REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 416 OF 2014

CONSOLIDATED WITH MISC APPLICATION NO. 379 OF 2018.

ANTHONY KIMANI .....APPLICANT

VERSUS

CIC GENERAL INSURANCE LIMITED .....RESPONDENT

RULING

1. This ruling relates to two notice of motion applications dated 24th and 28th August 2018. The first application dated 24th August 2018, is brought by the Claimant (herein "the 1st Applicant"), under the provisions of; Section 35 of the Arbitration Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and all enabling provisions of law.

2. The application is based on the grounds on the face of it and the supporting affidavit of the even date, sworn by the Applicant; Anthony Kimani, who is seeking for orders that: -

(a) That the Honourable court be pleased to set aside the final arbitral award made by the Arbitrator in the matter herein; dated 5th March 2018;

(b) That the Respondent be compelled to pay the A pplicant, an additional sum of; Kshs. 6,539,373, plus interest from 10th May 2014, until settlement in full in terms of the applicant's claim against the Respondent;

(c) That, in the alternative, the court be pleased to appoint and/or direct the appointment of another Arbitrator to hear the applicant's claim de novo;

(d) That, the respondent do pay the costs of the application.

3. The second notice of motion application dated 28th August 2018, is brought by the Respondent (herein "the Respondent), filed under a certificate of urgency, vide a chamber summons application, brought under the provisions of; the Judicature Act CAP 8, Rule 1,2 and 3 of the High Court (Practice and Procedure Rules) and all enabling provisions of law. It suffices to note that, the application does not invoke any provisions of the law.

4. However, it is supported by the grounds on the face of it and an affidavit sworn by the Applicant's legal officer; Lydia Wairimu. The Application is seeking for orders: -

(a) That the Arbitrator's final award dated 5th March 2018 between Anthony Kimani and CIC General Insurance Company Limited be adopted as an award of the Honourable court;

(b) That decree be issued to reflect the orders of the Arbitrator;

(c) That the Respondent be compelled to release the original log book and keys of the Motor Vehicle Registration Number KBS 110Q to the 1st Defendant/ Applicant; and

(d) That the costs of the application and the entire suit be awarded to the 1st Defendant/Applicant.

5. The background facts of this matter are relatively straight forward. In the month of June, 2013, the Applicant applied to the Respondent through its insurance agent; Four Stars Insurance Brokers Limited, for an insurance policy for his motor vehicle registration number KBS 110Q.

6. The agent requested him to have the motor vehicle valued to ascertain the current market value. He was referred to Automobile Association of Kenya (herein "AA"), the Respondent listed valuers on the panel, for the valuation. Subsequently, (AA) valued the motor vehicle; at Kshs. 12,750,000. Thereafter the premium payable was assessed and the Respondent advised to pay a sum of; Kshs. 528,984, which he paid in three instalments.

7. On 31st July 2013, the Applicant was issued with policy number 001/070/1/111098/2013/07, effectively covering the motor vehicle with effect from 10th July 2013, for a period of twelve months. However, during the subsistence of the cover, the vehicle was involved in an accident along; Forest road. The accident was reported to the Respondent.

8. The Respondent assesses the damage on the motor and found it uneconomical to repair. The Applicant was offered a sum of; Kshs. 6,215,625, in full and final settlement of the claim. However, the Applicant declined the offer arguing that, in view of the fact that, the insured sum was; Kshs. 12,750,000, just a year earlier, the motor vehicle could not depreciate by 50%, in less than ten (10) months.

9. As a result, a dispute arose between the parties and the Applicant filed the suit herein. Subsequently, on 13th March 2015, the court made an order that; the Applicant be paid the sum admitted of; Kshs. 6,215,625 and the rest of the claim be referred to Arbitration. The Chartered Institute of Arbitrators, appointed, Mr. Aasif Karim to hear and determine the dispute.

10. The matter was heard and the final award rendered on 5th March 2018, dismissing the claim in its entirety and costs quantified at Kshs. 658,900, to be borne by the parties in the ratio of; 80:20, against the Applicant and Respondent respectively. The parties had already paid the Arbitrator's amount in the ratio of; 50:50, and therefore the Applicant claim Respondent owes him Kshs. 197,670.

