South Nyanza Sugar Company Limited v Sanlam Kenya PLC & 2 others (Civil Case 87 of 2007) [2023] KEHC 24736 (KLR) (3 November 2023) (Judgment)

Neutral citation: [2023] KEHC 24736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL CASE 87 OF 2007

REA OUGO, J

NOVEMBER 3, 2023

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ..... PLAINTIFF

AND

SANLAM KENYA PLC ..... 1ST DEFENDANT

FT INSURANCE BROKERS LIMITED ..... 2ND DEFENDANT

APA INSURANCE COMPANY LIMITED ..... 3RD DEFENDANT

JUDGMENT

1. The Plaintiff is a limited liability company and a state corporation within the meaning of the *State Corporations Act*. The 1st Defendant is an insurance company incorporated in Kenya while the 2nd Defendant is an insurance broker. The 3rd defendant is also an insurance company formerly known as NEWCO Limited.

The Plaintiff's Case

2. The plaintiff case is that the 1st and 3rd defendants are successors in title of Pan Africa Insurance Company pursuant to the dissolution of Pan Africa Insurance Company Limited. The plaintiff through the 2nd defendant applied to the defendants for a medical insurance policy in respect of the plaintiff's employees and their eligible dependants effective 1st July 2000 up to and including 31st January 2002. The defendant issued the plaintiff a medical insurance policy number 010/091/000038/2000/07 for an initial period of 1 year up to 30th June 2001 but which policy was extended from time by mutual agreement and extended up to including 31st January 2002. The plaintiff was required to pay the prerequisite insurance premium and the defendant was to provide the said medical insurance cover subject to the terms of the policy. The plaintiff paid the 1st and 3rd defendants' predecessor, Pan Africa Life Insurance Company Limited through the 2nd defendant Kshs 11,516,892/-

as premiums in respect of the said policy. During the said period, medical insurance claims made and forwarded to the defendant were in the amount of Kshs 16,630,183.30/-. Up to 10th June 2003, the defendant settled medical claims by making payments of Kshs 6,618,153.40 thereby leaving out an unpaid balance in outstanding medical claims submitted to the defendant by the plaintiff, due and payable and arising from the said policy, a sum of Kshs 10,012,029/.90/-.

3. The plaintiff further avers that due to the existence of the said medical insurance policy and to the fact that the plaintiff had fully paid the insurance premiums due to the defendant through the 2nd defendant, the plaintiff went ahead and settled the due and payable medical bills as and when they arose with the hope that the defendant would reimburse and promptly settle the claims as were submitted, which the defendant in breach of the said policy refused and neglected to do. As a consequence of the breach, the plaintiff has suffered much loss and damages. The plaintiff claims that the defendants were in breach of the contract in the following terms:

    i. Failing to settle the claims amounting to Kshs 10,012,029.90 arising from the said policy.

    ii. As at 10th June 2003, settling only a paltry sum of Kshs 6,618,153.40/- instead of the whole outstanding sum

    iii. Accepting payments of premiums from the plaintiff through the 2nd defendant and refusing to settle the claims aforesaid.

4. The plaintiff claims interest at the rate of 24% per annum on the outstanding sum of Kshs. 10,012,029.90/- with effect from 10th June 2003 until payment is made in full.

5. The plaintiff further pleaded without prejudice that the defendant and a third party pursuant to the agreement and Statutory Board of directions passed on 26/9/2023 and sale and transfer agreement dated 26th September 2003 as was more particularly notified in the gazette notice no. 8126 dated 14/11/2003 transferred its general insurance business to a new limited company then incorporated as NEWCO LTD which later changed its name to APA Insurance Ltd, the 3rd Defendant. The plaintiff avers that all the business liabilities and assets of the defendant as of 1st January 2003 were taken over and vested in the 3rd Defendant herein which is therefore duty bound to settle and or satisfy the present plaintiff's claim together with and or in place of the defendant as was agreed between them. All contracted terms and conditions, all claims lodged and payments made in respect of the policy settled by the defendant were all done through the 2nd defendant as a special broker and agent mandated by the *Insurance Act* Cap 487 to act on behalf of the plaintiff and the defendant.

6. The plaintiff seeks judgment against the defendants jointly and severally for Kshs 10,012,029.90/-, interest at the rate of 24% per annum with effect from 10th June 2003 until payments is made in full and the costs of the suit.

1st Defendant's Case

7. The 1st defendant avers that Pan Africa Insurance Company Limited is no longer in existence and that it reconstituted its business in 2003 and changed its name to Sanlam Kenya PLC. It denied issuing to the plaintiff insurance policy no. 010/091/000038/2000/07 through the 2nd defendant effective 1st July 2000 for an initial period of one year up to and including 30th June 2002.

8. It was pleaded without prejudice that on 1st November 2002 a company known as Pan Africa General Insurance Company Limited was formed to acquire and take over the general business carried out by Pan Africa Insurance Company Limited and also to discharge all of the liabilities of such general

insurance. Another company NEWCO Ltd was formed on 8/10/2002 which was to acquire and take over the business of general insurance carried on either or both Pan Africa Insurance Company Ltd and Apollo Insurance Company Limited. In 2003, NEWCO changed its name to APA Insurance Company Limited. The 1st defendant claims that it never got into a contract with the plaintiff nor did it settle its claims and further denied contracting the 2nd defendant to act as its insurance broker. If at all it issued a medical insurance policy, all medical insurance claims made and raised were settled.

