



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 416 OF 2014
ANTONY KIMANI.....PLAINTIFF
VERSUS
CIC GENERAL INSURANCE LTD. & ANOTHER....1ST DEFENDANT
FOUR STAR INSURANCE BROKERS LIMITED....2ND DEFENDANT

R U L I N G

INTRODUCTION

1. There are two applications before this Court. The first application is a **Notice of Motion** dated **23rd September 2014** filed by the Plaintiff under Order 13 rule 2 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. The application seeks the following prayers:-

- 1. That this application be certified urgent and fit to be heard forthwith and ex-parte.*
- 2. That judgment on admission for Kshs.6,215,625/= be entered in favour of the Plaintiff against the Defendant plus cost and interest.*
- 3. That the Defendant be compelled to forthwith pay to the Plaintiff Kshs.6,215,625/- plus costs and interest.*
- 4. That he costs of this application be borne by the Defendant.*

2. The application is premised on the grounds set out therein and is supported by the affidavit of **Antony Kimani** dated **23rd September 2014** with annexures thereto.

3. The application is not opposed by the 2nd Defendant, but the 1st Defendant, opposes the same, through grounds of opposition filed in court on 10th November 2014.

4. The brief history of the application is as follows. The Plaintiff took out a comprehensive insurance cover with the 1st Defendant at the instance of the 2nd Defendant, valid from 10th July 2013 to 9th July 2014 for Kshs.12,750,000/= for motor vehicle registration number KBS 110Q Mercedes S500. On 9th May 2014, during the subsistence of the insurance policy, the Plaintiff was involved in a road traffic accident with the vehicle along Forest Road, Nairobi. The 1st Defendant thereafter assessed the damage

to the vehicle, found it uneconomical to repair, treated it as a total loss and was prepared to settle the claim at Kshs.6,215,625/=. However the Plaintiff insisted that he was entitled to full compensation to the full insured amount of Kshs.12,750,000/= which is the value that the Defendant's own approved assessors placed on the vehicle. The Defendants have however refused to pay full or part compensation to the Plaintiff which failure and/or refusal has forced the Plaintiff to take an alternative vehicle on hire at Ksh.25,000/= per day from 10th May 2014 which is alleged to be expensive, inconveniencing and extremely expensive yet the Plaintiff had paid the Defendants Kshs.528,984/= in premium among other costs of obtaining an insurance policy from the Defendants. The said policy contains an arbitral clause, which the 1st Defendant now seeks to enforce by referring this matter to arbitration, in accordance with the second application herein. The Plaintiff avers he is at liberty to avoid such clauses in the policy documents that are unfavourable to him because the insurance policy document issued to him 5 months into the commencement of this insurance was signed by the 1st Defendant, three months after his policy commenced. The Plaintiff avers therefore that he is at liberty to elect on which forum to enforce his rights in spite of the said document containing a mediation and arbitration clause. It is the Plaintiff's case that the 1st Defendant has expressly admitted that the Plaintiff is entitled to at least Kshs.6,215,625/= which it should be compelled to pay forthwith to the Plaintiff. The Plaintiff avers that he agreed to take a policy with the 1st Defendant based on information, representation and guarantees given to him by the 2nd Defendant that he would be promptly compensated for loss and had it not been for the said information, representation and guarantees the Plaintiff would not have taken out the policy with the 1st Defendant but rather with another reputable insurance company.

5. The 1st Defendant filed grounds of opposition stating that the Plaintiff and the 1st Defendant entered into a policy agreement whereby the 1st Defendant insured the Plaintiff's motor vehicle. According to Clause 9 of the Policy Document, any dispute between the Plaintiff and the 1st Defendant on any matter relating to the policy should have been referred to arbitration.

6. In further opposition to the application the 1st Defendant, has filed Chamber Summons application dated 10th November 2014 (hereinafter called the **SECOND APPLICATION**) where it seeks orders staying the current proceedings and referring this matter to arbitration in light of the insurance policy which provided for arbitration in the event of a dispute. It was agreed that both applications be heard and determined together.

