



REPUBLIC OF KENYA



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**Inchwara v APA Insurance Limited (Civil Appeal 17 of 2018)
[2022] KECA 885 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KECA 885 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 17 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MAY 27, 2022**

BETWEEN

YUNES MORAA INCHWARA APPELLANT

AND

APA INSURANCE LIMITED RESPONDENT

*(Being an appeal from the judgment (Cherere, J) delivered on
23rd November, 2017 in KISUMU HCCA NO. 47 OF 2011)*

JUDGMENT

JUDGEMENT OF TUIYOTT, JA

- [1] The vexed question as to whether there is a nexus between Pan Africa Insurance Company Limited and APA Insurance Limited (APA or the respondent) refuses to go away.
- [2] On 3rd April, 1999, Yunes Moraa Inchwara (the appellant) was a pillion passenger along Chetulu-Kamulemba road when motor vehicle registration KAC 943B knocked her down. She sustained bodily injury for which she sought compensation from one Prabhakar Bai Patel in Kisumu CMCC No. 47 of 2000 (the running down claim). She was successful and obtained judgment for Kshs. 123,000.00 in damages and costs of Kshs. 25,840.00
- [3] The decree was unpaid and so she took out declaratory proceedings in Winam Civil Suit No. 19 of 2006 Yunes Moraa Inchwara vs APA Insurance Co. Ltd on the basis that APA was under an obligation, by dint of the provisions of section 10 of the Motor Vehicle (Third Party Risks) Act, Cap. 405, to satisfy the decree at hand. Part of the defence by APA was that it did not insure the offending motor vehicle and was not liable to pay.
- [4] At the declaratory proceedings it turned out that at the time of the accident, motor vehicle registration number KAC 943B was insured by Pan Africa Insurance Co. Ltd. The substantial question then



became whether there was a connection between Pan Africa Insurance Co. Ltd. and APA, the respondent. In answer to this question, the trial magistrate held;

“As the case proceeded in Court, the defendant’s insurer sold its business to Pan Africa General Insurance LTD. Co. Exhibit p 6 & 7). This Company merges with Apollo Insurance Co. Ltd to be known as New Company Ltd. (nenco Ltd.) (sic). Newco Ltd later changed its name to APA Insurance Ltd. PW2 explained this well and produced exhibits p8 and 9 (b).”

- [5] Unhappy with this finding the respondent moved to the High Court on appeal at Kisumu in Civil Appeal No. 47 of 2011 APA Insurance Company Limited vs Yunes Moraa Inchwara. On this occasion the respondent was successful, the learned judge holding;

“I have considered the evidence and exhibits on record and I am persuaded by the holding in Civil Appeal NO. 78 of 2009 Wanga & Co. Advocates v APA Insurance Co. Ltd (UR) and Nairobi HCCC No. 121 of 2003 Mediplus Services Limited v Pan Africa Insurance Co. Ltd & Another (UR) that Gazette Notice No. 8126 was in respect of Pan Africa General Insurance Company Limited.

From the foregoing; I find and hold that Pan Africa Insurance Co. Ltd that had insured the accident motor vehicle KAC 943B is different from Pan Africa General Insurance Limited.

It is evident that the appellant did not morph from Pan Africa Insurance Co. Ltd. It was therefore a misdirection on the part of the learned trial magistrate to hold that APA Insurance Company was the successor of the Pan Africa Insurance Company Limited.”

- [6] Before us is a second appeal which raises six grounds but is really around one issue. That issue being whether the learned judge erred in her analysis of the evidence on record by failing to find that the respondent took over the liabilities of Pan African Insurance Company Ltd.
- [7] Arguing the appeal, counsel for the appellant submitted that the learned judge misconstrued the finding of the trial court to be that APA was the successor of Pan Africa Insurance Company Limited. It is argued that what the trial court found was that there was a transfer of business including assets and liabilities from the Pan Africa Insurance Company Limited, which had insured the accident motor vehicle, to Pan African General Insurance Limited, which later merged with Apollo Insurance Company Limited to form Newco Limited. This latter entity subsequently changed its name to APA Insurance Limited, the respondent. In this regard, the appellant places much premium on the Memorandum and Articles of Association of Pan African General Insurance Limited and those of Newco that were produced at trial. One needs to note that although the names are similar, Pan Africa Insurance Company Limited is different from Pan Africa General Insurance Limited.
- [8] The appellant cited to us decisions of the High Court in HM vs APA Insurance Ltd. & Another Busia HCC No. 26 of 2007, APA Insurance Limited v David Oleilei Amayo Kisii HCC No. 182 of 2011, and APA Insurance Co. Ltd vs Grace Muthoni Wainaina & Another Eldoret HCCA No. 141 of 2012. Also cited was the Court of Appeal decision in APA Insurance Company Ltd vs Zainabu Ali Ruwa Mombasa Civil Appeal No. 82 of 2008.
- [9] Supporting the decision of the High Court, the respondent contends that there is no relationship whatsoever between it and Pan Africa Insurance Company Limited and that the appellant failed to demonstrate any nexus between the two. The respondent further argues that the entity that would morph into APA Insurance Limited only bought part of the business of Pan Africa General Insurance Limited, hence it was not shown that Pan African Insurance Company Limited was defunct. We were



asked to give regard to the following holding of the Court of Appeal in Civil Appeal No. 78 of 2009-
Wanga & Company Advocates vs APA Insurance Company Limited;

