



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**COMMERCIAL DIVISION, MILIMANI**

**CIVIL CASE NO. 542 OF 2003**

**KENYA SCHOOL OF FLYING LTD. & ANOTHER.....PLAINTIFFS**

**VERSUS**

**ACE INA UK LTD. & ANOTHER.....DEFENDANTS**

**R U L I N G**

The Defendants in this suit have applied by chamber summons dated 1st July, 2004 for the following main orders:-

- (i) That the order of the court granting leave to serve summons herein outside the court's jurisdiction be set aside.***
- (ii) That the service of summons effected upon the Defendants in England be set aside.***
- (iii) That the plaint be struck out with costs.***

The application is stated to be made under Order 5, Rule 21 and Order 6, Rule 13 of the Civil Procedure Rules (the Rules). Grounds thereof as stated are:-

- (a) That the contract which the plaint seeks to enforce was made in England and was to be performed in England.***
- (b) That both the Defendants are resident and carry on business in England and are not domiciled or ordinarily resident in Kenya.***
- (c) That the 1st Defendant has been wrongly joined in the suit. The application is supported by the affidavit of one GARETH LEWIS of 51, Eastcheap, London EX3M IJP, England sworn on 29th June, 2004 at London.***

The order allowing service of summons was made by Mutungi, J. on 28th October, 2003. The Defendants entered appearance under protest on 4th June, 2004. They have not filed defence in order not to submit to the jurisdiction of this court. The application at hand challenges that jurisdiction.

The Defendants' case as put forward by their learned counsel, Mr. Fraser, is this.

The Defendants are companies incorporated and carrying on business in the United Kingdom. They do not conduct business in Kenya and have no place of business in the country. The insurance policy that has given rise to the claim was issued in England and was placed by an agent of the Defendants in England. The cause of action therefore does not fall within Rule 21 of Order 5 of the Rules and this court does not have jurisdiction to try the suit. The order of 28th October, 2003 permitting service of summons outside the court's jurisdiction should thus not have been made.

Mr. Makoloo, learned counsel for the Plaintiffs, responded as follows. To begin with the application is defective in that the particular paragraph of Rule 13(1) of Order 6 under which the application has been brought has not been stated. On jurisdiction Mr. Makoloo submitted that there is nothing to oust the court's jurisdiction in the matter, the Plaintiffs being Kenyan and the event giving rise to the claim having occurred in Kenya.

In any event the insurance contract in question does not provide for the applicable law; it will depend upon the intentions of the parties to be ascertained from evidence at the hearing of the action. The cause of action, further submitted Mr. Makoloo, falls within paragraphs (e) and (f) of Rule 21 of Order 5.

Mr. Makaloo further submitted that the parties intended that the applicable law would be that of the country where the event giving rise to the claim occurred. He referred to sections 76 and 77 of the Insurance Act, Cap. 487. He finally submitted that striking out being a draconian power the same ought to be exercised only in the clearest and obvious of cases and that this was not one of them. Furthermore, the supporting affidavit should not be relied upon in an application of this nature that seeks final orders as it is based on information without leave of the court. Mr. Fraser, was quick to point out that the application at hand does not seek determination of the suit at all. The application simply seeks a striking out of the suit upon the very clear ground that the court has no jurisdiction to hear and determine it.

I have considered the submissions of the learned counsels, including the various authorities that they sought to rely upon. I have also perused the plaint and the affidavits sworn in support of and in opposition to the application. The court may allow service of summons out of jurisdiction in any of the various instances set out in Rule 21 of Order V of the Rules. An order under that rule is out of necessity granted ex parte. A defendant is therefore entitled, after he has been served with summons out of jurisdiction, to challenge the order allowing such service. That is what the Defendants herein have done.

The fact that the Defendants are incorporated in England, and having their registered officers there is not disputed. It has been stated under oath that they do not conduct any business in Kenya and have not any place of business in the country. The Plaintiffs have not pleaded in the plaint or in the replying affidavit that the Defendants conduct business in Kenya or that they have any place of business in the country. The insurance policy in question is dated in London. There is no averment in the plaint or in the replying affidavit that it was executed in Kenya. All available material shows that it was issued and placed in England. It is true that the risks covered in the policy may occur "worldwide", to use the term used in the policy. It is also true that the event giving rise to the claim occurred in Kenya. But that is not to mean that the contract of insurance was to be performed in Kenya. Clearly it was to be performed in England. It does not by its terms state that it is to be governed by Kenyan law. Nor does it contain any provision to the effect that Kenyan courts have jurisdiction to hear and determine a suit in respect to it. To my mind therefore the claim does not come within paragraph (e) of Rule 21 aforesaid. Nor does it fall under paragraph (f) of the same rule, as the event giving rise to the suit, that is the accident, is not a tort alleged against the Defendants but an event giving rise to liability under the insurance contract. The suit is not a claim in tort. As the insurance policy was not issued by the Defendants in respect of insurance business carried on by them in Kenya section 76 of the Insurance Act, Cap. 487 has no relevance.

It is manifest that the court has no jurisdiction to entertain this suit. Leave to serve process out of jurisdiction should not have been granted. I will therefore allow the application by chamber summons dated 1st July, 2004 as prayed with costs to the Defendants. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF MARCH, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 11TH DAY OF MARCH, 2005.**