



**Jubilee Allianz General Insurance (K) Limited v CK Re Limited
International Reinsurance Brokers (Commercial Case E739 of 2021)
[2023] KEHC 20023 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E739 OF 2021**

A MABEYA, J

JULY 17, 2023

BETWEEN

JUBILEE ALLIANZ GENERAL INSURANCE (K) LIMITED PLAINTIFF

AND

**CK RE LIMITED INTERNATIONAL REINSURANCE
BROKERS DEFENDANT**

RULING

1. This is a ruling on an application by the defendant dated 22/1/2022. It was brought under sections 1A, 1B & 3A of the [Civil Procedure Act](#), order 5 rules 21(e) and order 51 rule 1 of the [Civil Procedure Rules](#).
2. The application sought the setting aside of the orders made on 6/10/2021 that granted the plaintiff leave to serve the plaint and the summons herein outside the jurisdiction of the Court.
3. The grounds for the application were set out in the body of the motion and in the supporting affidavit of Martin Andrew Wright dated 22/2/2022. It was averred that the defendant was a limited company incorporated in London and had no presence in Kenya. That the plaintiff failed to comply with the requirements of order 5 rule 21 and that the orders were therefore procured contrary to law.
4. That despite being under strict duty to comply with that provision of the law, the plaintiff failed to demonstrate that; there was a contract made in Kenya governing the relationship between it and the defendant; the defendant had an agent in Kenya; the contract stipulated that the laws of Kenya would apply; or that the contract donated jurisdiction to Kenyan courts.
5. It was further contended that, the place of performance of the contract was London wherein all services were rendered, documentation generated, payments done and claims effected.



6. That the defendant entered appearance under protest *vide* the memorandum dated 20/12/2021 as this court lacked jurisdiction to hear and determine the suit. That the appropriate forum was London and the defendant would be forced to defend itself in a court with no jurisdiction and also incur huge costs as it was domiciled outside the court's jurisdiction.
7. The plaintiff opposed the application *vide* the replying affidavit sworn by Isaac Adomako on 25/3/2022. It was contended that the cause of action was based on the various reinsurance contracts entered into by the parties in the period between 2009 and 2013 and the defendant had admitted to owing the plaintiff Kshs. 280,447,416.95 which was claimed in the suit.
8. That the contracts provided for choice of law and jurisdiction clauses which provided that the courts of Kenya had exclusive jurisdiction over disputes arising from them. That the contracts either provided that disputes were to be determined by Kenyan courts or the court where the original insured was domiciled. That the original insured in the contracts were domiciled in Kenya thus this Court was clothed with jurisdiction.
9. That upon the orders of 6/10/2021 being granted, the plaintiff served the defendant through substituted service as per the orders and that leave was properly obtained. That order 5 rule 21 granted this court jurisdiction over a foreign defendant. That the causes of action had their closest and most real connection in Kenya as the reinsurance contracts related to a risk in Kenya involving the plaintiff's insured clients based in Kenya who suffered loss and were paid in Kenya. That the plaintiff was to be indemnified for such losses by payment from the defendant which was receivable in Kenya.
10. It was thus contended that the defendant's assertions in its application were false and this court's jurisdiction was properly founded. The court was therefore urged to dismiss the application with costs and allow the suit to proceed to trial.
11. The defendant filed a supplementary affidavit sworn by Martin Andrew Wright on 7/4/2022 in response to the replying affidavit. It was contended therein that the reinsurance contracts were between the plaintiff and reinsurers themselves and the defendant was only an insurance broker. That the contracts relied upon by the plaintiff were only cover notes which were not reinsurance contracts. That the cover notes only set out the terms of the reinsurance and did not constitute a contract between an insured/reinsured and the broker but only summarized the contract made between the reinsured and the reinsurers.
12. That the defendant was only an intermediary and was not a party to the agreement between the reinsured and reinsurers. That the plaintiff failed to explain the nature of its relationship with the defendant wherein there was no written contract binding the parties.
13. The defendant also denied making any admission to the debt and the communication in the relied upon letter dated 8/3/2019 was an audit procedure by the plaintiff's auditors and that the defendant only agreed to the amount of Kshs. 395,546,790/- for the purpose of the audit and no other reason. That the reinsurers had been settling any amounts due thus the reason behind the plaintiff's claim for a lower figure in the plaint of Kshs. 280,447,416.96.
14. The application was canvassed by way of written submissions which were orally highlighted on 27/1/2023 and 23/2/2023, respectively. The plaintiff's submissions were dated 20/5/2022 whereas those of the defendant were dated 22/4/2022 and 27/10/2022, respectively.
15. The main issue for determination is whether the orders of 6/10/2021 were in breach of order 5 rule 21 of the *Civil Procedure Rules*. The other issue for determination is whether this court has jurisdiction to hear and determine the suit between the parties.



