



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 19 OF 2003

JACK AND JILL SUPERMARKET LTD.....PLAINTIFF
VERSUS
INTRA AFRICA INSURANCE CO. LTD.....1ST DEFENDANT
ANIL PATEL T/A ANIL INSURANCE2ND DEFENDANT

RULING

This Ruling is delivered in an oral objection raised in the course of recording the Plaintiff's evidence at the opening of the trial. The Plaintiff's claim against the Defendant is for compensation arising out of an insurance contract entered between the Plaintiff and the Defendant on or about 1st April 2000. Given the nature of the suit, several documents are therefore in use.

The objection raised by counsel for the Defendant is against the production of a photocopy of the relevant insurance proposal form for a money in transit insurance cover, in the absence of the original. The Plaintiff's witness (PW1) has told the court that the original was returned to the Defendant and that, despite the service of two notices to produce documents, served on 21st September 2006, and 5th March 2008, respectively the Defendant has refused to make discovery of the said document, as well as others mentioned in the written submissions filed herein.

The Plaintiff contends that the Notice to produce was served in accordance with the provisions of **Order X1 of the Civil Procedure Rules (2009 Revised Edition)** and that the requirements of **Sections 68 and 69 of the Evidence Act** as to the production of secondary evidence have been fulfilled. The Defendant claims that is not case. It claims also that a different version of the proposal form, which is listed as No. 1 in the Defendant's bundle of documents is the genuine one. It was agreed that the parties would hold a meeting on discovery to try and sort out documentation several documents were found to be overlapping. They were to come up with an agreed bundle. Counsel for the Defendant took responsibility for the mishap.

Despite attempts to agree on a bundle of documents, the Defendant having pointed out a number of documents in the Plaintiff's bundle that it objected to, the parties could not agree. They obtained directions to file submissions on the contested documents. The submissions filed have addressed the admissibility of copy of the insurance proposal form dated 4th April 2000, (No. 13 of the Plaintiff's bundle of documents), which the Defendant claims not to be a copy of the original, and, also not a document in its possession. The Defendant contends however, that the proposal form it is aware of and the original of which is in its possession is the one whose copy is contained in its own bundle of documents itemized as No. 1.

In its written submissions, the Defendant admits that notice to produce was served on 21st September 2006, and that, in response thereto, they furnished the Plaintiff with the document No. 1 of its bundle which, according to them, is a copy of the original and which is in its possession and custody, thus disowning the Plaintiff document No. 13. I find the respective submissions filed on matters of law and principle to be legally sound. I also find the interpretations given to the cited Sections of the Evidence Act to be correct. I am unable to agree with the Defendant that the Plaintiff ought to have dealt with the 2nd Defendant in seeking discovery since the 1st Defendant, as the principal bears that the ultimate responsibility and legal duty to the Plaintiff. The insurance forms and documents, save for the original policy which is ordinarily given to the insured in its original form.

My examination of the Defendant's document No. 1 shows clearly that it could not have been the basis of the Plaintiff's insurance cover from the Defendants, it being neither dated nor signed. It is common practice that once a proposal form, usually in the insurers' standard form, has been completed and signed by a proposed insured, the original is returned to the insurer with a copy only being left or given to the insured for record purposes. Looking at the two copies of the proposal form, I am persuaded that the Plaintiff's version of the proposal form is the correct one and the Defendant ought to have produced it for discovery and inspection. Since they have refused to do so, and being of the considered view that then non-production thereof is not explained, I have no option but to overrule their objection to the production of the Plaintiff's document No. 13 as secondary evidence.

An important question has been raised by the Plaintiff's in regard to the documents objected to – How could the Defendant begin to process a claim if the necessary documentation supportive of a valid insurance claim was not in its custody? Of particular importance in this regard is the fact that the Defendant's advocates, commissioned loss adjusters who requested for requisite documentation from the Plaintiff to enable them process the claim, a request the Plaintiff complied with. The disputed documents were not asked for under the letter of 7th November 2000, and no issue was raised as regards the document No. 13.

As regards the other of the Plaintiff's documents objected to, which have been examined, I am of the view that they too are documents the originals of which would ordinarily be in the custody of the Defendant as the insurer. I therefore deem them to be so placed and do hereby overrule the Defendants' objection to the same. I allow the Plaintiff to produce the copies thereof in view of the Defendant's refusal to co-operate in their inspection. The Defendant shall, in any event, have the opportunity to attack their evidential value during cross examination and will therefore suffer no prejudice as a consequence of this ruling.

Accordingly, the objection is overruled in its entirety.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH day of OCTOBER, 2011

M. G. MUGO

JUDGE

In the presence of:

Mr. Onido holding brief for Mr. Mwenesi
Mr. Muchiri

For the Applicant
For the Respondent