**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HCCS NO 0176 OF 2012**

**ISAAC KATONGOLE}.....PLAINTIFF**

**VERSUS**

**EXCEL INSURANCE COMPANY LTD}.....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

This ruling arises from preliminary objections to the Plaintiff's suit raised by the Defendants Counsel on two grounds and argued on two issues namely:

1. Whether the Plaintiff's suit is brought against the wrong party and is bad in law?
2. Whether the High Court of Uganda is the appropriate forum to institute a suit and if not whether this suit is barred for want of jurisdiction?

The Defendant is represented by Messieurs Barugahare and Company Advocates while the Plaintiff is represented by Messieurs Muyise and Company Advocates. When the matter came for completion of the scheduling conference, Counsel Edward Muyise represented the Plaintiff while Counsel Patrick Alunga represented the Defendant. Counsels opted to address to court in written submissions on the above points of law.

Defendant's objections

The facts in support of the objection is that this suit was filed on the 7th of May 2012 for a declaration that the Defendant breached the terms of a third-party insurance contract entered into on 18 October 2010 under the auspices of the COMESA Yellow Card Protocol and for expenses, damages and costs incurred by the Plaintiff as a result of the Defendants breach of contract. The facts averred in the plaint are that the Plaintiff acquired a PTA yellow card from the Defendant for its trailer registration number UAL 226 X/UAM 180 8Q. The Defendant is a member of the National Bureau of Uganda, the National Insurance Corporation, which is authorised to issue PTA yellow cards to its members.

The trailer got involved in an accident in Rwanda on 14 April 2011 injuring one Hadijah Mukakarisa. The Plaintiff's agents approached the National Bureau of Rwanda to settle the compensation claim arising out of the accident. The National Bureau of Rwanda refused to

honour the claim due to alleged errors in the yellow card issued to the Plaintiff. The Plaintiff settled the claim with the representatives of the insured and seeks compensation from the Defendant.

**Whether the Defendant is the proper party to this suit?**

The Defendant's case is that it is not a proper party to this suit. The Defendants Counsel submitted that in a bid to implement the provisions of paragraph (e) of article 3 of the protocol on transport and communications, Annexure VII to the PTA Treaty is to the effect that Member States shall adopt minimum requirements for the insurance of goods and vehicles, COMESA Member States came up with a protocol on the establishment of a Third-Party Motor Vehicle Insurance Scheme. The protocol introduces the use of a PTA Yellow Card as a means of operation for the Insurance Scheme. Article 1 of the protocol defines "the yellow card" as "the insurance card that is issued by the National Bureaux of Member States shall be evidence of third party liability insurance obtained in accordance with the laws in force where the accident occurs."

Counsel contended that the scheme operates in the following way: in every Member State, there is a National Bureau. The bureau is defined as "a Government Designated Agency in each member state that shall be responsible for the management and control of the PTA Yellow Card". In Uganda, the National Bureau is the National Insurance Corporation. Insurance companies in the member states apply to become members of the National bureau. The national bureau in each member state issues yellow cards to its member insurance, who in turn issue them to their clients, the insured motorists. Once an insured motorist is involved in an accident in any member state that results in injury to a third party, the National Bureau has the obligation of settling the claim on behalf of its members, something that would ordinarily be done by the insurer.

The Defendants Counsel submits that regardless of the terms of the insurance policy under which it is issued, a yellow card provides all the guarantees required by the laws or regulations governing compulsory motor vehicle insurance in the country in which the accident occurred. Whenever the production of a yellow card certificate is required in any member state, it shall be recognised as a valid certificate of insurance. According to article 8 of the protocol, in territories where insurance is not compulsory by law, the yellow card is to correspond to third-party liability of the motorists in accordance with the laws and regulations in force in the country where the accident occurred. The National bureau acts as a handling agency in relation to accidents involving PTA yellow card holders that occurs in its country. One of its duties is to act in the best interests of the issuing bureau in settling the claims against the holder of a PTA yellow card.

