



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 4828 OF 1987

PAN AFRICAN INSURANCE CO. LTD

& TWO OTHERS.....PLAINTIFF

VERSUS

CLARKSON AND SOUTHERN LIMITED.....DEFENDANT

RULING

Plaintiffs sued defendant in tort to recover damages for defendants negligence.

Defendant filed Defence and applied for leave to issue a Third Party Notice to Intra Africa Insurance Co. Ltd; Jubilee Insurance Co ltd and Kenya National Assurance Co. Ltd Leave was granted and defendant filed and served a Third Party Notice.

The defendants claims indemnity against the three Third Parties on the ground that the plaintiffs loss and damage claimed against defendant falls within the insurance cover provider for under the defendants Professional Indemnity Policy No. 790113 with third parties dated 1.4.80 The third parties entered appearance and filed a joint Defence under protest. The defences raised by third parties include:

- (a) A denial that third parties are liable to indemnify the defendants under the policy
- (b) A denial that defendant has committed breaches of duty or occasioned plaintiff loss as alleged in the plaint.

On 18.2.91 Bosire J (now J.A) ruled that the trial between plaintiffs and the defendant should precede the trial between defendant and Third Parties.

The suit between plaintiffs and defendant was eventually heard and on 12.2.93, the court allowed plaintiffs' suit against defendant

In the proceedings between defendant and Third Parties, one of the issues framed for determination:

“is the defendants claim covered by the Policy?” On that issue, Mr. Bwomote learned counsel for Third Parties insists on calling oral evidence on the scope of the cover and insurance practice on it in particular, Mr Bwomote intends to call evidence:

1. to show that the true proximate cause of insured loss is different from what defendants say and what plaintiffs told the court

2. To show that regardless of what plaintiff alleged, the duty of utmost good faith was throughout on Sylvester Holdings and never shifted to the defendant

3. To show the extent of duties of brokers; that evidence of Kithinji (PW1) regarding duties of brokers differ from duty of Brokers as recognized by law and that there is no trade usage requiring a Broker to act as a lawyer.

Mr. Nagpal for defendant submitted that the issue whether or not the defendant claim is covered by the policy is a pure point of law dependent on the construction of the policy and that no extrinsic evidence can be called. He observed that defendant has already been found negligent and that the finding of negligence cannot be challenged by calling oral evidence.

According to him, whether that negligence falls within the scope of the policy is a different matter and it is a pure point of law.

On 12.2.93, the court found defendant liable to plaintiffs in tort for negligence. The court found defendant not liable to plaintiffs in contract as it found no contract between the parties. The main act of negligence was defendants failure to take any or reasonable steps to ascertain whether or not Sylvester Holdings owned the properties offered as security for the Bonds (guarantee) The court in the judgment exhaustively dealt with the issue whether or not defendants owed plaintiffs a duty of care. In dealing with the duty of care the court considered the issue of privity of plaintiffs to defendants.

The court also considered the scope of the duty of care in the circumstances of the case. The court dealt with submission by defendants counsel that defendant being an insurance broker was not specialized in the arrangement of security and that its trust on an Advocate absolved it from duty of care.

I have perused the Request for Particulars of paras 2 and 6 of the Defence of Third parties filed on 16.5.2000 and the Third Parties particulars filed on 2.2.2001. I have also perused the Further Amended Statement of defence dated 17.10.91 and filed on 22.10.91. It is clear that the defendants defence was fully and ably presented to court.

The particulars of paragraph 6 of the Third Parties Defence given by the Third parties and the evidence intended to be introduced tend to show that, the Third Parties claim that the defendant did not owe a duty of care to plaintiffs and was not liable to the plaintiffs for negligence.

Well, the Court heard the suit in full and indeed found that defendant owed a duty of care to plaintiffs in the particular transaction and that defendant negligently performed the transaction. That decision is still subsisting. The defendant has satisfied the decree. The court has no jurisdiction to re-hear the issue of whether or not defendant was in fact liable to the plaintiffs. The court became functus officio when it pronounced the judgment. Any oral evidence to re-open the issue of defendant's negligence would be inadmissible.

For the above reasons I uphold Mr. Nagpal's objection and rule that the issue whether or not defendants claim is covered by the policy be determined on the basis of the policy, counsels submissions and on the basis of the finding of facts made by court in the trial between plaintiffs and defendants.

Costs of these proceedings shall be costs in the cause.

E. M. Githinji

Judge

23.5.2002

Miss Wallace for Nagpal present

Mr. Bwomote holding brief for Bwomote present

Miss Mugo present

Order: Ruling to be typed and supplied as prayed. Mention on 10.6.2002 at 9.00 a.m. for fixing hearing date.

E. M. Githinji

Judge