REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 2 OF 2016

JUBILEE HOLDINGS LIMITED ..... 1ST PLAINTIFF

JUBILEE INSURANCE COMPANY OF KENYA LIMITED ..... 2ND PLAINTIFF

VERSUS

BUPA INSURANCE SERVICES LIMITED ..... 1ST DEFENDANT

BUPA INSURANCE LIMITED ..... 2ND DEFENDANT

RULING

1. The Application herein is the Notice of Motion dated 8th February 2016. It is brought under Articles 159 (2) (c) of the Constitution of Kenya, Section 1A, 1B, 3A, 59B & 81 (2) (ff) of the Civil Procedure Act, Order 51 Rule 1 & 4 of the Civil Procedure Rules).

2. The Application seeks for Orders that:

- ***This matter be certified urgent and be heard ex parte in the first instance.***
- ***The suit herein be stayed and the dispute be referred to Mediation in accordance with the agreement of the parties as set out in the Distribution Agreement dated 5th December 2012.***

- ***The costs of this application be provided for.***

3. It is supported by the grounds on the face of it and the affidavit sworn by ATIK AHMED, and it is opposed based on the Replying Affidavit sworn by MARGARET KIPCHUMBA.

4. The applicant's case is that the Plaintiff's alleged cause of action herein arises from a claim for breach of the terms of the Distribution Agreement dated 5th December 2012 entered between the 1st Plaintiff and the 1st Defendant hereto. That under Clause 24 of the said Agreement the parties herein mutually agreed that in the event of a dispute or difference between the parties relating inter alia to their rights or duties arising out of the Agreement and which is not resolved by discussion, the dispute would be referred to mediation in the first instance. That the parties herein have failed to reach a mutual settlement of the dispute and consequently the matter should have been referred to mediation as per the terms of the said Agreement.

As the Plaintiffs herein accepted the terms of the Agreement this suit should be stayed and this matter be referred to mediation. In the premises the filing of the suit herein is improper and the dispute should be resolved as agreed.

5. The Dispute Resolution Clause is also drafted in terms that would render it a condition precedent to the filing of the present suit. The Plaintiffs were lawfully bound to invoke mediation prior to filing of the legal suit in court. The suit herein was therefore filed contrary to compliance with the mediation clause and in the circumstances this court has no jurisdiction to entertain, here or determine this matter in the first instance. The Defendants are willing to comply with the said clause for referral of the matter to mediation. It is only just and fair that the suit be stayed and the dispute be resolved in accordance with the terms agreed upon by the parties.

6. That the said Application is thus hopelessly misconceived, bad in law, without merit and ought consequently to be dismissed, with costs for reasons set out hereinafter.

7. The Respondents told the court that the dispute before the Court as presented in the Plaint has nothing to do with breach of the said Distribution Agreement, neither is the cause of action in this matter predicated upon the said Distribution Agreement. That indeed, the Distribution Agreement as amended by the Amendment Agreement dated 5th September 2013, was terminated by the Defendants on or about 8th September 2014 and there is no complaint raised by the Plaintiffs in connection therewith. There is nowhere in the pleadings that the Plaintiffs have asserted or alleged that their rights and/or interests in the Distribution Agreement as amended by the Amendment Agreement have been violated. To the contrary, the cause of action herein is predicated upon breach by the Defendants of an agreement that the Defendants would pay to the Plaintiffs a sum of GBP 60,000 per month from February 2014 until 1st July 2014 or until a Risk Share Agreement between the parties was finalized, whichever came first ("the agreement in issue"). That, the agreement in issue is separate and distinct from the Distribution Agreement as amended by the Amendment Agreement. In effect, the agreement in issue was a "stop-gap" agreed between the parties, pending the finalization of a Risk Share Agreement which was never finalized and the said agreement in issue is evidenced in minutes of meetings between the parties as well as correspondence and documents exchanged between the parties. As such the agreement in issue does not contain any provision to refer the dispute to mediation. It therefore follows that to refer the parties to mediation would be to impose non-existent terms upon the parties whereas it is settled law that it is not a function of the Court to re-write contracts for parties. That in any event, no prejudice would be suffered by the Defendants if the suit were to proceed, as they would every opportunity to adequately and sufficiently defend themselves. To the contrary, referral of the matter to non-binding mediation would only serve to waste valuable time, which would be contrary to the overriding objection of this Honourable Court's mantra as espoused under section 1A and 1B of the Civil Procedure Act.

