REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 309 OF 2011

W K……..……..……. 1ST PLAINTIFF

M W K (suing as Administrator of the Estate of Dr. W K)……2ND PLAINTIFF

W W K (a Minor suing through Hon. W K Her Guardian and Next Friend) ……..……..3RD PLAINTIFF

-VERSUS-

BRITISH AIRWAYS TRAVEL INSURANCE …….....… 1ST DEFENDANT

FINANCIAL INSURANACE CO. LTD…….....……2ND DEFENDANT

RULING

1. The 2nd defendant filed a preliminary objection dated 26th March 2014 raising the issue that the Court has no jurisdiction to determine this matter on the following grounds that;

a. English law applied to the policy the plaintiffs seek to enforce
b. The policy was made in England and was meant to be performed in England
c. The alleged breach occurred in England
d. The second defendant is a company incorporated and doing business in England
e. The second defendant does not have any place of business in Kenya, is not domiciled or resident on Kenya and neither does it operate a business either directly or through an agent in Kenya.
f. The deceased was resident in England.
g. In view of the foregoing, the contract sought to be enforced has the closet and real connection with the system of law of England
h. The Modified Brussel's Convention (Council Regulation (EC) No. 44/2001) applies herein and the presumptive Rule under Article 9 is that an insurer must be sued in their home country. A similar provision found in section 695 of the companies Act, 1985 (UK)
i. The claim is brought under the legal representatives of the deceased. The deceased was the policy holder. In the circumstances, any claim under the policy ought to have brought in England pursuant to English in law which applied to the contract.
j. In view of paragraphs (a) to (i) above, any claim ought to have been brought in England.

2. In any event, the suit is barred by limitation of time. Being a claim arising from contract the same

should have been brought within 6 years

i. Under English law, claims arising from contracts should be brought within 6 years of the accrual of the cause of action
ii. Under English law, the period within which the insurance claim should be instituted is 6 years from the occurrence of the insured peril which in this case is the date of the accident occurred on 24th January 2003 while the suit was filed in October 13th 2010.

3. The Preliminary Objection was opposed by the plaintiffs and they filed grounds of opposition dated 5th May 2014. The grounds are as follows;

i. That Article 165 of the Kenya Constitution 2010, Section 3A of the Civil Procedure Act and Order 5 rules 21 (f) and (g) of the Civil Procedure Rules gives the High Court jurisdiction in this matter, where the operative facts have all occurred within Kenya territory, except for the purchase of the worldwide insurance cover.
ii. It was also stated that the policy has no jurisdiction clause but having been bought in the United Kingdom allowed the insured under choice of Law (pp4) *"……choose which law will apply to the policy."*
iii. That the insurance cover covered the insured in her travels in Area 3- Worldwide as opposed to Area 1- Great Britain or Area 2- Europe and provides variously for the payment of certain benefits overseas to the insured or her legal personal representatives
iv. That performance on part of insurer was to provide cover in Area 3- Worldwide meaning the rest of world, outside Area 1 & 2 where the accident happened.
v. That the Modified Brussels Convention (Council Regulation (EC) no 44/2001) has no application to this suit, Kenya not being a member of EU or ratified convention.
vi. That the 2nd defendant has already appeared in Court, served a defence and has been served with Court papers, taken part in proceedings, obtained Court orders and stayed proceedings, cannot turn around and claim that the Court does not have jurisdiction.
vii. That all the material facts in this suit other than the undisputed purchase of the insurance policy from the 1st defendant took place from the 1st defendant occurred within the jurisdiction of the Kenyan Courts.
viii. That the court has already awarded some unquantified costs to the plaintiffs arising from the 2nd defendant's application dated 14/11/2011 and unless the case continues and is concluded in Kenya, the plaintiffs could suffer loss of these costs and also those incurred since 13/10/2010 when the case commenced and the summons issued.
ix. That the suit is not time barred by the Kenya and English Limitation Acts in respect of both adults (1st & 2nd plaintiffs) and the minor (3rd plaintiff).
x. That the insurance policy was purchased from the 1st defendant against whom the plaintiffs obtained judgment on the 24/06/2011, wherefore formal proof was stayed by the orders obtained by the 2nd defendant on 26/10/2012, preventing the plaintiffs from proceeding against the 1st defendant, and the case should proceed under Civil Procedure Rules, 2010 the pleadings having closed, and as directed by the court in the un appealed ruling made on 26/1/2012.

