



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 165 OF 2018

EVERETT AVIATION (CHARTER) LIMITED.....APPLICANT

-VERSUS-

JUBILEE INSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. Before me for determination is the application dated 20th March 2018 (originating Summons) wherein the applicant seeks orders for the appointment of an arbitrator to arbitrate in the dispute between the parties herein over the Special Group Accident Policy No. P/NRB/2527/2014/121391.

2. The application is supported by the affidavit of the applicant's Chief Financial Officer **Mr. Adrian Dearing** and is premised on the grounds that: -

1. That the respondent has failed to participate in the appointment of an arbitrator in terms of the Insurance Policy between the parties.

2. That the respondent herein is unwilling to participate in the arbitration process.

3. That there has been no response from the respondent in regards to approval, rejection or otherwise appoint an alternative arbitrator.

4. That the dispute between the parties cannot be resolved without an arbitrator in terms of the Insurance Policy.

5. That it is in the interest of justice that an arbitrator be appointed so that the dispute between the parties may be resolved.

3. The respondent opposed the application through the replying affidavit of its Legal Manager **M/S Dinah Musungu Ogulla** who avers that the period for appointment of the Arbitrator has lapsed in view of the fact that the respondent disclaimed liability on 9th March 2016 and restated its declinature on 13th March 2017 yet the applicant moved the court on 5th April 2018.

4. She states that Clause 12 of the Insurance Contract provided for a window period of 12 months from the date of disclaimer of liability within which to lodge any claim.

5. Parties canvassed the application by way of written submissions which I have considered.

6. The main issue for determination is whether this court should appoint an Arbitrator to determine the dispute between the parties herein. It was not disputed that the parties herein entered into a contract in which at Clause 12 thereof, they agreed on Arbitration as the choice of forum for dispute resolution.

7. The applicant's case is that a dispute arose between them and that its notices to the respondent to appoint an Arbitrator did not yield any positive response thereby leaving the applicant with no option but to approach the court for redress in appointing the Arbitrator pursuant to Order 46 Rule 5(2) of the Civil Procedure Rules(CPR) which stipulates as follows: -

“(2) If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the

arbitration, and in such case shall proceed with the suit.”

8. As I have already stated in this ruling, the respondents position was that the period within which an Arbitrator ought to have been appointed had long lapsed.

9. Clause 12 of the Insurance Contract between the parties stipulates as follows: -

“All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in differences or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed by each of the parties in writing or in case of disagreement of an Umpire appointed by the Arbitrators in writing before entering upon the Reference. The costs of the Reference and of the award shall be in the discretion of the Arbitrator, arbitrators or Umpire making the Award whose Award shall be a condition precedent to any liability of the company or any right of action against the company in respect of any claim. If the company, shall disclaim liability to the Principal for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to Arbitration under the provisions herein contained then the claim shall for the purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.” [Emphasis mine]

10. From the provisions of the above cited clause, it is crystal clear that the parties herein agreed on the time limit for Arbitration. The applicant was therefore, under their contract, required to lodge its claim before the Arbitrator within twelve calendar months from the date that the respondent disclaimed liability.

11. In present case, the applicant concedes that the respondent repudiated liability under the Insurance Contract through a letter dated 3rd March 2017 and has persisted in such repudiation to date. On its part, the respondent stated that it first repudiated liability on 9th March 2016.

12. My finding is that the moment the respondent denied liability the 12 calendar months’ period within which the Arbitrator ought to have been appointed in accordance with the terms of the contract kicked in, in which case, the Arbitrator ought to have been appointed as at 10th March 2017. I note that the applicant has attributed the failure and/or delay in appointing the Arbitrator to the failure by the respondent to respond to the request to appoint the Arbitrator, approve, or otherwise reject such an appointment.

13. My finding is that applicant was not completely helpless on the issue of the appointment of the Arbitrator as Order 46 Rule 5(1) of the Civil Procedure Rule and Section 12(3) (4) of the Arbitration Act provides for the action to be taken by an aggrieved party in the event of failure to agree on an Arbitrator.

14. The said Section stipulates as follows: -

“[Order 46, rule 5.] Power to appoint arbitrator.

5. (1) In any of the following cases, namely —

(a) where the parties cannot agree within thirty days with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator; or

(b) where the arbitrator or umpire—

(i) dies; or

(ii) refuses or neglects to act or becomes incapable of acting; or

(iii) leaves Kenya in circumstances showing that he will probably not return at an early date; or (c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any party may serve the other or the arbitrators as the case may be with a written notice to appoint an arbitrator or umpire.

Section 12 (3) and (4) of the Arbitration Act

(3) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party (“the party in default”) —

(a) has indicated that he is unwilling to do so;

(b) fails to do so within the time allowed under the arbitration agreement; or

(c) fails to do so within fourteen days (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party), the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(4) If the party in default does not, within fourteen days after notice under subsection (3) has been given —

(a) make the required appointment; and

(b) notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.”

15. In the present case, the applicant did not demonstrate that it invoked any of the above cited provisions on breaking the stalemate over the appointment of the Arbitrator. The applicant has further not explained why it did not heed the timelines provided in their Insurance Agreement and the above sections so as to justify its reference of the issue of the Appointment of an Arbitrator to this court.

16. My further finding is that the court cannot rewrite the Agreement between the parties and that parties are bound by the terms of their contract. (see ***National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999***). I find that having agreed to limit the period of appointing an Arbitrator to twelve months, this court would be rewriting the contract by purporting to appoint an arbitrator after the period stipulated in the Agreement.

17. Going by the terms of Clause 12 of the subject Insurance Agreement, I find that if the court was to intervene in the appointment of the Arbitrator, such intervention should fall inside the 12 calendar months' period.

18. For the above reasons, I find that the application dated 20th March 2018 is not merited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered via Skype at Nairobi this 29th day of October 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Musya for Kabaika for applicant.

Mr. Nyaribo for the respondent.

Court Assistant: Silvia