

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E1523 OF 2024

APA INSURANCE LIMITED..... APPELLANT

-VERSUS-

FRANCIS MULWA & SAMMY MUTISYA
MULWA (Suing as personal representatives
and the administrators of the estate of the
late PETER MULWA MBUTHU)..... RESPONDENT
(Being an appeal from the judgment of Hon. CHRISTINE A OGWENO
(SRM) in Milimani CMCC no. E1292 of 2021 delivered on 11/12/2024)

JUDGMENT

- 1) The respondents in this appeal, FRANCIS MULWA & SAMMY MULWA MUTISYA suing as personal representatives of the estate of PETER MULWA MBUTHU filed a declaratory suit vide plaint dated 13/9/2021 against the appellant, APA INSURANCE CO. LTD seeking to compel the appellant to settle the decretal sum in Milimani CMCC No. 1511 of 2015 amounting to kshs.765,036.08 together with costs and interest.
- 2) The appellant filed a statement of defence dated 25/11/2021 opposing the claim.
- 3) The respondent's case was that the deceased who was their brother died following a road traffic accident on 7/12/1992

involving motor vehicle registration no. KAS 642H owned by Coast Bus Co. Ltd insured by Pan African Insurance Holdings Ltd

- 4) The appellant called its legal officer who said he does not know if there existed an entity known as Pan African Insurance Company Ltd.
- 5) He said Gazette Notice No. 7928 relates to Pan African General Insurance Ltd and not Pan African Insurance Company Ltd.
- 6) The trial court found that APA Insurance Co. Ltd had taken over the legal obligations of the pan African Insurance Ltd and that the appellant's claims were mere technicalities meant to defeat the suit.
- 7) The trial court entered judgment in favour of the respondent.
- 8) The appellant has appealed against the said judgment on the following grounds;

- i. The Learned trial Magistrate erred in fact and in law by issuing declaratory orders where the conditions prescribed in Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, CAP 405 Laws of Kenya, had not been met.*
- ii. The Learned trial Magistrate erred in both fact and in law by failing to appreciate that no nexus was*

established between the subject policy and the primary suit's Defendant.

- iii. Having found that the Respondent had not proved service of Statutory Notice within the prescribed period, the Learned trial Magistrate erred in fact and in law by nevertheless finding for the Respondent*
- iv. The Learned trial Magistrate erred in both fact and law by purporting to presume existence and/or service of Statutory Notice from correspondences/documents on which such presumption could not factually be derived.*
- v. The Learned Trial Magistrate erred in both fact and law by failing to appreciate that service of statutory notice (within the prescribed period) was a condition precedent to success of declaratory proceedings under Section 10 of Cap 405 and could not be circumvented in any way.*

9) The parties filed written submissions as follows; the appellant submitted that Section 10 2(a) of the Insurance (Motor Vehicles Third Party Risks) Act (CAP 405) provides that;

"(2) No sum shall be payable by an insurance under the foregoing provisions of this section.

a. In respect of any judgement, unless before or within fourteen days of the commencement of the proceedings in which judgement was given, the insurer had notice of the bringing of the proceedings.

Issuance of a Statutory Notice within a prescribed period is a condition precedent to success of a declaratory suit under CAP 405. "

- 10) The appellant contended that the Respondent was required to prove service of Statutory Notice upon insurer either before filing the primary suit or within 14 days thereof. That period lapsed on 5th November 1993.
- 11) The Primary Suit's Complaint was filed in 1993 as HCCC No.5168 of 1993 then transferred to the Chief Magistrates Court as E 1292 of 2021. The produced copy of Complaint is illegible, and one cannot ascertain filing date therefrom. However, the Plaintiff's List of Documents dated 13th September 2025 indicates Complaint filing date as 22nd October 1993.
- 12) The Respondent neither alleged, nor demonstrated service of Statutory Notice upon the Appellant, its alleged predecessor PAN AFRICAN INSURANCE CO LTD, or any of the insurers mentioned in produced Gazette Notices and the Police Abstract. No Statutory Notice was attached to the Plaintiffs List of Documents or produced in evidence.
- 13) The attached correspondences bear dates long after 5th November 1993 (outside the prescribed statutory service period) and do not amount to the required statutory notice. No

evidence was adduced respecting service of Statutory Notice within the prescribed period or at all.

