



**INVESCO ASSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**CHARLES MUTURI MWANGI .....DEFENDANT**

**RULING**

By a service contract made on 3<sup>rd</sup> May, 2006, the applicant employed the Respondent in the capacity of General Manager/Marketing under the terms and conditions set out therein. Under Clause 11 of the said agreement any and all disputes arising from any matters under the said agreement was to be referred to arbitration.

On 14<sup>th</sup> December, 2007 the Applicant suspended the Respondent from duty. Shortly thereafter, in February, 2008 the Applicant was placed under statutory management which was however lifted after two years. By a Plaint dated 6<sup>th</sup> September, 2010, the Respondent commenced proceedings before the Industrial Court in Industrial Court Case No. 128 of 2011 wherein he claimed as against the Applicant a sum of Kshs.10,980,000/- amongst other reliefs. By a consent in those proceedings the parties agreed to refer the dispute to a sole arbitrator appointed by the parties.

It would seem that the parties settled for E.T Gaturu Esq. When the matter came before the arbitrator, the Applicant raised an objection to the claim presented to the arbitrator on the ground that whereas the consent recorded before the Industrial Court was to refer the dispute in that court to arbitration, the claim commenced before the arbitrator was completely different. It should be remembered that in the Industrial Court, the Respondent had lodged a claim for Kshs.10,980,000/- yet when he filed a statement of claim before the Arbitral tribunal, the Plaintiff made a claim, inter alia, for Kshs.44,782,500/-. The Applicant's objection was dismissed by the Arbitrator. The applicant felt aggrieved and took out an Originating Summons under Section 17(6) of the Arbitration Act setting out various questions for determination.

Together with the originating summons, the Applicant took out a Notice of Motion expressed to be under Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act. The Applicant sought an order to stay the proceedings before the arbitrator pending the hearing and determination of the proceedings herein. This ruling in is respect of that application.

The Applicant's contention is that the Arbitrator's impugned ruling contravenes the terms of the reference to arbitration, that the claim before the Arbitrator is a total deviation from the original dispute sought to be referred to arbitration, that the claim for Kshs.44,782,500/- is time barred in view of the provisions of Section 90 of the Employment Act of 2007, that the arbitrator has imposed the hearing dates for the arbitration between 18<sup>th</sup> June, 2012 through 22<sup>nd</sup> June, 2012.

Mr. King'ara for the Applicant submitted that the Applicant did not want to take part in flawed proceedings, that by taking part in those proceedings, the Applicant may be giving them legitimacy, that the Applicant will be incurring expenses by paying the arbitrator as well as legal costs in attending to flawed proceedings that might ultimately be set aside. He urged that the Motion be allowed.

The Respondent opposed the application by filing a Replying Affidavit of Charles Muturi Mwangi sworn on 18<sup>th</sup> June, 2012. He contended that after he had filed Industrial Court case No. 128 of 2011, it is

the Applicant who applied to refer the matter to arbitration in March, 2011, he denied that the consent referring the matter to arbitration was limited to Kshs.10,980,000/- or any amount at all, he referred to a letter dated 13/5/2011 requesting the Chartered Institute of Arbitrators to appoint an arbitrator. This letter was not exhibited. That the statement of claim before the arbitrator was in accordance with the arbitral clause in the agreement between the parties, that it contained the claim in its entirety, that the Applicant has exhibited its unwillingness to continue with the Arbitral proceedings, that it would be prejudicial to the Respondent to allow the application, that the application had not come to court with clean hands.

Mrs. Mwaura, learned Counsel for the Respondent submitted that the matter had come up severally before the Arbitrator for hearing but on all occasions failed to proceed on account of the Applicant's unpreparedness, that the law allows a matter before an arbitrator to continue notwithstanding the pendency of a matter before this court save for an award. She urged the court to dismiss the application.