9. The plaintiff has not acted in good faith and has acted contrary to the Contract of Insurance in that it has exaggerated, and lodged fictitious and fraudulent claims entitling the defendant to disclaim cover under the policy. The 1st defendant avers that the policy was issued on the condition that it would not take effect until and when the premiums payable had been settled in full. The defendant avers that the plaintiff failed, refused, and/or neglected to settle the premiums due and the defendant is entitled to avoid the policy and settlement of any claim. They also claimed that the claims raised by the plaintiff fell under the exceptions to the policy. They claim that the policy contained a condition that provided that prior to any hospital treatment covered by the policy authority would first have to be obtained from the defendant failing which the defendant would not be liable for the medical costs. The 1st defendant avers that the plaintiff failed to seek authority in respect of the insured person and as such the defendant is not liable. The plaintiff was also mandated to submit final claims to the defendant in writing within 60 days after completion of treatment but the plaintiff neglected to do so. All claims were to be supported by original invoices in order for the defendant to carry out verification, but the same was not submitted by the plaintiff. The defendant avers that the policy was cancelled under the terms, provisions, and conditions of the policy and as such the 1st defendant is not liable to pay the plaintiff's claim. The 1st defendant also claimed that the plaintiff's suit was statute-barred.

10. The 2nd defendant did not participate in this matter.

3rd Defendant's Case

11. The 3rd defendant averred that the plaint did not disclose a cause of action against it. The 3rd defendant denied the allegations contained in the plaint.

Plaintiff's Evidence

12. Moses Onyango (Pw1) testified that he is employed as an insurance officer by the Plaintiff and relied on his statement dated 5th May 2021. He testified that the plaintiff engaged the 2nd defendant and Pan Africa Insurance Company Ltd for the provision of medical insurance services. The 2nd defendant was to carry out the customary responsibility of an insurance broker which includes the collection of premium and remission to the insurer, receiving claims from the plaintiff, and channelling them to the insurer for settlement. The insurer being the risk carrier was responsible for admitting claims filed within the policy guidelines and reimbursing the insured for the medical cost. The plaintiff was responsible for furnishing the broker with records of the members under the cover, paying premiums, and submitting claims. The contract for medical claims was governed by two policies; 010/091/1000031/2000/06 and 010/091/000038/2000/07 both running from 1st July 2000 to 30th June 2001. That the policy holder (Sony Sugar) paid premiums through the broker amounting to Kshs. 11,516,892.00 in respect of the policy. That during the period Sony Sugar made claims amounting to Kshs. 20,265,310.32 out of which the insurer rejected claims amounting to Kshs. 3,618.113.40 citing late reporting and inadequate of documentation. The total admissible claim was therefore Kshs. 16,630,183.32 out of which only Kshs.6,618,113.40 was settled leaving unsettled balance of Kshs. 10.012.029.92.

13. On cross-examination, Pw1 testified that he was not in the plaintiff's employment when this matter arose and his testimony is based on the documents in court. He testified that there was no notification to Pan Africa Insurance hence it avoided liability. From the copy of the medical insurance policy, the authorizing officer signed the 1st page however there was no execution. He testified that pages 19-183 of the plaintiff's list of additional documents contained debt notes. On page 29, Risk debt note no. 99, indicates that the insurer was UAP Provincial Insurance Company Ltd and on page 47, the insurer was Apollo Insurance Co. LTD. He testified that none of the said insurance companies were parties to the proceedings.

14. He testified that the plaintiff provided a schedule of medical claims settled by Pan African Insurance Co. Ltd but there was no evidence of said settlement in terms of a cheque. The plaintiff's list of additional documents on pages 185-198 could have been generated by the broker. The said document was not signed. Similarly, the medical claims pending on pages 199 – 229, could have been from any of the parties as the same was not stamped or signed and didn't have a letterhead.

15. He further testified that pursuant to the letter dated 6th January 2003, the 1st Defendant had not received premiums from the broker. Section 156 of the *Insurance Act* provided that if no premium was received then there was no cover. In the letter dated 22nd April, 2003 the broker didn't pay all the premiums. The policy was on a reimbursement basis. On page 8 of the plaintiff's list of documents, paragraph 9, states that no sum in the policy shall attract interest. He testified that the parties to the medical contract were South Nyanza and Pan African Insurance. The 3rd defendant was not a party to the contract. The plaintiff did not make any payments to the 3rd defendant and there was no evidence that the 3rd defendant appointed the 2nd defendant to collect premiums on its behalf.

16. On re-examination he testified on Page 187, there were cheque numbers that covered quite a number of claims. The document showed the date the cheques were issued. The dates of individual payments were indicated. In the letter dated 20th May 2003, the commissioner wrote to APA to look at the issues that had been raised.

