

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 106 OF 2005

**RENAIR LIMITED.....PLAINTIFF
VERSUS
PHOENIX OF TANZANIA
ASSURANCE CO. LTDDEFENDANT**

R U L I N G

Date of Last Submission – 21/3/2006

Date of Ruling – 28/3/2006

MASSATI, J:

The Plaintiff, **RENAIR LIMITED** has sued the Defendant **PHOENIX TANZANIA ASSURANCE CO. LTD**, to claim USD 140,000/= for breach of contract (the said sum being the insured value of the aircraft) and USD 2406 as guarding and “securing” expenses. The Plaintiff also seeks general damages, interests and costs. In Court, the Plaintiff is represented by **LUTEMA AND COMPANY ADVOCATES** who filed the suit on 1/11/2005.

On 1/12/2005 the Defendant through the services of **OCTAVIAN AND COMPANY** filed a Written Statement of Defence. In the said statement of defence the Defendant not only disputes the claim in substance, but seeks to shake it to its very

foundation by raising two preliminary objections against it. These are that: -

“(a) The Plaintiff’s insurance policy is void ab initio for non disclosure of the material fact that the suit aircraft was involved in an accident in 1967.

(b) The insurance policy is voidable on grounds of material alteration of the insured risk in that the use of the Aircraft was changed from Public transport to Private without any disclosure to the Defendant.”

So, concludes the notice, the claim is not payable under the policy, and so the suit be dismissed with costs.

The Plaintiff was not amused. In a reply to the Written Statement of Defence filed on 13/12/2005, the Plaintiff averred that the points raised were factual rather than legal, and so they are not preliminary objections on points of law.

On completion of the pleadings the parties agreed to argue the preliminary objections in writing. That, the learned Counsel have done.

Mr. Temu, learned Counsel for the Defendant, submitted that since the Plaintiff did not reveal that the Aircraft was involved in an accident in 1997 in its Proposal Form, the subsequent insurance policy

on which the claim is based is void ab initio. Therefore, it is unenforceable. For this, he cited a decision from the High Court of Uganda in **MOTOR UNION INSURANCE COMPANY LTD VS A.K. DDAMBA** [1963] E.A. 271. Secondly, the learned Counsel argued that the insurance policy was voidable on grounds of material alterations of the insured risk from public to private transport. The non disclosure entitled the Defendant to avoid the policy. For that he referred to **UNITED BUS SERVICE LTD VS THE NEW INDIA INSURANCE CO LTD.** [1969] E.A. 242, a decision from the High Court of Tanzania.

Mr. Lutema, learned Counsel for the Plaintiff took offence to the preliminary objections first on the ground that no provision has been cited to support the same, and two, that those are allegations of fact which have to be proved by adducing evidence in Court, especially as these are disputed by the Plaintiff. For these he cited **MUKISA BISCUITS MANUFACTURING COMPANY LTD VS WEST END DISTRIBUTORS LIMITED** [1968] EA. 698 (sic). Turning to the substance of the Defendant's arguments, Mr. Lutema submitted that none of the cases cited by Mr. Temu, was decided as preliminary points of law. Therefore Mr. Lutema concluded that the preliminary objections are misconceived and should be dismissed with costs.

Mr. Temu, did not seek to rebut the Plaintiff's arguments.

Happily, the law on preliminary objections is now fairly settled. In **MUKISA BISCUIT MANUFACTURING CO LTD VS WEST END DISTRIBUTORS LTD** [1969] E.A. 696 (wrongly cited by Lutema as reported in “[1968] E.A. 698”, **LAW J.A.** (as he then was) with whom the other Justices of the East African Court of Appeal, agreed, defined “a preliminary objection” at p. 700 as:

“...a preliminary objection consists of a 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 to 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 to arbitration.”

And at p. 701, SIR CHARLES NEWBOLD, P. said:

“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.”

This decision has been adopted by the Court of Appeal of Tanzania in several cases such as **SHAHIDA ABDUL HASSANALI KASSAM VS MAHEDI MOHAMED GULAMALI KANJI** (CAT Application No. 42 of 1999 (Unreported), **CITIBANK TANZANIA**

LIMITED VS TANZANIA TELECOMMUNICATIONS
COMPANY LTD & 4 OTHERS CAT Civil Applications No. 64 of
2003, and Civil Application N. 112 of 2003 (both unreported).

According to those authorities, it is obvious that a preliminary objection must be pleaded or must be apparent from the pleadings, but I know of no rule of law or practice which compels a party to disclose or cite a particular provision of the law that has been contravened as suggested by Mr. Lutema. I will accordingly refuse to be so persuaded. However I agree that a preliminary objection on a point of law should, as the name suggests, be based on a pure point of law and not on facts which have to be ascertained, that is to say, if those facts are disputed by the other party.

In the present case, the Defendant's defence is based among others, on "*non disclosure of a material fact*" and "*alteration of the insured risk*". These allegations are contained in paragraph 16 of the Written Statement of Defence to which the Plaintiff joins issue in paragraph 9 of the Reply. So those facts are put in issue, and there has to be a trial in which the parties will have to adduce evidence to prove one way or the other. I am unable to accept that these are issues of law, or that they can be resolved on those points of law alone. Such will have to be resolved on the basis of the facts as found by a trial Court.

In my view therefore the preliminary objections cannot be sustained, as strictly speaking, they are not. In the event they are dismissed with costs.

Order accordingly.

S. A. MASSATI

JUDGE

28/3/2006

1,085 words

I Certify that this is a true and correct
of the original order Judgment Pulling
Sign *S. A. Massati*
Registrar Commercial Court DSM.
Date 31-3-06.