



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA)

CIVIL APPEAL NO. 39 OF 1980

BETWEEN

KANTI & CO LTD.....APPELLANT

AND

SOUTH BRITISH INSURANCE CO LTD.....RESPONDENT

JUDGMENT

The appellant company, as the plaintiff, filed a suit against the respondent (defendant) in the High Court of Kenya for the recovery of Stg £ 8,412.65 or Kshs 131,573.84 being the amount of the balance of loss or damage to a consignment of five thousand cartons of hurricane lantern glass globes. The said goods were insured by the defendant at its London office against such loss or damage during their carriage by sea from London to Nairobi via Mombasa. The goods were insured by the defendant under its certificate of Insurance No 3565 issued under a policy of Insurance No 74/13459, made in consideration of the premium paid to it by the plaintiff. The defendant made part payment of Stg £ 10,000 of the loss or damage leaving the balance of Kshs 131,573.84 outstanding claimed by the plaintiff in the suit.

The summons and plaint was served at the defendant's Kenya office in Nairobi upon Mr J A Christie a person resident in Kenya authorized to accept service on behalf of the company in compliance with the provisions of Section 366(1)(d) of the Companies Act (Cap 486).

The defendant entered unconditional appearance to the summons by a firm of advocates in Nairobi. Some seventeen days later, it moved the court for an order to strike out the plaintiff's suit against it on the ground that the defendant's London office was dealing with the plaintiff's alleged claim; that the certificate of insurance No 3565 states "The policy referred to in this certificate has been duly stamped in compliance with claims payable at UK subject to the company's regulations", and that jurisdiction in this matter was accordingly that of the courts in England and the High Court of Kenya did not have jurisdiction. The defendant's firm of advocates subsequently entered an amended appearance under protest to safeguard the defendant's interest or alternatively not to prejudice its defence of lack of jurisdiction. The amended appearance is not included in the record of appeal.

Simpson, J who heard the defendant's motion said in his ruling:

"By filing an unconditional memorandum of appearance the applicant (defendant) submitted to the jurisdiction of this court and I very much doubt whether it can thereafter file an amended memorandum under protest. It is not however a foreign company which is not otherwise subject to the jurisdiction of this court. It carries on business in Kenya and has an address for service there, that of a person duly

authorised to accept service of process on its behalf under the provisions of Section 366(1)(d) of the Companies Act (Cap 486). The applicant's objection to the jurisdiction of this court is based on the fact that its London Office is dealing with the matter and the certificate of insurance contains the words:

‘The Policy referred to in this certificate has been duly stamped in compliance with the British revenue laws. Claims payable at UK subject to company's regulations. The abbreviation ‘UK’ is typed on the printed forms’ (*sic*)

It is moreover stated in the plaint that the defendant has paid Stg £ 10,000 in part payment of the plaintiff's claim... The fact that the amount is stated in sterling pounds rather than Kenya shillings is indicative of payment in the UK. It is, I think, clear despite the averments to the contrary in paragraph 6 of the plaint that this court has no jurisdiction to hear this suit. I am by no means certain that the correct procedure has been adopted by the applicant but the matter having been fully argued it would save time and costs to dismiss the plaintiff's claim at this stage. The claim is dismissed but each party will bear its own costs.”

The averments in paragraph 6 of the plaint were that the cause of action arose at Nairobi as the defendant carried on business in Kenya, as any claim arising in respect of the goods was to be dealt with at Nairobi or Mombasa, as the performance of the contract of insurance was to be completed at Nairobi or Mombasa; by reasons whereof the High Court has jurisdiction to try and determine the suit.

I am of the opinion that the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court, and it could not thereafter abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of the court releasing it from its admission and acceptance of the jurisdiction. Once a defendant submits to the jurisdiction of the court, the plaintiff acquires a vested interest which the defendant cannot deprive him of at his whim by entering a conditional appearance or an appearance under protest. As long as the unconditional appearance stood, as it stands even today, the court was seized of jurisdiction to try the suit. This is what Simpson J may have had in mind when he said that he was by no means certain that the defendant had adopted the correct procedure.

Mr Barassa for the respondent submitted that an appearance is a pleading, and it may be amended at any time before the close of the pleadings. With respect, this contention does not fall in with the definition of “pleading” in Section 2 of the Civil Procedure Act (Cap 21) which is:

“ ‘pleading’ includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

Mr Barassa also submitted that the use of the word “includes” in the foregoing definition indicates that it is not exhaustive. I am not prepared to expand the statutory definition in that fashion.

Secondly, there is no magic in the words that the policy had been duly stamped in compliance with claims payable “at United Kingdom” subject to the company's regulations. A contract is usually stamped in the country where it is made mostly in order to validate it in so far as the revenue laws of the country are concerned. The policy in this case was stamped in compliance with claims payable “at United Kingdom” as stated because it was issued in the United Kingdom which by itself did not and could not oust the jurisdiction of the courts of Kenya. Nor is there any magic in the words that claims are payable “at United Kingdom” and the money remitted to it in Kenya.

Thirdly, it must be clearly and unequivocally stated in the contract that jurisdiction to entertain legal proceedings in connection with or arising out of it is exclusively conferred or reserved for the courts of a particular country to the exclusion of all other jurisdictions. The endorsement on the certificate of insurance in this case has no such binding force. It does not state that all suits and legal proceedings in connection with the policy and touching the rights of the parties shall be governed by and under English law to the exclusion of all other laws and only the courts in England shall have the jurisdiction to

entertain any disputes between the parties. Nor was it so contended in the High Court.

Fourthly, the defendant had voluntarily brought itself within the jurisdiction of the High Court in Kenya under Section 366(1)(d) of the Companies Act. It had a place of business and a person resident in Kenya authorized to accept in its behalf service of process under a statutory provision which it is not entitled to render nugatory.

Fifthly, when there is concurrent jurisdiction in more than one country the court will be guided by the principles of the balance of convenience between the parties. The contract was also to be performed in Kenya. The goods were consigned to the plaintiff at Nairobi via Mombasa where the plaintiff has its registered office and place of business. If necessary the loss or damage to the goods could be proved equally effectively at Nairobi. Must the plaintiff spend thousands of shillings to travel to the United Kingdom to pursue its legal remedy there, also probably pay a much larger legal fee and possibly be called upon to provide security for costs when the defendant has a place of business and has also itself appointed a person resident in Kenya authorized to accept on its behalf service of process? The balance of convenience is clear in this matter, the suit should be heard and determined in Kenya.

With respect, instead of saving time and costs, the contrary would be the situation in both respects if the plaintiff is not allowed to press its suit in Kenya.

I would allow this appeal with costs to the plaintiff. I would set aside the order made by the learned judge and substitute therefore an order dismissing the defendant's application with costs with a further order that the defendant may if so advised file defence within twenty one days from today.

As **Law** and **Potter JJA** agree, it is so ordered.

Dated and Delivered at Nairobi this 11th day of March 1981.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of
the original.

DEPUTY REGISTRAR