11. The Applicant is aggrieved by the decision of the Arbitral Tribunal and seeks that, it be set it aside on the grounds that; -

(a) That the arbitral award is based on an unconscionable representation and unconscionable conduct on the part of the Respondent, in procuring the insurance policy and cover, subject hereof, from the Applicant and thereby not valid under the provisions of; Section 13 of the Consumer Protection Act No. 46 of 2012 together with Section 56 of the Competition Act No. 12 of 2010;

(b) That the arbitral award is based on a misrepresentation of material facts by a service provider and material non-disclosure and thereby in conflict with the public policy in Kenya, as contained in; Article 46 of the Constitution of Kenya, 2010, that provides for the Consumers' rights in law in the Republic of Kenya;

(c) That it was not disputed that, the motor vehicle subject of the claim herein being the motor vehicle registration number KBS 110Q, Mercedes Benz 2500, was insured for Kshs. 12,750,000 and whereas the Respondent demanded and was paid premiums based on the said value, it is estopped from denying the said value for purposes of avoiding payment under the same insurance policy; and

(d) That the arbitral award is otherwise unlawful, invalid and unfair and it ought to be set aside by the court.

12. However, the application was opposed vide a Replying and Supplementary affidavits dated 19th October and 19th September 2018, respectively, sworn by the Respondent's legal officer; Lydia Wairimu, who deposed that, the application is disguised as an appeal. That, an award can only be set aside on limited grounds under section 35 of the Arbitration Act, 1995 (herein "the Act").

13. She averred that, the arbitration award herein is based on the arbitration agreement between the parties, to arbitrate any dispute between them, as contained in clause 9 of the policy document dated; 17th October 2013 and the Arbitrator was duly appointed according to that document.

14. That the issues raised in relation to; unconscionable conduct or representation of any parties, have never been raised for determination, by either the court or the Arbitrator tribunal. Further, the allegation that, a misrepresentation of facts was made by the Respondent, is just but an afterthought; as the allegations were never made or proved in the initial stages of hearing of the suit or the subsequent stages of the dispute through arbitration. It is only raised now after the matter has been determined and finalized.

15. The issue of the value of the motor vehicle was dispensed with by the Arbitrator, who conducted two (2) independent assessments to establish the pre-accident value. The arbitration proceedings were concluded and none of the issues raised in the application as to; the validity of the policy, the agreement or the issues to do with public policy ever arose.

16. That an insurance contract is one of indemnity, aimed to restore the insured to the state he was in before occurring of the loss. If indeed, the entire insurance policy is contrary to public policy and thus an illegality as alleged by the Applicant, then he should first and foremost immediately refund the sum of; Kshs. 6,215,625, he was (paid based on the value of the actual loss suffered); as no award and/or benefit can and should be derived from an illegality. The Respondent prayed that the award be recognised and adopted as an order of the court.

17. However, the Respondent's application was opposed vide grounds of opposition dated 28th September 2018, which states that: -

(a) The application has no merit and warrants dismissal;

(b) The Arbitrator's award is not final as the same is under challenge in; Nairobi High Court Misc. Application No. 379 of 2018,

Anthony Kimani v CIC General Insurance Limited and Another, where the Respondent has applied for its setting aside and which application is pending for determination before the honourable court;

(c) The question of custody of the logbook and keys of the motor vehicle registration number KBS 110Q, does not form part of the Arbitral award herein and cannot be introduced to the decree, by way of an application;

(d) There is no basis for the application made.

18. The parties disposed of the matter by way of submissions. The Applicant submitted that, the award herein is against public policy and relied on the provisions of; section 35 (2) (b) of the Arbitration Act No. 4 of 1995. It was argued that, it is against public policy to charge a policy holder premiums based on a clearly agreed value of the car and then seek to escape compensating the insured based on that value when risk insured occurs and compensation materializes.

19. The Applicant relied on the case of; *Christ for All Nations v Apollo Insurance Company Limited (2002) 2 E.A 366,* where the court held that:

> "*…an award could be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya, if it was shown that, it was either: (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality*."

20. Further, the award substantially violates; Article 46 (1)(b) and (c) of the Constitution of Kenya, which provides that; consumers have a right; to the information necessary for them to gain the full benefit from good and services and to the protection of their health, safety and economic interests.

21. That, the Arbitrator has indicated clearly at page 13 of the award that, clause 7 of the policy, which deals with "agreed value basis", (applicable to motor vehicles not more than eight years old from the year of manufacture), is applicable herein. The clause provides that, in case of loss, the agreed value shall be the basis of compensation. That the accident herein, occurred within a period of twelve (12) months of the policy, therefore valuation by AA Kenya was still valid and the sum of; Kshs, 12,750,000, should have been the compensation value.