8. The Applicant swore a further affidavit in response to the Replying Affidavit, and told the Court that the only agreements that were ever entered into between the parties are the Distribution Agreement dated 5th December 2012, and Amended Agreement dated 5th September 2015. No other agreement exists as alleged by the Plaintiffs, or at all. That, although the Plaintiff seek to distance themselves from the two agreements, by alleging that they do not make reference to them in their pleadings; yet they actually make reference to them in their pleadings and have annexed them thereto. That, the alleged "agreement" giving rise to the Plaintiffs' claim, and arising out of the various correspondences between the parties does not in any way amount to an enforceable agreement as envisaged by the law of contract. That, the correspondence between the parties does not in an way amount to an enforceable agreement as envisaged by the law of contract and the correspondence referred to merely represents negotiations between the parties, and do not amount to a contract, as the Defendants neither accepted the after made by the Plaintiffs with regard to payment and neither did they provide any consideration in order for such a contract to crystallise. There is no evidence that the minutes reflect a true record of the proceedings of the alleged meetings or were ever acted upon by either party. The Applicant submitted that a reference to two emails exchanged by the parties dated 18th March 2014 and 25th March 2014, supports the position that the correspondences were mere negotiation with a possibility of subsequent contract. They did not culminate into an enforceable contract. Thus, that only leaves the Distribution Agreement as reference

agreement which provides for mediation as the form of resolution of dispute between the parties unless there are allegations of fraud, misrepresentation and/or coercion are proved.

9. The parties agreed to dispose off the application through filing of submission. I have considered the same together with the authorities cited therein. In a nutshell, the Defendants/Applicants submitted that, the Plaint dated 7th January 2016 refers to the Agreement entered into by the parties dated 5th December 2012 and later amended by an Amendment Agreement dated 5th September 2013. However, the amendment did not affect clause 24 of the Agreement. Clause 24 of the Agreement provides that any dispute or difference shall in the first instance be referred to mediation before a suit or any proceedings are commenced in court. That clause 24 of the Agreement is a condition precedent to the filing of a suit. The Applicants further examined the contents of the Plaint where the pleadings make reference to the Agreement of Distribution as inter alia as matters relating **"reference to remuneration structure which the Plaintiff allege were unsatisfactory, the alleged fee payable to the Plaintiffs by the Defendants,** the relationship of the parties having come to and end on or about 8th September 2014 following the termination of the Agreements by the Defendants, the Notice of termination dated 9th June 2014".

10. The Applicants submitted that it is trite law that the Court is obligated to enforce the terms of a contract. They made reference to section 26 (4) of the High Court (Organization and Administration Act, 2015) where if an Alternative Dispute Resolution Mechanism, is a condition precedent to any proceedings before the Court **shall** by order stay the proceedings until the condition is fulfilled. They submitted thus, the court is bound by statute to refer the matter to mediation.

The Applicants further relied on the case of **Areva T. & D India Limited –vs- Priority Electrical Engineers and Another Civil Appeal No. 103 of 2011** which held that where no special or exceptional circumstances exist (as in this case), the court will not depart from or interfere with a contract that parties had freely and voluntarily agreed on. The Applicants distinguished the cases of **UAP Provincial Insurance Company Limited –vs- Michael John Beckitt 2013 eKLR** in that, the matter was dealing with the enforcement of the settlement Agreement sought under a summary Judgment Application and whether the matter to be heard was a Preliminary objection that had been raised. They stated that in the case of **Chevron Kenya Limited –vs- Tamoil Kenya Limited 2007 eKLR** dealt with a dispute concerning shares in a joint venture agreement terms irrelevant herein. The Plaintiffs submitted that in the plaint filed in court on 7th January 2016, the Plaintiff is seeking for a sum of GBP 300,000 which the Defendants have failed and/or refused to remit to the Plaintiff, despite an agreement between the parties to the said effect. That, the agreement to pay the said sum of money was not founded on the Distribution Agreement dated 5th December 2012, and that there is no where in the plaint that the Plaintiff pleads breach of the Distribution Agreement dated 5th December 2012. That to the contrary the agreement to pay was arrived at following meetings between the parties, in September 2013 and February 2014 and acted upon by way of correspondence and documents exchanged between the parties – including emails and a schedule of supply. Thus, the cause of action herein is not predicated on the said Distribution Agreement.

11. On the analysis of the law, the Plaintiff submitted that, although the Applicant seeks to have the matter referred to mediation pursuant to Article 159 (2) of the constitution of Kenya 2010 but that is on a complete misunderstanding of the Plaintiffs' claim that the relationship between the parties was governed by various agreements as set out in paragraph 3 and 4 of the Plaint, including a Memorandum of Understanding dated 5th December 2012, a Distribution Agreement dated 5th December 2012, a Non-Disclosure Agreement dated 13th July 2012, Trade Mark Licence dated 6th December 2012 and an Amended Agreement dated 5th September 2013. Hence, there is no basis for the Defendants' to invoke breach of the Distribution Agreement, and not any other agreements, especially when the Plaintiff does not plead breach the same.