BACKGROUND

4. The plaintiff gave a brief history of the matter. Via a letter dated 28/7/2008 the plaintiff demanded for payment of the benefits under the deceased's policy. The 2nd defendant rejected it via letter dated 28/05/10. The suit was first filed before the lower court in CMCC No. 6418 on the 13/11/2010 but it turned out that the Court lacked pecuniary jurisdiction subsequently the matter was transferred to the High Court Commercial division as Suit No. 871 of 2011 and then to the Civil Division on 28/11/2011as HCCC 309 of 2011. The plaintiff obtained an interlocutory judgment on 24/06/2011 against the 1st and 2nd defendants after they failed to enter appearance or file their defenses. On 19/9/2011 when the matter came up for formal proof the 2nd defendant entered appearance and sought leave to file their defence out of time and to have the said

interlocutory judgment set aside. The said application was allowed by Justice Mwera.

2ND DEFENDANT'S SUBMISSIONS

5. The 2nd defendant submitted that the two main grounds were;

a. The court has no jurisdiction to determine the matter
b. Even if the court had jurisdiction the claim would be barred by limitation.

6. It was submitted that the policy that forms the basis of the plaintiffs claim is a contract between the deceased and second defendant. The contract was made in England where the deceased was resident. The contract was bought from British Airways Travels Shops Limited which was at all time registered and operating in England and does not have any place of business in Kenya and is not domiciled or operating in Kenya. That it was an express term of policy that the choice of law is English law. That the insured had a right to lodge complaints with the Insurance Ombudsman Bureau established under the English law as appears in clause 6.4 of the insurance policy document. On jurisdiction the 2nd defendant relied on cases of ***Raytheon Aircraft Credit Corporation & Another v Air Al-Faraj Limited [2005] 2KLR 247,*** the case of ***Bash Hauliers Limited vs Damco Logistics Kenya Limited [2012],*** where the court considered the ***Court of Appeal case of United India Company Ltd vs East African Underwriters (Kenya Limited [1985] KLR*** and on whether the contract was enforceable in Kenya the 2nd defendant relied on the case of ***Kenya School of Flying Ltd and Another –vs- ACE INA UK and Another [2005] eKLR.***
7. It was submitted that in determining the jurisdiction questions raised, the express and implied intention of the parties must be respected and it is clear that the intention of the parties is to have the matter determined in England. It was argued in considering the principle of closest and real connection (*Forum Non Conveniens rule)* the rule to be applied when there is doubt is if the court that has jurisdiction; that contract sought to be enforced was the closest and most real connection with England and the systems of law of England. On this the 2nd defendant relied on the case of ***Roberta Maccledon Fonville v James Otis Kelly III and 3 Others [2002] eKLR*** where the court applied the real and closet connection and found that it had no jurisdiction to try the case.
8. It was further submitted that according to English Law any claim should have been brought in England in that the Modified Brussels Convention (Council Regulation (EC) No. 44/ 2001) applies and the Presumptive Rule under Article 9 is that an insurer must be sued in their home land; that the claim was brought by the legal representatives of the discussed, who was the policy holder and that any claim under the policy ought to have been brought in England pursuant to English law which applied to the contract.
9. The 2nd defendant further referred to the case of ***Owners of Motor Lillian S –vs- Clartex Oil (K) LTD*** where it was held that jurisdiction is everything. Without it a Court has no power to make one more step. When a Court has no jurisdiction there would be no basis of continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the view that it is without jurisdiction.
10. On limitation the 2nd defendant argued that the claim was extinguished by limitation of actions; that the Limitation of Actions Act 1980 England stipulates that any claim on contract should not be brought after 6 years from the date when the cause of action arose; that the cause of action in this case occurred on 24th September 2003 and the suit was filed on 13th October 2011 which was almost 10 months after the claim had been extinguished by limitation. On this 2nd defendant's l referred to the case of ***Callaghan v Dominion Insurance Co. Ltd 1997 2 Lloyd's Rep 54 , and the case of Virk v Gan Life Holding Plc 1999 WL 1613247*** where the court stated that; *"It is common ground that a contract of indemnity insurance is an agreement by the insured to confirm a contractual right to indemnity which on the face of it comes into existence immediately of an event insured against."*
11. It was submitted that the court also stated that in respect of insurance policy including property, life and other forms of insurance, the law has long been that because an insurance policy is to be construed as insurance against the occurrence of an insured even, the occurrence of that event is treated as equivalent to a breach of contract by the insurer. Accordingly in the absence of policy

terms affecting the matter, the limitation period begins to run as soon as the insured event occurs even though no claim has been made.

