at this juncture.
30. On whether the Defendant can be compelled to satisfy the decree in *HCCC No. 3204 of 1994*, it was posited that the Plaintiff's movable property having already been sold in execution of the decree emanating therefrom there exists no decree capable of satisfaction by the Defendant, hence can be reasonably concluded that the Plaintiff's suit has been overtaken by events.
31. Addressing the Court on whether the Defendant is liable to compensate the Plaintiff for any loss out of the Policy No. 0887/MCV/N4435, counsel submitted that the policy of insurance for which the Plaintiff seeks to rely on was issued by Apollo Insurance Company Limited and not the Defendant as such there was no contract between the Plaintiff and the Defendant of which can be enforced. That from the gazette notice relied on by the Plaintiff, concerning transfer of business, the same was in respect of certain assets and liabilities of Pan Africa General Insurance Ltd and Apollo Insurance Ltd.
32. He further submitted that it was clear that only some assets and liabilities of the two companies would be transferred to the said Newco Ltd and not all, to wit, the Plaintiff has not adduced evidence to the effect that liability arising out of Policy No. 0887/MCV/N4435 was among the liabilities transferred to Newco Ltd and later APA Insurance Ltd.
33. Further while calling to aid Section 8 of the Transfer of Business Act, it was argued that the Plaintiff cannot claim to be indemnified by the Defendant for an accident that he was compensated and or occurred about thirteen (13) years before the alleged transfer of business which claim was not brought to the Defendant's attention within six (6) months of the transfer of business per statute. In any event, it was equally submitted that the decretal sum in *HCCC No. 3204 of 1994* was to the tune of Kshs. 625,028.70/- therefore the Plaintiff claim, if at all, ought to be limited to the said amount.
34. On whether the Plaintiff is entitled to an award of general damage, counsel called to aid the decision in [*Gichaba v Lexis Investment Limited*](#) [2024] KEHC 479 (KLR) to posit that there was no contract



between the parties herein, and even if such a contract existed, the Plaintiff is not entitled to general damage for alleged breach of contract as the loss incurred has already been quantified. Concerning the claim for special damages to the tune of Kshs. 2,926,400/-, counsel iterated that the Plaintiff's claim can only be limited to the decretal sum award in *HCCC No. 3204 of 1994* to the tune of Kshs. 625,028.70/-.

35. It was further summarily submitted that the Plaintiff failed to specifically prove by adducing receipts of the alleged total value of attached goods whereas the purported receipts evinced had glaring discrepancies that are questionable in the circumstance. In the alternative, counsel submitted that the Plaintiff failed to adduce evidence of the decree sought to be enforced therefore without documentary proof this Court cannot proceed to award the Plaintiff the sum claimed meanwhile having failed to plead estoppel the Plaintiff cannot tacitly rely on the same by relying on the contentious affidavit of E. Koskei, in order to advance his claim. The decision in *Republic v Kenya Railways & another Ex-Parte Inviolatte Wacike Siboe* [2014] eKLR was relied on in the latter regard. In conclusion, the Court was urged to dismiss the Plaintiff's suit with costs.

Analysis and Determination

36. The Court has considered the pleadings by the respective parties, the evidence and the submissions filed in respect of the matter.

Issues for determination

1. Whether the Plaintiff has established his case as against the Defendant on a balance of probabilities, and if so, whether the Court ought to grant the relief(s) as sought in the Amended Plaint.
 2. Who should bear costs of the suit.
37. Having condensed the above, this Court has on occasion addressed itself to the importance of pleadings in determining the issues before a Court pleadings form the thrust of the respective parties' cases. See Court of Appeal decision in *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91. Palpably, the gist of the respective parties' pleadings had earlier been highlighted in this judgment thus negating the need for restatement.
38. It is further well-trodden that the applicable law on burden of proof, in civil cases, can be clasped by reading of the provisions of Section 107, 108 and 109 of the *Evidence Act*. The impetus of the forestated provisions and the standard of proof in civil liability claims in our jurisdiction, being on a balance of probabilities, was reasonably discussed by the Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR. Preferably, the duty of proving the rival averments contained in the respective parties' pleadings lay squarely with the parties themselves.
39. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the Court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of



rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

40. The undisputed facts in the matter are that the Plaintiff had insured the suit motor vehicle with Apollo Insurance Co. Ltd under a comprehensive contract of insurance contained in Policy No. 0887/MCV/N4435; that as a result of the accident incident involving the suit motor vehicle and motor vehicle registration number KJD 174 on 05/08/1990, the suit motor vehicle was written-off and the Plaintiff was subsequently compensated to the tune of Kshs. 176,500/- being the value of the suit motor vehicle. (See PExh.1) The Defendant’s on its part aside from vehemently disputing issue surrounding the merger between Apollo Insurance Co. Ltd and Pan Africa Insurance Co. Ltd leading up to Newco Ltd and latter APA Insurance Co. Ltd, it further asserts that Plaintiff failed to prove a contract of insurance as between the parties and discharged its burden of proof to the required standard.
41. Therefore, what this Court has been called upon to determine is whether, the Plaintiff is entitled to declaration that the Defendant is liable to compensate the Plaintiff for loss arising out of Policy No. 0887/MCV/N4435 and whether if the latter is on the affirmative, the Plaintiff is entitled to general and special damages as pleaded.
42. To the foregoing end, it warrants reminder that at the epicenter of the dispute is a contract of insurance whereas the role this Court plays in adjudicating over a dispute between contracting parties was settled in the often cited decision of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, wherein it was succinctly stated that-;

....“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

43. As to the nature of a contract of insurance, the Court of Appeal in *Kenindia Assurance Co. Ltd v Monica Moraa* [2016] eKLR describing the nature of an insurance contract cited with approval the decision of the Supreme Court of India in *United India Insurance Company v Kantika Colour Lab and others* Civil Appeal No. 6337 of 2001 where the court stated as follows:-

“Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of Life Insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance, which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in Halsbury's Laws of England - 4th Edition” [Emphasis Added]

44. Thus, for the Plaintiff’s cause to succeed on a balance of probabilities he ought to have demonstrated the existence of a contract of insurance, accruing rights thereunder and proof of alleged loss of on accord of the Defendant’s breach of the policy, or otherwise. That said, the policy of insurance is the



document that creates the legal relationship between the respective parties and upon which the claim of either breach of contract or indemnity may be founded.

45. However, before proceeding any further it equally warrants mentioning that the debate concerning the nexus between Apollo Insurance Co. Ltd, Pan Africa General Insurance Ltd, Pan Africa Insurance Co. Ltd, Newco Ltd and later APA Insurance Co. Ltd has since been the subject of numerous decisions within our jurisdiction however the same has since been settled. The Court of Appeal in *Inchwara v APA Insurance Limited* [2022] KECA 885 (KLR) observed as follows-;

“(17) In Gazette Notice No. 7928, the public is notified of an intention that the general insurance business of Pan African General Insurance Limited and the general insurance business of Apollo Insurance Company Limited would be sold and transferred by way of sale of certain assets and liabilities of those two businesses to Newco Limited as APA Insurance Company Limited. The latter being the transferee would assume the debts and liabilities in respect of the assets transferred.

(18) A week later, on 14th November, 2003, Gazette Notice No. 8126, being a statutory notice under section 114 (1) (a) of the *Insurance Act*, was published. The public was duly informed that Apollo Insurance Company Limited and Pan Africa General Insurance Limited had jointly applied to the Minister for Finance, through the Commissioner of Insurance, for approval of the transfer of property, undertakings, assets and liabilities of their respective general insurance businesses to the new company.

(19) Admittedly, neither of the two notices makes mention of Pan Africa Insurance Company Limited and if that was all to the matter then no nexus would seem to exist between Pan African Insurance Company Limited and the respondent.

