



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Madison General Insurance Kenya Ltd v Walter (Civil Case
E002 of 2021) [2023] KEHC 1327 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE E002 OF 2021
CW GITHUA, J
FEBRUARY 16, 2023**

BETWEEN

MADISON GENERAL INSURANCE KENYA LTD PLAINTIFF

AND

MOSE OTISO WALTER DEFENDANT

RULING

1. This ruling is in respect of a preliminary objection filed on July 26, 2022 by the defendant, Mr Mose Otiso Walter, seeking that the Plaintiff's suit be struck out for having been filed in the wrong judicial forum or that alternatively, the court should exercise its supervisory jurisdiction under Section 18 of the *Civil Procedure Act* and transfer the suit to the Chief Magistrate's Court at Kisii for hearing and determination.
2. The background against which the preliminary objection was filed is that the plaintiff, Madison General Insurance Kenya Limited sued the defendant seeking several declarations to the effect that it was entitled to avoid the policy and any other claims that may arise from Insurance Policy Number xxxx issued in respect of motor vehicle Registration Number xxxx Toyota Voxy (hereinafter the subject vehicle) allegedly owned by the defendant.
3. According to the plaintiff, the subject vehicle was involved in a road traffic accident on July 11, 2021 along Kisii – Keroka road while being used for the carriage of passengers for hire and reward which was not one of the purposes covered in the parties insurance contract.
4. Upon being served with the plaint, the defendant filed a statement of defence and counterclaim on July 26, 2022 contemporaneously with the instant preliminary objection.
5. By consent of the parties, the preliminary objection was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered.



Having evaluated the nature of the preliminary objection, the parties rival written submissions and all the authorities cited, I find that the key issue for my determination is whether the preliminary objection as filed is merited.

6. I wish to start by observing that what in law constitutes a preliminary objection was concisely articulated in the celebrated case of *Mukisa Biscuit Company V West End Distributors Ltd [1969] EA 696* in which Sir Charles Newbold at page 701 defined a preliminary objection as follows;

' A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.'

7. The defendant in the preliminary objection has indirectly challenged the High Court's jurisdiction to hear and determine the plaintiff's suit by contending that this court is not the appropriate judicial forum to entertain the suit in lieu of Section 11 of the [Civil Procedure Act](#) (hereinafter the Act).
8. Section 11 of the Act stipulates that a suit should be instituted in the court of the lowest grade competent to try it. The defendant has advanced the view that since the suit was filed in the High Court and not in the Magistrate's Court which has jurisdiction to try it, the suit contravened Section 11 of the Act and should be struck out. However, in his submissions, the defendant appears to have changed this position when he admitted that the High Court has original and unlimited jurisdiction in both civil and criminal matters thus acknowledging that the High Court has jurisdiction to hear and determine all civil and criminal cases filed before it.
9. The aforesaid jurisdiction is conferred by Article 165(3) of the [Constitution](#) which as I held in the case of [Selina Vukino Ambe V Ketan Shashikant Khatri \[2020\] eKLR](#) which was cited by the plaintiff essentially means that the court is constitutionally empowered to try all civil suits irrespective of their nature or value of their subject matter. Consequently, the fact that a suit is filed in the High Court and not in the court of the lowest grade competent to try it as required by Section 11 of the Act does not by itself make the suit incompetent or incurably defective in order to warrant its striking out as sought by the defendant.
10. As correctly submitted by the plaintiff, the objective of Section 11 of the Act is to regulate the filing of suits in subordinate courts in order to guide litigants to file suits in the lowest court so as to make better and efficient use of scarce judicial resources.
11. I wholly agree with the decision of Majanja J in [Interactive Gaming & Lotteries Ltd V Safaricom Ltd \[2021\] KEHC 335 \(KLR\)](#) that Section 11 should be read together with Section 18 (1) (a) of the Act which empowers the High Court to transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same. This in effect means that if a suit had been filed in the High Court but the subordinate court has jurisdiction to try it, the High Court either on application by one of the parties or on its own motion can transfer the suit to the subordinate court competent to try it. This is the position I re-iterated in [Alexander Kimutai Kigen Kosgey V Erick Kirima & 4 Others \[2018\] eKLR](#) which has been cited by the defendant.
12. In view of the foregoing, I am satisfied that the defendant's prayer for striking out of the suit lacks merit and ought to be dismissed. Since the defendant's position is that the suit ought to have been filed in the subordinate court instead of this court, he ought to have filed an application for transfer of the suit to the lower court under Section 18 of the Act instead of filing the instant preliminary objection.



13. Regarding the alternative prayer sought in the preliminary objection, I have noted the plaintiff's argument in its submissions that the suit should be retained in the High Court as the word 'court' is defined in Section 2 of the [Insurance Act](#) which regulates Insurance business in Kenya as the High Court.
14. It is however important to note that the plaintiff's suit is not instituted under the [Insurance Act](#). A look at the Plaintiff filed in this court dated October 5, 2021 shows that the prayers sought in the suit are declarations under Section 10(4) of the [Insurance \(motor vehicle\) Third Party Risks Act](#) Cap 405 Laws of Kenya. The claims that may arise as a result of the alleged use of the subject vehicle for purposes not covered in the insurance contract cannot reasonably exceed Kshs 20,000,0000 which is the upper limit of the subordinates court's pecuniary jurisdiction it is thus my finding that the suit is one which can be tried by the Magistrate's Court. The plaintiff has not demonstrated what prejudice, if any, he is likely to suffer if the suit was transferred to the Magistrate's Court.
15. Having found as I have above, I hereby exercise my discretion and allow the defendant's alternative prayer with the result that this suit is hereby transferred to the Magistrate's Court at Kisii for hearing and final disposal.
16. I further direct that the case be mentioned before the Chief Magistrate, Kisii Law Courts on March 6, 2023 for directions or further orders.

It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 16TH DAY OF FEBRUARY 2023.

C. GITHUA

JUDGE

In the presence of:

Mr. Ojonga holding brief for Ms. Rweya for the Plaintiff

No Appearance for the Defendant

Ms. Aphline Court Assistant

