**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.

Page 53 of [2004] 1 EA 52 (CCK)

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**

**Ruling**

**Mutungi J:** Under this notice of motion dated 31 October 2003, and canvassed under Order 14, rule 2 of

Civil Procedure Rules, the Applicant prays for orders that:

“1 This issue whether the Plaintiff’s claim is time barred by virtue of sections 3 and 7 of the Carriage by

Air Act 1993 and Article 29 of the Warsaw Convention and is therefore extinguished, be determined

as a preliminary issue.

2. T he issue whether the Plaintiffs are the proper parties to make the claims herein be determined as a

preliminary issue.

3. C osts of this application be provided for”.

Page 54 of [2004] 1 EA 52 (CCK)

The application is supported by an affidavit of Kiragu Kimani, an advocate of this Court, of even date.

The provisions of Order 14, rule 2 of the Civil Procedure Rules, under which the notice of motion is

brought provide as follows:

“If it appears to the court that there is in any suit a question of law which it would be convenient to have

decided before any evidence is given or any question or issue of fact is tried, or before any reference is made

to a referee or an arbitrator, the court may make an order accordingly, and may direct such question of law to

be raised for the opinion of the court in such manner as the court thinks expedient; and all such further

proceedings as the decision on such question of law may render unnecessary may thereupon be stayed”.

The statutory provision herein above seems simple and straightforward. But as with all simple and

apparently straightforward propositions problems arise when put against actual factual situations.

In the present case, the following brief facts are crucial prior to considering the propriety or otherwise

of the provisions in this suit. The facts are as given in the plaint, dated 3 May 1999.

On or about 27 March 1992, Citibank NA entered into a currency transit policy with Somerset Marine

Inc and the Plaintiffs as co-insurers. Under the said policy, the assurers 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, and as at 1 January 1997, the Plaintiffs were the sole assurers under the policy.

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 custody of the First Defendant, in their offices at Jomo Kenyatta

International Airport for onward delivery to Citibank NA (the consignee).

The Plaintiffs aver that the First Defendant was under a duty as a bailee and/or agent of the Second

Defendant to keep the consignments safely and deliver the same to the consignee in good condition and

order.

In breach of the said duty, the First Defendant either by its employees, servants and/or agents

negligently and/or by wilful default released the said packages to a person or persons unknown to the

consignee without the authorisation or knowledge of the consignees as a result of which the consignee

suffered loss to the tune of US$ 1 million.

The Plaintiffs, insurers under the currency transit policy indemnified the consignee for the loss

suffered as a result of the negligence of the Defendants, and claim to be entitled to be subrogated to the

rights of the consignee.

As against the Second Defendant, the Plaintiffs aver that on or about 3 January 1997, the Second

Defendant was entrusted by the Republic National Bank of New York to deliver the said packages to the

consignee on the terms of an Airway Bill number 085-6776 5025 one of which terms was that the Second

Defendant was to notify the consignee immediately the packages arrived in Nairobi. The said packages

arrived in Nairobi on 5 January 1997, but by wilful

Page 55 of [2004] 1 EA 52 (CCK)

default and/or negligence the Second Defendant omitted to immediately notify the consignee of the

delivery of the said package, or at all.

The foregoing facts are crucial in appreciating the problems raised, and that need to be considered, in

determining whether:

“1 (a) The issues raised by the Applicant are purely matters of law or whether certain issues of fact

must be established first, if they are not clear from the plaint and or the pleadings as a whole,

( b) T he statutory provisions relied upon, namely the Carriage by Air Act 1993 and the Warsaw

Convention, are the proper law to be invoked or applied in determining whether the suit herein

is barred by the limitation period.

2 Whether the Plaintiff’s are entitled, in law, to bring this suit in their own name”.

Each of the above issues needs to be related to the specific facts as pleaded in the present suit. I have

chosen to deal with the issues in the reverse order, starting with number 2 above; that is whether the

Plaintiffs are the parties in this suit.

The claim to *locus standi* of the Plaintiffs herein is based on the law of insurance, specifically

subrogation. Under insurance law principles for an insurer to be subrogated to the rights of the insured,

the latter must have been indemnified by the former. Only then can the insurer step into the shoes of the

insured:

“the insurers, on payment of the loss, by virtue of the doctrine of subrogation are entitled to be placed in the

position of the assured, and succeed to all his rights and remedies against third parties in respect of the

subject-matter of insurance. *ER Hardy Ivamy*, (6 ed) 1993 at 493.

