



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO E286 OF 2020**

**RABADIA ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**MAYFAIR INSURANCE COMPANY LIMITED.....DEFENDANT**

**RULING (2)**

**BACKGROUND**

1. The Defendant filed Chamber Summons Application dated 26<sup>th</sup> August, 2020 seeking orders: -

1) Stay be granted on all proceedings herein pending the hearing and determination of this Application.

2) The suit herein be referred to arbitration as envisaged at Clause 9 of the Insurance Policy Documents dated 13<sup>th</sup> January, 2017 and 12<sup>th</sup> July, 2017 which have given rise to the present suit.

3) That costs of this Application be provided.

Which Application is supported by the sworn Affidavit of **Emma Mwangi** dated **26<sup>th</sup> August 2020** on the following grounds;

a. On 13<sup>th</sup> January 2017, the Plaintiff applied for; and the Defendant granted an insurance policy in favour of the Plaintiff; and executed that Policy Document No.01/COMP/01/0800/4412/2017 dated 13<sup>th</sup> January 2017.

b. On 12<sup>th</sup> July 2017, the Plaintiff took out a comprehensive insurance policy with the Defendant and executed that Policy Document No.01/COMP/01/0800/4591/2017 dated 12<sup>th</sup> July 2017.

c. That both parties herein bound themselves by the said Insurance Policies.

d. Clause 9 of the said Insurance Policies provides for mechanisms for resolving disputes arising between the parties, and requires mediation or Arbitration.

e. The Plaintiff has knowingly filed the instant suit in ignorance of the Dispute Resolution Clause contained in the said Insurance Policies and this Court must not cordon the abuse of the court process demonstrated by the Plaintiff herein.

f. The Insurance Policies and the said Dispute Resolution Clause remain to be operative, valid and is capable of being performed.

g. The dispute between the parties as pleaded by the Plaintiff relates to issues arising from the Insurance Policies.

h. It is in the interest of the just and expeditious resolution of this matter that this Application be allowed as prayed and this suit be stayed pending Arbitration.

**REPLYING AFFIDAVIT**

The Application was opposed vide the sworn Replying Affidavit of **Ramji Premji Rabadia** dated **14<sup>th</sup> October 2020** and states that:

- 1) Two of the Plaintiff's vehicles being KCM 814A and KCK 987L were insured by the Defendant who issued comprehensive policy numbers 01/COMP/01/0800/4591/2017 and 01/COMP/01/0800/ 4412/2017 respectively.
- 2) The above vehicles were stolen on or about 27<sup>th</sup> October, 2017 and the Plaintiff reported the theft to both the Defendant and the police.
- 3) The Plaintiff thereafter lodged a claim for compensation which claim was rejected by the Defendant without any legal or factual basis while replying on a report that was not shared with the Plaintiff and the Plaintiff is seeing the same for the first time in the Defendant's court papers.
- 4) The parties tried to resolve this matter through various intermediaries but it soon became clear that the Defendant was not willing to compensate the Plaintiff for completely selfish and unfounded reasons.
- 5) The Defendant's standard policy documents are unconstitutional, illegal and enforceable to the extent that it purports to shorten the limitation period of 6 years to 1 year.

## **DETERMINATION**

The Court delivered Ruling on Preliminary Objection of 26<sup>th</sup> August, 2020 on 31<sup>st</sup> May 2021 and dismissed the Preliminary Objection for lack of merit as it raised issues that ought to be dealt with at the trial.

The Applicant sought to have the Court to determine the Chamber Summons Application dated 26<sup>th</sup> August, 2020 brought under Section 6 of the Arbitration Act to Stay the Proceedings and refer the matter to Arbitration. The Parties waived their right to file further Applications.

The Applicant in its submissions in support of its Application cited authorities on the following issues;

- a. Jurisdiction of the Court.

