



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 50 OF 2015 O.S.
IN THE MATTER OF: MOTOR VEHICLE INSURANCE ACT CAP 405
LAWS OF KENYA AND ANY OTHER PROVISIONS OF THE LAW
IN THE MATTER OF: DELIVERY OF THE RESPONDENT OF CASH
FOR COMPENSATION OF INSURANCE POLICY
BETWEEN
RAYMOND MUINDI SIMON.....APPLICANT
VERSUS
TAKAFUL INSURANCE OF AFRICA LTD.....RESPONDENT

RULING

1. On 26th May, 2015 the defendant/applicant filed a Notice of Preliminary Objection dated 21st May, 2015 on the grounds that:-

- i. The claim filed is bad in law and amounts to an abuse of the court process;
- ii. The claimant's claim is a non-starter and does not lie as the matters herein are the subject matter of the Arbitration Act and/or the arbitration clause at par 9 (sic) of the policy document;
- iii. That the applicant has contravened key provisions under the existing policy document;
- iv. That the applicant having disregarded the laid down dispute resolution mechanism has no cause of action against the respondent;
- v. That by dint of the Arbitration clause 9, of the said policy document and by dint of the Arbitration Act, the Honorable Court has no jurisdiction to hear the matter; and
- vi. Reasons whereof the defendant prays that the claim be struck out and/or dismissed with costs.

2. The suit giving rise to the above application is the Originating Summons filed by the plaintiff/respondent on 9th April, 2015 under the provisions of Order 52 rules 4(1) (2) and Order 36 rule

12 of the Civil Procedure Rules. The Originating Summons seeks the following orders:-

- i. That the defendant/respondent as the insurer of the plaintiff's motor vehicle KBY 700D which was declared written off deliver the compensation cash to the applicant herein;
- ii. That the defendant/respondent to deliver to the applicant the monies the applicant has paid for the hire of a car since 4th September, 2014 to date;
- iii. That the Honourable court does order the respondent to comply with the above within 14 days from the date of issuing this order in default of which judgment be entered in favour of the applicant as against the defendant; and
- iv. That the costs of the application be borne by the defendant/respondent.

3. The applicant herein was required to enter appearance to the summons within 8 days of service of the same. The applicant entered appearance on 4th June, 2015 and filed a replying affidavit on the same date. Prior to so doing, it filed a Notice of preliminary objection on 26th May, 2015.

4. The applicant's Learned Counsel, Ms. Akee, submitted that the preliminary objection was a non-starter as although the policy document in issue at clause 9 made provision to refer disputes to arbitration, and if arbitration did not work, the parties could come to court; the respondent moved to court instead of proceeding for arbitration. Counsel further submitted that since the other avenue was not exhausted the High Court has no jurisdiction to determine this suit. She relied on the cases of **Mukisa Biscuit Manufacturing Company Ltd. vs West End Distributors Ltd.** [1969] EA 696. She submitted that this court has no jurisdiction to hear the Originating Summons.

5. Mr. Muganda, Learned Counsel for the respondent submitted that this court has jurisdiction to hear their claim as Section 5 of the Civil Procedure Act empowers all courts to hear cases unless they are expressly or impliedly barred. He cited the case of **Joseph Mwangi Gitundu vs Gateway Insurance Co. Ltd.** [2015] eKLR where the court was of the view that the effect of arbitration clauses in contracts is not to bar parties from accessing courts of law. It simply allows parties to apply for stay of the suit and refer the dispute to arbitration. Counsel further submitted that clause 9 of the policy document does not bar the plaintiff from accessing a court of law and if such a clause exists, it would be repugnant to justice. He added that the relationship between the parties hereto was contractual.

6. In further reference to the case of **Joseph Mwangi Gitundu** (supra) Counsel submitted that the court held that a policy holder pays premiums to be compensated in the event of an accident and not to enrich himself. It is a statutory obligation and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the defendant.

7. Counsel also cited the case of **UAP Provincial Insurance Company Ltd. vs Michael John Beckett** Nairobi Civil Appeal No. 26 of 2007 (unreported) where the Court of Appeal cited with approval the case of **Ellis Mechanical Services Ltd. vs Wates Construction Ltd.** [1978] 1 Lloyd's Rep 33, where Lord Denning M.R. stated that where there is a general arbitration clause, any dispute or difference arising on the matter is to go for arbitration. Mr. Muganda contended that the applicant is aware of the sum in issue and the dispute is on whether the matter should go for arbitration or not.

8. He cited the case of **Kisumuwalla Oil Industries Ltd. Vs Pan Asiatic Commodities PTE & Another** (2) EALR [1995- 1998] where the court held that the appellant's application to strike out the plaint and dismiss the suit was a step in the proceedings and the appellant had forfeited its right to rely on the arbitration clause. The court further stated that the effect of arbitration clauses in contracts is not to preclude parties from accessing courts of law. It simply allows parties to apply for stay of the suit and refer the suit to arbitration and found that the suit was competent.

9. Counsel argued that the applicant should have applied for stay of the proceedings herein so as to have the case arbitrated upon. He informed the court that the applicant participated in this matter by filing a

replying affidavit instead of filing an application for stay of proceedings. He wound up his submissions by stating that the preliminary objection is defective and should be struck out.

10. In response to the foregoing, Ms. Akee submitted that the respondent made no effort to move towards the appointment of an Arbitrator. She referred to the applicant's deposition in the replying affidavit filed on 4th June, 2016 and particularly to paragraph 13 where the deponent states that the respondent failed to adhere to the procedure laid out in clause 9 of the policy document whereas he had committed to abide by the said document.