22. The Applicant faulted the Arbitrator for criticizing the one-page valuation report from AA, yet the Respondent relied on the same to determine the payments and is estopped from disputing the validity of thereof; for the purposes of determining the amount of compensation. The Applicant relied on the provisions of; section 120 of the Evidence Act (Cap 80) Laws of Kenya and the cases of; *Esther Akinyi Odidi & 2 others v Sagar Hardware Stores Limited and Another (2006) eKLR* and *Ayman Hijjawi v Anwar Hussein (2014) Eklr*, in support of his argument on estoppel.

23. It was further argued that, the award offends section 13 (1) of the Consumer Protection Act, No. 46 of 2012, for reason that, the construction and interpretation of the policy contract shows that, the consumer transaction was excessively one-sided, in favour of someone other than the consumer. Further the impugned award should be set aside for upholding a contractual agreement whose terms of the consumer transaction are adverse and unequitable to the consumer. Reliance was placed on the cases of; *Johnson M Mburungu v Fidelity Shield Insurance Company Limited (2006) eKLR* and *Leonard Otieno v Airtel Kenya Limited eKLR*.

24. It was further submitted that, the award goes against the provisions of; section 56 of the Competition Act No. 12 of 2010, which provides that, it is an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable.

25. However, the Respondent submitted that, for the award, to be set aside, Applicant must prove the grounds provided for under section 35 of the Arbitration Act. In particular, that the award is against public policy as alleged. The Respondent relied on the case of; *Rwama Farmers' Co-operative Society Limited v Thika Coffee Mills Limited, HCC N0. 836 of 2003,* where the court defined the meaning public policy and stated that: -

> "*conflict with the public policy" used in section 35 (2) of the Arbitration is akin to "contrary to public policy" "against public policy". These terms do not seem to have a precise definition but they connote that which is; injurious to the public, offensive, an element of illegality, that which is unacceptable and violates the basic norms of society".*

26. The Respondent submitted that, the award rendered in this does not injure the public in any way neither is it illegal. It is not devoid of reason. That the Arbitrator has set out in the award; the reasoning leading to each decision he has made. The Respondent reiterated that, all grounds relied on to set aside the award are an afterthought, as they should have indeed formed the substance of the Applicant's claim before the Arbitrator, but did not.

27. Further that, it should not go unnoticed by the court that, no allegation of the insurance policy having been obtained by way of misrepresentation of material facts, was made by the Applicant during the substantial hearing of the dispute and any such argument is an attempt to appeal the final award of the Arbitrator and cannot form basis of a setting aside application.

28. The Respondent relied on the case of; *Mahican Investments Limited v Giovanni Gaidi & 80 Others (2005) eKLR,* where the court held that:

> "*a court will not interfere with the decision of arbitration even if it is apparently a misinterpretation of contract, as this is the role of the Arbitrator. To interfere would place the court in the position of the Court of Appeal, which the whole intent of the Act is to*

avoid. The purpose of the Act is to bring finality to the disputes between the parties."

29. That, the Applicant has not furnished the court with any proof as required under; section 35 of the Arbitration Act; to warrant refusal of recognition or enforcement of an arbitral award. Reliance was placed on the case of; *Anne Mumbi Hinga v Victoria Njoki Gathara (2009) eKLR*, where the Court of Appeal held: -

> *"we therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and simultaneously there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in section 39 of the Arbitration Act."*

30. I have considered the arguments advanced by both parties and I find that, several issues have arisen for consideration namely: -

a) Whether the Applicant has raised matters and/or issues which were not raised before the arbitral tribunal;

b) Whether the award is against public policy as alleged;

c) Whether the court should grant the orders sought for by either party;

d) Who should pay the costs of the application(s)?

31. In relation to the 1st issue I find that, the only document provided by the Applicant in support of the application is a copy of the final award annexed to the affidavit in support of the application and marked "AK1". Apparently there are no proceeding of arbitration and it does appear from the final award that, the parties agreed inter alia, "the award be published by documents only" and submissions.

32. Be that as it were, I note that, the arbitrator has reproduced the list of issues in dispute as agreed on by the parties for the determination as follows: -

a) Whether the sum insured as indicated in the policy at the inception of the cover, be the determining value for the settlement of the claim;

b) Whether the assessment report prepared by the Respondent should be the Market Value for settlement of the claim;

c) Whether the claimant is entitled to the claim for loss of use of the motor vehicle;

d) Whether the claimant should be awarded general damages;

e) Whether the claimant is entitled to relief sought, including interest;

f) Whether the claimant is entitled is entitled to costs?

