REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 483 OF 2017

CIGNA INTERNATIONAL HEALTH SERVICES

(formerly Vanbreda International).....APPELLANT/APPLICANT

VERSUS

MANISH DHANSUKH VAGHELLA.....1ST RESPONDENT

GOLDSTAR HEALTHCARE LIMITED.....2ND RESPONDENT

R U L I N G

1. The appellant/applicant herein has brought the Notice of Motion dated 23rd October, 2017. The same is supported by the grounds set out on the body thereof and the facts deponed to in the affidavit of *James Muthui*. The substantive order being sought in the aforesaid Motion is a stay of part of the order made by the Honourable E. Nyaloti (Mrs.) (Chief Magistrate) on 31st August, 2017 in CMCC NO. 7357 OF 2016, referring the dispute to arbitration in Nairobi and any such pending arbitral proceedings in Nairobi pending the hearing and determination of the appeal. The applicant is also seeking costs of the said Motion.

2. *James Muthui*, advocate for the applicant, depones that the applicant had previously filed an application dated 17th November, 2016 seeking a stay of the suit and proceedings in CMCC NO. 7357 OF 2016 filed by the 1st respondent and an order to the effect that the dispute between the parties be referred to arbitration in accordance with clause 13.1.2 of the Insurance Policy agreement entered into between the said parties.

3. The deponent asserts that vide its ruling delivered on 31st August, 2017, the trial court granted the order for stay but directed the parties to subject themselves to the arbitration process in Nairobi, despite the express terms of the Insurance Policy citing Paris, France, as the appropriate forum for arbitration in the event of a dispute.

4. It is further asserted by the deponent that the applicant has since filed an appeal against part of the said ruling with the High Court and that unless the order sought is granted, the 1st respondent will commence arbitration proceedings against it, thus rendering the appeal irrelevant and nugatory.

5. The Motion is opposed. In his replying affidavit sworn on 15th November, 2017, the 1st respondent asserts that the Arbitration Act makes provision for the seat of arbitration to be in Nairobi and thus, the application is frivolous, vexatious and aimed at frustrating him.

6. The 1st respondent adds that his health has deteriorated and that if the arbitral proceedings are to be held in Paris, he will not be in a position to afford the arbitration costs and that as a result, he will be denied his constitutional right to a fair hearing.

7. The Motion was disposed of through oral arguments though the record indicates that only the applicant's advocate was present in court at the time. *Mr. Muthui* counsel for the applicant essentially restated the averments in the Motion and supporting affidavit, carefully adding that the question of jurisdiction of the arbitration proceedings is a substantive issue that can only be properly determined on appeal and that if the order for stay sought is not granted, the parties will only spend more time and money, thus rendering the appeal nugatory.

8. I have carefully considered the Motion as is; the facts deponed to in the affidavit in support thereof; the reply in opposition and the oral arguments by counsel for the applicant. I have also taken into account the authority cited by counsel in his oral arguments; however, I find the same to be irrelevant in this instance on the basis that whereas it relates to an arbitration clause in an agreement, the issue arising therefrom touches majorly on the conferment of jurisdiction to a foreign country pursuant to an arbitration clause; which differs from what is currently before this court for determination.

9. By and large, the issue here purely revolves around whether to grant a stay of the order of 31st August, 2017 directing that the arbitral

proceedings be conducted in Nairobi, as well as a stay of any such arbitral proceedings.

10. I have perused the file and established that the applicant filed an appeal against the aforesaid order vide a memorandum of appeal dated 12th September, 2017. I have also perused the Policy document (hereinafter referred to as *"the agreement"*) entered into between the parties and noted that the execution page appears to be missing from the copy availed to this court. Suffice it to say that none of the parties has disputed the existence of either the agreement or the arbitration clause.

11. In that case, clause 13.1.2 of the said agreement stipulates in a nutshell that any dispute that cannot be amicably settled shall be settled in Paris, France pursuant to its relevant rules of arbitration.

12. Needless to say the issue of the appropriate seat of arbitration can only be determined on appeal and this court is not sitting on appeal at this instance.

13. As earlier stated, there exists an arbitration clause to the effect that the seat of arbitration as agreed between the parties is Paris, France. In view of this, the 'how' and 'why' behind the learned trial magistrate's finding that the arbitration proceedings do proceed in Nairobi despite the agreement stating otherwise remains unclear; there is nothing to indicate any amendments to the arbitration clause whether verbally or in writing. In the premises, it is my considered view that the jurisdictional issue would require further investigation and determination on appeal, which goes to show that the applicant has a *prima facie* arguable appeal with a likelihood of success.

14. There also arises the issue of whether the appeal will be rendered nugatory if the arbitration proceedings are allowed to proceed as ordered by the trial court. The applicant has taken the position that going by the agreement, the arbitral tribunal in Nairobi lacks jurisdiction to entertain and determine the dispute between the parties, hence if the same proceeds in Nairobi, the appeal will be rendered nugatory. In opposition, the 1st respondent argues that the Arbitration Act provides that the seat of arbitration should be in Nairobi.

15. Having considered the respective positions, I deem it necessary to state that I am not privy to any information regarding whether or not the arbitration proceedings involving the parties have commenced. That notwithstanding, it is evident that there is a jurisdictional issue at play here, which means that if at all the arbitration proceedings are initiated or continued on while the issue of jurisdiction is yet to be determined on appeal, the outcome of the appeal will be rendered a futile endeavor.

16. Might I add that it is this court's duty to ensure a meaningful determination of cases; to do anything short of this would impede the interest of justice and reduce public confidence in the justice system. In so saying, I associate myself with the reasoning of the court in ***Attorney General v Chief Magistrate (supra***) in that:

> ***"Where the Court has found that there are issues in the suit which deserve further investigations, the Court is enjoined to preserve the substratum of the suit so that at the conclusion of the case, its decision will not be merely an academic exercise. The Court therefore has a duty to ensure that its proceedings are geared towards the achievement of a meaningful determination otherwise litigants who come to Court to seek redress therefrom will lose faith in the judicial system if the Courts cannot, during the pendency of the dispute preserve the subject of litigation."***

17. Closely tied to the above is the subject of expeditious disposal of cases which goes hand in hand with the proper use of judicial time. In that regard, this court is required to balance the interests of the parties on a reasonable scale against the speedy determination of the dispute. On the one hand, the respondent has urged this court to consider his deteriorating health by not hindering the progress and expeditious determination of the dispute while on the other hand, it is the applicant's contention that to deny a stay of the proceedings would force the parties to incur additional expenses and time.

18. With regards to the subject of the 1st respondent's health, my reasoned opinion is that no evidence has been availed to support the claim on deterioration of his health. Either way, it is also my opinion that in the event that the appeal is successful and the parties have simultaneously proceeded with the arbitration proceedings in Nairobi, it follows that the parties will have incurred unnecessary expenses and possibly wasted their time and that of the court, thereby hampering the expeditious disposal of the dispute.

19. It would thus only be practical to have the appeal heard and determined first since only then can the issue of jurisdiction be put to rest and the parties be better placed to appropriately begin or carry on with the arbitration proceedings.

20. The upshot is that I find merit in the application and allow the same. Consequently, I hereby order that there be a stay of both the order directing the parties to proceed with the arbitration proceedings in Nairobi and/or any such pending arbitration proceedings. Costs of the Motion shall abide the outcome of the appeal.

Dated, signed and delivered at **NAIROBI** this **20TH** day of **JUNE**, 2019

.....

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant/Applicant

……. for the 1st Respondent

……. for the 2nd Respondent