PLAINTIFFS' SUBMISSIONS

12. The plaintiffs submitted that the entering of appearance was tantamount to an appearance and submission to the jurisdiction of this honorable court. It was submitted that Order 6 Rule 4 of the Civil Procedure Rules provides; *"Where the defense contains the information required by rule 3 it shall where necessary be treated as an appearance."* On this the plaintiff relied on the case of ***Kanti & Co. Advocates Ltd. Vs. South British Insurance Co. ltd. CA [1981] KLR1,*** *where the Court of Appeal held that a defendant who enters an unconditional appearance to a summons under whatever pretext, submits to the jurisdiction of the Court.*
13. That the 2nd defendant in its submissions urged the Court to set aside the interlocutory judgment so that the trial may be heard and determined on merit it was argued that it defies logic that the defendant has sought to challenge jurisdiction after submitting to it.
14. The plaintiffs further argued that if the parties did not want or intend to enter appearance they could have opted to file a separate application and obtain an interim injunction, stopping or preventing this court from hearing the suit because of lack of jurisdiction; that the court was seized with the plaintiffs' case and was under duty to deliberate under the Constitution, statute and common law, Civil procedure Rules and come up with a fair and just decision.
15. It was further submitted that the ruling delivered by Mwera J. estoppels the 2nd defendant from challenging the jurisdiction of the Court. That Justice Mwera held that, *"In the result the prayers are granted. The 2nd defendant file, pay for and serve its defense. The parties to move to close proceedings and then prepare the suit for hearing as per Civil Procedure Rules 2010. Costs of the application go to the plaintiffs"*.
16. That if the defendants were dissatisfied with the said ruling they ought to have appealed against it. That the ruling decided the issue of jurisdiction as it charted the path of the subsequent proceedings which included the 2nd defendant filing a defense. For this argument the plaintiffs relied on the case of ***Agip (K) Ltd –vs- Ltd Kibutu CA [1981] KLR 20,*** where the Court of Appeal dealt with the consequences of filing a defense and held that; *"the defense and counterclaim in this case constituted a step taken and invoked the jurisdiction of the Court, after which it was no longer open for the defendant to apply for stay."*
17. The plaintiffs submitted that the interlocutory judgment entered against the 1st defendant was still good and the Court should proceed to award compensation with interests to the plaintiffs on the evidence submitted; that the 1st defendant was paid the insurance premiums by the insured on the 25/04/2002 and they invited the 2nd defendant to underwrite the policy and it is their view that the 2nd defendant operates under some trade arrangement with the 1st defendant in the sale of travel insurance bringing in Order 5 rule 8 of the CPR. The plaintiffs went further to tabulate the amounts plus interests as claimed under the said policy.
18. On the issue of jurisdiction the plaintiffs referred the Court to article 165(3) of the Constitution 2010, which gives the High court original jurisdiction in criminal and civil matter. That section 3A also reiterates the High Court's jurisdiction. The plaintiff relied on the case of ***United India Insurance Co. Ltd. –vs-East African Under writer (Kenya) Ltd CA [1985] KLR 898*** where the Court held that, *"the onus of establishing a strong reason for avoiding jurisdiction of Kenyan Court is on the party who seeks to avoid that jurisdiction, and that burden is a heavy one."*
19. Further that the Judicature Act Cap 8 clearly confirms that the laws of Kenya are not anywhere different from English law (of contract) and the 2nd defendant does not suffer prejudice or any disadvantage, if the case which is already substantially heard, with the pleadings having closed, is concluded in Kenya. Section 3 of the said Act also outlines the sources of Kenyan laws.
20. The plaintiffs relied on the case of ***United India Insurance (supra)*** case where it was stated that the Court has discretion to assume jurisdiction over the agreement which is made not to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign in exercising this discretion and that the Court should take into account all the circumstances of a particular case such as:-

"in what country the evidence on issues of facts situated or more readily available and the effect of that convenience and expense of trial as between the courts of the two countries; whether and how differently the law of foreign country applies; what country either is closely connected and how closely; whether the defendants genuinely desire trial in the foreign country or seeking procedural advantage; and whether the plaintiffs would be prejudiced by having to sue in the foreign Court".

