**Indemnity Insurance Co of North America and another v Kenya Airfreight**

**Handling Ltd and another**

[2004] 1 EA 52 (CCK)

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 20 January 2004

**Case Number:** 531/99

**Before:** Mutungi J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*Civil procedure – Preliminary issue – Whether Plaintiff correct party to sue under subrogation rights –*

*Could be determined as preliminary issue – Carriage by air – Whether carriage by Air Act 1993 and*

*Warsaw Convention could be determined to be the applicable law as preliminary issue.*

**Editor’s Summary**

On 27 March 1992 Citibank NA entered into a currency transit policy with Somerset Marine Inc and the

Plaintiffs as co-insurers whereby the insurers agreed to insure Citibank against all physical loss and

damage from transit of currency worldwide to a limit of US$ 15 million. Under the terms the Plaintiff’s

share of liability under the policy was 25% and the amount insured was US$ 2 500 000. As at 1 January

1997, the Plaintiffs were the sole assurers under the policy.

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On or about 3 January 1997, the Republic National Bank of New York (“the consignor”) at the

request of Citibank NA Nairobi, delivered two consignments weighing 11kg each comprising of US$ 1

million to the Second Defendant for transmission to Nairobi. On or about 5 January 1997 the said

packages arrived in Nairobi and were transported and released by the Second Defendant to the First

Defendant in their offices at Jomo Kenyatta International Airport for onward delivery to Citibank NA

(“the consignee”). The First Defendant allegedly released the said packages to persons unknown to the

consignee as a result of which the consignee suffered a loss of US$ 1 million.

The Plaintiffs as insurers under the policy, indemnified the consignee for the loss suffered and

brought this suit claiming to be entitled to be subrogated to the rights of the consignee.

After filing of the suit, the Defendant filed an application under Order 14, rule 2 of the Civil

Procedure Rules praying for orders that the issues whether the Plaintiff’s claim was time-barred by virtue

of sections 3 and 7 of the Carriage by Air Act 1993 and Article 29 of the Warsaw Convention, and

whether the Plaintiff was the proper party to make the claim, be determined as preliminary issues.

The Court in determining the application addressed itself to the following issues: whether the issues

raised by the Applicant were purely matters of law or whether certain issues of fact must be established

first; whether the Carriage by Air Act 1993 and the Warsaw Convention were the proper statutes to be

invoked in determining whether the suit was barred by limitation of time, and whether the Plaintiffs were

entitled in law to bring the suit in their own names.

**Held** – The claim to *locus standi* of the Plaintiff was based on subrogation. For an insurer to be

subrogated to the rights of the insured, the latter must have been indemnified by the former. This could

only be established by calling evidence and was therefore not necessarily a purely legal as opposed to a

factual matter.

Under article 18(1) and (2) of the Warsaw Convention, a carrier’s liability is only for loss sustained

during carriage by air and during the period when the carrier is in charge of the cargo, whether in an

aerodrome or on board an aircraft. The question whether the loss took place when carriage was in force

or when carriage had been terminated was not a purely legal but factual matter.

The matter was therefore not fit to be determined on a preliminary basis. Application dismissed.

**No cases referred to in ruling**