



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT MOMBASA**

**Civil Appeal 82 of 2008**

**A.P.A. INSURANCE COMPANY LIMITED .....APPELLANT**

**AND**

**ZAINABU ALI RUWA .....RESPONDENT**

***(An appeal from the ruling of the High Court of Kenya at Mombasa (Sergon, J.) dated 26<sup>th</sup> July, 2007 in H.C.C.C. NO. 216 OF 2006)***

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**JUDGMENT OF THE COURT**

**APA Insurance Ltd**, the appellant herein, appeals against the order of the superior court (Sergon, J.) made at Mombasa on 26<sup>th</sup> July, 2007 and by that order, the learned Judge had struck out the appellant’s amended defence to the claim of **Zainabu Ali Ruwa**, the respondent herein. By a plaint dated 28<sup>th</sup> September, 2006, the respondent who had earlier on obtained a judgment in the sum of Shs.3,044,343/= against **Samken Ltd** in respect of a road traffic accident on 4<sup>th</sup> April, 1995 sought a declaration that the appellant was statutorily liable under **section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act, Cap 405** of the Laws of Kenya, to satisfy the judgment obtained by the respondent against Samken Ltd. At the time of the accident, Samken owned motor vehicle Reg. No. KAD 396 L and according to the respondent the vehicle was insured by Pan Africa Insurance Company Ltd; that company had been served with the relevant notice when the suit against Samken Ltd was filed by the respondent who sued as a next friend to one **Miriam M. Ali**, a minor, and who was the party injured during the accident.

In the suit against the appellant, it was pleaded in paragraphs 3 and 4 of the plaint: -

“(3) *The Defendant is sued in these proceedings in its capacity as the successor in title to PAN AFRICA INSURANCE COMPANY LIMITED following the merger of the said PAN AFRICA INSURANCE COMPANY LIMITED with APOLLO INSURANCE CO. LTD.*

(4) *The Plaintiff avers that the Defendant following the said merger, assumed the legal obligations of PAN AFRICA INSURANCE COMPANY LIMITED as insurer within the meaning and scope of sections 5 and 10 of the Motor Vehicle (Third Party Risks) Insurance Act Cap 405 of Laws of Kenya (sic).”*

The appellant at first filed a two-paragraph defence dated 16<sup>th</sup> October, 2006, and the averments in that

defence were as follows: -

“1. The defendant admits paragraphs 1, 2, 3 and 4 of the *plaint and adds that henceforth its address for service* *for the purposes of this suit is care of the office of Pandya & Talati Advocates, Fort Manison, Nkrumah Road, P. O. Box 82402, Mombasa.*

(2) *The defendant does not admit plaintiff's averments in paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the plaint and puts the plaintiff to strict proof thereof and states that the (sic) none of the averments in the plaint reveal reasonable or any cause of action against the defendant and prays that the plaintiff's suit be struck off and or dismissed with costs.”*

This defence was subsequently amended but the admissions in paragraph 1 remained untouched. Paragraph 3 was added and it was in these terms:-

“(3) Without prejudice to the foregoing and in addition the *defendant contends that: -*

(i) *the judgment/decree of the court in HCCC 12 of 1997 cannot be enforced against the defendant herein under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405.*

(ii) *the plaintiff's suit herein is premature as the judgment/decree is not final and no proceedings are pending in the court to set aside the said judgment.”*

Faced with this defence, the respondent applied to the superior court to have it struck out. It was not disputed that the respondent had obtained a judgment against Samken Ltd. It was not disputed that notice of institution of the suit had been served upon Pan Africa Insurance Co. Ltd, the insurer of the vehicle involved in the accident. In arguing the appeal before us, Mr. Khatib for the appellant told us that the appellant was not in existence in 1995; that may well be true but nobody had alleged that the appellant was in existence at the time of the accident or at the time when the suit was filed. The allegation in paragraphs 3 and 4 of the plaint were that the appellant was sued in its capacity as the successor in title to Pan Africa Insurance Co. Ltd. following the merger of that company with Pan Africa Insurance Co. Ltd and that subsequent to the said merger, the appellant **“.....assumed the legal obligations of PAN AFRICA INSURANCE COMPANY LIMITED as insurer within the meaning and scope of sections 5 and 10 of the Motor Vehicle Third Party Risks) Insurance Act .....**”

