



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO E 286 OF 2020

RABADIA ENTERPRISES LIMITED..... PLAINTIFF

VERSUS

MAYFAIR INSURANCE COMPANY LIMITED.....DEFENDANT

PRELIMINARY OBJECTION

RULING

BACKGROUND

1. The Plaintiff filed a Plaint dated 27th July 2020. The statement of claim is that the Plaintiff applied for and was insured with insurance cover by the Defendant for its fleet of transport vehicles. On or about 26th October 2017 some of the Plaintiff's vehicles were stolen which theft was reported to the police and the Defendant. The Plaintiff then lodged a claim for compensation in respect of the vehicles insured by the Defendant.
2. Despite lodging the claim and cooperating with the Defendant, the Defendant refused to admit the Plaintiff's claim and this conduct amounts to breach of contract exposing the Plaintiff to loss.
3. The Plaintiff avers that Clause 9 of the Defendant's policy documents is unlawful and unconstitutional to the extent that it purports to limit the Plaintiff's right to seek legal redress by inter alia purporting to shorten the statutory limitation of 6 years provided by the law to a mere 12 months. In addition, the Arbitrator does not have jurisdiction to interpret the Constitution.

PRELIMINARY OBJECTION

4. The Defendant raised a Preliminary Objection on Points of law to oppose the Plaintiff's entire suit dated 27th July 2020 to be determined *in limine*, on grounds inter alia that: -

- a) The Suit is bad in law and offends the mandatory provisions of **Section 11 of the Civil Procedure Act, Cap 21 Laws of Kenya** that provides that Every suit shall be instituted in the court of the lowest grade competent to try it; the subject matter of the Plaintiff's suit is below Kshs.20,000,000.
- b) The suit is contractually time-barred as the Insurance Policies provide to *wit* any claims be brought before the expiry of 12 months.
- c) This Honourable Court and any Court's jurisdiction is ousted in view of the Arbitration Clause;

DEFENDANT/APPLICANT'S SUBMISSIONS

5. The Defendant submits that **Section 10 of the Arbitration Act** states that no court shall intervene in a matter governed by the Act except as provided under the Act. Kenyan Courts always uphold this provision and consistently refuse to entertain suits where arbitration is set out as the dispute resolution mechanism. The role of the courts in matters governed by arbitration is merely supervisory and facilitative. In the case of **Union Technology Kenya Limited versus County Government of Nakuru [2017] eKLR** in which the high court in upholding the arbitration clause in the agreement between the parties held; -

“Parties in an agreement/contract are bound by the mutually agreed and express terms of their agreement. It is not the duty of a court to re-write the agreement for the parties.”

6. The tenor and import of **Article 159(2)(c) of the Constitution** as read together with **Sections 6(1) and 10 of the Arbitration Act** is that where the parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.

PLAINTIFF’S/RESPONDENT SUBMISSIONS

7. The Plaintiff submits that the Defendant purports to shorten the statutory limitation from 6 years to 12 months. This is unlawful because an agreement cannot take away that which the statute has given. An unlawful agreement or clause is null and void and is of no legal effect. The same cannot be performed or enforced and comes within the exception provided in **Section 6 (1)(a) of the Arbitration Act**.

8. The Court of Appeal in ***Njogu & Company Advocates – versus- National Bank of Kenya Limited [2016] eKLR*** stated; -

“Since the appellant and the respondent had clearly agreed on the above provisions, it is evident that they were both party to an agreement that is illegal as the terms of the agreement contravened the law. In the case of Patel v Singh (2) [1987] KLR 585, the Court of Appeal dismissed an appeal holding that a contract entered into by the parties that was contrary to the provision of section 3(1) of the Exchange Control Act Cap 113 was illegal ab initio and unenforceable.”

9. The Plaintiff indeed appreciated the contract provides for mediation and that mediation was attempted and failed and the next available remedy under Clause 9 is Arbitration but the Plaintiff has taken issue with the Arbitration clause and argued that the same is unlawful and unconstitutional and has prayed that the court makes a declaration to that effect.

DETERMINATION

Issues for Determination:

a) Whether the Suit is bad in law and offends the mandatory provisions of Section 11 of the Civil Procedure Act, Cap 21 Laws of Kenya?

Section 11 of the Civil Procedure Act provides; -

Court in which suit to be instituted Every suit shall be instituted in the court of the lowest grade competent to try it, ... Provided that—

(i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court;

10. The High Court is established under **Article 165(1)** of the Constitution and its jurisdiction is set out in **Article 165(3)** of the Constitution which reads:-

“3) Subject to Clause (5) the High Court shall have

a. Unlimited original jurisdiction in Criminal and Civil matters.

11. In view of **Article 162 and 165 of the Constitution** as quoted above, it is clear that the High Court has unlimited original jurisdiction in Civil and subsequently in this matter the amounts claimed according to the pleadings exceed Ksh 20 million the pecuniary jurisdiction of the Magistrates court.

1. Whether the Suit is contractually time-barred as the Insurance Policies provide to wit Any claims be brought before the expiry of 12 months? The issue is intertwined with the issue of Arbitration whether there is a dispute to be determined by the court or by Arbitration in light of the question of limitation.

12. The Arbitration Clause (**Clause 9**) in the agreement reads as follows: -

“Disputes between you and us.

If any dispute arises between you and us on any matter relating to this policy such dispute will be referred to

a. A single mediator to be agreed between you and us within 30 days of the dispute arising and the mediation process to be finalized not later than 30 days thereafter; or

b. A single arbitrator agreed between us, to be appointed within 30 days of the dispute arising if we cannot agree, either party will refer the dispute to the Chairman of the Chartered Institute of Arbitrator (Kenya Branch) whose decision will be binding on you and us. The Arbitral Award will be final. If the dispute is not referred to the arbitration process within 12 months we will assume

you have abandoned this claim.”

13. Section 6 of the Arbitration Act provides two exceptions when a matter cannot be referred to arbitration one being where the arbitration agreement is null and void, inoperative or incapable of being performed.

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

14. Clause 9 of the Defendant’s policy documents purports to limit the Plaintiff’s right to seek legal redress by inter alia purporting to shorten the statutory limitation of 6years provided by the law to a mere 12 months. This is an issue the court is seized to determine.

15. In Civil Appeal No 157 of 2000 Niazsons (K) Ltd –versus- China Road & Bridge Corporation Kenya (2001) eKLR where the Court of Appeal (Tunoi, Bosire & O’Kubasu JJ A) held as follows: -

“Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The afore quoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.”

16. The Plaintiff at paragraph 13 of the plaint has pleaded that the arbitration clause is invalid and has proceeded to state the particulars of invalidity. The Plaintiff has demonstrated that it has raised matters in the plaint which calls for determination by this Court as provided under **Section 6(1)(a) of the Arbitration Act**.

17. The issues raised are not pure points of law on agreed facts and are to be determined at the trial. If there is a valid arbitration clause it ought to be lodged as prescribed by law by **Section 6 of Arbitration Act** and determined by the court together with the issue of limitation on whether there is a dispute. It is therefore, **the finding of this court that the Preliminary Objection is devoid of merits and it is hereby dismissed and the issue shall be dealt with at the trial.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

OCHWO & CO. ADVOCATES FOR PLAINTIFF

LJA ASSOCIATES ADVOCATES FOR DEFENDANT

COURT ASSISTANT - TUPET