



**Destiny Hauliers Limited & another v Kenya Orient Insurance Limited & 2 others (Civil Suit 008 of 2019) [2025] KEHC 12132 (KLR) (7 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12132 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 008 OF 2019  
F WANGARI, J  
JULY 7, 2025**

**BETWEEN**

**DESTINY HAULIERS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**KATUB ABDI OSMAN ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA ORIENT INSURANCE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**INSURANCE REGULATORY AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**CHARLES ONKOBA OMBAKI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The ruling relates to a Notice of Preliminary Objection raised in the 2<sup>nd</sup> Defendant's Statement of Defence dated 22/07/2024. The Preliminary Objection is premised on the ground that the suit be dismissed with costs as the suit offends the doctrine of privity of contract and that this court had no jurisdiction by virtue of section 168 and section 173 of the *Insurance Act*, with the latter being read together with section 2, 7 (1) and 7(2) (j) of the *Fair Administrative Actions Act*.
2. The Plaintiffs instituted this suit vide the Plaint dated 20/02/2019 seeking to have the Defendants liable for claims arising out of Policy No. MSA/0807/014828/2016 where the Plaintiffs were insured and the 1<sup>st</sup> Defendant the Insurer. The 2<sup>nd</sup> Defendant is the statutory government agency whose core function is to regulate, supervise and develop the insurance industry. It cannot be discerned from the Plaint the reason why the 3<sup>rd</sup> Defendant was sued.
3. The court directed that the PO be disposed of by way of written submissions. Both parties complied by filing their rival submissions.
4. The 2<sup>nd</sup> Defendant submitted that the suit offends the doctrine of privity as the insurance contract was between the Plaintiff and the 1<sup>st</sup> Defendant. It was stated that a contract cannot confer rights and



obligations on any party other than the parties to the contract. The 2<sup>nd</sup> Defendant cannot be held liable for claims under the contract between the Plaintiffs and the 1<sup>st</sup> Defendant.

5. The 2<sup>nd</sup> Defendant further submitted that the suit against it offends the doctrine of exhaustion. It relied on section 204A of the *Insurance Act* that provides for dispute resolution mechanism in the insurance industry before approaching the court. This court ought to sit as an appellate court for decisions made by the Insurance Appeals Tribunal. The suit offends the doctrine of ripeness as it was prematurely filed against the 2<sup>nd</sup> Defendant. This court was invited to down its tools as it had no jurisdiction to hear the matter.
6. The Plaintiffs submit that the Preliminary Objection does not meet the threshold as it did not raise points of law but facts that require to be proved through evidence. It is submitted that all the queries raised has to be led by way of evidence and documents which must be interrogated by both parties. It was prayed that the Preliminary Objection be dismissed with costs to the Plaintiffs.

### Analysis

7. I have duly considered the Preliminary Objection, submissions together with the authorities relied as well as the law and in my view, the following issues are for determination;
  - a. Whether the notice of preliminary objection is merited;
  - b. Who bears the costs?
8. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
9. For a Preliminary Objection to succeed the following tests ought to be satisfied;
  - a. it should raise a pure point of law
  - b. it is argued on the assumption that all the facts pleaded by the other side are correct
  - c. it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
10. A valid Preliminary Objection should, if successful, dispose of the suit or application.



11. Privity of contract is a legal doctrine hence an issue of law. A contract cannot confer rights or impose responsibilities to a party other than the parties to the contract.
12. In *Dunlop Pneumatic Tyre Co Ltd -versus- Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC held as follows;
 

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”
13. It is not denied that the insurance policy contract was between the Plaintiffs and the 1<sup>st</sup> Defendant. Any claim under the said contract ought to be between the parties to the contract. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not party to the said contract.
14. In regard to the doctrine of exhaustion and doctrine of ripeness, the Plaintiffs sued the 2<sup>nd</sup> Defendant for failure to ensure that the Plaintiffs are indemnified in respect to the insurance policy between the Plaintiffs and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant is also said to frustrate the claim under the policy and failure to act on the complaint lodged for non-compliance by the 1<sup>st</sup> Defendant.
15. The 2<sup>nd</sup> Defendant states that the Plaintiffs did not exhaust the provided dispute resolution mechanisms in the insurance industry before filing this suit in court. Section 204A of the [Insurance Act](#), provides as follows;
 

“204 (1) Any insurance customer may lodge a written complaint with the Commissioner against a regulated entity in relation to the provision of its services.

  2. Subject to subsection (3), where the Commissioner determines a dispute such determination shall be binding on the parties to the dispute.
  3. A party that is dissatisfied with the determination of the dispute by the Commissioner may within thirty days appeal the determination to the Tribunal.”
16. There is nothing to show that the Plaintiff after lodging their complaint with the 2<sup>nd</sup> Defendant and being dissatisfied with their action or lack of it, they did not lodge their complaint as provided for under section 204A as stated herein above. The process after lodging a complaint before filing of the suit against the 2<sup>nd</sup> Defendant was not followed. I do concur with the 2<sup>nd</sup> Defendant that the filing of the suit against it was premature.
17. In respect to the 3<sup>rd</sup> Defendant, I find no reason as to why the party was sued considering that he was the successful party in a claim against the Plaintiffs subject to the insurance policy in issue.
18. On the issue of costs, Section 27 of the [Civil Procedure Act](#) decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall be awarded costs.
19. I note that the Plaintiffs and the 1s Defendants had partly settled the matter save for the issue of costs which is yet to be settled.

### **Determination**

20. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The Notice of Preliminary Objection dated 22/07/2024 has merits and is hereby upheld.
  - b. The suit against the 2nd and 3rd Defendants is hereby struck out.



c. Costs awarded to the 2nd and 3rd Defendants.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF JULY, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Plaintiffs

Mr. Mueke Advocate for the 2<sup>nd</sup> Defendant

N/A by the 3<sup>rd</sup> Defendant

Ms. Getrude, Court Assistant

