



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 274 OF 2015**

**BETWEEN**

**W K ..... 1<sup>ST</sup> APPELLANT**

**M W K ..... 2<sup>ND</sup> APPELLANT**

*(Both suing as the Administrators of the Estate of Dr. W K)*

**W W K (A minor suing through Hon. W K,**

*Her guardian and Next Friend) ..... 3<sup>RD</sup> APPELLANT*

**AND**

**BRITISH AIRWAYS TRAVEL INSURANCE ..... 1<sup>ST</sup> RESPONDENT**

**FINANCIAL INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling, Orders and all other consequential orders, if any, of the High Court of Kenya at Nairobi (Ougo, J.) delivered on 16<sup>th</sup> January, 2015*

**in**

**HCCC. No. 309 of 2011)**

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**JUDGMENT OF THE COURT**

**INTRODUCTION**

1. This appeal arises from a ruling delivered by Ougo, J. on a preliminary objection that was raised by the 2<sup>nd</sup> respondent to the effect that the High Court had no jurisdiction to hear and determine the suit that had been filed before it by the appellants. The learned judge upheld the preliminary objection and struck out the appellants’ suit with costs to the 2<sup>nd</sup> respondent. The appellants were aggrieved by that ruling and preferred an appeal to this Court.

## **SUMMARY OF THE APPELLANTS' CASE**

2. The appellants, as Administrators of the estate of Dr. W K (deceased), filed a suit against both respondents in the High Court of Kenya at Nairobi, H.C.C.C. No. 877 of 2010, claiming benefits that accrued to the deceased under a travel insurance policy (the policy) that existed between the deceased and the 2<sup>nd</sup> respondents.

3. The 2<sup>nd</sup> respondent was an insurance underwriter that had its registered office in Middlesex, England. The deceased was working and residing in London. Sometimes in April 2002 the deceased purchased a travel insurance policy from the 2<sup>nd</sup> respondent, whose validity was between 25<sup>th</sup> April, 2002 and 27<sup>th</sup> April, 2003.

4. The policy, which covered an area known as Geographical Area 3, was of an individual annual worldwide type and specified the benefits and entitlements that the insured would be entitled to if certain events occurred during her travels by air.

5. The insured flew to Kenya sometimes in late 2002. On 24<sup>th</sup> January, 2003 the deceased travelled from Nairobi to Busia on a chartered flight. As the aircraft was taking off from Busia airstrip to do a return flight to Nairobi it crashed; as a result the deceased sustained injuries that rendered her unconscious for the next three years and nine months, until she died on 12<sup>th</sup> October, 2006.

6. The appellants claimed unlimited emergency expenses, evacuation and hospitalization costs, personal accident losses and disablement and death benefits.

7. The 2<sup>nd</sup> respondent filed a statement of defence and stated, *inter alia*, that it did not have a place of business in Kenya; that the High Court lacked jurisdiction to hear the suit; that the policy stipulated that English law was to apply to the policy unless the insurer agreed otherwise; that flying of any kind other than as a fare paying passenger in a fully licenced passenger aircraft was not covered and therefore the deceased's ill fated travel to Busia was not covered as she was not a fare paying passenger; under English law the limitation period for insurance claims such as the one raised was 6 years from the date of the occurrence of the insured peril and therefore the claim was time barred.

## **PRELIMINARY OBJECTION**

8. On 26<sup>th</sup> March, 2014 the 2<sup>nd</sup> respondent filed a notice of preliminary objection to the appellants' suit. It contended that the High Court of Kenya had no jurisdiction to determine the suit on the following grounds:

***(a) English Law applied to the policy the Plaintiffs seek to enforce.***

***(b) The policy was made in England and was meant to be performed in England.***

***(c) The alleged breach occurred in England.***

***(d) The second defendant is a company incorporated and doing business in England.***

***(e) The second defendant does not have any place of business in Kenya, is not domiciled or resident in Kenya and neither does it operate a business either directly or through an agent of Kenya.***

***(f) The deceased was resident in England.***

***(g) In view of the foregoing, the contract sought to be enforced has the closest and real connection with the system of law of England (the Forum Non Conveniens rule).***