It is only on payment of the whole of the loss sustained by the assured, whether total or partial, that the insurer

is entitled to be subrogated to his rights of action, so that if the amount insured is less than the amount of that

loss, the insurers even though they have paid the amount insured, will not be subrogated to those rights.

Therefore the assured remains the person who has control of the suit in any action brought by him against the

person primarily liable, and will be entitled to compromise the action without the insurer’s assent, …”

Halsbury’s Laws of England (4 ed) 1994 at page 191 paragraph 317(3)”.

In the instant suit and pleadings, there is no evidence of the insured having been indemnified. Such

matters of fact can only be established by evidence, before the application of the law. Thus, whether the

legal issue of the Plaintiffs being the proper Plaintiffs is upheld or not hinges on the compliance with the

rules governing subrogation. And that is not necessarily a purely legal as opposed to factual matter.

Turning to the proper applicable law in determining whether or not the suit is time-barred, it must be

appreciated that law does not operate in a vacuum but within given facts and context. Thus, in calculating

the time, as to when time began to run against the Plaintiffs herein, there must be a firm take-off point.

When did time start running against the Plaintiffs in a case like this?

Under article 18(1) and (2) of the Warsaw Convention – incorporated into the Kenya Law by the

Carriage by Air Act, 1993 – “the liability of a carrier for damage sustained in the event of the destruction

or loss to any baggage or any cargo if the occurrence which cause the damaged so sustained took place

during the carriage by air”.

Then 18(2) defines carriage by air referred to in 18(1):

“The carriage by air within the preceding paragraph 18(1) comprises the period during which the baggage or

cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or in case of a lading

outside an aerodrome, in any place whatsoever”.

Page 56 of [2004] 1 EA 52 (CCK)

Then comes article 29 of the Convention, which reads as follows:

“29 (1) The right to damage shall be extinguished if an action is not brought within two years, reckoned

from the date of arrival at the destination, or from the date on which the aircraft ought to have

arrived, or from the date on which the carriage stopped”.

The above provisions can be very abstract unless related to the facts on the ground. In the present case,

the consignee, in its plaint and pleadings avers that it was not notified as to when the cargo was expected

or when it arrived, by the Second Defendant – the carrier. In that case, how did the Plaintiff/consignee

know that the packages were lost? This is a matter of crucial importance before one considers when the

time began running against the Plaintiffs. But of even greater significance is whether this is the proper

law to be invoked. Under article 18(1) and (2) the carrier’s liability is only for loss sustained “during the

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 then is whether, from the pleadings, the loss took place when carriage was in force or

when carriage had been terminated? This is not a purely legal, but factual matter. Yet without firmly

fixing these facts, which can only be established by evidence, when time began to run becomes highly

abstract.

To this extent, therefore, it is neither practical nor logical to isolate the question of whether the suit is

time-barred, from the issue as to when carriage terminated and when loss took place *et cetera*. These are

the core beacons without which it is not possible to calculate when the two-year period commenced,

assuming that the loss took place during the tenure of the carriage as described by the convention.

Order 14, rule 2 of the Civil Procedure Rules under which this application is canvassed, is premised in

convenience. Indeed, counsel for the Applicant went as far as adducing evidence to show that a full trial

of all the issues in this suit would be too expensive with the actual hearing necessitating appearance of

witnesses from as far as the United States and other countries outside Kenya. He also strongly argued

that the hearing would run into at least two days.

With all due respect to the learned counsel for the Applicants, I am totally convinced that justice must

not be sacrificed at the altar of convenience or costs in litigation. In my humble view there is no price

that is too.

All in all therefore, and having found and concluded as herein earlier stated, I am convinced that

granting of the application herein under consideration will not result in justice for either party in this suit.

Indeed such an order would be tantamount to closing my eyes and mind to issues which call for

clarification through evidence, before the question as to which is the appropriate law to apply, can be

answered.

Accordingly I rule as follows:

“1. Dismiss, with costs in favour of the Plaintiffs and against the Defendant/Applicants, the notice of

motion dated 31 October 2003.

“2. Order that the parties move with speed to fix a hearing date or dates for all the issues, on merit”.

For the Applicants:

*Information not available*