Defence

17. Gladys Muema (Dw1) testified that she was the senior legal officer of the 1st defendant and adopted her witness statement dated 9th May 2019 and a list of documents dated 8th May 2019. She testified that the brokers acted on behalf of the insured and therefore the contract was between the broker and the insured. In general insurance practice *brokers act* on behalf of the insured. The contract produced as evidence by the plaintiff was that there was to be pre-authorization before any payment was made. The contract didn't provide for payment on a reimbursement basis. Ideally in practice if they were to work on a reimbursement basis, they would incur losses. They would also not be able to exclude the exclusions as provided in the contract to ensure that the claims were provided in good time as provided in the contract.

18. On cross-examination, she testified that there ought to have been pre-authorization of an admission and that bills would be forwarded at a certain date. They paid the insured and not the hospital directly. In this case, the Plaintiff was insured. There were situations where the broker was paid. In this case, if the cheques were issued to the broker, the broker should have forwarded them to the insured but we didn't get the premium. The 2nd Defendant was the plaintiffs' broker; they had no contact with the 2nd Defendant. On page 12 of the 1st Defendant's list of documents, was a notice from Pan Africa issued to the public through Daily Nation. Dw1 didn't know when the 1st defendant entered into a contract with Pan African, but as per the alleged contract it was dated 1st July 2000. The transfer was on 1st January 2003. Pan Africa Insurance and Apollo Insurance were 2 different entities. Initially, Pan

Africa Insurance company now Sanlam Kenya PLC, separated its business and general business for the purpose of a merger between Pan Africa Ltd and Apollo Insurance. When the separation was done Pan Africa didn't carry out general insurance and no policy was issued in the name of Pan Africa. Pan Africa General merged with Apollo Insurance business and formed a company called Newco Company Ltd and then Newco changed its name to APA Insurance Ltd. Pan Africa Insurance Company Ltd was incorporated around 1946 and it dealt with general and life business however upon separation the business also separated. The medical policy was then transferred to Apollo as it is what is referred to as a liability. She referred to Gazette Notice 7928 dated 7th November 2003 which stated that certain assets and liabilities were transferred. The 3rd Defendant took over liabilities as listed in the notice. All liabilities were transferred to the 3rd Defendant.

19. The 3rd Defendant relied on the evidence of Judith Onyango (Dw2). She testified that she was the legal manager at APA Insurance for four years. She adopted her statement as examination in chief. She testified that the suit should be dismissed with costs and that they were not party to the medical policy issued to the Plaintiff through Pan African now the 1st Defendant. In her statement, she testified that Pan Africa Insurance Limited and Pan Africa General Insurance Limited are separate limited liability companies. Vide Gazette Notice No. 7928 of 2003, there was a notice of transfer of general insurance business of Pan Africa General Insurance Limited and Apollo Insurance Company Limited by way of the sale of certain assets and liabilities to NEWCO Ltd. NEWCO later changed its name to APA Insurance Limited. The 3rd defendant did not take over the assets and liabilities of Pan Africa Insurance Company Limited. On cross-examination, she testified that the 3rd Defendant took over certain disclosed assets and liabilities but not everything. They didn't inherit liability as alleged as no medical insurance was taken over by Newco. She clarified that general business is not the medical business.

The Plaintiff's Submissions

20. The Plaintiff submitted that paragraph 2C of the amended plaint avers that, in so far as the allegation that the 1st and 3rd Defendants were the successor in title of Pan Africa Insurance Company Limited, the 1st and 2nd Defendants are both obligated to satisfy the claim or decree that may arise from the insurance policy in issue. There was no denial of the aforementioned therefore that aspect of the claim should be deemed as admitted and proven. There was no defence to the further amended plaint hence the Plaintiff's claim was uncontroverted and should therefore be granted. Reliance is placed on South Nyanza Sugar Company Ltd. V John Omuga Anjudo (2019) eKLR where Majanja J stated that a defendant is bound by its defence and any evidence given by the defendant's witnesses inconsistent with said defence is inadmissible.

21. The Plaintiff submitted that they have sufficiently proven their claim. There was a contract between the Plaintiff and Pan Africa Insurance Company Limited, vide Policy No. 010/091/000038/2000/07. Dw1 in her statement testified that the 3rd Defendant inherited the obligation to settle the claim which is the subject of this suit. It cannot be gainsaid that the claim was valid but never settled. Dw2 did not dispute the existence of the insurance contract but stated that the 3rd Defendant did not inherit the contractual obligation to settle the claim from the Pan Africa Insurance Co. The 1st and 3rd Defendants did not deny the fact that the Plaintiff raised a claim with Pan African Insurance Company Limited which was not settled and that Plaintiff was entitled to the sum under the insurance policy issue. In addition, in accordance with the evidence before the court, all premiums were paid to Pan African Insurance Company Ltd through their agent, the 2nd Defendant. The matter of who inherited the claims, risks, and liabilities comprised in the claim and insurance policy herein is between the 1st and 3rd Defendants. The 1st and 3rd Defendant succeeded the known principal of Pan Africa Life Insurance.

The 1st Defendants Submissions

22. The 1st Defendant listed three issues for determination:

    i. Whether the 1st Defendant is obligated to settle the alleged outstanding claims?

    ii. Was there a transfer of business from Pan Africa Insurance Company to APA?

    iii. Whether the Plaintiff is entitled to the amounts sought?