***(h) The Modified Brussels Convention (Council Regulation (EC) No. 44/2001) applies herein and the Presumptive Rule under Article 9 is that an insurer must be sued in their home country. A similar provision is found in section 695 of the Companies Act, 1985 (UK).***

***(i) The claim is brought by the legal representatives of the deceased. The deceased was the policy holder. In the circumstances, any claim under the policy ought to have brought in England pursuant to English Law which applied to the contract.***

***(j) In view of paragraphs (a) (i) above, any claim ought to have been brought in England.”***

9. The 2<sup>nd</sup> respondent further stated that the suit was barred by limitation in that:

***“(a) Under English law, claims arising from contract should be brought within 6 years of the accrual of the cause of action.***

***(b) Under English law, the period within which an insurance claim should be instituted is 6 years from the occurrence of the insured peril which in this case, is the date of the accident. The accident occurred on 24<sup>th</sup> January 2003 while the suit herein was filed on 13<sup>th</sup> October 2010.”***

10. The learned judge, having considered exhaustive submissions by counsel for the appellants and the respondents, held that the applicable law was English law; that the 2<sup>nd</sup> respondent had no place of business in Kenya and was not resident in Kenya, **Order 5 rule 21** of the **Civil Procedure Rules** did not apply as no leave was granted for service of process outside the court’s jurisdiction. Consequently, the court upheld the preliminary objection and struck out the appellants’ suit.

### **APPEAL TO THIS COURT**

11. In their memorandum of appeal consisting of 17 grounds, the appellants faulted the learned judge for declining jurisdiction, thereby failing to apply relevant provisions of the Kenya Constitution, statute law and Civil Procedure Act and Rules; binding case law; for holding that choice of law was an outstanding matter in the policy; for equating the choice of law provision with the jurisdiction requirement; by reading an exclusive jurisdiction clause in the policy when it did not have such a provision; and for failing to distinguish performance on the policy from where the policy was bought; for failing to find that the 2<sup>nd</sup> respondent, having, *inter alia*, entered appearance, presented an application to set aside an ex parte judgment and filed a defence, could not argue that the court did not have jurisdiction; and for striking out the suit when limitation period had kicked in respect of the entire suit.

12. Arguing the appeal, the 1<sup>st</sup> appellant, an advocate of the High Court of Kenya, started by submitting that the 2<sup>nd</sup> respondent, having filed an application to set aside a default judgment, which was accompanied by a draft defence, that in itself amounted to entering an appearance, which is tantamount to submission to the court’s jurisdiction. He cited this Court’s decision in **KANTI & COMPANY LIMITED v SOUTH BRITISH INSURANCE COMPANY LIMITED [1981] KLR 1**, where the Court held that a defendant who enters an unconditional appearance to a summons, under whatever pretext, submits to the jurisdiction of the court.

13. Mr. Kihoro further submitted that the court’s jurisdiction is conferred by **Article 165** of the **Constitution of Kenya, 2010**, which confers on the High Court unlimited original jurisdiction in criminal and civil matters; that the event insured against happened in Kenya and so High Court had jurisdiction; that although the policy document contained a clause on choice of law, it was the insured who was to make a choice as to the applicable law, and in her absence the responsibility of so doing fell upon her personal representatives. For that submission, counsel cited this Court’s decision in **UNITED INDIA INSURANCE COMPANY LIMITED v EAST AFRICAN UNDERWRITER (KENYA) LIMITED [1985] KLR 898**.

14. The 1<sup>st</sup> appellant further submitted that there was a relationship between the 1<sup>st</sup> and 2<sup>nd</sup> respondents,

in that the policy that was issued to the deceased by the 2<sup>nd</sup> respondent was sold by the 1<sup>st</sup> respondent.

15. **Mrs. Kashindi**, learned counsel for the 2<sup>nd</sup> respondent, submitted that the High Court had no jurisdiction to hear the matter because the 2<sup>nd</sup> respondent was a company incorporated in England but it no longer exists as it had been dissolved; it had neither a place of business in Kenya, nor was it operating in Kenya directly or through an agent or subsidiary; that the applicable law was the English law since the parties had not agreed otherwise; and that no application for leave to serve court process outside the jurisdiction of the court under **Order 5 rule 21** of the **Civil Procedure Rules** had been made.