Article 3 of the agreement provides for the claims handling procedure and places an obligation on the handling Bureau to receive all notifications on behalf of the insurer and the issuing

bureau. As this accident occurred in Rwanda (a member state), the handling Bureau (which is defined as, "National Bureau of the country which handles claims when an accident occurs in that country"), which is the National Bureau of Rwanda. It should have been notified by the Plaintiff of the accident as is alleged to have been done in this case. It is the duty of the handling Bureau to settle claims on behalf of the insurer in liaison with the issuing agency, (National Insurance Company in the present case) and not, the insurer. According to article 14, in case the claim cannot be settled out of court as is alleged in this case and the insured commences litigation, it is the handling Bureau that is mandated to accept service of legal process against the insured and arrange legal defence of the suit.

In the premises the Defendant's Counsel submits that the Defendant is not the proper party to the present suit and is being put to expenses in defending the claim. He submits that this position is supported by the provisions of the operations manual of the yellow card scheme and reinsurance pool. According to section 3.1 of the operations manual, handling of claims against holders of yellow card is the mandate of the handling bureau. Section 4.5 reiterates the position of article 14 of the inter-bureau agreement that litigation against the holder of the PTA yellow card is a preserve of the handling bureau.

In conclusion Counsel for the Defendant contends that the Plaintiff's claim in this case is to be handled by the handling bureau, the National bureau of Rwanda. The Defendant being a member of the National bureau does not have the capacity to contest or institute legal proceedings in relation to claims in holding a PTA yellow card holder. That is the preserve of the National bureau. Therefore the Plaintiff's suit was instituted against a wrong party and should be struck out with costs against the Plaintiff.

In reply the Plaintiff's Counsel submits that this objection is not a preliminary point of law and cannot be decided at this stage of the proceedings. A preliminary objection is in the nature of a demurrer and is argued on the assumption that all facts pleaded by the Plaintiff are correct. If the facts are to be ascertained by way of leading evidence, then the objection does not amount to a preliminary objection. Counsel relied on the decision in **Mukisa Biscuits Manufacturing Company versus West End Distributors Ltd [1969] 1 EA 696**. The Plaintiff's Counsel contends that there are several facts relied upon by the Defendant in support of its objection which requires proof by way of leading evidence. At page 3 of the joint scheduling memorandum there is a summary of relevant facts in support of the Plaintiffs case contested by the Defendant. In item "B" the Defendant contests the facts of occurrence of the accident. The same Defendant hinges its preliminary objections on sections 3 and 4 of the operations manual both of which stipulates the procedure to be followed upon occurrence of an accident. Section 3.1 starts with the words "while an accident occurs" while section 4.1.2 starts would "as soon as any such accident is notified…" In both sections what follows are procedures and processes culminating into compensation of the accident victim or court action.

Article 14 of the Inter – Bureau agreement upon which the preliminary objections are further hinged, also related to claims arising out of accidents. By denying or disputing the fact of occurrence of the accident but at the same time premising its preliminary objections on provisions which may only be invoked when an accident has occurred, the Defendant is appropriating and reprobating in the same cause. It can only be able to raise the points of law based on those provisions after the facts of the accident have been ascertained via evidence adduced in accordance with the dictum in the case of **Mukisa Biscuits** (supra). In conclusion on the first point, the Defendant's preliminary objection is not preliminary and ought to be dismissed with costs.

Without prejudice the Plaintiff's Counsel submitted that the Plaintiff's case is hinged inter alia on the argument firstly that the yellow card that was issued by the Defendant to the Plaintiff which was eventually presented to the handling bureau of Rwanda was a discrepant one according to paragraphs 2 and 5 of the amended WSD and paragraph 4 (D – G) of the plaint. Secondly as a result of the above, the handling Bureau of Rwanda could not handle the compensation claim. Among the admitted documents in the joint scheduling memorandum is exhibit P5 which is the impugned yellow card and exhibit P7 which is a letter from the National Bureau of Uganda (National Insurance Corporation) to the managing director of the Defendant highlighting the discrepancies with the yellow card and calling for an explanation for such discrepancies before the National Bureau of Uganda could be able to confirm the validity of the card to the handling bureau of Rwanda, as required by section 4.2 of the Operations Manual. Thirdly it was also the Plaintiff's case that because no such explanation was ever given by the Defendant, confirmation of the validity of the card was never made and the handling bureau of Rwanda was not in a position to carry out its mandate under the protocol and other treaties.