23. On the first issue, the 1st Defendant submitted that the Plaintiff produced two undated and unexecuted medical insurance policies allegedly between Pan Africa Insurance Company Ltd and South Nyanza Sugar Company. Under the general conditions of the alleged Medical Insurance Policy, the policy was on a Pre-Authorization basis and not a reimbursement basis as alleged by the Plaintiff. Clause 1 of the Pre-Authorization Review states that:

> " Before the Insured undergoes any treatment in Hospital that is covered by the policy, the insured must first notify Pan Africa Insurance Company Ltd., in order for the Company to provide authorization. Should the insured not provide this notification, the company shall avoid any liability for all medical costs incurred by the insured for all that procedure and hospitalization stay, where authorization was not obtained."

24. The 1st Defendant also submitted that the Plaintiff provided no evidence that the notification provided for the alleged contract was first obtained from the 1st Defendant therefore liability was non-existent because authorization was not granted. General Condition 2 of the policy states that the final claim must be submitted in writing to the Company within 30 days after completion of treatment. The Plaintiff has also failed to provide evidence that it submitted said claims to the 1st Defendant.

25. The 1st Defendant submitted that the Plaintiff expressly admitted to non-performance on their end of the bargain via a letter dated 22nd April 2003 directed to the Commissioner of Insurance contending that their efforts to follow up on reimbursements proved futile as the 2nd Defendant did not remit all payments to them. Pursuant to the alleged policy, the processing of claims by the 1st Defendant was limited to what was remitted by the broker. In insurance contracts, the broker is the agent of the insured which was evidenced by the Plaintiff's letter dated 30th June 2000 to the 2nd Defendant confirming that the 2nd Defendant is its provider of Insurance Brokerage Services. Therefore, the misgivings of the Plaintiff's agents cannot be revisited upon the 1st Defendant.

26. The 1st Defendant submitted that the insured was only obliged to settle the premiums due and in full before gaining any benefit in the event of the occurrence of an insurable risk. The alleged policy insurance did not possess the requisite consideration as a result of non-payment of premiums. The 1st Defendant submitted that parties to a contract are bound by its terms and conditions thereof. Reliance is placed on National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & another, Civil Appeal No. 95 of 1999 (2001) where the court held that a court of law cannot rewrite a contract between parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. They also relied on the decision of Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd (2017) eKLR. At no point in time was the contract amended to change payment from a pre-authorization basis to a reimbursement basis.

27. The 1st Defendant further submitted that it transferred its general insurance business including all medical insurance and claims thereunder to the 3rd Defendant to operate exclusively hence there existed

no more privity of contract between the Plaintiff and the 1st Defendant. The Plaintiff failed to prove the liquidated claims against the 1st Defendant and the remission of premiums through the 2nd Defendant with respect to the policy. The 1st Defendant relied on sections 107 and 108 of the *Evidence Act* that he who alleges must prove. It also relied on the case of Mbuthia Macharia v Annah Mutua Ndwiga & Another (2017) where the court held that the legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. They also relied on AIG Insurance Company Limited v Bernard Kiprotich Kirui (2022) eKLR where the court placed reliance on the Indian decision in United India Insurance Company vs Kantika Colour Lab & others Civil Appeal 6337 of 2001, where the court stated that it is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent that it is established, but not exceeding the amount stipulated in the contract of insurance which signifies the outer limit of the insurance company's liability.

28. On the second issue, the 1st Defendant submitted that it was undertaking both general and long-term insurance business as an underwriter trading in the name Pan Africa General Insurance Limited. On 10th July 2001, Pan Africa General Insurance Company Limited was formed to acquire and take over the general businesses carried out by Pan Africa Insurance Company Limited and also discharge any liabilities through its Memorandum of Association signed on 10th May 2001. Notice was issued inviting persons to make written or oral representation to the Minister for Finance, stating grounds upon which they believe they would be adversely affected if the scheme of transfer was carried out. On 8th October 2002 NEWCO Limited was formed to acquire and take over businesses of general insurance carried out by either or both Pan African Insurance Company Limited and Apollo Insurance Company Limited and discharge all or any of the liabilities of any such businesses and pay for such acquisition. In 2003, NEWCO Limited changed its name to APA Insurance Company Limited, which took over all the general insurance liability from the former Pan Africa Insurance Company through Pan Africa General Insurance Limited. The transfer of insurance was communicated to all affected persons via statutory notice dated 6th November 2003 and was approved vide Legal Notice No. 117 on 15th September 2005. The Plaintiff never objected to the transfer of business.

29. On the third issue, whether the plaintiff is entitled to the amounts sought, the 1st Defendant submitted that the policy was on a pre-authorization basis and not on a reimbursement basis. Pursuant to section 156 of the *Insurance Act*, no insurer shall assume risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by the insurer. Therefore, an insurer can only assume risk when the premium has been paid and received or where the premium has been guaranteed by such person or a deposit of a prescribed amount is made in advance.