16. The issue of jurisdiction is preliminary and should be determined first. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989), it was held: -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
17. The defendant’s case was that this Court lacks jurisdiction to hear this suit as there is no existing contract or contracts between the plaintiff and itself that vests it with jurisdiction to hear disputes arising from such contract. That the contracts relied upon by the plaintiff are not contracts but cover notes which do not constitute contracts.
18. The defendant further claimed that the relationship between itself and the plaintiff was that of a broker and the defendant was only an intermediary between the reinsurers and the plaintiff. That consequently, the reinsurance contracts sought to be relied upon by the plaintiff were not binding on the defendant but only between the plaintiff and the reinsurers.
19. The plaintiff contended otherwise. It claimed that the document relied on were reinsurance contracts in respect of which the plaintiff had made unequivocal acknowledgment of the debt arising therefrom. That the contracts gave a choice of law and jurisdiction clause. That they were in the defendants letter headed paper.
20. This court has considered the plaint dated 30/7/2021. From this court’s understanding, the plaintiff’s case is that parties entered into reinsurance agreements which the plaintiff referred to as ‘reinsurance slips’ between 2009 and 2013. The defendant was a broker who placed risks underwritten by the plaintiff with various reinsurance companies.
21. The plaintiff would pay the agreed reinsurance premiums to the defendant who would then forward the same to the reinsurers, and all claims and payments under the reinsurance slips would be made through the defendant.
22. The plaintiff contended that it would pay out claims to its insured and seek reimbursement from the insurers through the defendant. The plaintiff however claimed that after getting into direct contact with some of the reinsurers, it found out that some of the claims had already been paid whilst others were rejected on account of non-payment of premiums by the defendant.
23. The plaintiff claimed that the defendant had admitted to owing it Kshs. 359,546,790/- *vide* a letter dated 31/12/2018 and thus claimed the sum of Kshs. 280,447,416.95 which was outstanding as at September 2019.
24. In my view, at this juncture, all that the court has to look at is the pleadings before it. Whether there is liability or not, that is an issue for trial. Does the plaint as drawn disclose a cause of action over which this court has jurisdiction? The view the court takes is that the merits or demerits of the plaintiff’s claim can only be gone into after the defendant is substantively under the jurisdiction of the court and invites the court to consider that issue.
25. Looking at the plaint, the plaintiff alleged that there were reinsurance contracts through reinsurance slips and renewals between it and the defendant for the years 2009 and 2013. It produced those slips by way of cover notes. Those cover notes are in the documents that were lodged together with the plaint