[20] Shown to the trial court as well was the Memorandum of Association of Pan Africa General Insurance Limited. Stated as one object of this company was that it would acquire and take over as a going concern the general insurance business then carried on by Pan Africa Insurance Company Limited. There lay the umbilical cord that tied Pan African General Insurance Limited to Pan Africa Insurance Company Limited. The former having taken over the general insurance business of the latter, then there would be transfer of this business when the general business of Pan Africa General Insurance and that of Apollo Insurance Company Limited were sold and transferred to Newco Limited as APA Insurance Limited, the respondent and which, in fact, later formally changed to APA Insurance Company Limited. There was sufficient basis and evidence, on a balance of probabilities, that APA Insurance Company Limited would be liable for claims falling for payment by Pan Africa Insurance Company Limited under its general insurance business and which liability was transferred to Pan African General Insurance Limited and eventually to itself. On my part I would endorse the finding of the trial Court and fault that of the first appellate court.

(21) That evidence was on its own sufficient even when Gazette Notice No. 1758 dated 5th February, 2003 and published on 14th March, 2003 was not before the courts below. The significance of that Gazette Notice was that it was a notice that Pan Africa Insurance Company Limited had sought the approval of



the Minister for Finance, through the Commissioner of Insurance, for transfer of its general insurance business to Pan Africa General Insurance Company Limited. It was on the strength of this Notice that the High Court in Busia HCCC No. 26 of 2007 *HM v Pan African Insurance Co. Ltd & Another* [2015] eKLR had held;

“The Gazette Notice dated 25th 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 8th December 2000, (b) a Resolution of the Board of Directors passed on 20th August 2002 and (c) a Sale and Transfer of Business Agreement dated 30th September 2002. 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 1st 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 2nd Defendant). The Notice of Transfer of Business to Newco Limited was published on 28th 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.”

(22) I repeat myself, for clarity, that even on the basis of the Memorandum of Association of Pan Africa General Insurance Limited alone, the trial court was correct in deducing a nexus between Pan Africa Insurance Company Limited and the respondent. Gazette Notice No. 1758, though not produced at the trial, fortifies the correctness of that decision.”

46. With the above in reserve, notwithstanding the settled position concerning the nexus between Apollo Insurance Co. Ltd and the Defendant herein, it was still incumbent of the Plaintiff to recognizably demonstrate loss on accord of the Defendant’s breach of the purported policy of insurance. However, the Court does not agree with the position taken by the Defendant that onus was on the Plaintiff to demonstrate that the liability arising out of Policy No. 0887/MCV/N4435 was among the liabilities transferred to Newco Ltd and later APA Insurance Ltd.

47. Due reference to the dicta in *Inchwara v APA Insurance Limited* (supra) as juxtaposed alongside PExh.1 and evidence of PW2, the Plaintiff had on a balance of probabilities demonstrated the nexus between Apollo Insurance and the Defendant, to wit, the claim arising out of Policy No. 0887/MCV/N4435 would reasonably be a liability subject for settlement by the Defendant. Invariably, despite the legal burden of proof being on the Plaintiff, the evidential burden would lay upon the Defendant to validate that liability arising out of Policy No. 0887/MCV/N4435 was not one of the liabilities taken up by the Defendant on accord of transfer of business.



48. Nevertheless, I digress, instinctively. That the onus was still on the Plaintiff to establish a causal link between his loss and the Defendant's purported breach of policy of insurance. By his Plaint and evidence, PW1 referred to the subrogation suit (*CMCC No. 9785 of 1993*) in which it would appear that the defendant therein (one James Mwangi Gichura's) motor vehicle was attached and sold in execution, upon Apollo Insurance Co. Ltd obtaining a judgment and decree in the subrogation suit. It would thus appear that the said James Mwangi thereafter he filed suit (*HCCC No. 3204 of 1994*) against the Plaintiff; counsel representing the Plaintiff; and the Auctioneer who carried out execution in the subrogation suit successfully obtained a judgment and decree that led to execution against Plaintiff's goods.
49. A cursory review of PExh.1, neither were pleadings nor decree in respect of the above suits placed before the Court to aid it draw a correlation between the Defendant's purported breach and the resultant decree in *HCCC No. 3204 of 1994*. As is, the Plaintiff's claim concerning the same remains mere averment without tangible proof as to the suits in question. And in any event, the nature of liability by dint of the decree emanating from *HCCC No. 3204 of 1994* does not appear to be one of liabilities encapsulated in Section II - Liabilities to Third Parties in the Policy of Insurance (See PExh.1) between Apollo Insurance Co. Ltd and the Plaintiff as concerns Policy No. 0887/MCV/N4435.
50. To the foregoing end it is difficult to see how a claim on breach can be sustained on account of the above.
51. Adjunct, the Defendant advanced an interesting argument in its submission concerning the suit being time barred by dint of Section 8 of the [Transfer of Business Act](#), to wit, the Plaintiff offered no retort. The aforesaid provision provides that -;

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.

52. It must be emphasized that the above provision must be read alongside the Act, particularly Section 3 of the same [Act](#), which provides-;
1. Whenever any business or any portion of any business is transferred, with or without the good will or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this section shall have been given and shall have become complete at the date of the transfer.

The liability of the transferee under sub-section (1) of this section shall cease immediately notice given in accordance with this section shall have become complete:

Provided nevertheless that should proceedings be instituted against the transferee before such liability has ceased the said notice shall (for the purposes of such proceedings but for such purposes only) be deemed incomplete pending the final determination of such proceedings including all possible appeals, and pending the expiration of all periods during which such appeals may be brought.
 - (3) The notice referred to shall contain the particulars hereinafter specified, and shall be given by publication, either before or after the date of the transfer, in the Gazette and in such newspaper or newspapers circulating in the Colony as may from time to time be prescribed by the Registrar General, and shall, subject to the proviso to sub-section (2) of this section be deemed to be complete upon the expiration of two months from the publication of the notice



in the manner aforesaid. The particulars above referred to are as follows:—(a)The name and address of the transferor;(b)the nature of the business, and the name or style under which, and the address at which the transferor has carried on the business;(c)the name and address of the transferee;(d)the address where the transferee intends to carry on the business; and(e)a statement as to whether the transferee is assuming or is intended to assume all the liabilities incurred in the business by the transferor.

- (4) The production of the Gazette containing the notice shall be prima facie evidence as against both the transferor and the transferee of the statements contained in the notice.
- (5) Nothing in this section contained shall have the effect of relieving the transferor from any liability to which he would otherwise be subject.
53. The instant suit was filed on or about 14/09/2007 whereas going by PExh.1. vide a Legal Notice No.117 issued on 23/09/2005 and made on 15/09/2005 pursuant to Section 117(2)(a) of the Insurance Act, the Finance Minister then approved the transfer of general insurance business following the scheme of transfer dated 01/01/2003 signed between Apollo Insurance Co. Ltd and Pan Africa General Limited (as transferors) and APA Insurance Limited (as transferee).
54. By dint the above and reading of Section 3 & 8 of the Transfer of Business Act, the Plaintiff's suit ought to have been filed within six (6) months thereof however it would appear that the suit was filed two (2) years later. No explanation or retort was offered for the late filing of the suit herein. A suit barred by limitation goes to the heart of the Court's jurisdiction to entertain proceedings before it.
55. The Court of Appeal in Tburanira Karauri v Agnes Nchebe [1997] KECA 77 (KLR) observed that-;
- “Ral Rulea point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.
56. The same Court in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR) observed that-:
- “ A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied....Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise jurisdiction, which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”
57. Given the above, the Court cannot do more than concur with Maina, J. in Copana Limited v Pan Africa Insurance Co. Limited [2017] KEHC 3760 (KLR) wherein she dismissed an application for substitution by dint of Section 8 of the Transfer of Business Act that limits actions against the transferee to a period of six (6) months from the date of the transfer.
58. Consequently, despite this Court's earlier finding on the Plaintiff's failure to adduce pertinent and or tangible material demonstrating breach of the policy of insurance, by dint of Section 8 of the Transfer of Business Act. This Court need not address itself further on the matter on accord of the Plaintiff's suit being caught up by limitation. Therefore, the commending order in the circumstance is that the suit is struck out with costs to the Defendant.

Order Accordingly.



DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2025.

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JANET MULWA.

JUDGE

