IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, ONYANGO OTIENO & AZANGALALA , JJ. A)

CIVIL APPEAL NO. 78 OF 2009

BETWEEN

WANGA & COMPANY ADVOCATES …..... APPELLANT

AND

APA INSURANCE COMPANY LIMITED .....RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at

***Kisumu (J. W. Mwera, J) dated 16th April, 2008* In**

KSM HCMISC No. 215 OF 2005

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JUDGMENT OF THE COURT

In an application by Notice of Motion dated 25th April, 2006 and filed on 13th July, 2006, the respondent herein, which was the applicant in the Motion, sought one substantive order of the Court, that it was not liable to the appellants herein, who were the respondents in the Motion in respect of payment of their fees and that an entity called Kenya Bus Services Limited was liable for the same. **Mwera J,** as he then was, on 16th April, 2008 granted the order sought with costs against the appellants. The appeal before us is against that Order.

The appellants are advocates and the respondent is an entity which offers, insurance services in Kenya. It was not disputed that the appellants rendered legal services to the Kenya Bus Services Limited. The dispute was on whether the respondent was liable to pay for those services. The appellants contended before the High Court through affidavit evidence and submissions of counsel that the respondent had previously paid for the appellant's legal services to Kenya Bus Services Limited and was estopped from denying liability to pay their fees.

For the respondent, it was contended that an entity called Pan Africa Insurance Company Limited, previously gave insurance cover services to Kenya Bus Services Limited. The former was not in existence by the time the High Court dealt with the dispute between the parties herein. However, it was contended that another entity called **Pan Africa General Insurance Limited** merged with Apollo Insurance Company Limited to form the respondent herein and none of the entities took over Pan African Insurance Company Limited's liabilities with Kenya Bus Services Limited. In the respondent's view, if

any payments had been made to the appellants then such payments were made in error.

To buttress its arguments, the respondent exhibited Gazette Notice No. 8126 of 14th November, 2003 which demonstrated that the respondent was indeed the product of the merge between Apollo Insurance Company Limited and Pan African General Insurance Limited and Pan Africa Insurance Company Limited was not involved.

Upon consideration of the affidavit evidence and the law applicable the High Court rejected the appellants' contention that the respondent was liable to pay their fees concluding as follows:-

> **"By the evidence of the Gazette Notice No. 8126 (above) this court is satisfied that the applicant company was as a result of Apollo Insurance Company Limited and Pan Africa General Insurance Limited transferring their business, including assets and liabilities to the applicant. Pan Africa Insurance Company Limited was not part of this deal and whoever dealt with it when it existed e.g. Kenya Bus Services Limited, should look elsewhere for accommodation. And if that company hired lawyers e.g. the respondent, to do work for it arising from insurance cover it had, that work cannot be paid for by the applicant. The two Pan Africas are totally different limited liability companies and it cannot be assumed that they were one and the same entity. It is no matter that at one stage the applicant paid legal fees on behalf of Kenya Bus Services."**

M/s Wanga & Company Advocates were aggrieved by those findings and now come before us seeking reversal thereof. Some five grounds were put forward in the Memorandum of Appeal drawn by Learned Counsel for the said firm of Advocates, M/s Behan & Okero. They were expressed as follows.

" 1. That the Learned Trial Judge erred by making findings that were not supported by evidence.

2. **That the learned Trial Judge erred in finding that the respondent was not liable to pay the fees incurred by the appellant in representing Kenya Bus Services Limited.**
3. **That the Learned Trial Judge erred in not finding that the respondent was estopped by its conduct from denying liability .**
4. **That the Learned Trial Judge erred in making findings based on conjunctures and opinions not supported by evidence.**
5. **That the Learned Trial Judge erred in finding that the appellant was instructed by Pan Africa Insurance Company Limited while the documentary evidence showed that the appellant was in fact representating Kenya Bus Co Ltd on behalf of Pan Africa General Insurance Company Ltd."**

Mr. Okero, learned counsel who represented the appellants at the hearing of this appeal, condensed the above grounds into two by arguing grounds 1,2 and 3 together and ground 5 separately. Ground 4 was abandoned. The substance of counsel's submissions was that correspondence exhibited by the appellant clearly showed that the respondent had indeed instructed the appellants and was liable for their fees. Counsel placed reliance upon Legal Notice No. 1728 of 2003 which, in his view, demonstrated that Pan Africa Insurance Company Limited transferred its general insurance business to Pan Africa General Insurance limited. Learned counsel however, acknowledge that this legal Notice was not brought to the attention of the High Court. Consequently, according to learned counsel, the decision of Mwera J, was made per in curium.

Mr. Nyamweya, Learned counsel for the respondent, on his part opposed the appeal contending in the main that the appellants were instructed by Kenya Bus Services Limited which is liable to pay their fees given that Pan Africa Insurance Company Limited is no longer in existence. In counsel's view legal Notice No. 1758 of 2003 should not be considered since it was not available to the High Court and reliance thereon would greatly prejudice the respondent. In any event, according to counsel, the appellants have not sought leave to rely upon additional evidence.

We propose to first consider the issue of Legal Notice No. 1758 of 14th March 2003. It is common around that the said legal Notice was not brought to the attention of the Learned Judge of the High Court by any of the parties. It did not therefore form part of the appellants' case before the High Court. For the appellant to rely upon evidence which was not adduced before the High Court, they should have sought leave of this court to do so. There are good reasons for the principles which include considerations of fairness and prejudice which may be occasioned to the opposite party. Other considerations have been given in various cases of this court and cases from other jurisdictions. In **Alwi A. Saggaf v Abed Algeredi [1961] EA. 767,** the following passage from the speech of Lord Birkenhead in **North Staffordshire Railways Co. -V- Edge [1920]A.C. 254** was cited with approval:

> **"The appellate system in this country is conducted in relation to certain well known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require the judgments of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially on a final Court of Appeal are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all, from the judges in the court's below."**

In the case of **The United Marketing Company -V- Hasham Kara [1963]EA 276** it was held as follows:

> **" (ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required their Lordships would not readily allow a fresh point of Law to be argued without the benefit of the judgments of the judges in the Courts below, accordingly;**
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> **(iii) their Lordships would not even if the question were a bare question of law, entertain the submission that the respondents claim was to be defeated by reason of his breach of a condition in his contract of insurance. North Staffordhire Railway Company -V- Edge [1920] A.C 254,applied."**

The appellants' case before the High Court was specific and was argued on the basis of estoppel by reason of the previous conduct of the respondent. Legal Notice No. 1758 of 14th March, 2003 was never referred to, yet it had been published even prior to Gazette Notice No. 8126 published on 14th November, 2003 which was availed to the High Court. To allow the appellants to alter their case at this stage would in our view, be grossly prejudicial to the respondent. It is besides being against public policy not in accordance with Public Interest that a party who has presented a case in an inferior court in a specific manner and failed should be allowed, on appeal, to raise a new point and put his case in an entirely different way as a matter of law and so defeat a successful party who would probably have fought the case differently if the point had been raised in the inferior court.

We have said enough, we think, to show that we cannot accede to the invitation of counsel for the appellant to consider Legal Notice No. 1758 of 2003. We reject the same.

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.

We have carefully examined the material which was availed to the learned Judge of the High Court. We have also duly considered the submissions made before us and the authorities cited and have come to the conclusion that there is no reason to interfere with the decisions of the High Court.

In the result the appeal is for dismissal in its entity and we so order. Costs of the appeal shall be paid to the respondent by the appellant.

Dated and Delivered at Kisumu this 24th day of January, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR