THE REPUBLIC OF KENYA

THE HIGH COURT AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC CIVIL APPL NO 344 OF 2013

THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED…….....APPLICANT

VERSUS

YACOOV MAIMON……………………………………………...…RESPONDENT

AND

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF AN ARBITRAL AWARD UNDER SECTION 36 OF THE ARBITRATION ACT 1995

BETWEEN

YACOOV MAIMON…………………………………………………..…CLAIMANT

VERSUS

THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED…..…RESPONDENT

RULING

1. This is a consolidated ruling in respect of the Notice of Motion application dated 20th August 2013 and filed on 21st August 2013 by The Jubilee Insurance Company of Kenya Limited and the Chamber Summons application dated 14th November 2013 and filed on 19th November 2013 by Yacoov Maimonas parties agreed that the same could be heard together and one ruling be delivered. As Jubilee Insurance Company of Kenya Limited and Yacoov Maimon were both applicants and respondents in the two applications, the court found it fit to refer to them as "the Insured" and "the Insurer" respectively to avoid any confusion.

THE INSURER'S CASE

2. The Insurer's Notice of Motion application was brought under the provisions of Section 7 and 35of the Arbitration Act 1995 and Rule 7 of the Arbitration Rules, 1997. The application sought the following prayers:-

1. THAT pending the determination of this application, enforcement and/or further

proceedings consequent upon the Final Award dated 12th June 2013 and published on 26th July 2013 by J. Louis Onguto in Arbitration proceedings between (Yacoov Maimon vs The Jubilee Insurance Company of Kenya Limited) be stayed.

2. THAT the Final Award dated 12th June 2013 and published on 26th July 2013 be set aside in its entirety.

3. THAT the costs of this application be provided for.

3. Its case was that the Final Award was in conflict to public policy and indeed inimical to public policy because despite the Arbitrator having found that the insured's driver held no valid driving license under the Traffic Act at the material time of the accident on 4th August 2007, he nonetheless found that the said driver was an authorised driver within the meaning of the insurance policy and thus made an Award in favour of the Insured.

THE INSURER'S CASE

4. The Insured's Chamber Summons application was brought pursuant to the provisions of Section 26 of the Arbitration Act 1995 and Rule 9 of the Arbitration Rules, 1997. It sought the following orders:-

1. THAT the arbitral award dated 12th June 2013 in favour of the Applicant a copy which is filed herewith be enforced.

2. THAT a decree be issued in terms of the award.

3. THAT costs of the enforcement proceedings be met by the Respondent.

5. Its case was that the Insurer had refused to settle the claim that he was rightly awarded by the Arbitrator.

LEGAL ANALYSIS

6. While Article 165 of the Constitution of Kenya, 2010 gives the High Court supervisory jurisdiction over any person, body or authority exercising a judicial and quasi-judicial function to ensure the administration of justice, it must be done within the parameters of Section 10 of the Arbitration Act which provides as follows:-

"**Except as provided in this Act, no court shall intervene in matters governed by this Act."**

7. A court will set aside a Final Award delivered by an Arbitrator if it is satisfied that grounds under Section 35 of the Arbitration Act exist. Under Rule 7 of the Arbitration Rules, 1997 it is provided as follows**:-**

"An application under Section 35 of the Act shall be supported by an affidavit specifying grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator."

8. Notably, the Insurer did not specify the subsection it was relying upon but the same seems to have been under Section 35 (2)(b)(ii) of the Arbitration Act which stipulates as follows:-

35(2) An arbitral award may be set aside by the High Court only

(b) The High Court finds that-

(ii) the award is in conflict of public policy of Kenya.

9. The Insured raised issues of non-disclosure by the Insurer relating to the use of the subject motor vehicle registration number KAV 398U at the material time of the accident and the person who was the driver at the time. It argued that the burden of proof shifted to the Insured to satisfy the Insurer that a person was an authorised person within the meaning of the insurance policy. It was its contention that the Kenyan law placed an evidentiary burden on the Insured to prove that the driver at the material time of the accident, Shmual Zarkovski, an Israeli, was an authorised driver.

10. It referred the court to the letter dated 18th April 2008 (pg 79 of the Insurer's application) from Kenya Revenue Authority (KRA) and contended that the Arbitrator failed to address himself to the import of the contents of the said letter. It stated in part:-

"However, a national Israeli licence is valid for the first 90 days from the date of entry into the country.

Unless he has a valid International Driving Permit, which is exchangeable with a Kenyan licence, he is required to take a test in Kenya and obtain a Kenyan licence if he is going to stay beyond the period of 90 days.

E.S. Odero

REGISTRAR OF MOTOR VEHICLES."

11. It referred the court to Section 30(4) of the Traffic Act which provides that an expired license was only valid upon its renewal. It argued that in view of the fact that the license expired on 28th July 2007 and the accident occurred on 4th August 2007, the Insurer was right to have repudiated liability of the Insurer's claim. As a result, the Arbitrator's Award in favour of the Insured was thus in conflict with the public policy.

12. On its part, the Insurer admitted that it was indeed true that the said driver's license expired on 28th July 2007 but that it was subsequently renewed. It was emphatic that the authorised driver clause in the policy document was not restricted to persons holding a valid driving license but extended to persons who had held and were not disqualified from holding or obtaining such license and that in the said letter of 18th April 2008, KRA had confirmed that a National Israeli License was valid for use on Kenya.

13. It placed reliance on the relevant clause in which it was stated as follows:-

> **"Authorised person" any of the following:-**
>
> **a. The insured.**
>
> **b. Any person driving on the insured's order or with permission provided the person driving holds a valid driving license to drive the motor vehicle <u>or has held and is not disqualified from holding or obtaining such licence</u>** (emphasis court). **The term "Licence" means a Licence or other permit required by the Licencing Authority or regulation."**

14. His argument was that the Arbitrator correctly interpreted the authorised driver's clause in the policy when he stated as follows:-

"There is evidence before me that the Claimant's driver had held a valid driving licence, which expired on 28th July 2007. There is however no evidence before me to show that the Claimant's driver was disqualified from holding or obtaining such a licence. No law or authority or regulation barred the Claimant's driver from obtaining or holding a licence. Indeed, as pointed out under paragraphs E15 and E17 above, the Claimant's driver could as well claim to be authorized due to the apparent ambiguity in the directions of the Licencing Authority…In these respects therefore the Claimant is entitled and right in stating that for the purposes of the Policy, the Claimant's

driver was an authorized driver.

Further there is also an apparent ambiguity when one reads and interprets the definition of an authorised driver under the Policy vis-à-vis a driving licence. The Insured is one such person (authorized driver). There is no indication that he needs a valid driving licence. His driver however needs a valid driving licence. His driver could also not be having a valid driving licence but would still have been authorized to drive so long as he had held a valid driving licence and was not disqualified from holding or obtaining one. …I would also apply the contra-preferentem rule in reading and interpreting what an "authorized driver" for the purpose of the Policy means. The Respondent was the sole author of the policy document. There was no joint drafting effort. I would give it the interpretation, which I hereby do, most favourable to the Insured in this case the Claimant and hold that the Claimant's driver was an authorized driver as he was not disqualified from holding or obtaining a licence. Perhaps the mischief intended to be cured by the rather wide and open definition was to ensure only competent persons or drivers controlled or managed the motor vehicle. Persons who had held driving licences and are not disqualified would fall into this category…"

15. On the question of public policy, the said Arbitrator had the following to say:-

"…the Respondent has also contended in its submissions that the claim is tainted by an illegality and the Arbitral tribunal ought not aid the Claimant in benefitting from the Claimant's own illegality...I would agree with that general proposition of the law. The law has always recognized that, in the public interest, criminal acts should be deterred. It would be obnoxious to public policy and would shock public conscience if a man could use any dispute resolution forum to enforce a claim by reason of his having committed a criminal act…Yet public policy is an unruly stallion and must always be approached with caution…It is evident the loss here was not on purpose. I have also found that the Claimant's driver was an authorized driver for the purposes of the Policy. The consequence is that the Respondent's invocation of *ex turpi causa non oritur actio* cannot be upheld in the circumstances…"

16. The court found it prudent to set out in great detail what the Arbitrator's findings were to show to what extent he considered the distinction of an authorised driver both under the Policy and under the Traffic Act. He made a correct interpretation based on the contents of the Policy. He also considered the purport of public policy in relation to his finding that the Insured's driver was an authorised driver within the meaning of the Policy. It would have been a different matter if the question he was to determine was under the Traffic Act.