The Plaintiff's Counsel contends that from a reading and construction of the entire section 3 of the operations manual (exhibit P4) which the Defendant seeks to rely on, the exercise of the mandate of the handling bureau is dependent upon presentation of compliant and correctly issued documents. Section 3.1.2 obligated the handling bureau to carry out an underwriting verification and to conduct investigations. It was this process that led to the discovery of the discrepancies highlighted in exhibit P7, prompting an enquiry to the National Bureau of Uganda to confirm the validity of the card. In fact section 3.1.3 claws back what the Defendant thinks is an automatic duty for the handling bureau of the country of accident to handle every claim whatever the circumstances. It mandates the handling bureau to settle claims only after all the necessary documents have been obtained; otherwise no reimbursement will accrue to it. In the instant case the leading document was discrepant as highlighted above. The handling bureau of Rwanda therefore did not obtain the necessary documents within the meaning of this section to enable it to execute its mandate.

According to section 3.3.1 of the Operations Manual, a duty to verify the underwriting details falls due before handling the claim, in the instant case, it followed that once they verified and

requested for documents which could not be acted upon, it divested the handling Bureau of further duties or obligations under the protocol among which is the duty to receive legal process and to contest a legal action. It is therefore submitted for the Plaintiff that the duty of the handling Bureau of Rwanda to receive legal process and to contest any such action on behalf of the insured abated the moment the primary documents upon which it would act were proved to be incorrectly issued. This however does not mean that the Defendant, whose omissions and commissions made it impossible for the national bureau of Rwanda to handle matters, can escape scot-free. That kind of absurdity is not what the framers of the protocol and underlying documents intended, as the Defendant would want this court to believe.

Furthermore section 4 of the operations manual, reinforces the provisions and requirements of section 3 in terms of the fact that under section 4.2 requires the handling bureau to verify the underwriting details before processing the claim by; under 4.2.1 checking whether the yellow card is original and has been correctly issued. Under section 4.2.2 the application has to be done by e-mail, fax, telex or telephone. The foregoing is precisely what was done, leading to a finding that the yellow card was not correctly issued in view of exhibit P7. As earlier noted this finding led to a cessation of the handling bureau's mandate and recourse has to be had to the Defendant who issued the discrepant yellow card in the first place. The handling bureau's mandate which includes receipt of legal process is consequent upon satisfaction of the foregoing procedural and substantive requirements. Where the same was not lived up to, the Defendant remains the proper party to sue.

Going to article 14 of the inter-bureau agreement (exhibit P3), the provision is couched in the following terms:

> "Where a claim cannot be settled out of court, then only the handling bureau is empowered to accept service of legal process against the insured."

The provision is made in a very categorical terms, it is clear and unambiguous requiring nothing beyond the literal rule of interpretation. In the first place, whereas the article refers to legal process against the insured, the instant one is a legal process against the insurer. Secondly whereas the article is premised on compensation claims that cannot be settled out of court; the instant legal process arises out of a claim that was actually settled out of court as between the injured party and the insured.

Article 14 envisages claims brought by the injured third parties against the insured for failure to compensate. In the instant matter it is brought by an aggrieved insured against the insurer who has reneged from its contractual obligations and whose omissions and commissions led to the inability to compensate by the National bureau of the country where the accident occurred. The provision could not be more inapplicable in aiding the Defendant's arguments. The Defendant has quite clearly interpreted it out of context and it (Defendant) remains the proper party to the suit.

It is a misconstruction for the Defendant's Counsel to submit that the cause of action can be commenced by the insured against insurer but be defended by a third party on behalf of the insured who instituted it.

Article 14 (a) of the protocol on the establishment of a third-party motor vehicle scheme (exhibit P2) (to be distinguished from article 14 of the inter-bureau agreement (exhibit P3)), which is the founding document of the entire COMESA Yellow Card Scheme, helps to make the point further. The wording of the article is deliberate. The relevant sentence provides: "at a judicial level, the bureau, in its capacity as a handling agency, shall be entitled to take any steps to Institute or contest a legal action". The key operative phrase is "in its capacity as a handling agency". The mandate of the national bureau of Rwanda as a handling agency abated upon discovery of documents that were discrepant and thus not correctly issued. It therefore does not enjoy the capacity of the handling agency which alone would afforded the right, power and ability to receive and contest legal process. The current Defendant is therefore the proper party to proceed against.