- 14) The trial court alluded to letter of 9th December 1993 (page 48 of the Record) which does not in any way evidence service of statutory notice within the prescribed period. That letter bears a date, two months after the primary suit's filing date (22nd October 1993) and long after lapse of the 14-day Statutory Notice service period.
- 15) The letters cannot lead to a conclusion that Statutory Notice was timeously served. It is from Pan Africa Insurance Company, addressed to Oraro & Rachier Advocates, and forwards Summons, Plaint with instructions to the latter to defend suit. There is nothing thereon indicating service of Statutory Notice as prescribed.
- 16) The appellant submitted that the Respondents also failed to prove ownership and insurance of motor vehicle registration number KAC 642H by the primary suit judgment debtor COAST BUS COMPANY as per Decree.

- 17) The only document produced alluding to insurance was the Police Abstract dated 15 th February 1993 (page 18 the Record). It named COAST LINE SERVICES and PAN AFRICAN INSURANCE CO LTD as the subject motor vehicle's owner and insurer respectively.
- 18) The appellant contended that a declaratory remedy under Section 10 of CAP 405 is only available where judgment is obtained against a person insured by the terms of the policy, in this case, COAST LINE SERVICES the presumed insured.
- 19) The primary suit Defendant (COAST BUS COMPANY) was evidently a stranger to the policy. A judgment against it cannot be enforced as purported, based on the insurance particulars on the Police Abstract. The presumed insured, COAST LINE SERVICE, was not sued nor was any judgment obtained against it.
- 20) The merger allegations in the Plaint were not established. There is no evidence establishing any nexus between the Appellant herein and PAN AFRICAN INSURANCE CO LTD (insurer on the Police Abstract).

- 21) Gazette Notice No 7928, relates to transfer of general insurance businesses of both PAN AFRICA GENERAL INSURANCE LIMITED and APOLLO INSURANCE COMPANY LIMITED to NEWCO LIMITED.
- 22) It does not mention PAN AFRICAN INSURANCE CO LTD, (the presumed insurer) neither does it establish any nexus between two entities. Gazette Notice No 8726 comprises Notice issued by APOLLO INSURANCE COMPANY LIMITED respecting PAN AFRICA GENERAL INSURANCE COMPANY LIMITED it does not relate to either PAN AFRICAN INSURANCE COMPANY LIMITED or the Appellant (APA INSURANCE COMPANY LIMITED).
- 23) Those Gazette Notices did not prove transfer of any liability to the Appellant. The Transferee pursuant to Gazette Notice No 7928 is NEWCO LIMITED.
- 24) The allegations in the paragraph 9(a) (b) of the Plaintiff that "NEWCO LIMITED changed its name to become APA LIMITED" were not proved. The "Special Resolution" alleged to in paragraph 9(b) of the Plaintiff was not produced. It behooved

the Respondent to establish those denied allegations by credible evidence.

25) The respondents, as personal representatives of the deceased's estate, obtained judgment in Milimani CMCC No. 1511 of 2015 for the sum of Kshs.765,036.08 together with costs and interest.

26) The declaratory suit giving rise to this appeal was filed to compel the appellant, APA Insurance Limited, to satisfy that decree on the ground that the appellant had taken over the legal obligations of Pan African Insurance Ltd.

27) The trial magistrate found in favour of the respondents, and the appellant now appeals.

28) The issues for determination in this appeal are as follows;

- (i) Whether the respondents proved service of statutory notice upon the insurer.**
- (ii) Whether the respondents established a nexus between the judgment debtor (Coast Bus Company) and the insured named on the Police Abstract (Coast Line Services).**
- (iii) Whether the respondents proved the succession, merger, or transfer of liabilities from Pan African Insurance Co Ltd (the alleged insurer on the**

Police Abstract) to the appellant, APA Insurance Limited.

- 29) On the issue of statutory notice, Section 10(2)(a) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 provides that no sum shall be payable by an insurer in respect of any judgment unless before or within fourteen days of the commencement of the proceedings in which judgment was given, the insurer had notice of the bringing of the proceedings.
- 30) I find that the law does not prescribe any particular form for the notice. Any communication that alerts the insurer to the existence of proceedings suffices.
- 31) A document once admitted in evidence without objection is properly before the court. The letter of 9th December 1993 was admitted without objection and clearly demonstrates that the insurer had actual notice of the proceedings.
- 32) The forwarding of the summons and plaint to its advocates with instructions to defend the suit is the clearest possible evidence that the insurer was aware of the proceedings.

- 33) To hold that such actual knowledge does not constitute "notice" under Section 10(2)(a) would be to elevate form over substance in a manner that Parliament never intended.
- 34) Moreover, the evidence on record does not conclusively establish the exact filing date of the primary suit. The copy of the plaint produced was illegible, and the filing date of 22nd October 1993 is drawn from a list of documents, not from a court stamp on the plaint itself.
- 35) It is entirely possible that the suit was filed later, or that the notice was served earlier. The trial magistrate, having seen and assessed the evidence, was satisfied that the insurer had notice.
- 36) This Court, sitting on a first appeal, should not lightly disturb that finding unless it is plainly wrong. I find no such error.
- 37) I also note that the appellant raised the issue of statutory notice for the first time in the declaratory suit, having had every opportunity to raise it in the primary proceedings.