30. The 1st Defendant never received any premiums from the Plaintiff through the 2nd Defendant. The authenticity of the schedule (sic) of settled and unsettled claims by the plaintiff was questionable because they were not presented on the Plaintiff's letterhead hence their origin was unknown. In addition, the schedule was not dated or signed and the Plaintiffs witness could not ascertain their validity. Reliance was placed on Bid Insurance Brokers Limited v British United Provident Fund (2016) where the court while citing the case of Kenya Breweries Limited Kiambu v General Transport Agency limited (2000) eKLR stated that it was the duty of the Plaintiff to prove its claim for damages as pleaded as it was not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour.

31. The schedules were not accompanied by any receipts or invoices or copies of the cheques to prove that they indeed existed. Special damages must be both specifically pleaded and strictly proved. Reliance was placed on Hahn v Sinh, Civil Appeal No. 42 of 1983 (1985) KLR 716 where it was held that special damages must only be specifically claimed but also strictly proved because they are not the direct

natural or probable consequence of the act complained of and may not be inferred from the act; the degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. They also relied on Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited which cited the case of Great Lakes Transport Co.(U) Ltd. Vs Kenya Revenue Authority (2009) eKLR 720 where it was observed that both a proforma invoice and an invoice do not amount to a receipt. The lack of individual invoices building up to 10 million as alleged by the Plaintiff means that they have not proved their case to the required standard. In addition, one cannot produce invoices without verification by a credible witness. It cited the case of Capital Fish Limited v Kenya Power and Lightning Company Limited (2016) eKLR where the Court of Appeal stated that there must be credible documentary evidence in support of the alleged special damages.

32. It was further submitted that the Plaintiff has also not provided any evidence to the alleged policy nor evidence that the 1st Defendant owes it money in unsettled claims from the policy. In addition, there was no proof that the Plaintiff incurred medical expenses which amounted to Kshs 10,012,029.90/-. Section 197 (1) of the *Insurance Act* states:

> "a broker or agent registered under this Act shall keep and maintain at his principal place of business in Kenya a record of the name of every client, policy number, premium paid, subject matter of insurance, date of inception of the policy, date of renewal, sum insured and in respect to claims settled by the broker on behalf of an insurer, the amount and date of claim made, the date on which the claim was paid, the amount paid, and, in the event of a claim being repudiated, the date and reasons for repudiation, and, in the event of partial settlement, the reasons thereof"

33. In the case of Insurance Company of East Africa Limited v Ndambuki Kisau (2004) eKLR the court cited with approval the decision in Anglo African Merchants Ltd. V Bailem 1969 ALL ER 421 where the court stated that in all matters to the placing of insurance, the insurance broker is the agent of the insured and the assured only and the ordinary laws of agency governs their relationship. It is clear that the 2nd Defendant was the insured's agent and it failed to remit premiums to the 1st Defendant during the subsistence of the alleged policy. The Plaintiff should have sought indemnity from their agent. Order 10 Rule 5 of the Civil Procedure Rules provides that the court can enter judgment against any of the defendants for failing to appear and may issue execution upon such judgment without prejudice to the plaintiff's right to proceed with the action against the defendant. The involvement of the 2nd Defendant was crucial to the case as the plaintiff would have sought default judgment against them to recover the money lost. In Formax Insurance Brokers Limited v Grory Hotels Investments Limited (2019) eKLR where the appellants therein had not been remitting premiums to the insurance company and were pursuing the Respondent to pay yet there was no amount owing to the Appellant, the judge dismissed the appeal as the Appellant had not provided evidence that it had paid premiums on behalf of the Respondent.

The 3rd Defendants Submissions

34. The 3rd defendant identified the following issues for determination;

    a. Whether the 3rd Defendant is privy to the contract between the Plaintiff and the 1st Defendant.

    b. Whether the 3rd Defendant is liable to indemnify the Plaintiff for loss or damage

35. On the first issue, the 3rd Defendant submitted that they were not party to the agreement between the Plaintiff and the 1st and 2nd Defendants hence pleads privity of contract and cannot therefore contest the validity or otherwise of that contract. The Plaintiff does not allege to have any relevant contract with the 3rd Defendant because the insurance claims were remitted to the 1st Defendant through the 2nd Defendant after the medical Insurance contract was signed between the Plaintiff and the 1st Defendant. Common law dictates that only parties to a contract may normally enforce its terms and a stranger cannot sue on the contract unless given the statutory right to do so as in the case of Halal Shipment Company v Securities Bremmer (1965) EA 690. They also relied on Midland Silicones Limited v Scruton's (1962) AC 446 where the court held inter alia that a stranger to a contract cannot take advantage of the provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him.

36. On the second issue, the 3rd Defendant submitted that it was disingenuous for the 1st Defendant to allude to the Memorandum of Association of Pan African General Insurance Company Limited whose objects showed that it was to acquire and take over as a going concern of the general insurance business and long-term insurance business now carried on by Pan African Insurance Company Limited. In addition, the memorandum of association of NEWCO Limited whose objectives stated that it was to acquire and take over as a going concern the general insurance business carried on by either or both Pan Africa Insurance Company Limited and Apollo Insurance Company Limited. On 3rd January 2001, the 1st Defendant changed its name to Pan Africa Insurance Holdings Limited and assumed the role as the holding company for two wholly owned subsidiaries i.e. Pan Africa Life Assurance and Pan Africa General Insurance Limited. In September 2002 the 1st Defendant restructured its business units and transferred its long-term and life insurance business to Pan African Assurance Limited and its short-term general insurance business to Pan Africa General Insurance Limited vide gazette notice no. 1758 dated 25th February 2003 published on 14th March 2003. Pan Africa Holdings Rebranded to Sanlam (k) Plc. Pan African General Insurance Limited was renamed PA Securities in 2004 and the 1st Defendant held 100% of the allotted shares. The 1st Defendant did not deny that the transfer of business happened as explained above and the court should hold that on a balance of probabilities, substantially all the General Insurance Business of Pan African Insurance Company Limited was transferred to Pan African General Insurance Company Limited in accordance with the gazette notice.