Finally the Plaintiff's case is that the lookout that was issued to him was invalid/not in proper order. The card was issued to him by the Defendant. The Plaintiff is therefore at liberty to sue all and any person who he believes has caused him damage. The Defendant is one such person and the court ought to overrule the objections of the Defendant.

**Whether the High Court is the appropriate forum to Institute a suit?**

On this issue the Defendant's Counsel submitted that the provisions of article 14 of the inter-bureau agreement as well as section 3.1 and 4.5 of the operations manual, permits litigation against the handling bureau (the National bureau of Rwanda). Whereas the High Court has unlimited original jurisdiction to hear and determine all matters, the High Court when considering whether to hear the matter or not, should consider the realities of the case and should not exercise such jurisdiction unless a justifiable cause has been shown by one of the parties to this suit. The Plaintiff is not in any way shown that it is impossible or impracticable to Institute a suit in Rwanda against the handling bureau and get redress he is seeking. Furthermore, as the accident occurred in Rwanda, the law requires that the National bureau of Rwanda would be the appropriate party to contest the claim and in accordance with the Rwanda law. Consequently the Defendant prays that the suit is struck out with costs because the High Court of Uganda is not the appropriate forum to resolve this dispute.

In reply to the second objection of **whether the High Court of Uganda is not the appropriate forum in which to Institute this action?** The Plaintiff's Counsel contends that in the amended written statement of defence, the Defendant did not include the second point of law but only raised it in their written submissions. While the Plaintiff considers this to have been improperly included in the submissions, Counsel without prejudice submitted in reply.

Firstly the Defendant in the previous point had relied on provisions that may only be invoked upon occurrence of an accident which had in fact been denied by the Defendant and therefore cannot be appropriate for consideration as a preliminary point of law without ascertainment of matters of fact i.e. the occurrence of the accident.

Secondly the submission on the question of jurisdiction relies on similar provisions as in the previous issue. For the Plaintiff it was submitted in reply to the first objection why proceedings cannot be brought against the handling bureau of Rwanda. Furthermore article 139 of the Constitution confers on the High Court unlimited original jurisdiction in all matters and so does the Judicature Act section 14 (1). Ouster of jurisdiction of the High Court by an enactment was considered in the case of **David Kayondo versus Cooperative Bank Civil Appeal No 19 of 1991** where it was held that the provisions of the Cooperative Societies Act to the effect that all disputes shall be referred to arbitration did not oust the jurisdiction of the High Court. It was further the finding of the court in **Huadar Guandong Chinese Co. Ltd vs. Damco Logistics HCCS 4 and 5 of 2012** where there was a clause to submit disputes to the jurisdiction of a foreign court, that the High Court does not lose jurisdiction to entertain an action if the Plaintiff can show some just cause why proceedings should not be stayed or dismissed. In resolving issue one above, just cause has been shown why service of this legal process cannot be made on the National Bureau of Rwanda and therefore any action cannot be commenced there.

Section 15 of the Civil Procedure Act as interpreted by Honourable Lady Justice Stella Arach Amoko, judge of the High Court as she then was in **Congolese Rally for Democracy versus Palm Beach Hotel HCMA No 279 of 2000,** requires that suits are instituted where either the Defendant resides or where the cause of action partly or wholly arose.

It is not in dispute that the Defendant was incorporated in and carries on business in Uganda at Crest House along Nkrumah road. It is also not in dispute that the insurance transaction that led to the instant action for breach of contract was concluded in Uganda. The instant action is an action for breach of contract of insurance and not for damages arising out of negligence that led to the accident. Following the inability of the National Bureau of Rwanda to settle the claim, a vain demand was made to the Defendant to pay. The Defendant's refusal to pay was a manifest breach that took place in Uganda and consequently the cause of action arose in Uganda. Accordingly the Defendant's bid to hide behind legal and technical labyrinth in order to escape liability under the contract is futile because the instant case is not covered and is excluded from the said provisions of the protocol and underlying documents.

The interpretation the Defendant is advancing would if adopted by the court set a precedent where insurers under the COMESA scheme would renege on their contractual responsibilities, while at the same time purporting to hide behind unsubstantiated technicalities to avoid court action. Section 98 of the Civil Procedure Act and section 33 of the Judicature Act are meant to cure such scenarios.