12. The Respondent submitted that for the Court to order the suit be referred to Mediation, the Court must first establish that the Distribution Agreement dated 5th December 2012, is the one in disputed, and second, that the present dispute falls within the scope of that dispute resolution mechanism of that

Agreement. That, the failure to pay GBP 60,000 per months by the Applicant lead to the breach of the agreement and that gave rise to the cause of action, and is evidenced in writing i.e in the minutes correspondence, and documents exchanged between the parties. The Respondent relied on the cases of **Chevron (K) Ltd –vs- Tarmoil Kenya Ltd 2007 eKLR**, where the Court found that although there was an Arbitration Agreement between the parties, the dispute was not within the scope of the matters agreed by the parties to be referred to arbitration. They also relied on the case of **UAP Provincial Insurance Company Limited –vs- Michael John Beckitt 2013 eKLR** which held, that if the Court comes to the conclusion that a dispute is not within the scope of the Arbitration Agreement, then the correct forum for resolution of the dispute is the court. The Respondents argued that, an aggrieved party is entitled to bring forth a case as it conceives it. It is for the trial Court to decide whether or not a case has been proved to the required standards and it is certainly not open to an opposing party without even having filed its pleadings to dictate what the aggrieved party's case should be.

13. I have considered the prayers sought for in the Notice of Motion herein, the grounds, Affidavit in support, and the further Affidavit sworn by ATIK AHMED. I have also considered the Replying Affidavit sworn by **Margaret Kipchumba**. I have also considered the written submissions filed by the parties and the authorities cited therein.

14. In my considered opinion the following issues arise for determination; namely whether:-

1. ***The pleadings in the plaint are premised on the Distribution Agreement dated 5th December 2012 or***

2. ***The Distribution Agreement that is in dispute***
3. ***The present dispute falls within the scope of the dispute resolution mechanism of the said Distribution Agreement.***
4. ***On inter alia the other "various agreements" as set out in paragraph 3 and 4 of the plaint.***
5. ***The said documents and/or correspondence between the parties amounts to a binding contract.***
6. ***The court is obligated to enforce the terms of a contract.***

15. I shall first make a reference to Article 159 (2) (c) of the constitution which I reproduce herein as follows:-

> S. 159 (2) (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).
>
> I shall also make a reference the High Court (Organization and Administration Act) No. 27 of 2015, section 26, which again I shall reproduce herein as follows:- S. 26
>
> > ***1. In civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute.***
> >
> > ***2. The Court shall, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.***
> >
> > ***3. Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.***
> >
> > ***4. Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled.***

It's clear from the foregoing provisions that parties are encouraged to settle their matters through Alternative Dispute Resolution, which includes but not limited to Mediation. The Alternative Dispute Resolution mechanism is indeed a complementary and/or supplementary dispute resolution mechanism that aims at expeditiously and at relatively low costs and in an informal manner of disposal of disputes. However, the same must be applied within its Rules, Procedures and relevant Statutory Provisions.

16. Having borne that in mind, I now turn to the issues identified for determination. The main issue is; the Provision of the Distribution Agreement, in particular clause 24 that deals with referral of a dispute between the parties to mediation. I have gone through the Distribution Agreement dated 5th December 2012, executed by the parties herein and Clause 24, thereof that deals with referral of a dispute between the parties to mediation.

A reading of the same reveals the following:

- ***The dispute anticipated to be governed by the clause, must be a dispute relating to the said Agreement of 5th December 2012.***
- ***The parties must have failed to resolve the dispute by discussion then it can be referred to non-binding mediation.***
- ***Agreement between the parties that mediation must come before legal proceedings (except where a court order may be necessary to immediate by preserve rights or assets***.

17. This are the relevant provisions in so far as this matter is concerned. The question then is: **Does the Dispute herein relate to the said Agreement?** The entire matter seems to rest on that question. I therefore turn to the pleadings in particular, the claim in the plaint. The basic relationship between the parties relate to insurance business activities which Plaintiffs was to conduct in Kenya on behalf of the Defendants the business involved inter alia distribution, sale, marketing administration and management of International Insurance Policies and Travel products in Kenya and other territories that were to be agreed on by the parties. In a nutshell the claim is for a sum of £300,000 allegedly payable to the Plaintiffs by the Defendants, and allegedly admitted, vide an email dated 14th February 2014 forwarding a schedule of supply from the Defendants to the Plaintiff.