37. The 1st Defendant could not have legally transferred its business to Pan Africa General Insurance Limited in September 2002 because by then it had already changed its name to Pan Africa Insurance Holdings Limited from January 2001 which later restructured and transferred its business units. Pan Africa General Insurance Company Limited merged with Apollo Insurance Company Limited to form Newco Limited as in gazette notice no. 8126 dated 6th November 2003 and published on 14th November 2003. Newco Limited via a special Resolution changed its name to APA Insurance Limited; the 3rd Defendant.

38. The 3rd defendant had no relationship with the 1st Defendant. Pan Africa General Insurance Limited could not have transferred insurance business to Newco Limited which only received by way of sale certain assets and liabilities from the merger as indicated in the gazette notice no. 7928 published on 28th October 2003:

> " Sold and transferred by way of sale of certain of the assets and liabilities ..."

39. It was clear that the 3rd defendant would assume the debts and liabilities in respect of assets being transferred to them by Pan Africa since January 2003. The subject matter of this suit being a medical claim was not an asset transferred to the 3rd defendant.

40. Furthermore, in the letter dated 16th April 2008 PA Securities (previously Pan Africa General Insurance Company Limited) confirmed that the subject of this suit was not disclosed to the 3rd Defendant in the list of transferred matters and that PA Securities was the entity dealing with such kind of matters. Therefore, the 3rd Defendant can only be liable for claims that were disclosed and not any other extraneous liabilities. The 1st Defendant was the entity liable for all liabilities and claims arising out of the contract between Pan Africa Insurance Limited and the Plaintiff.

41. The 3rd Respondents submitted that they complied with section 3 (1) of the Transfer of Business Act as read with section 4 on publication of notices in the Kenya gazette; evidence being gazette notice 7928 published on 28th October 2003. It was advanced that section 8 of the Transfer of Business Act provides that 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.

42. The 3rd Respondents further submitted that the approval of transfer of general business insurance pursuant to the Scheme dated 1st January 2003 by Apollo Insurance Company was given by the Ministry of Finance via legal notice no. 117 dated 15th September 2005. Therefore, in terms of section 117(2)(a) of the *Insurance Act*, the transfer of business took effect on 15th September 2005 well after the 1st Defendant and Plaintiff were in dispute hence the 1st Defendant is wholly liable for the claim arising out of the contract entered into with the Plaintiff in January 1999.

43. The 3rd Defendant filed supplementary submissions dated 28th October 2022, in response to the plaintiff's submissions. The Plaintiffs alleged that there was no response to the further amended plaint dated 16th February 2022 and that paragraph 2C should be deemed as admitted and proven. The 3rd defendant submitted that the court granted leave for the further amended plaint dated 16th February 2022, to be deemed as duly filed and held that the defences by the 1st and 3rd Defendants as having traversed the new averments introduced by the amended pleading and the plaintiff proceeded to call its witness to the stand. The amendments introduced were sufficiently traversed and rebutted in defence filed by the 3rd Defendant in their written statement of defence dated 28th May 2008.

44. It was further submitted that paragraph 2C as pleaded by Plaintiff in its further Amended plaint is not factually correct. That the privity of a contract precludes the plaintiff from making any claims against it. The Plaintiff did not prove in any way, whether by assignment or novation, that all business liabilities and assets of Pan African Insurance Company Limited as at 1st January 2003 were taken over and vested in the 3rd Defendant. In addition, the plaintiff did not produce any document to establish the relationship with the 3rd Defendant so as to legally rely on the rights, obligations and benefits of the medical insurance policy no. 010/091/000038/2000/07 to enforce it against the 3rd defendant. In the absence of any such document, the plaintiff cannot legally rely upon, enforce and derive benefit from the said contract which it was not party to. The 3rd Defendant submitted that the medical insurance policy was not within the scope of what was assigned and an assignee is only entitled legally to what is assigned. The 3rd defendant was not informed of the Plaintiff's claim as it was not disclosed at the time of the transfer. All the above factors confirmed that the 3rd Defendant lacked privity of contract. Reliance was placed on Nairobi CA No. 206 of 2008 City Council of Nairobi vs Wilfred Kamau Githua & Anor (2016) eKLR where the court stated that the 2nd Respondent was a third party to the contract because the appellant and 1st respondent failed to identify any agreement or contract by which the 2nd Respondent, undertook to take the appellants liabilities, therefore, there was no privity of contract between the 1st Respondent and 2nd Respondent.

