



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 21 OF 2015

KENINDIA INSURANCE COMPANY LTD.....APPELLANT

VERSUS

GEORGE MUNGAI.....RESPONDENT

J U D G M E N T

1. The appeal by the Appellant is against the decision of the trial court at Kwale by which the court dismissed a Preliminary Objection argued on the basis that the court had no jurisdiction to entertain the suit. The decision dated 8/7/2015 having endeavoured to define the phrase ‘cause of’, action the trial court said:

“What triggered this suit is road accident which occurred at Tiwi area along Ukunda – Likoni road. If the issue of accident is removed there will no maintainable suit as against the defendant. There is no dispute that the plaintiff took comprehensive motor vehicle policy from the defendant. This fact was settled by defendant admissible that claim has been settled to the tune of Kshs.956,250.

As define in the black law dictionary, cause of action are facts giving to one or more bases for suing. A m of the opinion that what gave rise to this suit was traffic road accident which occurred on 13/9/14 at Tiwi area.

The interpretation of policy document is secondary issue which ordinary could not be there if there was no accident. It is therefore my finding that the cause of action is the road accident as stated in paragraph 4 of the plaint and the defendant preliminary objection is dismissed with cost.

2. As, argued, the Preliminary Objection was grounded on the fact that the cause of action having been founded on the contract of insurance entered into in Mombasa and intended to be partly performed in Nairobi, the Magistrates Court sitting in Kwale had no jurisdiction to entertain nor determine the suit.

3. The objection was opposed by the Respondent who contended and maintained that there was no dispute about the policy but that the cause of action was the accident pleaded and conceded to have occurred at Tiwi area within Kwale County and therefore within the territorial jurisdiction of the court whose jurisdiction was challenged.

4. Having read the proceeding before the trial court and the submissions, both written and oral, offered by the parties, there is only issue for determination by the court. It is whether or not the magistrates court,

sitting at Kwale had the requisite territorial jurisdiction to entertain the suit. The starting point must be the pleadings filed. The plaintiff pleaded at paragraphs 3 & 4 as follows:-

Paragraph 3: On 19th March 2014 the plaintiff took a Comprehensive Motor Vehicle Insurance Cover for Motor Vehicle KBY 132L and the defendant undertook to indemnify the Plaintiff against any loss or damage that may be suffered by the Plaintiff in respect of the said Motor Vehicle.

Paragraph 4: On 13th September 2014 the plaintiff was involved in an accident in Tiwi area along Ukunda-Likoni road within Kwale County.

Paragraph 10: That the cause of action that lead to this claim arose within the Jurisdiction of this Honorable Court.

5. In response to that pleading the defendant pleaded at paragraphs 3, 4, 6 and 13 as follows:-

Paragraph 3: Without prejudice to the contents of paragraph 2 hereof, the Defendant admits that by a Policy No. P/107/071/0770/2014/29/03 made between the Plaintiff and the Defendant (the Policy), the Defendant, in consideration of the premium of Kshs.40,220.00 paid to it by the Plaintiff and subject to the terms contained therein or endorsed thereon, agreed for the period of 1 year, from 19th March 2014 to 18th March 2014, to indemnify the Plaintiff against (interalia) the loss of or damage to the motor vehicle registration No. KBY 132L (the motor vehicle) and its accessories and spare parts thereon.

Paragraph 4: Save as aforesaid, the Defendant denies that it made the policy with the Plaintiff alleged in paragraph 3 of the Plaint or any Policy as alleged or at all.

Paragraph 6: The Defendant admits paragraph 4 of the Plaint.

Paragraph 13: The Defendant denies that the alleged cause of action arose within the jurisdiction of this Honourable Court. The Defendant avers that if the Plaintiff has any cause of action against the Defendant (which is denied), the same arose in Mombasa where the Policy was made.

6. From these pleadings, it is not in dispute that while the Respondent contended his cause of action to be the event of the accident, the Appellant took the view that the cause of action was actually the insurance policy. With that divergence of opinion and stand point on the pleadings, the first question the court should have asked and addressed was whether the Preliminary Objection was properly taken.

7. In the now well respected and repeatedly cited decision of the then Court of Appeal for East Africa in *Mukisa Biscuits Ltd vs West End Distributors Ltd* [1969] EA 696 the Court said:-

“A preliminary objection is in the nature of what used to be called a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

8. I understand the judge, SIR CHARLES NEWBOLD, P, to say that a Preliminary Objection cannot be argued on contested facts and that the person raising the objection proceeds from the assumption that the facts as pleaded by his opponent are correct.

9. Put in the context of this appeal the Respondent pleaded in his plaint that having taken an insurance policy, a loss occurred, he did enter into a settlement agreement with the defendant by executing a discharge voucher but the Appellant had refused to effect payment. Those were the set of facts showing the Respondents complaint or rather the cause of action. Therefore if the Appellant was to be guided by the decision on Mukisha Biscuits (supra) then it must be taken to have conceded that the loss it had

agreed to compensate was the result of the accident which occurred in Tiwi, Kwale and not the policy of Insurance.

10. My understanding of a policy of insurance is that it is an undertaking to indemnify the insured against a loss resulting from an insured risk.

In this matter, the dispute did not arise because there existed a contract of insurance between the parties. No. The dispute was that there having been an insurance contract, the event insured, loss by accident, occurred and the Appellants obligation therefore arose.

11. On the facts pleaded and submissions offered the trial court was perfectly entitled to hold, as he did that the cause of action, the loss by the occurrence of accident, was within its jurisdiction. This determination is enough to determine the appeal but, a lot of argument was offered on the extent of territorial jurisdiction of the Magistrates Court. The answer to that question is to be found at section 3(3) of the Magistrate Courts Act, 1967 which grants Magistrates Courts jurisdiction throughout Kenya. That law provides:-

“3(3) the Resident Magistrate’s Court shall have jurisdiction throughout Kenya”.

12. In my view the jurisdiction of a Magistrate Court was vested, in terms of Article 169(2), by the Magistrates Courts Act 1967. The provisions of Civil Procedure Act, are and must remain what they are; Procedural and directory enactment. Civil Procedure Act does not last nor does it limit the jurisdiction vested by Parliament under the statute creating the court. That is the reason, I find for the existence of sections 17 & 18 Civil Procedure Act which allows transfer of a matter from one court of another.

13. To the extent that the Appellant read the Section 15 of the Civil Procedure Act as the statute vesting jurisdiction, the objection was misconceived and totally not in consonance with the facts as disclosed on the plaint.

14. This subject has been repeatedly determined by the courts and one only need to read the following decisions to confirm that the jurisdiction of a Magistrates court is not confined or limited by Section 15 of the Civil Procedure Act:-

a) Mohamed Sitiban vs George Mwangi Keroki, Nairobi Civil Application No. 13 of 2002 (unreported).

b) Justus Kyalo Mutunga vs Labh Singh Harman Singh[2012] eKLR.

c) Samwel Kuria Kwemu vs Bond of Trustees, PCEA Makongeni Church [2014] eKLR.

15. The foregoing irresistibly and inevitably leads me to find that this appeal lacks merit and therefore, it is dismissed with costs to the Respondent.

Dated and delivered at **Mombasa** this **12th** day of **April 2017**.

HON. P. J. O. OTIENO

JUDGE