18. I however, find that the key words under clause 24 of the Distribution Agreement is that, the dispute referred to there under must relate to that Agreement. A reading of the correspondences between the parties, led me to a letter dated **11th August 2014, written by MALCOMS CAIMS, Head of Marketing Development, Bupa Global Business Unit. The letter is addressed to Patrick Tumbo Chief Executive Officer.** The Jubilee Insurance Company Kenya Ltd. Jubilee Insurance House, Wabera Street P.O. Box 30376 – 00100 NAIROBI. The letter states under paragraph

> ***"Your letter refers to an umbrella fee. There is no provision in either the Distribution Agreement or in the Trade Mark Licence for the payment of such fee. Whilst a contract for services was discussed by the parties, this was to explore the possibility of Bupa contributing to certain expenses incurred by Jubilee (for services falling outside of its usual operating practice) in the implementation of risk share and local servicing."***

From these content, I am inclined to think that, the Defendant's herein are clearly stating that this amount claimed falls outside the main provision of the Distribution Agreement dated 5th December 2012 and therefore cannot form the basis of referral to mediation under clause 24. In fact the Defendant allege that there was no agreement entered into in relation to the same. They state:-

> ***"while a draft contract on this basis was issued to Jubilee in February of this year, terms were not finalised and no contract was entered into".***

It goes on to state;

> ***Notwithstanding the fact that no agreement was entered into, and there is no contractual***

> ***obligation on Bupa in this respect, Bupa may be willing to consider a contribution towards expenses actually and properly incurred and evidenced by jubilee.***

This position by the Defendants seems to have resanated with the Plaintiffs who responded vide their reply letter dated 12th August 2014 at page 2, under the heading **Definition, agreement on and settlement of any monies owing between Jubilee and BG**, as follows:

> ***"In respect to what your purport to be an umbrella fee, this is the subject of separate correspondence, and is not a matter relating to the Termination of Trade Marks and Distribution Agreement. We responded to you separately on this point by way of letter dated 11th August 2014.***

The Plaintiffs goes on the write:

> ***"In respect of commissions, distribution fees payment and royalty fees, these are matters relating to the agreements and will be settled on reconciliation as soon as the amounts have been calculated and agreed".***

19. Thus, it's clear from both parties, the sum so called **"umbrella fee"** and thereafter proposed to be called a capacity fee, is not provided for in the Distribution Agreement dated 5th December 2012, or in the trade Mark Agreement. Consequently any disputed thereof cannot be deemed to related to the said Agreement, and therefore does not fall under clause 24 of the Distribution Agreement. It cannot therefore be a subject of referral to mediation.

20. I therefore concur with the submissions of the Respondents that it is founded on a different kettle of fish all together. As to whether the correspondence relied on to support claim the said fees constitute a valid, and/or enforceable contract, that will be a matter to be canvassed at the trial, just as to whether that fee is due, and payable to, the Plaintiff by the Defendants. The Court's simple task herein, is to determine whether, the claim herein falls within the anticipated dispute under the Distribution Agreement entered into by the parties.

21. As regards, the issues of enforcement of Contracts entered into by the parties by the Court. I wish to adopt the Applicant's submissions that, it is trite law that, the Court should enforce contracts between the parties and not re-write the same. Fortunately, in the circumstances herein the contract entered herein does not apply relation to this claim.

22. As regards the authorities cited, I agree that where a Alternative Dispute Resolution mechanism is a condition precedent to any proceedings before the Court, the Court is obligated to stay proceedings until the condition is fulfilled unless their exist special and exceptional circumstances. However, for such reference to be ordered, that dispute must exists and fall within the scope of matters agreed to be referred to mechanism resolution. That is not the case herein.

23. The upshot of all this is that I decline to stay proceedings herein as there is no dispute founded on the Distribution Agreement dated 5th December 2012 or trade Mark Agreement which relates to mediation as Alternative Dispute Resolution. All there is a claim based on correspondence not the agreement. Therefore property filed in court is capable of litigation or through a court process which is forum for resolution.

I therefore find the Application a Notice of Motion dated 8th February 2016 lacks merit and I dismiss it with costs to the Respondents.

DATED AND DELIVERED IN AN OPEN COURT AT NAIROBI THIS 30TH DAY OF JUNE 2016.

G. L. NZIOKA

JUDGE

Ruling Read in open court in the presence of:

Mbaluto for Plaintiff

Kotonya h/b Gachuhi for Defendant

Teresia – Court Clerk