21. Further the plaintiff referred to clause 3 of the said policy which indicated that having bought the policy in the UK had the insured had the option to *"…choose which law will apply to the policy."* It was submitted that the law is clear that if the parties in a contract have agreed on what should happen, then Courts will enforce the agreement unless there is an overriding reason why this should not be done. It was argued that the policy in issue gives a right to the insured to choose what court and which law. That the material facts other than the purchase of the policy happened in Kenya, these being the air accident, the emergency evacuation of the insured, her hospitalization, the injuries suffered by the injured and her demise in Kenya.
22. It was submitted that had the 2nd defendant persisted in not appearing in the matter then the provisions of Order 5 rule 21 would have been applied; that the 1st defendant who sold the policy to the insured has not challenged the jurisdiction of the Kenyan courts; that the insurance policy was to be used by the insured in Area 3- Worldwide and when travelling in Area 3 the insured was involved in the accident; that the policy is clear and does not require the introduction of either Kenyan or the English law of contract to assist in the interpretation; that as the insured's personal representatives they have the required grant which could not be issued by the UK courts; that the suit is time barred in the UK and they cannot re-start there if the 2nd defendants objection is upheld and as per the policy as the insured's personal representatives they can make a decision on the location of their action.
23. It was further submitted that the limitations of actions acts is based on contract and should be filed within 6 years from the occurrence of the event insured against which could occur suddenly or gradually over time. That the event which triggered the need for the 2nd defendant to perform is the air accident on 24/01/2003 the event was completed with the death of the insured on 12/10/2006. That since the policy covered the insured with respect to medical emergency the first benefits payable on the policy were those connected with the emergency treatment and the last payable were the funeral expenses abroad. That with respect to the 1st and 2nd plaintiffs the period of limitation runs for six years from the date of death of the insured which is up to 11/10/2012 and with respect to the 3rd plaintiff who was born on 17/04/1992 the period of limitation runs for six years up to 16/04/2016 leaving all the plaintiffs within the statutory limitation period.
24. The 2nd defendant's response to the plaintiff's submission was that the 2nd defendant is not aware of any entity known as British Airways Travel Insurance, an insurance policy the subject of the policy, which was brought from British Airways Travel Shops Limited which no longer exits ; that the suit was filed on 13th October 2010 and not 13th November 2010; that the defense filed on the 9th of February 2012 disputes the court's jurisdiction; that Order 6 rule 2 (4) does not apply in this matter nor does the case of **Kanti & Co. Ltd vs South British Insurance Co. Ltd C.A. 1981 KLR** apply as the foreign defendant had a registered office in Kenya; that the position in law is set out in the Court of Appeal case of **Raytheon** (supra); that the plaintiffs' submissions as to the ruling of 26th January 2012 by Justice Mwera is misleading as the court stated that " *Argument about jurisdiction and whether the suit is time barred cannot be taken lightly by any measure. They deserve to be argued fully on a trial";* that having been allowed to file the defense and the judgment set aside there is no estoppel; that the case of **Agip K. Ltd -vs- Kibutu CA (supra)** is irrelevant as the application was made under section 6 of the Arbitration Act for stay of proceedings in a matter which was the subject of an arbitration agreement; that submissions on what should be paid to the plaintiff should be disregarded; that order 5 rule 8 of the CPR has no application , that it involves service on a defendant personally or through an agent which was not the case with the defendants in this matter; that the issue of the grant of original jurisdiction by the Constitution was addressed by the Court of Appeal in the **Raytheon case (supra)** in which the court stated that section 60 (1) of the Constitution which is the same as Article 165 (3) of the Constitution 2010 does not authorize the High Court to disregard private International Law and exclusive jurisdiction clause in international commercial agreement and assume jurisdiction over

persons outside Kenya.

25. It was further submitted that the choice of law clause in the policy stated that "if *you buy this insurance in the United Kingdom you can choose which law will apply to the policy. English law will apply unless we agree otherwise."* That the deceased did not choose any other law to apply to the policy and as such the choice of law remained English law as the 2nd defendant did not agree otherwise; that the clause is unequivocal. That the plaintiffs appear to be confusing the place of occurrence of the accident and the performance of the contract being in the policy of insurance, the performance was to be in England where the 2nd defendant is based. That order 5 rule 21(e), (f) and (h) does not assist the plaintiffs as paragraph (e) deals with of contract made in Kenya which is not the case, the action is not founded on tort as the plaintiff seeks to enforce an insurance policy. That the plaintiffs did not seek leave to serve the 2nd defendant out of the jurisdiction of this court and that the default judgment was set aside pursuant to an application by the 2nd defendant who raised the issue of jurisdiction.