- and application for leave. Whether they constitute a valid contract between the parties that is not for consideration at this stage.
26. At the leave stage, all that the court was called upon was to satisfy itself if the claim fell squarely within the four corners of order 5 Rule 21 of the *Civil Procedure Rules*. The validity, efficacy or otherwise of the alleged contracts can only be challenged either after entry of defence or at the trial.
 27. This court has seen the reinsurance slips and cover notes appearing on the plaintiff's list of documents dated 30/7/2021. They provide for choice of law and jurisdiction between Kenya, Uganda and Tanzania. By virtue of those clauses, the disputes arising from the agreements can be heard and determined by the courts in Kenya.
 28. Other contracts provided that jurisdiction will lie in the courts of the country wherein the original insured was domiciled. The plaintiff being the original insured and domiciled in Kenya, the court's in Kenya become vested with jurisdiction.
 29. Though the defendant claims that the contracts were between the plaintiff and reinsurance companies, that is an issue that can only be properly canvassed and investigated either as a preliminary issue after filing of the defence or at the trial. The documents show that defendant fixed its seal on the contracts and its directors signed them. The defendant is part of the triangular relationship between the plaintiff as the insured and domiciled in Kenya, the defendant as the broker and the reinsurance claims. It will be determinable at the hearing where the defendant was paying the claims, in Kenya or in the UK, since claims were being settled through the defendant.
 30. The defendant's contention that it cannot be bound by the contracts goes into the merit of the case. The defendant denies any cause of action against it on the basis that the contracts are between the plaintiff and reinsurance companies.
 31. This is not a matter to be decided at the leave stage. Whether or not the defendant is liable under the contracts is a matter to be determined once a proper defence is filed. Of importance at this juncture is that the plaintiff has pleaded its case based on contract which it has brought before this court which clearly vests the court's in Kenya with jurisdiction to determine any disputes arising therefrom. However, denial of liability under the contracts does not in any way take away this court's jurisdiction to hear and determine the matter.
 32. The same applies to the issue of admission of the debt by the defendant as claimed by the plaintiff. This can only be addressed on merit and not at leave stage. As such, this court cannot pronounce itself on the issue of admission at this stage.
 33. From the foregoing, this court finds that it is well vested with jurisdiction to hear and determine the suit before it.
 34. The next step is to now determine whether the defendant has established a case for setting aside the orders of 6/10/2021.
 35. The defendant's case was that the said orders ought to have been set aside for contradicting order 5 rule 21 (e) of the *Civil Procedure Rules*. It provides that: -

“Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever—

“the suit is one brought to enforce, rectify, rescind, dissolve, annul, or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—



- (i) made in Kenya; or
- (ii) made by or through an agent trading or residing in Kenya on behalf of a principal trading or residing out of Kenya; or
- (iii) by its terms or by its legislation to be governed by the Laws of Kenya; or
- (iv) which contains a provision to the effect that any Kenya court has jurisdiction to hear and determine that suit in respect of that contract,
or is brought in respect of a breach committed in Kenya, of a contract, wherever made, even though such a breach was preceded or accompanied by a breach out of Kenya which rendered impossible the performance of the part of the contract which ought to have been performed in Kenya;...”

36. It has already been found that the contracts upon which the suit is founded on contain provisions that confer jurisdiction upon Kenyan courts to hear and determine any disputes arising from them. Consequently, the orders given on 6/10/2021 did not contravene the said provision.

37. Upon issuing such leave, this court assumed jurisdiction over the defendant despite that the defendant is domiciled outside Kenya.

38. In *Leisure Lodges Limited v Patcham Holdings & another*, consolidated with *Numesid Ag v Patcham Limited & another* [2010] eKLR the Court held that: -

“...the High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by the plaintiff to serve summons or notice of summons, as the case may be, outside the country under order v rule 23 and after such summons are served in accordance with the machinery stipulated therein...”

39. Having found that the leave granted to serve the summons outside jurisdiction was granted regularly and in accordance with the law, there is no justification in setting aside such leave.

40. Accordingly, the application dated 22/2/2022 is found to be unmerited. The Court makes the following orders: -

- a. The application dated 22/2/2022 is dismissed with costs to the plaintiff.
- b. The defendant is hereby directed to file its statement of defence and supporting documents within 14 days of these orders.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023

A. MABEYA, FCIArb

JUDGE