16. Counsel cited this Court's decision in **RAYTHEON AIRCRAFT CORPORATION & ANOTHER v AIR AL-FARAT LIMITED [2005] 2 KLR 47** where the Court held, *inter alia*, that:

***“The first appellant, Raytheon, is a foreign corporation incorporated under the laws of Kansas, USA, and having its registered office in Kansas. It was not trading within the jurisdiction by a subsidiary company at the time it was sued and it is not domiciled in Kenya. In such a case, the High Court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in order V rule 21 (e) Civil Procedure Rules, that is, inter alia, the contract is made in Kenya or if it is governed by the laws of Kenya or if a breach of contract is committed in Kenya . The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a 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 in accordance with the machinery stipulated therein.”***

17. Mrs. Kashindi added that the alleged breach did not occur in Kenya and at no time did the 2<sup>nd</sup> respondent submit to the jurisdiction of the court.

18. In response to the submissions by the 2<sup>nd</sup> respondent's counsel, Mr. Kihoro submitted that the 1<sup>st</sup> respondent operates world wide, but he did say anything relating to the current status of the company, evidence having been adduced to show that it had been dissolved. He added that its letterheads showed that the 1<sup>st</sup> respondent was a company of the British Airways Group that operates in Kenya and so it was properly served with summons to enter appearance through the offices of British Airways in Nairobi.

## **DETERMINATION**

19. We have carefully considered the submissions by counsel. The central issue is this appeal, as earlier stated, is whether the High Court had jurisdiction to hear the suit that had been filed before it.

***“Jurisdiction is everything. Without it, a court has no power to make one more step. When a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the view that it is without jurisdiction.”***

Those powerful sentiments by Nyarangi, JA. in **OWNERS OF THE MOTOR VESSEL LILLIAN “S” v CALTEX OIL (K) LIMITED [1989] 1 KLR 1** ring true in this appeal. No matter how weighty a matter may otherwise be, if a court has no jurisdiction it cannot proceed to hear it, the provisions of **Article 165(3)** of the **Constitution** notwithstanding.

20. In determining the question of jurisdiction, we shall begin by considering the location of the 2<sup>nd</sup> respondent's registered office and whether it had any place of business in Kenya.

21. The appellants stated in their plaint that the registered office of the 2<sup>nd</sup> respondent was in Middlesex; United Kingdom. The draft statement of defence by the 2<sup>nd</sup> respondent so affirmed and added that it neither had any place of business in Kenya, nor was it operating in Kenya directly or through any agent.

22. It is not in dispute that M/S Shapley Barret & Company Advocates entered appearance for and on

behalf of the 2<sup>nd</sup> respondent. It was argued that the 2<sup>nd</sup> respondent's intention in instructing the said firm of advocates was to avoid entry of a default judgment and then raise the issue of jurisdiction. But according to the appellants, as long as the entry of appearance was unconditional, the 2<sup>nd</sup> respondent had submitted to the court's jurisdiction and was estopped from disputing it.

23. While we agree with this Court's holding in **KANTI & COMPANY LIMITED v SOUTH BRITISH INSURANCE COMPANY LIMITED** (supra), that a defendant who enters an unconditional appearance to a summons submits to the court's jurisdiction, the facts in that case were distinguishable from the facts in the case that gave rise to this appeal.

24. In the **KANTI** case, the appellant had filed a suit seeking to recover from the respondent Sterling Pounds 8,412.65. The respondent had an office in Nairobi where service of summons was effected upon a person who was duly authorized to accept service. The respondent entered an unconditional appearance but 17 days later it sought to strike out the plaintiff's suit on grounds, *inter alia*, that its London office was the one dealing with the claim; and that jurisdiction in the matter was that of the courts in England and the High Court of Kenya did not have jurisdiction. The High Court dismissed the appellant's claim for want of jurisdiction and the appellant appealed to this Court. Allowing the appeal, this Court held that jurisdiction can only be exclusively conferred or reserved for the courts of a particular country to the exclusion of all other jurisdictions by a clear and unequivocal statement in the contract.

25. In the matter that was before the High Court, the 2<sup>nd</sup> respondent had no office in Kenya and it denied any knowledge of the 1<sup>st</sup> respondent, a member of the British Airways Group, through which summons to enter appearance were served.

