



**Imbuye v Mosiori (Civil Appeal E185 of 2020)
[2024] KEHC 1720 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E185 OF 2020

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

DAVID ODENYO IMBUYE APPELLANT

AND

HEBSON NYAGAKA MOSIORI RESPONDENT

(Being an appeal against the Ruling and Order of Hon. I. Orange, SRM dated 3rd February 2020 at the Magistrates Courts in Milimani, Nairobi in Civil Case No. 3541 of 2018)

JUDGMENT

Introduction & Background

1. On 11.04.2018, the Respondent filed suit against the Appellant in the Subordinate Court stating that he was the registered owner of motor vehicle registration number KAT 847P insured by Fidelity Sheild Insurance Company Limited. He claimed that the Appellant was the registered owner of the motor vehicle registration number KBZ 196N. That on 17.05.2015, the Respondent was driving along Ngong Road to Nairobi town when the Appellant negligently and recklessly managed and controlled his motor vehicle that he permitted it to violently run into the Respondent's motor vehicle thereby causing it extensive damage. The Respondent sought damages for the loss he suffered from the accident even though he disclosed that his insurer Fidelity had already compensated him for the said loss but that they are entitled to recover the same from the Appellant under the doctrine of subrogation.
2. In response to the suit, the Appellant filed a defence and later on a notice of preliminary objection dated 19.09.2019 ("the Objection") to which he stated that the parties are bound by a "Knock for Knock Agreement" ("the Agreement"). The Subordinate Court directed that the Objection be disposed by way of written submissions. The Appellant submitted that the Association of Kenya Insurers defines the Agreement at Clause 5(iii) as "An agreement between two insurers whereby each member agrees to



pay for the damage of its own policy holders vehicle irrespective of responsibility for the accident” and that Clause 5(v) defines a member as “All motor underwriters”. The Appellant therefore submitted that the suit fell within the ambit of Knock for Knock as evidenced by the Respondent’s own pleadings and documents as Fidelity paid for the repair charges and was thus claiming under the doctrine of subrogation, that Fidelity is a motor underwriter and is thus bound by the Agreement and that the suit was brought for the insurance company, Fidelity.

3. The Respondent opposed the Objection by stating that it is not anchored in any provisions of the law and that an objection ought not to raise factual aspects calling for proof, or seeking to adduce evidence for its authentication as such is not a matter of legal principle. The Respondent denied the existence of the Agreement or the claim that he was bound by it as it lacked signatures from the respective alleged parties.
4. On 03.02.2020, the Subordinate Court rendered its ruling on the objection (“the Ruling”). It dismissed the Objection on the ground that the issues raised required proper ventilation at a full trial. The Appellant is aggrieved with the Ruling and has now appealed against the same to the court through its memorandum of appeal dated 01.09.2020. The appeal has been canvassed by way of written submissions which are on record and since they rehash the positions I have already summarized above, I will only make relevant references in my analysis and determination below.

Analysis and Determination

5. The leading decision on preliminary objections is that of the predecessor of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, a decision that has since been affirmed by the Supreme Court (see *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* SCK Petition No. 10 of 2013 [2014]eKLR). In the *Mukisa Biscuits Case* (Supra) Law J.A., and *Newbold P.* respectively at 700 and 701, held as follows:

Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

Newbold, P.:

“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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

6. The Appellant’s Objection was grounded on the Agreement whose form and substance has been contested by the Respondent. This contestation automatically strikes out the Objection from the purview of a ‘preliminary objection’ as the court will definitely be invited to a fact-finding mission involving evidence. I agree with the Subordinate Court that the Objection is not founded on a pure point of law and since it requires further interrogation, it will be best if the same is determined at the hearing of the main suit. At that point, the existence and/or effect of the Agreement will be brought to the fore and parties will be at liberty to produce evidence on the same.



Disposition

7. The Appellant's appeal lacks merit. It is dismissed with costs to the Respondent assessed at Kshs. 20,000.00.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Mr Ngechu instructed by C. W. Githae and Company Advocates for the Appellant.

Mr Omangi instructed by Omangi and Associates Advocates for the Respondent.