“The other grounds of appeal argued before us, in our view, relate to the finding by the High Court that the respondent was the product of a merger between Pan Africa General Insurance Limited and Apollo Insurance Company Limited which had no relationship with Pan Africa Insurance Company Limited which had previously offered insurance cover to Kenya Bus Services Limited. The learned Judge of the High Court held that Pan Africa Insurance Company Limited and Pan Africa General Insurance Limited were separate legal entities. The Learned Judge cannot be faulted on that finding as he, in our view, correctly applied a basic principle of company law. Liability of the respondent could not be implied by previous payments which, as the respondent submitted, could have been made in error. There was, in legal parlance, no privity of conflict between the appellants and the respondent and the respondent could not therefore be liable for the appellants' fees.”

- [10] This is a second appeal and I am keenly aware of the role of this Court in that jurisdiction spelt out under section 72 (1) of the *Civil Procedure Act* which restricts this Court to the determination of matters on points of law only. This mandate has been reinforced in a myriad of decided cases by this Court where it has held inter alia that, a second appellate court ought to confine itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse. Among them are *Kenya Breweries Ltd v. Godfrey Odongo*, Civil Appeal No. 127 of 2007 and *Stanley N. Muriithi & Another v. Bernard Munene Ithiga* (2016) eKLR.
- [11] The singular question that arises in this appeal is whether the appellant had, through evidence, established that the liability of Pan African Insurance Company Limited, in respect to her claim, had been lawfully transferred to the respondent thereby making it liable to meet the decree in the accident claim. In considering this question, I must right from the outset, state that I am not hamstrung by the Court of Appeal decision in Wanga, not in the least, because the Court there was considering the matter on the basis of evidence that had been presented before the High Court in that particular matter. The Court of Appeal found that on the basis of the material availed to the learned judge of the High Court, it could not fault the finding of the learned judge that Pan Africa Insurance Company Limited and Pan African General Insurance Limited were separate legal entities. I do not understand the decision in Wanga to be one in rem as regards whether or not the two entities are related. Indeed, in that decision, the Court of Appeal declined to accede to the invitation of counsel for the appellant to consider Gazette Notice No. 1758 of 2003 that had not been produced at trial. As will be clear presently, the outcome may have been different had that Gazette Notice been adduced in evidence.
- [12] Let me start with what is common ground. It is not in dispute that an entity by the name Pan Africa General Insurance Limited (as distinct from Pan African Insurance Company Limited) merged with an entity by the name Apollo Insurance Company Limited to form Newco Limited which later changed its name to APA Insurance Limited, the respondent.
- [13] At trial, evidence regarding the controversial issue as to whether there was a nexus between Pan Africa Insurance Company Limited and Pan Africa General Insurance Limited was led by two witnesses. An examination of that evidence will yield the answer whether the conclusion drawn by the High Court is so much at odds with the evidence presented as to be a perverse finding that must be upset.



[14] Johnson Adera, a Senior Assistant Registrar of Companies, testified for the appellant. He produced extracts of documents kept with the Registrar of Companies regarding APA and Pan African General Insurance. From the records he deduced as follows;

“I have documents for APA Insurance Limited formerly known as Newco Limited certificate of incorporation No. 100942. Certified copy is here. Newco transferred to APA on 17/11/2003, transfer document – exhibit P8. Memo for Newco is here. Article 3(1) reads, “To acquire and take over as a going concern the business carried on by any person including without limitation general insurance business carried on....and Apollo Insurance.....and discharge liabilities.” MF1 P7 exhibit P7.

I produce certificate for APA and Newco. Newco Limited certificate – Exhibit 9(a) Certificate for change from Newco to APA – Exhibit 9(b). I have certificate of Pan African General Insurance is here. It acquired business from Pan African Insurance Company. Certificate Exhibit P6. These documents are extracts from what Registrar of companies holds. That is all.”

[15] For the respondent, Antony Mungai Njogu, a Legal Officer with the company, referred the trial Court to Gazette Notices No. 7928 of 7th November, 2003 and 8126 of 14th November, 2003. He maintained that the respondent has no link to Pan African Insurance Company Limited.