Consequently the objection is misplaced. Under Order 9 rule 3 (1) (g) of the Civil Procedure Rules, a Defendant who wishes to challenge the jurisdiction of the court should file an application under the above rule. In this case the Defendant did not raise the issue in its written statement of defence neither did it file the required application. The objection is therefore improperly before the court.

In conclusion the Plaintiff's Counsel submits that firstly, the points of law are not preliminary points strictly speaking because they are based on disputed facts which are yet to be agreed upon or proved. Secondly the Defendant's submissions on the alleged points of law are premised on provisions to do with service of legal process against the insured and whether compensation claim cannot be settled out of court. Thirdly this suit does not involve service upon the insured since the action is against the insurer and contrary to what the section requires the compensation claim in the instant case was settled out of court. Fourthly the requirement to serve upon the handling bureau of Rwanda is only consequential upon the fulfilment of antecedent conditions and procedures as outlined under sections 3 and 4 of the Operations Manual including confirmation that the document to be acted upon were correctly issued, a circumstance that does not obtain in the present case. Fifthly the jurisdiction of this court is being disputed in an improper manner, making the objection incompetent. Seventhly this court has inherent unlimited original jurisdiction to hear all matters. The eight point is that just cause has been shown why the instant matter could not take off in Rwanda since the National Bureau of Rwanda no longer enjoys the capacity of a handling agency in this matter.

For the Defendant to be successful in the alleged points of law, apart from addressing all the other inadequacies highlighted in the submissions, it has to bring its objection within the purview of sections 3 and 4 of the operations manual as well as article 14 of the protocol and the inter-bureau agreement which it has miserably failed to do. In the circumstances the Plaintiff's Counsel contends that the objections have no merit and ought to be dismissed with costs.

**Ruling**

I have duly considered the Defendant's objections on the competence of the suit, the reply of the Plaintiff's Counsel and authorities cited.

The first objection is to the effect that the suit was brought against the wrong party as it ought to have been brought against the Handling Bureau of Rwanda. Secondly it was argued that the forum of the High Court of Uganda is not the appropriate forum or the convenient forum. On the other hand the Plaintiff's Counsel interpreted the second objection to mean that the jurisdiction of the High Court to handle this suit is being contested.

The question of jurisdiction is fundamental and ought to be tried first before the second objection, of whether the Defendant is the proper party to the action (if at all the High Court has jurisdiction), can be handled.

As far as objection to jurisdiction is concerned, the Plaintiff's argument is that the Defendant never gave prior notice of such an objection in the written statement of defence. Secondly and most importantly there was no formal application under the provisions of Order 9 rule 3 of the Civil Procedure Rules formally disputing the jurisdiction of the court. The Defendant's Counsel did not file a rejoinder to the question of the appropriateness of the application at this stage of the proceedings.

Before going into the substance of the objection to jurisdiction Order 9 rule 2 of the Civil Procedure Rules provides that the filing of a defence by the Defendant shall not be treated as a waiver by him or her of any irregularity in the summons or service of the summons or in any order giving leave to serve the summons out of the jurisdiction or extending the validity of the summons for the purposes of service. Secondly Order 9 rule 3 (g) of the Civil Procedure Rules provides inter alia that a Defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of any irregularity as mentioned in rule 2 or on any other ground shall give notice of intention to defend the proceedings and shall within the time limited for service of the defence apply to the court for a declaration that in the circumstances of the case the court has no jurisdiction over the Defendant in respect of the subject matter of the claim or the relief or remedy in the action. A defence is required to be served within 15 days. Notwithstanding the applicant has never filed any application as envisaged by Order 9 rule 3 (g) of the Civil Procedure Rules objecting to jurisdiction. There are timelines involved in the rules for filing an application objecting to jurisdiction. The rules are explicit that the filing of a defence does not operate as a waiver to any such objection to jurisdiction.

Where no application has been filed Order 9 rule 3 (6) of the Civil Procedure Rules provides that the Defendant is deemed to have submitted to the jurisdiction of the court in the proceedings. It provides as follows:

> "Except where the Defendant makes an application in accordance with sub rule (1) of this rule, the filing of a defence by a Defendant shall, unless the defence is withdrawn by leave of the court under rule 1 of Order XXV, be treated as a submission by the Defendant to the jurisdiction of the court in the proceedings."