17. In this regard, the court wholly concurs with the Insured's submissions that the said Arbitrator's findings of illegality and breach of public policy were well considered and supported by law and precedent. The court has no jurisdiction of power to determine the legality or otherwise of the Arbitrator's finding or to entertain arguments as to the implications of the letter dated 18th April 2008 as doing so would be tantamount to re-opening the challenge that ought to have been and was actually canvassed before the Arbitral tribunal.

18. In any event, as was correctly stated by the said Arbitrator, the said letter did nothing to support the Insurer's arguments that the Insured's driver's license had expired and was therefore not valid as the said letter merely outlined the extent of the validity of an Israeli driving license.

19. If the Insurer had wished to have the issues of the licensing under the Traffic Act re-visited by this court, it ought to have filed an appeal to enable the court determine that question of law. It is, however, important to note that under Section 39 of the Arbitration Act, the court can only consider questions of law arising in the course of the arbitral proceedings and if the parties have consented to lodging of appeals or the Court of Appeal is of the opinion that a point of law of general importance due to the final and binding nature of arbitrations.

20. From the evidence that was placed before the court, the Insurer did not demonstrate that the Arbitral

Award was inconsistent with the Constitution or other laws of Kenya, or inimical to the national interest of Kenya or contrary to justice and morality. Its arguments did not reveal that there was a violation of public policy herein and in this regard its application must fail in its entirety.

21. In view of the fact that the court found that the said Arbitrator made a correct finding of fact, the Insurer's ground of setting aside the Arbitral Award on the basis that it was in conflict to public policy or inimical to public policy would not hold. The case of **Christ For All Nations vs Apollo Insurance Co Ltd [2002] 2 EA 366 (CCK)** would thus not come to its aid herein.

22. Having considered the pleadings, the affidavits, the written submissions and the case law in support of the respective parties' cases, the court is more persuaded by the Insured's arguments that the Insurer did not demonstrate that any of the ground under Sections 35 or 37 of the Arbitration Act existed in this case that would have persuadedthe court to set aside the Final Award herein. The only option left for this court is to recognise and uphold the Arbitrator's said Award as has been provided under Section 36 of the Arbitration Act.

23. As an *obiter*, the court wishes to remind parties to ensure that they must at all times premise their applications on the correct provisions of the law. The Insurer's application under Section 7 of the Arbitration Act was clearly erroneous as the arbitral proceedings had long been concluded.

24. The provisions of setting aside are clearly spelt out in the Arbitration Act and Arbitration Rules. Motions and Summons must be used only as have been provided by rules as failure to do so can lead to the dismissal of an otherwise meritorious application.

25. Similarly, the Insured had brought its application pursuant to Section 26 of the Arbitration Act instead of Section 36 of the said Act. As it was clear from the body of the application what he was seeking, the court opted to disregard the technicality and determine the application herein on merit. However, an applicant that seeks recognition and enforcement must strictly adhere to the Arbitration Rules, 1997.

26. The court overlooked the requirement under Rule 5 of the Arbitration Rules, 1997 in view of the fact that the application for enforcement and recognition of the Final Award was made in the same file as the application for the setting aside of the said Final Award. It must be noted that this provision must be strictly adhered to whenever an applicant wishes to have its Final Award enforced and recognised by the court.

27. As it also follows that a court should always hear an application for setting aside an arbitral award before one for recognising or enforcing such an award, parties should therefore not be anxious until such time that an arbitral award is recognised and enforced. It was therefore not necessary for the Applicant to have prayed that the enforcement and recognition of the Final Award and proceedings be stayed. Prayer No (2) of the Applicant's application was sufficient.

DISPOSITION

28. For the foregoing reasons, this court's ruling is that theInsurer's Notice of Motion application dated 20th August 2013 and filed on 21st August 2013 was not merited and the same is hereby dismissed with costs to the Insured.

29. Accordingly, Insured's Chamber Summons application dated 14th November 2013 and filed on 19th November 2013 was merited and the same is hereby granted as prayed.

30. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 11TH day of DECEMBER ,2014

J. KAMAU

JUDGE