The issue for determination is if this court has jurisdiction to hear the Originating Summons.

11. Ms Akee cited the case of **Mukisa Biscuit Co. Ltd vs Westend distributors Ltd** (supra) which provides that a preliminary objection consists of a point of law which has been pleaded, or which arises from clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are ***an objection to the jurisdiction of the court***, or a plea of limitation, ***or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration*** (emphasis added). She also relied on the case of **the Presbyterian Foundation & Another vs East Africa Partnership Ltd & Another**, Nbo HCCC No. 314 of 2012 on the issue of what constitutes a preliminary objection. Counsel for the applicant also referred to an extract from **the Law of Insurance by R. Colinvaux, 5th Edn.** that states that strictest good faith is required in policies of assurance and that the insured has a duty to make full disclosure to the underwriter. The allegation against the respondent is that the respondent's claim had discrepancies on the date of the accident, use of the vehicle, the time of the accident and that the narratives of both the insured and the alleged driver did not tally. There was an additional issue of ownership of the subject motor vehicle. The foregoing issues, in my considered view, cannot be glossed over by a court of law without it hearing *viva voce* evidence to support the same. The issue of non-disclosure of material information is an issue of fact and considered on its own it cannot lead to upholding of the preliminary objection raised.

12. On the issue of jurisdiction of this court, clause 9 of the insurance policy document provides as outlined below:-

“if any dispute arises between you and us on any matter relating to this policy such dispute will be referred to either –

a. a single mediator to be agreed between you and us within thirty (30) days of the dispute arising and the mediation process to be finalized not later than thirty (30) days of the dispute arising thereafter; or

b. A single arbitrator agreed between us, to be appointed within 30 days of the dispute arising, if we cannot agree either party will refer the dispute to the chairman of the Chartered Institute of Arbitrators (Kenya Branch) whose decision will be binding to you and us. The arbitral award will be final. If the dispute is not referred to the arbitration process within (12) months we will assume you have abandoned the claim.”

13. Section 6 of the Arbitration Act provides as follows:-

“(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration.”

14. Section 6(1) of the Arbitration Act is clear as to the time of filing an application under the said section which is ***“not later than the time when that party enters appearance or files any pleadings, or takes any other step in the proceedings”***. In **Lofty vs Bedouin Enterprises Ltd [2005] 2 EA**, the Court of Appeal addressed the issue of section 6(1) of the Arbitration Act. The Court stated thus:-

***“We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. (emphasis from original ruling).*”**

15. In the case of the **Diocese of Marsabit Registered Trustees v Technotrade Pavilion Ltd** [2014] eKLR, Gikonyo J. stated thus:-

“I should add that, the requirement in section 6(1) of the Arbitration Act is not a mere technicality which can be diminished by Article 159(2) (d) of the Constitution as claimed by the Applicant. It is a substantial legal matter which aims at promoting and attaining efficacious resolution of disputes through arbitration by providing for stay of proceedings but only where a party desirous of taking advantage of an arbitration clause in a contract has applied promptly for stay of proceedings and made a request to have the matter referred to arbitration. Needless to state that arbitration falls in the alternative forms of dispute resolutions which under Article 159(2) (c) of the Constitution should be promoted by courts except in so far as they are not inconsistent with any written law. By these provisions of the Constitution and the fact that the process of arbitration is largely consensual, a party who fails to adhere to the law such as section 6(1) of the Arbitration Act forfeits his right to apply for and have the proceedings stayed or matter referred to arbitration. And for all purposes, such is an indolent party who should not be allowed to circumvent the desire and right of the other party from availing itself of the judicial process of the court.....” (emphasis from original ruling).

16. The respondent herein did not pursue the arbitration process but opted to file an Originating Summons. The applicant did not apply for stay of the proceedings pursuant to the filing of the Originating Summons filed on 9th April, 2015 to enable the parties to pursue arbitration. The applicant therefore subjected itself to the proceedings herein. As a result thereof, this Court finds that it has jurisdiction to hear the Originating Summons.

17. The Originating Summons filed on 9th April, 2015 gave the applicant herein 8 days within which to enter appearance. Counsel for the applicant entered appearance on 4th June, 2015 and filed a replying affidavit on the said date. Prior to that, on 26th May, 2015 Counsel for the applicant had filed a Notice of Preliminary Objection dated 21st May, 2015. It thus appears that the said Counsel put the cart before the horse. Having not entered appearance, the said Counsel had no legal authority to file the Notice of Preliminary Objection that he did on 26th May, 2015. I have considered if this is an error that is curable under the provisions of Article 159 (2) (d) of the Constitution of Kenya. In **Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others** [2013] eKLR the Court of Appeal stated thus:-

***“We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash that cures and mends all ills, misleads and defaults of litigation. A five Judge bench of this court expressed itself very succinctly but a few days ago on this precise point in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 as follows:*”**

“In our view it is a misconception to claim, in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9) procedure is also a handmaiden of just determination of cases.”

18. Having taken into consideration the chronology of the filing of the Notice of Preliminary Objection, a memorandum of appearance and the replying affidavit, the preliminary objection filed before the memorandum of appearance was filed is incompetent. The end result is that the Notice of Preliminary Objection is hereby dismissed. Costs are awarded to the plaintiff/respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of May, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the defendant/applicant

Mr. Muganda for the plaintiff /respondent

Mr. Oliver Musundi - Court Assistant