The question is therefore whether an objection to jurisdiction cannot be made at any stage of the proceedings. In this particular case the objection made in the written submissions is without prior notice to the opposite side. Are proceedings without jurisdiction not a nullity? The law under article 139 of the Constitution the Republic of Uganda is that the High Court has unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law. Statutory provisions include section 14 (1) of the Judicature Act which repeats the constitutional provision that the High Court has unlimited original jurisdiction in all matters. Furthermore provisions for the place of suing are filed under sections 11 to 15 of the Civil Procedure Act. Under section 15 suits are instituted where any of the Defendants at the time of commencement of the suit actually and voluntarily resides or

carries on business or personally works for gain. Suits may be instituted where the cause of action wholly or in part arises.

Jurisdictional power is a fundamental rule of law because it deals with the power of the court to handle a dispute. The exercise or purported exercise of judicial authority without jurisdiction is a nullity. For that reason even if a formal application has not been filed, where there are any facts showing that the court has no jurisdiction in the matter, it would be prudent for the court to consider the issue before spending more time on the trial to avoid delivering a judgment that would be challenged for want of authority or jurisdiction.

Paragraph 2 of the plaint avers that the Defendant is a body corporate established under the Companies Act cap 110 whose registered office is at Crest House Plot 2 Nkrumah Road Kampala. There are therefore facts which show that the Defendant is domiciled in Uganda at the time of commencement of the action thereby fulfilling the provisions of section 15 of the Civil Procedure Act for filing an action in the local limits of the court where the Defendant resides. The High Court has jurisdiction in all the territory of Uganda. Secondly the facts giving the cause of action show that the Plaintiff took a third-party insurance contract with the Defendant under the COMESA Yellow Card protocol for motor insurance. These considered together with paragraph 3 shows that the Plaintiff's claim against the Defendant is for a declaration that the Defendant breached the terms of the third-party insurance contract entered into on 18th of October 2010 under the auspices of the COMESA yellow card protocol.

I agree with the Plaintiff's Counsel that there are facts showing that the High Court has jurisdiction on the basis of the residence of the Defendant as well as where the cause of action arose. It is alleged that there was a contract to take out third party insurance between the Plaintiff and the Defendant on 18 October 2010. The Plaintiff seeks declarations for breach of the terms of the third-party insurance contract. Declarations of right can be made under Order 2 rule 9 of the Civil Procedure Rules which provides that:

> "No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

Jurisdiction to make declaratory orders exists without the need to have a claim for consequential relief. In the circumstances objection to jurisdiction couched as a prayer that the forum for dispute resolution is not convenient has no merit. The grounds for showing that the High Court is a forum which is not convenient have not been advanced. Secondly on the basis of the residence of the Defendant and the execution of the contract within Uganda, the High Court has jurisdiction and the second objection is overruled with costs.

On the question of whether the Defendant is the proper party to be sued, the Plaintiff's Counsel submitted that the determination of the question requires evidence.

I agree with the Plaintiff's Counsel that the submission that the Defendant is not a proper party to be sued has to be based on pleadings in the plaint and not evidence. The facts in support of the objection must be disclosed in the plaint as held **Attorney-General v Oluoch [1972] 1 EA 392** in deciding whether a plaint discloses no cause of action. In that appeal the East African Court of Appeal sitting at Nairobi held at page 394 that:

> "In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged in it are true."

They applied an earlier decision of the East African Court of Appeal sitting in Kampala in **Jeraj Shariff & Co vs. Chotai Fancy Stores [1960] 1 EA 374** where Windham JA at page 375 held that:

> "The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true."

The plaint discloses no cause of action where the Plaintiff sues a party against whom there is no cause of action as held in **Auto Garage vs. Motokov [1971] EA 514 at 519**. Spry VP in summarising the essential ingredients of a cause of action held at 519:

> "In addition, of course, the Plaintiff must appear as a person aggrieved by the violation of the right and the Defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment."