7. Parties filed written submissions. The Plaintiff's/Applicant's case and submissions is that the 1st Defendant insured the Plaintiff's motor vehicle registration number KBS 110Q for Kshs.12,750,000/=. During the validity of the insurance policy the vehicle was involved in an accident and the 1st Defendant, on assessment declared the said motor vehicle a write off. The 1st Defendant then informed the Plaintiff that it could only compensate the Plaintiff to the extent of Kshs.6,215,625/= and even sent the Plaintiff discharge vouchers (*Exhibits 8 and 9 of the Plaintiff's affidavit*). The Plaintiff's position is that he should receive full compensation up to the amount insured of Kshs.12,750,000/=. Despite the fact that the 1st Defendant has admitted that the Plaintiff is entitled to Kshs.6,215,625/= it has refused to pay the admitted amount insisting that this matter ought to be referred to arbitration. The Plaintiff submits that the only amount in dispute is Kshs.6,534,625/= being the difference of the insured amount of Kshs.12,750,000/= and the admitted amount of Kshs.6,215,625/=. The Plaintiff therefore prays that judgement for the admitted amount be entered and the 1st Defendant be compelled to forthwith pay the said amount. The Plaintiff submitted that the 1st Defendant has not denied that it has admitted owing the said Kshs.6,215,625/=. The 1st Defendant's only defence is that this matter should be referred to arbitration. The Plaintiff submitted that it is not necessary to refer this matter to arbitration because:- the contract of insurance for the cover of the motor vehicle commenced on 13th July 2013 (exhibit 2 and 3); the policy documents (exhibit 6) which has an arbitration clause is dated 17th October 2013, three months after the commencement of the insurance cover; there was no arbitration clause when the contract of insurance between the Plaintiff and the 1st Defendant commenced on 13th July 2013. Further, the 2nd Defendant, on whose representation the Plaintiff took out the policy is not a party to the arbitration clause. Citing the case of NAIROBI HCCC No. 245 of 2012 where the court stated that, "***if a certain portion of a claim is not in dispute it is improper to refer the entire claim to arbitration. . .***", the Plaintiff submitted that this is a clear matter in which to enter judgement on admission.

8. On their part, the 1st Defendant submitted that the the Plaintiff took a policy of insurance with the 1st Defendant through the 2nd defendant. The contract commenced on 10th July 2013 to 9th July 2014(AK2). The vehicle registration number KBS 110Q was insured for a sum of Kenya shillings 12,750,000. A policy document dated 17th October 2013 was sent to the Plaintiff and it set out all the terms of the contract of insurance. The vehicle was involved in an accident on 9th May 2014 and was declared a write off. Subsequently the Plaintiff claimed the full sum from the 1st defendant. As per the practice in the insurance industry, the vehicle was assessed and was declared a total loss and was also assessed to declare its pre-accident value. The vehicle was assessed by two assessors. The first gave a figure of Kshs. 6,500,000 and the second gave a figure of Kshs. 6,250,000 (AK8). The 1st Defendant summed up the two figures and got an average figure of Kshs. 6,375,000 and reduced this figure by excess payable by the Plaintiff being Kshs. 159,375 to yield a figure of Kshs. 6,215,625. The 1st Defendant therefore prepared and dispatched a discharge voucher to the plaintiff for a sum of Kshs. 6,215,625 ((AK9). The plaintiff declined to sign the discharge voucher and made a demand for the entire sum of Kshs. 12,750,000 in its letter dated 13th August 2014 (AK 10). He later filed suit and the subject application. The Defendant cited the provisions of the law applicable as Order 13 Rule 2 of the Civil Procedure Rules 2010. Order 13 contains two rules only and can be set out hereinunder:-

1. Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party

2. Any party may at any stage of a suit, where admissions of facts has been made, either on the pleadings or otherwise, apply to the court for judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just.

9. The 1st Defendant submitted that the two rules must be read together to make a purposeful meaning. The first rule contemplates existence of a suit so that any admission is made by a pleading or otherwise (maybe by affidavit or letter). That is why in the two rules the word “**suit**” is common. It is very important to mention at the outset that the 1st defendant has not made an admission either by pleading or otherwise. The Plaintiff has made an allegation/insinuation that the discharge voucher issued to him is an admission. But a close examination of the document reveals that it is the plaintiff “**who is admitting to receive Kshs. 6,215,625 in full satisfaction of all claims accrued . . .**” The plaintiff is obligated to sign the discharge receipt to signify his intention that no further claim shall be made against the company after the stated sum is paid. It is not an admission of any fact or liability on the part of the 1st defendant at all. **The intention and object of the document is that either the plaintiff accepts the sum stated without any conditions or rejects the entire sum and declares a dispute to be referred to arbitration.** He cannot give a conditional acceptance and claim that it is an admission

10. The 1st Defendant further submitted that this was a contract of indemnity. The principal document is the policy document dated 17th October 2013. Indemnity is defined as a step restoring the plaintiff to financial position he was immediately before accident and also gives the meaning of pre-accident value as the market value immediately before the accident. The 1st Defendant submitted that the compensation payable is not determined by the sum insured in contracts of indemnity. This is a cardinal rule in Insurance law on contracts of indemnity. In **Halsbury’s Laws of England (Volume 25 (2003))**, it is stated clearly that ***the happening of an event does not itself entitle the insured to payment of the sum stipulated in the policy, the event must, in fact, result in a pecuniary loss to the insured who then becomes entitled to be indemnified subject to the limitations of his contract . . .*** It is very notable that the plaintiff herein is claiming the full sum insured as declared when he took the policy of insurance and does not even deduct the excess payable. To him the sum insured is payable in full during the term of the contract. This we humbly submit run against the principle of indemnity. However, I do not understand the Plaintiff to be claiming the entire sum insured. He is claiming that part which he believes has been admitted by the 1st Defendant.