[16] What do the Gazette notices tell us? For good measure, i reproduce them;

Gazette Notice No. 7928

Newco Limited

Business Transfer

Notice is hereby given pursuant to the provisions of the Transfer of Business Act (Cap. 500) of the laws of Kenya, that it is intended that:

- (i) The general insurance business of Pan Africa General Insurance Limited (the “Pan Africa Transferor”) carried on from its offices at Pan Africa House, Kenyatta Avenue, Nairobi, Ambalal House, Nkrumah Road, Mombasa, NDCU House, Nyeri Mache Plaza, Nakuru, Shabana Building, Kisii, Giddo Plaza, along Nairobi-Eldoret Highway, Nakuru, Kenya Finance House, Tom Mboya Street, Meru, Al-Imram Plaza, Oginga Odinga Road, Kisumu, Kenya Red Cross Building, Machakos, KVDA Plaza, Oloo-Utalii Streets, Eldoret, Mugo Gatungo Building, Embu and Thika Arcade, Kenyatta Highway Thika; and
- (ii) The general insurance business of Apollo Insurance Company Limited (the “Apollo Transferor”), carried on from its offices at 6th Floor, Hughes Building, Kenyatta Avenue, Nairobi and Apollo Court, Moi Avenue, Mombasa and Giddo Plaza, George Murara Road, Nakuru,

Be sold and transferred by way of sale of certain of the assets and liabilities of Pan Africa General Insurance Limited and Apollo Insurance Company, respectively to Newco Limited (to be known, subject to approval from the Commissioner of Insurance pursuant to the [Insurance Act](#) (Chapter 487), as Apa Insurance Company Limited) (the “transferee”) who will carry on a similar business utilizing the said assets and liabilities at 6th Floor, Moi Avenue, Mombasa and Giddo Plaza, along Nairobi-Eldoret Highway, Nakuru.

The address of the Pan Africa Transferor is P.O. Box 62551, Nairobi.



The address of the Apollo Transferor is P.O. Box 30389, Nairobi.

The address of the Transferee is P.O. Box 30389, Nairobi.

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.

Dated the 28th October, 2003.

Kapila Anjarwalla & Khanna,

Advocates for the Transferee.

Gazette Notice No. 8126

THE [INSURANCE ACT](#)

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

Apollo Insurance Company Limited

and

Pan Africa General Insurance Limited

Transfer Of General Insurance Businesses

Statutory Notice

NOTICE is given for and on behalf of each of Apollo Insurance Company Limited and Pan Africa General Insurance Limited (“the Companies”) in accordance with section 114 (1)(a) of the [Insurance Act](#) (Cap. 487) of the laws of Kenya, that pursuant to (1) resolutions of their respective boards of directors passed on 26th September, 2003 and 4th April, 2003, respectively, and (2) a sale and transfer of business agreement dated 26th September, 2003, the Companies have applied jointly to the Minister for Finance, through the Commissioner of Insurance, pursuant to section 113(1) of the [Insurance Act](#), for approval for the transfer of the property, undertaking, assets and liabilities of their respective general insurance businesses to a new limited liability company incorporated for the purpose under the [Companies Act](#) (Cap. 486) of the laws of Kenya, with effect from 1st January, 2003.

The form of this notice has been approved by the Minister of Finance pursuant to section 114(1)(a) of the [Insurance Act](#), and the Minister has consented pursuant to section 114(1)(b), that the copies of this notice need not be sent to every affected policy holder and every other person who claims an interest in a policy included in the proposed transfers.

Copies of a statement setting out particulars of the transfer aforesaid, approved by the Minister of Finance pursuant to section 114 (1)(c), have been made available at (1) the registered office of Apollo Insurance Company Limited at Hughes Building, Kenyatta Avenue, Nairobi, in each case in accordance with section 114(1)(c) of the [Insurance Act](#) as well as at the offices of the Commissioner of Insurance at Anniversary Towers, Monrovia Street, Nairobi.

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



Any queries may be directed:

On behalf of Apollo Insurance Company Limited:

Kapila Anjarwalla & Khanna, Advocates,

7th Floor, Transnational Plaza,

City Hall Way,

Box 41144, Nairobi,

Facsimile: 254 20 337620,

E-mail: nbi@ka-legal.com

Attention: Sonal Sejpal.

On behalf of Pan Africa General Insurance Limited:

Mboya Advocates

7th Floor, Nation Centre,

Kimathi Street,

Box 10818, Nairobi

Facsimile: 254 20 342390,

E-mail: mboya@mboya.co.ke

Attention: Waringa Njonjo

Dated the 6th November, 2003.

KAPILA ANJARWALLA & KHANNA,

Advocates for the Transferee.

MBOYA ADVOCATES

Advocates for Pan Africa General Insurance Limited.

- [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.
- [23] I would allow the appeal and set aside the judgment of the High Court and confirm the judgment of the trial court. I would propose that costs of the appeal and that in the High Court be awarded to the appellant.



JUDGMENT OF KIAGE, JA

I have had the advantage of reading in draft the judgment of Tuiyott, JA, with which I am in agreement and have nothing useful to add.

JUDGMENT OF MUMBI NGUGI, JA

I have had the advantage of reading in draft the judgment of Tuiyott, JA, with which I am in agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF MAY, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