**Titus Kitonga & Another –versus- Total Kenya Limited & Another [2018] eKLR** where the Court stated; -

***“It is noteworthy that the courts derive their jurisdiction either from statutory provisions or jurisdiction agreement. In contrast, the arbitration tribunal's jurisdiction is based solely on an agreement between two or more parties to submit their existing or future dispute to arbitration..... the issue under consideration is merely whether, the court has jurisdiction to hear and determine the dispute herein. Therefore, the court will restrict itself to the same.”***

(See **Selle –versus- Associated Motor Boat Company [1968] EA 123**)

- b. Mandate of Alternative Dispute Resolution when parties have chosen the Dispute Resolution method and forum.

**Elite Earthmovers Limited –versus- Machakos County Government & Another [2020] eKLR** the Court stated as follows; -

***“In Shamji vs. Treasury Registrar Ministry of Finance [2002] 1 EA 173 it was held inter alia that as a matter of general principle, it has been stated that where a dispute between the parties themselves in terms of the agreement to be referred to the decision of the tribunal of their choice, the court would direct that the parties should go before the specified tribunal and should not resort to courts and that “any dispute” should not be read as excluding disputes involving fraud or misrepresentation since it is not the function of the court to rewrite and insert provisions to which parties could have agreed to deal with in a situation which might arise.”***

- c. Parties bound by the terms of their Contract.

In **Pius Kimaiyo Langat –versus- Co-operative Bank of Kenya Limited [2017] eKLR** the Court of Appeal stated; -

***“We are alive to the hallowed legal maxim that it is not the business of the courts to rewrite contracts between parties. They are bound by the terms of their contracts unless, fraud, coercion or undue influence are pleaded and proved.”***

- d. Contractual time bar clauses.

**West Mount Investment Limited –versus- Tridev Builders Company Limited [2017] eKLR** the Court stated; -

***“Contractual time bar clauses are a common place in commercial, especially engineering and construction contracts. They vary from contract to contract... Where the effect of default is to bar the right to arbitrate or obtain remedy in arbitration, then any arbitration forum constituted despite the default will lack jurisdiction. But where the effect is to extinguish the claim, then the arbitral tribunal, will be possessed with the jurisdiction to decide if the claim is barred i.e. whether it is ‘a dead claim’. A strict interpretation is therefore to be adopted when construing a contractual time bar clause given that it has the potential of locking out a claim which statute has not time barred.”***

The Applicant relied on the case of Niazsons (K) Ltd –versus- Chain Road and Bridge Construction Kenya (2001) eKLR.

***“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.”***

The Respondent submitted that the Applicant’s Application though appearing innocent on the face of it is actually mischievous and ill intended. The Applicant in reality wants to take the matter to Arbitration knowing well 12 months have already lapsed and the Applicant/Defendant wants to rely on the alleged time limitation and apply to have the Respondent/Plaintiff’s suit filed before the Arbitration.

The Applicant/Defendant’s Application is misplaced as it has completely ignored the nature of the suit and prayers sought. It is premature to stay the suit and refer the same for Arbitration yet the Respondent/Plaintiff is challenging the constitutionality, legality and enforceability of the very arbitration clause as drafted.

Therefore, this Court reiterates in full its Ruling of 31<sup>st</sup> May 2021 Pg 9;

***The Plaintiff at Paragraph 13 of the Complaint 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 Complaint which calls for determination by this Court as provided under Section 6(1)(a) of the Arbitration Act.***

***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 its merits and it is hereby dismissed and the issue shall be dealt with at the trial.***

Under Section 6 of the Arbitration Act, it is not automatic that parties pursue Arbitration as a Dispute Resolution Forum but subject to whether there is a valid Arbitration agreement and/or dispute to settle under Section 6 and limitation of time taken into account.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 30<sup>TH</sup> JUNE 2021**

**(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**M/S OCHWO & CO. ADVOCATES – PLAINTIFF**

**M/S LJA ASSOCIATES ADVOCATES – DEFENDANT**

**COURT ASSISTANT: TUPET**