It follows that the plaint should disclose that the Defendant is liable for the violation of the Plaintiff's rights. It may further be argued on a point of law that no action lies against the Defendant. The point of law must be based on uncontested facts or facts not in controversy. In the case of **NAS Airport Services Limited vs. The Attorney-General of Kenya, [1959] 1 EA 53** Windham JA interpreted order 6 rule 27 which is in pari materia with Order 6 rule 28 of the revised Uganda Civil Procedure Rules and applies to points of law as requiring facts not in controversy for the point of law to be considered as a preliminary point: Order 6 rule 28 of the Civil Procedure Rules provides that:

> "28. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing."

According to Windham JA at page 58 of the judgment:

> "Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, *on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end.*" (Emphasis added)

If the facts are not averred in the plaint and assumed to be true the facts must either be admitted or should not be in dispute. This is emphasised by the East African Court of Appeal in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] 1 EA 696** per Sir Charles Newbold P at page 701 where he said:

> "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 increase costs and, on occasion, confuse the issues. This improper practice should stop." (Emphasis added)

A point of law can be set out as an issue under Order 15 rule 2 of the Civil Procedure Rules. It has however to arise from the pleadings. A point of law whose effect is to resolve the dispute without adducing evidence saves the parties expenses and ought to be tried first. A point of law set down for hearing under Order 15 rule 2 of the Civil Procedure Rules has the same effect as order 6 rule 28. However where it is not pleaded, the point can be raised in an application under order 6 rule 28 for argument with leave of court or on the basis of facts admitted during the scheduling conference. It either case the point of law is argued on the basis of agreed facts or facts not in dispute or proven facts.

The Defendant's objection has its foundation as the plaint and interpretation of the law governing the PTA yellow card scheme of insurance. He contended that the National Bureau under the scheme acts as a handling agency in relation to accidents involving PTA yellow card holders that occur in its country. The accident occurred in Rwanda which is a member state. It is the National Bureau of Rwanda which should be notified of the accident and it is its handling bureau to settle claims on behalf of the insurer in liaison with the issuing agency such as the Defendant in this case. However the objection is premised on an understanding that this is a suit for indemnity under the third-party insurance scheme. The Plaintiff's pleadings however suggest that the cause of action is not necessarily a cause of action for indemnity but for breach of contract in relation to documents which were turned down by the National Bureau of Rwanda.

This is because it is averred in several paragraphs that there were certain inaccuracies in documentation prepared by the Defendant which led to the National Bureau of Rwanda rejecting

the Plaintiff's claims. The Plaintiff avers in the plaint that it had initially presented the claim to the National Bureau of Rwanda but due to commissions or omissions of the Defendant, the claim was rejected. The Plaintiff also seeks damages for delays due to the holding of its trailer as a consequence of failure to produce acceptable documents to the National Bureau of Rwanda which documents were issued by the Defendant under the third-party insurance scheme. Furthermore it is averred that in order to mitigate the loss of the Plaintiff, the Plaintiff settled the accident victim. Paragraphs 5 & 6 of the plaint are very revealing about the Plaintiff's cause of action and avers as follows:

> "5.The Plaintiff shall aver and contend that because of the Defendant's commissions and omissions the Plaintiff's trailer remained impounded for a period of 64 days leading to the loss of business by the Plaintiff amounting to US$20,000 (copies of invoices of routine operations of the Plaintiff attached and collectively marked "G")
>
> 6. The Plaintiff shall aver and contend that the Defendant's commissions and omissions were in breach of its contractual obligations owed to the Plaintiff and contrary to trade usage and practice in the insurance industry and also contrary to the Defendant's obligations under the Yellow Card Protocol under which the instant contract was entered into."

In the prayers, the Plaintiff seeks a declaration that the Defendant's conduct amounts to breach of contract. The Plaintiff also seeks some liquidated damages due to loss of income occasioned to the Plaintiff by the Defendant's conduct. I therefore do not agree with the Defendant's Counsel that the cause of action of the Plaintiff is for indemnity and to be made against the National Bureau of Rwanda under the protocol for indemnity. In the premises the Defendant's objections lack merit and are overruled with costs.

Ruling delivered in open court the 22nd day of August 2014

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Lenard Ote for the plaintiff

Rwobushero Barbara for the Defendant

None of the parties in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

22/08/2014