33. As can be clearly seen from these issues, the issues raised by the Applicant at paragraph 22 of the affidavit in support of the application to the effect that; the award is against public policy as on the basis of; "unconscionable representation and unconscionable conduct on the part of the Respondent in procuring the policy and cover subject herein" and/or "on misrepresentation of material facts by the service provider and non-material disclosure" were not part of the issues agreed on by the parties for determination by the Arbtral Tribunal.

34. If they were raised in the submissions by any chance, then the court is unable to determine the same, as the submissions filed at the arbitral tribunal were not availed for consideration herein. Even if they were, the same could not have been considered herein, if the Arbitrator had not been invited to deal with them. In that, regard I uphold the Respondent's submissions that, grounds (i) and(ii) of the application do not lie for consideration.

35. That leaves two grounds namely whether the award is against public on the ground that, the Arbitrator failed to find and hold that; the Applicant is entitled to be compensated the full value of the motor vehicle assessed at a sum of Kshs 12, 750,000. Secondly the award is otherwise unlawful, invalid, and unfair.

36. However, before I deal with the first issue, it suffices to note that the Applicant had several claims before the Arbitral Tribunal, namely; total loss of the motor vehicle, loss of use, general damages and interest thereon. It is not clear from the arguments advanced whether; the Applicant is challenging the findings on all these claims or only the claim on loss of the vehicle.

37. Be that as it were, the loss of the vehicle seems to have been the main borne of contention. In that regard, as properly stated by the Arbitral Tribunal, it is not in dispute that, Applicant applied for a comprehensive insurance cover for the motor vehicle registration number; KBS 110Q, for the period of; 10th July 2013 to 9th July 2014 and the Respondent issued him with the same on; 31st July 2013 vide Policy No. 001/070/1/111098/2013/07.

38. It is also not in dispute that; the value of the motor vehicle is stated in the policy as per the insured's estimate value of; Kshs. 12,750,000. The occurrence of accident on 9th May 2014, when the policy was still valid and the motor vehicle subsequently declared a write of is not disputed.

39. I have considered the finding of the Arbitral Tribunal on the subject issue and I note that, the Arbitrator addresses it at paragraph 19; on pages 12 to 15 of the final award. He considered the various provisions in the policy that relates to; loss and damage to the insured subject matter, agreed value basis, definition of market value and the explanatory notes thereof, indemnity, and pre-accident value. He also considered the report prepared by, AA Valuers dated 4th July 2013, produced by the Applicant, two reports produced by the Respondent and an independent valuation which the parties agreed should be procured.

40. It is noteworthy that, the Arbitrator found the valuation report prepared by AA, as inadequate in content. He actually refers to it as a "one-page valuation" and disregarded it. He stated that, the Applicant should have provided further information in support of the value of the motor vehicle before insurance thereof. That, he should have provided evidence of; purchase price, import documents, invoices, and payment of taxes. The Arbitrator states that; "no such documents were produced to strengthen the value stated on the insurance policy document and justify the claimant's case to the Tribunal." He then disallowed the AA valuation report.

41. Be that as it were, the Honourable Arbitrator considered the other three (3) reports produced in support the pre-accident value of the motor vehicle. He addresses these reports at pages 14 to 15 of the final award and rejects finding by the Internal Loss Assessor, due to lack of a supporting report. He then evaluated the independent report prepared by; Universal Independent Assessor and Valuers and concluded that, the figure given of; Kshs. 3,645,00, was too low compared to the figure given by; Instep Loss Assessor commissioned by the Respondent, of; Kshs. 6,250,000, which the Respondent accepted and paid a sum of; Kshs. 6,215,625, thereof. He then upholds and relies on the valuation report prepared by Instep Loss Assessor.

42. The Arbitrator further considered the provisions relating to; "agreed value basis" as stated under clause 7 of the policy and arrived at the conclusion that, the motor vehicle was seven (7) years old and therefore falls within that policy condition. However, he held that the "policy condition could be sustained despite the valuation done by AA valuers" but did not expound on this finding and how he arrived at that conclusion is not clear, unless it was on the basis that, the report by AA Valuers was unreliable.