These averments were specifically admitted in both the defence and the amended defence. It was contended before us as it was before the learned Judge that there was no privity of contract between the appellant and the respondent. That contention is correct just as there was no privity of contract between the respondent and Pan Africa Insurance Co. Ltd. But the respondent did not claim at any stage that there was any contract between her and Pan Africa Insurance Co. Ltd or between her and the appellant. The contract of insurance was between Samken Ltd and Pan Africa Insurance Co. Ltd, and the subject matter of that contract was the vehicle owned by Samken Ltd and insured by Pan Africa Insurance Co. Ltd; the respondent was injured by that vehicle and Pan Africa Insurance Co. Ltd was required to compensate the respondent for her injuries not on the basis of any contract between the respondent and Pan Africa Insurance Co. Ltd but because **section 10** of the Insurance (Motor Vehicle Third Party Risks) Act, imposes on an insurer the obligation to pay any sums of damages awarded to victims of accidents by court judgments, provided certain conditions are satisfied before such judgments are given, e.g. the giving of notice to the insurer before or within fourteen days after the commencement of the suit. So the question of privity of contract between the appellant and the respondent does not and could not have arisen.

The appellant admitted that it had assumed the legal obligations of Pan Africa Insurance Co. Ltd; among those obligations was and still is the liability to compensate the respondent. In its memorandum of appeal, the appellant complains that:

“1. *The learned Judge erred in holding that APA Insurance Co. Ltd were the insurers of the defendant Samken Ltd in HCCC No. 12 of 1997 between Ali Ruwa through Zainabu Ali vs. Samken Ltd which was earlier filed in C.M's Court being C.M's CC No. 291 of 1996 when APA Insurance Ltd was not in existence. The defendant had no knowledge of the said pending case till after*

judgment was delivered by the High Court.

2. The learned Judge ought to have held that in the circumstances of the case there was no statutory or contractual liability of the defendant to satisfy the plaintiff's claim against Samken Limited in HCCC No. 12 of 1997 and the plaintiff ought to have sued Pan Africa Insurance Co. Ltd, which is still in existence and with whom the defendant's vehicle was insured.

3. The learned Judge failed to consider that there were other defences which the defendant could not raise in HCCC No. 12 of 1997 between Miriam M. Ali (suing as the next of kin of Zainabu Ali Ruwa) and Samken Limited as the defendant A.P.A Insurance Ltd was not then in existence and did not and could not know until after it was incorporated in the year 2004 in which said Company Apollo Insurance Company Ltd hold 60% and Pan Africa Insurance Company Limited hold 40%.

4. The learned Judge failed to appreciate and hold that the original summons to Enter Appearance issued in C.M's CC No. 291 of 1996 was invalid, null and void ipso facto and was devoid of legal consequences and rendered all proceedings following the issue of bad summons incurably bad and void to all purposes and intents and having drawn the court's attention it should have forthwith vacated the judgment in HCCC No. 12 of 1997 ex debito justitiae.

5. The learned Judge failed to appreciate that the defendant herein had no opportunity to raise any of the valid defences available to the defendant Samken Limited in C.M's CC No. 291 of 1996 and HCCC No. 12 of 1997 instituted by the plaintiff."

These grounds clearly show that the appellant and his legal advisers did not really understand the respondent's claim against it. Nobody ever alleged that the appellant was the insurer of motor vehicle KAD 396 L; that vehicle had been insured by Pan Africa Insurance Co. Ltd; the Judge did not hold that the appellant had been the insurer of the vehicle; the appellant was not. The other defences which could have been raised in the earlier case or cases were available to Samken Ltd and if Pan Africa Insurance Co. Ltd was interested in their being raised, they could have been raised. The application to strike out the defence was not, as it were, a venue for determining the issue of whether or not the summons to enter appearance had been properly issued. The appellant could not have raised any defence or defences in the two earlier cases because it was not and could not have been a party in those proceedings. It was not even existing at the time those cases were initiated.

We repeat that the only basis upon which the respondent was calling upon the appellant to satisfy the decree obtained in HCCC No. 12 of 1997 was that the appellant had assumed the legal obligations of Pan Africa Insurance Co. Ltd which obligations were imposed on Pan Africa Insurance Co. Ltd by **section 10 of Cap 405**. Having expressly admitted in its defence and the amended defence that it had assumed those obligations, it was idle for the appellant to again raise these complaints. The learned Judge was clearly justified in striking out the purported defence. We agree with Mr. Muthama for the respondent that this appeal is wholly without merit. We order that it be and is hereby dismissed with costs to the respondent.

***Dated and delivered at Mombasa this 12<sup>th</sup> day of March, 2010.***

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**D.K.S AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**