- 38) The appellant's predecessor was served with the summons and plaint in 1993, instructed advocates to defend, and participated in the primary suit.
- 39) To now argue, decades later, that no proper statutory notice was served is an invitation to the court to countenance sharp practice.
- 40) The purpose of the notice requirement is to ensure the insurer is not ambushed by a judgment to which it was not a party.
- 41) Where the insurer actually participated in the proceedings, that purpose is fully served, and the technical requirement of the notice form ought not to be used as a shield against liability.
- 42) Turning to the second issue of the nexus between the judgment debtor and the named insured, the Police Abstract dated 15th February 1993 is a contemporaneous document prepared shortly after the accident.
- 43) It names the owner as "Coast Line Services." However, the decree from the primary suit names the defendant as "Coast Bus Company."

- 44) The respondents adduced evidence that these are trading names or business names for the same entity.
- 45) It is a notorious fact within the transport industry that bus companies often operate under multiple business names.
- 46) The trial magistrate accepted this evidence, and I see no reason to disturb that finding.
- 47) In any event, the insurance policy itself was not produced, and the appellant did not adduce any evidence to show that Coast Bus Company was not its insured.
- 48) The burden of proving that the judgment debtor was not insured rests on the insurer who wishes to avoid liability.
- 49) Once a respondent produces a police abstract or insurance certificate naming an insured, the evidential burden shifts to the insurer to demonstrate that the judgment debtor was not covered.
- 50) The appellant called no evidence to rebut the Police Abstract. That abstract was the only documentary evidence available from 1993, and it is unreasonable to expect accident victims or

their representatives to adduce more conclusive proof of ownership decades after the event.

- 51) The trial magistrate correctly applied the principle **in Mbugua v Gatune [2002] 1 EA 352** that in civil cases, proof is on a balance of probabilities, and that standard is more than met by the Police Abstract in the absence of any contrary evidence from the insurer.
- 52) On the issue of succession or merger between Pan African Insurance Co Ltd and the appellant, I find that the trial magistrate was equally correct.
- 53) The respondents produced Gazette Notice No. 7928, which relates to the transfer of general insurance businesses of Pan Africa General Insurance Limited and Apollo Insurance Company Limited to Newco Limited.
- 54) They also produced Gazette Notice No. 8726. While these gazette notices do not explicitly mention "Pan African Insurance Co Ltd," they form part of a broader body of evidence demonstrating that the appellant acquired the liabilities of the Pan African group of insurance companies.

- 55) The appellant is a well-known entity in the Kenyan insurance market, having been formed through a series of mergers and acquisitions involving Pan African Insurance companies.
- 56) The appellant did not adduce any evidence to deny that it succeeded to the liabilities of Pan African Insurance Co Ltd.
- 57) It merely argued that the respondents had not proved the succession.
- 58) However, under Section 112 of the Evidence Act, Cap 80, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
- 59) The fact of whether the appellant succeeded to the liabilities of Pan African Insurance Co Ltd is peculiarly within the knowledge of the appellant.
- 60) Having been served with the suit and having had every opportunity to produce its own incorporation and succession documents to disprove liability, the appellant failed to do so.
- 61) The trial magistrate was therefore entitled to draw an adverse inference against the appellant under Section 119 of the Evidence Act.

- 62) Where a party fails to produce documents that are within its exclusive possession and that would elucidate a fact in issue, the court is entitled to presume that those documents would be adverse to that party's case.
- 63) The appellant's failure to produce its own historical records of merger and acquisition speaks volumes.
- 64) The deceased died in 1992. His personal representatives have pursued this claim for over three decades.
- 65) The insurer had actual notice of the proceedings, instructed advocates to defend, and participated in the primary suit.
- 66) The decretal sum of Kshs.765,036.08 is modest. The respondents have done everything within their power to prove their case.
- 67) I dismiss the appeal with costs to the respondents and affirm the judgment delivered on 11th December 2024 in its entirety.
- 68) I further order the appellant to settle the decretal sum in Milimani CMCC No. 1511 of 2015 amounting to Kshs.765,036.08 together with costs and interest as prayed by the respondents.

69) Orders to issue accordingly.

**Dated, Signed and Delivered online via Microsoft Teams at
Nairobi this 7th day of May, 2026.**

A. N. ONGERI

JUDGE

In the presence of:

Mr Kausi holding brief Mr Mege for the Applicant

No appearance for the Respondent