43. The Arbitrator also stated that, the "Motor Policy" unless "issued on agreed value, is based and settled if any, on indemnity basis and market value". He then concluded that, the motor vehicle policy was not issued on the agreed value. In final conclusion, the Honourable Arbitrator states at paragraph 19 (j) and (k) as follows: -

> "(j)*The Motor Policy (Section 1) allows the Respondent the choice of paying cash, repair, or replace the vehicle. The Respondent chose to settle the same by paying the claim as Total Loss. The Claimant should be satisfied with the payment received going by the option the Respondent had, including the different and lower valuation received from the Independent valuation,*
>
> *(k) With the above, I do NOT find the Claimant's case of demanding additional payment justifiable. While the Policy Conditions do not obligate the Respondent to refund the Premiums based on the Pre-Accident Value, I find the same unfair to collect the Premiums without recourse for the Claimant, especially when the Claim is not paid or payable against the Premiums collected."*

44. However, before I consider the finding of the Arbitrator, in the light of the submission of the parties and terms and conditions in the contractual documents executed by the parties, it suffices to note that a lot of water has gone down under the bridge. In fact, the rain started beating the parties when they completely disregarded the dispute resolution mechanisms provided for, in the agreement, being arbitration and ended up in court litigation. In my opinion, had the entire claim been subjected to arbitral process, it would have been decided wholly and probably justly. However, the horse has long bolted.

45. Be that as it were, it is not in dispute that, the value therein of; Kshs 12, 750, 000, formed the basis of payment of the premiums of, Kshs; 528, 984. The Arbitrator states at page 6 item (b) of the final award that, it is not in dispute that "the sum insured was Kshs 12, 750,000." However, he observes at page 14 of the final award that, the parties disagreed as to who initiated or appointed for the valuations to be done by the valuer and "that there was no evidence produced on the same by either party" and reiterate that, the Applicant should have availed more supportive evidence in support of the value of the vehicle before cover.

46. I do concur with the finding of the Arbitrator on need for provision of more information, especially when the Respondent had declined to compensate him on the basis of the agreed value. However, in view of the fact that, the Respondent too relied on the AA valuation to calculate premiums, the Respondent cannot fully run away from it. The Arbitrator should have considered the same and not just dismiss the AA valuation report.

47. Indeed, it is on the basis of that finding, that the Arbitrator held that, the clause on "agreed value basis" was not applicable. However, I note that, the schedule to the policy contains inter alia; clauses/endorsement that attach and form part of the policy and includes therein is; clause 7 on the agreed value basis (applicable to motor vehicle not more than eight years old from the date of manufacture). It is therefore not correct, for the Arbitrator to expressly find, as he did, that the "motor policy was not issued on the agreed value basis".

48. However, the Arbitrator states that, where the motor policy is not subject to agreed value then, indemnity basis and market value applies. Assuming then, the Arbitrator arrived at the correct finding that, the parties agreed on the value. What then would be the indemnity basis and/or the market value. I note that the Arbitrator discussed these concepts at page 13 of the final award, but did not clearly deal with them in the final findings in the matter.

49. The term indemnity as defined in the insurance policy herein means; means restoring the insured to the financial position he was in immediately before the accident. Market value, entails; the cost of replacing the vehicle with one of the similar type and condition. Thus, basically it calls for establishing the value of the motor vehicle before the accident.

50. From the evidence adduced herein it appears that, the value of the motor vehicle would be based on either; the agreed value and/or the insured value, the market value or the pre-accident value. Apparently, pre accident value, under the policy means, "the market value of the motor vehicle, immediately before the accident".

51. It is not in dispute that, the Respondent relied on the pre- accident value. The expert reports produced herein were to establish that value. The Arbitrator analysed all of the reports properly. I entirely agree with his findings on the reports by; Internal Assessor, and Universal Independent Assessors, & valuers. However, one issue should not elude the parties that, by "Order for direction No.6 dated 16th October, 2017", the Tribunal was authorised to obtain an independent valuation report.

52. What was the purpose of that report? The purpose was to assist the Tribunal resolve the issues as to; whether the insured sum or the market value as stated in the Respondent's Assessment Report would be used as a basis of evaluating the Applicant's claim. The Arbitrator opted for the later having held the AA valuation report wanting.

53. The question is whether the Arbitrator's decision in conflict with public policy. The parties have referred the court to several decisions on the same and correctly so. However, it is noteworthy that, the concept of public policy has not been specifically defined and has often been left open to judicial interpretation. It has been suggested that, an award should only be set aside on the public policy ground if it is contrary to "truly transnational" public policy (see Societe Impex v Societe PAZ, Judgment of 18 May 1971, Cour de Cassation, [1972] DS Jur 37).