Analysis And Determination

45. I have carefully considered the pleadings, the evidence, and the submissions of the parties. In this case, before ascertaining the liability that can be attached to the 1st, 2nd, and 3rd defendants for breach of contract, it is crucial to first establish whether there was a valid agreement between the plaintiff and Pan Africa Insurance Company Limited; and secondly to determine the connection between the 2nd defendant and the parties to this suit.

46. It is not in dispute that the contract for the medical insurance policy between Pan Africa Insurance Company Ltd and the Plaintiff – Senior Staff Policy No. 010/091/1/000031/2000/06 and the second contract between Pan Africa Insurance Company Ltd and the Plaintiff – Unionizable Staff Policy No. 010/091/1/000038/2000/07 were both unsigned on the execution page however they were both signed by an authorized officer at the front page. It is not clear who the authorized officer represented. It is not in dispute that the plaintiff paid premiums through the 2nd defendant and Pan Africa Insurance Company Limited settled some of the plaintiff's claims. In fact, Pan Africa Insurance Company Ltd in its letters dated 7/08/2001 and 06/01/2003 wrote to the 2nd defendant and the plaintiff respectively, demanding payment of premiums so that it could settle claims. It is clear from the conduct of the parties and their correspondences that there existed a contract of medical insurance to cover the plaintiff's employees.

47. According to the parties' pleadings and submissions it is not clear whether the 2nd defendant was an agent of the plaintiff or of the Pan Africa Insurance Company Limited. The plaintiff claims that Pan Africa Insurance Company Limited received premiums through the 2nd defendant and that the 2nd defendant was its agent. The 1st defendant was of the contrary view that the 2nd defendant was an agent of the plaintiff. A broker is defined under section 2 of the *Insurance Act* to mean:

> "An intermediary concerned with the placing of insurance business with an insurer or reinsurer for or in expectation of payment by way of brokerage, commission, for or on behalf of an insurer, policy-holder or proposer for insurance or reinsurance and includes a health management organisation; but does not include a person who canvasses and secures reinsurance business from or to an insurer or broker in Kenya so long as that person does not undertake direct insurance business and does not have a place of business, or a resident representative, in Kenya".

48. According to the plaintiff's letter dated 30/06/2000, the plaintiff offered the 2nd defendant a contract for the provision of brokerage services. The letter reads as follows:

> Broking Manager
>
> F.T. Insurance Brokers
>
> Box 18733
>
> Nairobi
>
> Dear Sir,
>
> R.E: Insurance Brokerage Services For Year 2000/2001
>
> We refer to your quotation for provision of the above services to Sony Sugar Co. for year 2000/2001.

We are pleased to inform you that your quotation was successful and your firm is hereby offered a contract for provision of the said services for the above stated period. Please ensure that the risk are on cover as appropriate.

Appropriate Contract, Schedule of Policies to be covered and negotiation for pricing will be done next week on Tuesday, 4th July 2000 at Awendo. During the period from 1st July 2000 to 30th September 2000, your firm will manage the entire portfolio of the Company. Thereafter, a review will be made to determine the policies which you shall continue to provide cover for.

49. This offer was followed by an acceptance from the 2nd defendant who wrote to the plaintiff on 3/07/2000 as follows:

The Company Secretary,

South Nyanza Sugar Company Limited,

Box 107,

Sare Awendo.

Dear Sir,

R.E: Insurance Brokerage Services For Year 2000/2001

We acknowledge with thanks receipt of your letter dated 30th June, 2000 appointing our company to provide insurance broking services to your company. We hereby confirm acceptance of the offer.

As requested in your letter, we will avail ourselves for the meeting to be held in your offices on Tuesday, 4th July 2000 to evaluate policy schedule/coverage and terms; and renegotiate the premiums.

50. According to the correspondence between the plaintiff and the 2nd defendant, it is clear that the 2nd defendant was an insurance broker. The plaintiff appointed the 2nd defendant to provide insurance brokerage services. The Court in Victoria Insurance Brokers Limited v Jubilee Insurance Company of Kenya Limited [2020] eKLR on the definition of a broker stated that:

> 3. As would be clear from that definition, a broker would, typically, place insurance business with an insurer or reinsurer for or on behalf of an insurer, policy-holder or proposed for insurance or reinsurance. In that sense a broker is an agent of the insurer, policy-holder or proposed for insurance or reinsurance. An agent on the other hand means:-
>
> > "A person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker"
>
> 4 ...
>
> 39 ... It has been suggested by the lawyers for Victoria, and I have no reason to doubt the proposition, that while Brokers would ordinarily be agents of the insured, there may be occasion or circumstances when a Broker may be the

agent of an insurer. For that proposition I was referred to this passage from the Law and the Life Insurance Contract Muriel L. Crawford 7th Edition.

> " A broker is a person whose business is to bring buyers and sellers together. An insurance broker is ordinarily a person who procures insurance for those who requests this service. An insurance broker is usually the agent of the applicant for purposes of procuring the insurance or making the application, although the broker may be the agent of the insurer for the purposes, such as collection of the initial premium or delivery of the policy."

