



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPLICATION NO. 3739 OF 1995

MALIKE CO.LTD.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

RULING

Before me is a notice of preliminary objection of 28th February 2000 wherein the following point of law is sought to be raised and argued namely:-

“That this suit contravenes section 168 of the Insurance Act, cap 487 of the Laws of Kenya and ought to be struck out with costs.”

Mr Imbambwa submitted that the plain reading of provisions of section 168 of the Act makes this suit liable to be struck out. The suit is filed against the Attorney-General on behalf of the Government of Kenya, Ministry of Finance. The plaint does aver only tort of negligence on the part of the Commissioner of Insurance which is a claim under common law. The provision of Insurance Act take precedence over the claims under common law. The immunity given under the statute thus comes into effect.

On the interpretation of the words "good faith" he cited an English case of *Cannock Chase District Council vs Kelly* [1978] 1 All ER 152 wherein it was held that bad faith or lack of good faith meant dishonesty and should not be treated as synonym for an honest though mistaken taking into consideration of an irrelevant factor. By using the above case he submitted that the good faith stipulated in the section should be accordingly interpreted

Mr Wamalwa the counsel appearing for the plaintiff stated that the objection is misconceived. He argued that the Act came into effect to establish machinery for supervision of the insurance companies. Act gives immunity for the acts done under the Act and not the omissions of the Commissioners of Insurance. The plaint relies on the omissions or refusal to take steps required to be taken under the Act and not an action covered under section 168 of the Act. He thus argued that the suit is properly before the Court and should proceed for trial.

In short rejoinder it was submitted that the Act only gives discretion to the Commissioner. As there is no duty cast the question of omission to perform that duty does not arise.

The preamble of the Act is in the following words:-

“An Act of Parliament to amend and consolidate the law relating to insurance and to regulate the business of insurance and for connected purposes.”

Section 3 of the Act appoints the Commissioner of Insurance who is responsible for general administration of the Act and the performance of all the duties and functions assigned to him by or under the Act.

As against those the wordings of the sections imposing the powers of the Commissioner are not in mandatory terms. But because of that whether the Commissioner can avoid his duties and obligations and take shelter under section 168 is the issue herein.

Section 168 stipulates as under:-

“168 (1) No legal proceedings shall be instituted in any Court against the Minister or Commissioner or any person authorized by the Minister for anything done or intended to be done in good faith under this Act.

(2) No compensation shall be payable to any person for any loss. Damage or harm directly or indirectly caused by anything done or intended to be done in good faith by the Minister or Commissioner or any person authorized by the Minister or Commissioner under this Act.”

The plaintiff’s claim against the defendant is averred in paragraph 6 and 7 of the plaint. Some of the particulars do suggest acts of the Commissioner which are negligent not only the failures to do the acts under the Act.

The said section gives protection to the Commissioner for anything done or intended to be done in good faith under this Act.

Sub-section (2) also talk about acts or intended acts.

The word “act” is defined in Interpretation and General Provisions Act (cap 2) which states “act used with reference to an offence or civil wrong includes a series of acts, and words which refer to acts done extend to illegal omissions.”

The defendant herein is alleged to have done acts or omissions of negligence which is a civil wrong. Thus those acts are covered under section 168 of the Act. The question remains to be answered whether they were done under good faith. The word good faith is explained in the book in “*Words and Phrases*”, second edition edited by John Saunders where amongst other meaning it is described “as absence of bad faith – of *mala fides*.” The word “good faith” means “without notice that any fraud or fraudulent preference is intended.”

In the book of Stroud's “*Judicial Dictionary of Words and Phrases*” 4th edition - those words are defined as 'the act in fact done honestly whether it is done negligently or not'.

With the above observations and considerations, it is quite clear in my mind that the acts (which includes omissions) alleged to have been done is not specifically averred to have not been done in good faith. Only negligence is averred and that does not make the acts “not in good faith.” In the premises, I do agree with the submissions made by the defendant's counsel and strike out the plaint filed as being in contravention of section 168 of the Insurance Act. The costs shall be paid by the plaintiff to the defendant.

Dated and Delivered in Nairobi this 13th day of April, 2000.

K.H.RAWAL

COMMISSIONER OF ASSIZE