54. The concept of public policy is de?ned by Sir Anthony Mason NPJ in; *Hebei Import & Export Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 at 130F; [1999] 1 HKLRD 665; [1999] 2 HKC 205*, as being "contrary to the fundamental conceptions of morality and justice of the forum". It has been held that; public policy considerations "should be approached with extreme caution" as held in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co [1987] 2 All ER 769 at 779; [1990] 1 AC 295 at 316 (Donaldson MR, with Woolf and Russell LJJ agreeing)*

55. It has been said that, "it is never argued at all but when other points fail" and described as "a very unruly horse and when once you get astride it, you never know where it will carry you" *(see Richardson v Mellish (1824) 2 Bing 229 at 252; 130 ER 294 at 303).*

56. Further, the Model Law, the NYC, does not prescribe a universal standard of public policy. However a breach of natural justice has been internationally accepted as a violation of generic "procedural public policy". It is suggested that "most national courts have adopted the narrower standard of International public policy, applying substantive norms from international sources" (Pieter Sanders (ed) ICCA Guide to the interpretation of the 1958 New York Convention ICCA, Schiedam 2011 p 107)

57. It follows from the above that, generally, public policy as a ground of setting aside a final arbitral award will be the last resort and/or additional ground.

58. To revert back to the subject matter, it suffices at this point to reproduce the grounds upon which an award may be set aside as stated under section 35(2) of the Act, noting that, the Applicant relied on the ground of public policy purely.

59. The Provision of that section states that: -

> "*(2) An arbitral award may be set aside by the High Court only if—*
>
> *(a) the party making the application furnishes proof—*
>
> *(i) that a party to the arbitration agreement was under some incapacity; or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or*
>
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or*
>
> *(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;*
>
> *(b) the High Court finds that—*
>
> *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or*
>
> *(ii) the award is in conflict with the public policy of Kenya.*

60. I have considered the evidence adduced and with utmost due respect, the evidence herein does not support the ground that the "award is in conflict with public policy". The Applicant supported this ground by arguing that, the Respondent breached his rights as a consumer and/or that the policy was influenced by misrepresentation made by the Respondent which rendered the contract voidable. However, once those arguments were dismissed the Applicant lost ground.

61. Even then, the Applicant's main issue is that, the Arbitrator failed to consider the insured value of the vehicle, due to the disregard of the valuation by AA. If that is the case, then the award being in conflict public policy does not lie.

62. Finally, I find that despite the application herein being a simple application of setting aside the award and/or recognition or enforcement, the respective parties have included other prayers that cannot be granted in this matter. The Applicant, for instant includes the prayer seeking that the court do issue an order that; the Respondent be compelled to pay the Applicant an additional sum of Kshs 6,539,373 plus interest from 10th May 2014, until 2014 settlement in full cannot be granted. The court has no jurisdiction to hear a matter that is subject of Arbitration unless it is brought subject provisions of Arbitration Act that allows the court to intervene in the matter.

63. Similarly, the court cannot appoint for the parties an Arbitrator or direct the same, the parties are bound by the terms of; clause 9 of Motor policy. In the same vein, the court cannot order the Applicant to release the log book to the motor vehicle to the Respondent. In that regard, those respective prayers are not granted.

64. The last question is whether the court should grant the other orders sought. My findings are that, none of the parties herein have approached the court with clean hands. I say so because of the following;

> *a) The Applicant has already received the payment made in the sum of; Kshs 6, 215,625, but has refused to execute the discharge voucher in relation to the same and/or release the log book to the Respondent; and*
>
> *b) The Respondent on the other hand, has relied on a policy where it was paid a total sum of; Kshs 528,984, as premiums based on the insured sum of; Kshs 12, 750,000 and while retaining the premium and paid the Applicant just 50% of that alleged insured sum.*

65. It is clear that the dispute between the parties is long way to be resolution. In that, I order that, this dispute be remitted to a single Mediator to be agreed on by the parties and if the parties fail to agree on a Mediator, then, under the powers given to the court under Article 159 (2) of the Constitution to promote Alternative Dispute Resolution (ADR), a Mediator be appointed by the Court in which case, the Hon Deputy Registrar shall facilitate the same.

66. Once appointed, the Mediation shall take place within thirty (30) days thereafter. However, the Mediator shall only consider the issue of the basis of assessing the total loss of the vehicle and/or the release of the log book. The other claims dismissed by the Arbitrator are upheld. In view of the orders made, I make no orders as to costs in this matter.

67. It is so ordered

Dated, delivered and signed on this 28th day of May 2020

GRACE L. NZIOKA

JUDGE

In the presence of:

No appearance of parties

Robert ----------Court Assistant

Delivered via virtual communication