26. I have read and considered the submissions and authorities relied on. The two issues in the preliminary objection raised by the 2nd defendant are on jurisdiction of this court and limitation of action. I will first deal with the issue of jurisdiction. In the case of **Owner of the Motor Vessel ' Lillian S' vs Caltex Oil (Kenya) Ltd C.A No.50 of 1989 , Nyarangi** JA stated that ***" a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it"*** . The insured who is now deceased bought the insurance cover in England where she was a resident. There is no dispute that the insurance cover covered the insured in her travels in Area -3 worldwide. There is no dispute that the policy was made in England. It is the 2nd defendant's argument that since the policy was made in England it was to be performed in England and that English law applied to the policy the plaintiffs seek to enforce and that the alleged breach occurred in England. The plaintiffs' on the other hand argue that the 2nd defendant by entering appearance and filing a defense has submitted itself to the jurisdiction of this court. In deciding the issue of jurisdiction I have carefully considered the contents of the insurance policy that forms the basis of the contract between the insured/ deceased and the 2nd defendant. The contract was made in England. There is a term in the policy on the Choice of Law. It states as follows; ***Choice of Law: If you buy this insurance in the United Kingdom you can chose which law will apply to the policy. English law will apply unless we agree otherwise.***

27. The 2nd defendant has submitted that this was an express term of the policy and that the choice of law is English law. The plaintiffs on the other hand submit that having bought the policy in UK the insured had the option to choose which law will apply in the policy. I do agree that Article 165 (3) of the Constitution gives the High Court original jurisdiction in criminal and civil cases and that Section 3A also reiterates the High Court's jurisdiction. In the case of **Raytheon supra** the Court of Appeal held that " ***the High Court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in order V rule 21 (e) Civil procedure Rule , that is inter alia, the contract is made in Kenya or if it is governed by the Laws of Kenya or if a breach of contract is committed in Kenya.***

28. The insurance policy was taken in England. Did the policy give the insured a choice of law? Yes it did. The clause I have refereed to on the choice of law expressly stated that if you buy the insurance in the UK you could choose the law to apply to the policy. That English law would apply unless they agree otherwise. The plaintiffs have failed to show that the insured choose which law to apply. They cannot make that choice now. Thus from the wording of the clause the law applicable was the English law, further the 2nd defendant does not have any place of business in Kenya and is not resident in Kenya. This was not a contract made in Kenya. In the case of United India Company the court held **that parties should be held to their agreement as regards jurisdiction clause.** I find further that the provisions of order 5 rule 21 do not apply as no leave was granted for service of process outside the jurisdiction of the court. In the case of **United India Company (supra**) the Court of Appeal when considering whether Kenyan courts can assume jurisdiction notwithstanding a clause in an agreement conferring jurisdiction on a foreign court stated as follows;"***The courts of this country have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. <u>The exclusive jurisdiction clause</u>***

however should normally be respected because the parties themselves freely fixed the forums of the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement (emphasis mine)

29. The 2nd defendant has filed a defense and had denied this court's jurisdiction. I do not agree with the plaintiffs' submission that by filing a defence the 2nd defendant has submitted to this court's jurisdiction. I need not consider the principle of closest and real connection. The ruling of Justice Mwera did not make a finding on the issue of jurisdiction, the Judge gave direction on how the issue was to be dealt with. The 2nd defendant has shown that the contract was made in England and the choice of law is English and guided by the Court of Appeal holding in the case of Raytheon (supra) I uphold the 2nd defendant's preliminary objection that this court has no jurisdiction to determine this suit. In the case of "**Lillian S" supra** Nyarangi JA stated that "***jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would no basis for a continuation of proceedings pending evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'***
30. With this direction in mind, it is in my view that I need not make any determination on the issue of limitation. I therefore allow the preliminary objection and strike out the plaintiffs' suit with costs to the 2nd defendant. It is so ordered. I do apologies to the parties for the delay in delivering this ruling this was due to this court's heavy workout load throughout the term.

Dated signed and delivered this ***16th*** day of **January, 2015**.

R. E. OUGO

JUDGE

In the presence of;

…….……..……..…….For the Plaintiffs

……..……..…….1st Defendant

……..…For the 2nd Defendant

……..……..Court Clerk