



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S MAJANJA J.

CIVIL SUIT NO. 201 OF 2009

BETWEEN

JEREMIAH ONGERI SAMBA.....1ST PLAINTIFF

BENSON MUSA MOGAKA t/a

MERVE COMMERCIAL INSURANCE AGENCIES.....2ND PLAINTIFF

VERSUS

KENINDIA INSURANCE CO. LTD.....DEFENDANT

RULING

1. This is an old matter that was commenced in 2009 and has not seen the light of day given the various interlocutory proceedings that took place until I set aside the ex parte judgment on 11th October 2018. On 7th November 2018, I directed the parties to agree on terms of arbitration given the nature of the case. When the matter came up today for directions neither party had taken any step towards that end despite the duty of the parties and their advocates to assist the court in light of the overriding objective in **section IA** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**. As I directed on 7th November 2018, I would make default orders in that regard and I propose to do so.

2. The only issue pending determination in this case, as I understand, is the taking of accounts on the plaintiffs' claim for the sum of Kshs. 7,504,629/00 on account of unpaid commissions. In fact, in the course of the proceedings the parties did record a consent order dated 25th February 2010 as follows:

“Accounts be taken on commission earned by the plaintiff upto 31/12/2007 together with particulars of any payment made by the defendant to the plaintiff in settlement of the commissions earned to date.”

3. I would also add that in the course of the proceedings, the defendant paid the plaintiff Kshs. 3 million on account leaving a balance of Kshs. 4,508,629/-. The respondent has not raised any counterclaim or set off in its defence and any issues legal or otherwise can be settled in the course of taking accounts. I am therefore satisfied that taking of accounts is a matter that can be expeditiously resolved by reference to a suitably qualified arbitrator.

4. I am also satisfied that I possess the necessary jurisdiction to make such an order as it is this court's constitutional imperative under **Article 159(2)(c)** of the Constitution to promote all forms of Alternative Dispute Resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

5. In civil proceedings, this imperative is underpinned by **section 59C** of the **Civil Procedure Act** which provides as follows:

59C(1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.

(3) Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.

(4) No appeal shall lie in respect of any judgment entered under this section. [Emphasis mine]

6. There is also **Order 46 rule 20** of the **Civil Procedure Rules** which states as follows:

20. (1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.

(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.

(3) Where a court mandated mediation adopted pursuant to this rule fails, the court shall forthwith set the matter down for hearing and determination in accordance with the Rules.[Emphasis mine].

7. All the provisions I have cited empower the court to act *suo moto* in an appropriate case. I have shown this is case that would benefit from arbitration as an expeditious mode of dispute resolution as it has been on our rolls for almost 10 years and the subject matter is appropriate for such course.

8. I therefore order as follows:

1. The parties shall agree on a suitably qualified arbitrator within **twenty one (21) days** from the date hereof.
2. In default, the Chairman of the Chartered Institute of Arbitrators, Kenya, shall appoint a suitably qualified arbitrator to resolve the dispute.
3. The dispute shall be determined within **ninety (90) days** of such appointment and the award shall be filed in court.
4. Both parties shall share the costs of arbitration equally.

DATED and DELIVERED at KISII this 28th day of November 2018.

D.S MAJANJA

JUDGE

Miss Gogi instructed by Samba and Company Advocates for the Plaintiff.

Mr. Wesonga instructed by Mose, Mose and Milimo and Company Advocates for the defendant.