26. The 2<sup>nd</sup> respondent raised the issue of jurisdiction immediately after entering appearance. In **RAYTHEON AIRCRAFT CREDIT CORPORATION & ANOTHER v AIR AL-FARAH LIMITED** (supra), this Court held that even if the High Court assumes jurisdiction over a foreign defendant by granting leave to serve summons or notice of summons outside Kenya, the foreign defendant is still entitled to challenge the jurisdiction of the High Court.

27. In an application by the 2<sup>nd</sup> appellant seeking to set aside an interlocutory judgment that had been entered against it, Mwera, J. (as he then was), in his ruling delivered on 26<sup>th</sup> January, 2012, did not make any finding about the Court's jurisdiction. In granting the orders sought, the learned judge simply stated that **“Arguments about jurisdiction and whether the suit is time-barred cannot be taken lightly by any measure. They deserve to be argued fully in a trial.”**

28. We therefore find that the 2<sup>nd</sup> respondent was not estopped from challenging the High Court's jurisdiction to hear the matter. Mwera, J. had not pronounced himself on the issue and it was properly raised at the earliest instance during the hearing of the application that gave rise to the ruling that was appealed from.

29. Turning to the policy of insurance and the applicable law, the same was entered into in England; the deceased was residing in England; and the 2<sup>nd</sup> respondent's registered office was in Middlesex, England. As regards the choice of law, the policy stated as follows:

***“If you buy this insurance in the United Kingdom you can choose which law will apply to the policy. English law will apply unless we agree otherwise.”***

30. The policy did not state when the election was to be made. There was no agreement between the parties herein as to what the applicable law was. Evidence may therefore have been necessary to determine the issue. But under the principle of **closest and real connection**, otherwise known as *Forum Non Conveniens* rule, which is applied in the event that there is doubt as to whether a court has jurisdiction, English law had the closest and most real connection. In **RAYTHEON AIRCRAFT CREDIT CORPORATION & ANOTHER v AIR AL-FARAT LIMITED** (supra) where this Court considered its earlier decision in **UNITED INDIA COMPANY LIMITED v EAST AFRICAN**

**UNDERWRITERS (KENYA) LIMITED** (supra), the Court held that the High Court will not assume jurisdiction in relation to any matter arising from a contract unless the contract is made in Kenya; or if it is governed by the laws of Kenya; or if a breach of the contract is committed in Kenya. None of these three factors was applicable to the subject contract. The appellants had not filed any application under **Order 5 rule 21** of the **Civil Procedure Rules** to seek leave to serve the 2<sup>nd</sup> respondent outside the court's jurisdiction.

31. Likewise, in **KARACHI GAS CO. LIMITED v ISSAQ [1965] E.A. 42** at 53, the predecessor of this Court (Newbold, Ag. V.P.) stated, *inter alia*:

*“The two main issues which arise in this appeal are first, whether the Supreme Court had jurisdiction and, secondly, whether the contract was frustrated. As regards the first of these issues the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya. In such a case the courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract unless the circumstances fall within the provisions of O. V, r. 21 of the Civil Procedure (Revised) Rules, 1948 (K). This rule details the circumstances in which service of a summons or a notice of summons may be allowed out of the jurisdiction in order to give effect to a jurisdiction which the courts have assumed. In the case of a contract the courts of Kenya will assume jurisdiction, inter alia,*

*if the contract is made in Kenya or if the proper law of the contract is Kenya law or if a breach is committed within Kenya. While it is not perfectly clear where this contract was made, I shall assume that it was made in Pakistan. If, therefore, the Kenya courts are to have jurisdiction in this case, either the proper law of the contract must be Kenya law or a breach of the contract must have been committed in Kenya.*

*The various factors in this case, as is so often the position, point in different ways for the purpose of determining what is the proper law of the contract. The test to be applied is, in my view, the system of law by reference to which the contract was made, or that with which the transaction has its closest and most real connection.”*

32. In view of the foregoing, we would agree with the learned judge that the High Court had no jurisdiction to determine the suit, the appellants having failed to invoke the provisions of **Order 5 rule 21** of the **Civil Procedure Rules**. Consequently, this appeal is dismissed with costs to the 2<sup>nd</sup> respondent.

*Dated and Delivered at Nairobi this 28<sup>th</sup> day of July, 2017.*

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIrb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**