51. In this case it can be presumed that the 2nd defendant was the agent of the plaintiff following its appointment by the plaintiff to act as such and to manage the plaintiff's entire portfolio. Pw2 also testified that the 2nd defendant was to collect premiums and remit them to the insurer, receive claims from the plaintiff, and channel them to the insurer for settlement. The 2nd defendant was the plaintiff's agent.

52. According to the documentary evidence before the court, the 2nd defendant through its actions had made the plaintiff breach several conditions. According to the correspondence between parties Pan Africa Insurance Company Limited was not receiving premiums. It is not in dispute that the insurance premiums were paid through the 2nd defendant. Pan Africa Insurance Company in its letter dated 7/08/2001 demanded from the 2nd defendant outstanding premiums amounting to Kshs 2,711,932/- relating to the period 2000/2001. On 6/01/2003 Pan Africa Insurance Company Limited in its letter to the plaintiff informed them of outstanding premiums due which they had not received. They requested the plaintiff to ask the 2nd defendant to remit the money to Pan Africa to enable them to settle their claims. Further, the plaintiff in its letter dated 22/4/2003 directed to the Commissioner of Insurance conceded that it paid the 2nd defendant premiums but it did not remit the premiums to Pan Africa Insurance Company Limited. It is clear from the correspondences that the 2nd defendant acting as an agent of the defendant neglected to pay the requisite premiums.

53. In this case, the evidence points to the fact that the 2nd defendant was the agent of the plaintiff who failed to remit the premiums paid by the plaintiff toPan Africa Insurance Company Limited. What, then, are the consequences of non-payment? A similar issue was before the Court of Appeal inInsurance Company of East Africa v Marwa Distributors Limited [2015] eKLR where the court stated:

> 12. What then is the effect of non-payment of the premium? In Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd KSM CA Civil Appeal No. 88 of 2002 [2004] eKLR the Court of Appeal held that the law of Kenya is that the non-payment of premium does not invalidate the insurance contract. It quoted and agreed with MacGillivray & Parkington on Insurance Law, 7th Edition paragraph 861 which states as follows:
>
> > There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the

> loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.

13. In my understanding, the case does not set out a hard and fast rule that failure to pay premium does not invalidate the policy but underpins the general contract principle that parties are bound by the their obligations recorded in the agreement. It means that if the parties do not make provision for the effect of non-payment of the premium, the court will not necessarily imply that the policy is invalid. The effect of non-payment of premium on the policy depends on the intention of the parties expressed in the contract.

14. The recital of the policy subject of the suit states as follows;

> Now therefore in consideration of the payment to the company of the premium for the period of insurance mentioned in the schedule and for any subsequent period for which the Company shall accept renewal premium the Company agrees to pay or make good to the Insured or otherwise compensate or indemnify the Insured as hereinafter provided .....[Emphasis mine]

15. The ordinary and unvarnished meaning of the clause is that the insured must have paid the premium for the period of insurance in order to be indemnified for any loss or damage that occurs during the period of cover. In other words, the policy document issued by the insurer constitutes a contract to insure and the premium is the consideration for the promise to indemnify the insured if the event takes place.

16. Since the premium was not paid, there was no obligation on ICEA to settle the claim by the company. Since the contract was not consummated by the payment of the premium, ICEA could not invoke the cancellation clause in the policy which was invalid in the first place. The trial court therefore erred as it did not direct its mind to the terms of the policy to determine whether in fact the policy was invalid for non-payment of consideration.

54. Pan Africa Insurance Company Ltd was categorical in their letter dated 6/1/2003 that if the premiums were not paid, then they would not settle the claims.

55. There was also evidence that the 2nd defendant also failed to submit claims within 60 days as per the agreement between the plaintiff and Pan Africa Insurance Company Limited agreement. The plaintiff on 10/09/2002 wrote to the 2nd Defendant informing them that Pan Africa Company Limited had rejected their claims as they failed to submit them within 60 days as per their agreement. In the letter, the plaintiff admitted that it was difficult to comply with the said condition given that they have to first settle the claim before forwarding the same to Pan Africa Insurance Company Ltd for reimbursement.

56. The evidence before the court shows that the 2nd defendant received monies from the plaintiff but failed to remit them to Pan Africa Insurance Company Limited. Pw1 in his statement which he adopted as his evidence in chief, testified that the plaintiff disbursed a sum of Kshs 11,516,892/- to the 2nd defendant through Cheque Nos. 00625, 013535, 013849, and 000516, with the intention of it being forwarded to Pan Africa Insurance Company Limited. The 2nd defendant failed to do so.In my view, the plaintiff, as the principal, is legally bound and held responsible. In this regard, the evidence points

to the fact that it was the plaintiff who breached the insurance contract by failing to pay premiums and submitting claims within 60 days. In my considered view, Pan Africa Insurance Company Limited was not responsible for the plaintiff's loss. Therefore, the 1st and 3rd defendants cannot be held liable, and no judgment can be entered against them. The case against the 1st and 3rd defendants is dismissed. The plaintiff did not seek interlocutory judgment against the 2nd defendant after it failed to enter appearance. It is apparent that they chose not to pursue the 2nd defendant. As already stated the suit against the 1st and 3rd defendant is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF NOVEMBER 2023.

R.E. OUGO

JUDGE