I have considered the Affidavits on record and submissions of Counsel. The letter and spirit of the Arbitration Act is to give the parties to commercial transactions the freedom to decide how their disputes are to be resolved, who and how the arbitrator is to be appointed, the limited power and/or jurisdiction that courts can exercise on matters arbitral and the need for arbitral proceedings to proceed uninterrupted once they have commenced. This is clearly set out in Section 10 of the Act which provides that :-

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

One of the instances of such intervention is under Section 17(6) of the Act. That provision allows an aggrieved party to challenge the arbitrators decision on jurisdiction. However, Section 17(8) provides that whilst an application under Section 17 (6) is pending, the parties may continue with the arbitral proceedings save that no award shall take effect until the application is determined.

The Applicant has approached the court to stay the proceedings which are to proceed this afternoon. The Act has not given the court any power to interfere with those proceedings. This I believe is why the Applicant invoked the inherent jurisdiction of the court and the provisions of Sections 1A and 1B of the Civil Procedure Act.

The inherent jurisdiction of the court is to be exercised where there are no rules of procedure or where if they are applied they will lead to an injustice. Further, Sections 1A and 1B enjoins the court when resolving disputes to do so with a view to expeditious and proportionate settlement thereof. The Court of Appeal held in the Case of **E. Muiru Kamau and Another –vs- National Bank of Kenya Ltd (2009) e KLR**, observed as under:-

***“The Courts including this court in interpreting the Civil Procedure Act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.” (Emphasis supplied)***

The Arbitrator may or may not be right in his decision. The issue in the main Originating Summons will be whether the dispute before the arbitrator is the same that was intended to be referred to him by the parties in Industrial Court case No. 128 of 2011. The other issue would be whether the claim lodged with the Arbitrator is time barred under Section 90 of the Employment Act, 2007. Of course the arbitrator has jurisdiction to determine these two issues. Indeed he has already determined the first issue which has provoked these proceedings.

The question which this court should determine is whether in view of the express provisions of the Arbitration Act as to non-interference in matters arbitral, are there any good grounds that would attract this court's discretion towards staying those proceedings pending the determination of the originating summons?

I do not agree with Mr. King'ara that by participating in the proceedings before the arbitrator, the Applicant will be giving them legitimacy. The Applicant, if aggrieved with those proceedings, will have a chance of finally coming to this court under Section 35 of the Arbitration Act after the final award is made.

However, my concern is, what will be the effect of those proceedings and the position of the parties if the Originating Summons ultimately succeeds and it is found that the arbitrator did not have jurisdiction to entertain those proceedings as presented ? Won't they be set aside ? Where will the parties be left? What of the costs and expenses that would have been incurred in the meantime ? The Applicant through its Counsel complained that it will be paying the arbitrator every time it will appear before him, it will also incur legal costs. My take of it is that if those proceedings proceed as scheduled and then they are finally overturned, the parties would have incurred unnecessary costs which can be avoided. The prejudice to be suffered will be irreversible as the costs incurred would not be recoverable, and even if they are recovered, they would have been incurred in an exercise in futility.

I am alive to the allegations that have been levelled against the Applicant of being an unwilling participant in the arbitral proceedings. But I am also alive to the fact that if these proceedings are expedited, the prejudice to be suffered by the Respondent would be a delay in the determination of his dispute if the Originating Summons is finally unsuccessful.

Accordingly, in order to save the parties on expenses, I am inclined to grant Prayer No.3 of the Motion dated 14<sup>th</sup> June, 2012 for a limited period. The Respondent shall respond to the Originating Summons within 7 days of today, thereafter, Applicant shall list its Originating Summons for directions within 7 days and thereafter list the same for trial within 90 days of the date of directions. If the suit would not have been concluded by expiry of the said 90 days, the stay herein shall expire without the necessity of making any other order.

DATED and delivered at Nairobi this 18<sup>th</sup> day of June, 2012

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**A. MABEYA**  
**JUDGE**