11. On the alleged repudiation by the Plaintiff of the arbitral clause in the policy contract, the 1st Defendant submitted that once the Plaintiff received the policy document, the plaintiff did not repudiate the contract. He is therefore bound by its terms. In terms of clause 9 of the policy document, the 1st defendant has already filed an application dated 10th November 2014 seeking to refer the matter to arbitration. The 1st defendant did not file any defence and did not make an admission. The plaintiff was notified in the policy document that the vehicle was to be regularly valued to avoid over or underinsurance. If he over-insured the vehicle, the 1st defendant cannot be blamed. But this can only be determined in the arbitration.

12. I have considered the submissions of the parties. In my view, the issues for consideration are as follows:-

i. Whether there is an admitted debt due to the Plaintiff by the 1st Defendant.

ii. Whether there is an arbitration clause to enable the court refer the matter to arbitration.

13. On the first issue, that is, whether there is an admitted debt owed to the Plaintiff by the Defendant, it is easy to note that while the Plaintiff claims a sum of Kshs.12,750,000/=, the 1st Defendant has assessed the loss due at Kshs.6,215,625/= under the said insurance policy, and which amount the 1st Defendant is prepared to pay to the Plaintiff. Pursuant to that the 1st Defendant prepared and forwarded a Discharge Voucher for the same amount dated 16/07/2014 for the Plaintiff to sign in final settlement of the debt. The Plaintiff rejected the condition attached to the Discharge Voucher and so he did not execute the same. The issue which arises then is whether the said sum of Kshs.6,215,625/= was admitted due to the Plaintiff by the 1st Defendant. It was submitted for the 1st Defendant that this being an insurance of indemnity, the Plaintiff can only accept a sum in full and final settlement of the claim, and that having rejected the same, the Plaintiff cannot then claim that the 1st Defendant had made any admission and that in any event, the said sum may come down during arbitration.

14. In my view, it should be noted that the said sum of Kshs.6,215,625/= was arrived at through a process of assessment which is now on record as “AK8”. The said sum was based on assessor’s reports which are not likely to change. The Plaintiff’s claim can therefore only escalate rather than reduce. In my view, the sum of kshs.6,215,625/= is clearly admitted both pursuant to a letter dated 16th July 2014 by the 1st Defendant to the Plaintiff “AK8” and also pursuant to the said Discharge “AK9”. There is no room that the said sum of kshs.6,215,625/= will come down either through a hearing process in this court or through the proposed arbitration. The aim of this court is to do justice with minimum delay and minimum costs and resources under the overriding objectives in Section 1A, 1B and 3A of the Civil Procedure Act. In that regard, I find that the sum of Kshs.6,215,625/- was admitted due to the Plaintiff by the 1st Defendant and I enter judgement accordingly for the said sum in favour of the Plaintiff against the Defendant.

15. The second issue is whether this matter should be referred to arbitration. There is no doubt that the said policy of Insurance has an arbitration clause for all the disputes. Since the said admitted sum of Kshs.6,215,625/= is admitted and not disputed, judgement has already been entered for the Plaintiff in that respect. However, for the disputed amount of Kshs.6,534,625/- the same is arbitrable. The Plaintiff had submitted that there can be no recourse to arbitration since the policy took effect three months before the policy document was executed. However in my view the fact that the Plaintiff did not reject the same policy document and proceeded to execute the same shows that the Plaintiff had ratified the policy document with all its terms and conditions. The Plaintiff cannot now challenge any clause in that insurance policy document.

16. It was also submitted that the matter cannot be referred to arbitration for the reasons that the 2nd Defendant is not party to the said insurance policy. However, the 2nd Defendant’s participation is not necessary in the arbitration proceedings. Indeed even in this application the 2nd Defendant’s presence has been dispensed with, and for all intents and purposes the 2nd Defendant is not relevant to this suit. The 2nd Defendant’s being party to this proceedings is a misnomer, and its being a party is a kind of technicality which cannot be used to deny reference of this suit to arbitration. Under Article 159 2 (d) of

the Constitution this court is urged to dispense justice without undue reliance to technicalities of procedure, and to ensure that substantive justice is rendered to deserving parties without delay and at minimum costs.

17. Pursuant to above findings, I make orders as follows:-

(a) Judgment is hereby entered for the Plaintiff against the Defendant in the sum of Kshs.6,215,625/=.

(b) This suit is hereby referred to arbitration in terms of the outstanding disputes.

(c) Costs of this application shall abide the outcome of the arbitration.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 13TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Macharia for the Plaintiff

Mr. Karuga for the Defendant

Teresia – Court Clerk