



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**Civil Case 18 of 1997**

**NZOIA SUGAR COMPANY LTD .....PLAINTIFF**

~VRS~

**APOLLO INSURANCE CO. LTD.....DEFENDANT**

**RULING**

This is the Defendant's application dated 23/4/1997 which was heard by Justice Mitey on 10/7/2003. The Judge retired thereafter before delivering the ruling. I have now taken over this case in order to write and deliver the pending ruling.

The application was brought under section 3 A of the Civil Procedure Act and Order L rule 1 of the Civil Procedure Rules. It seeks for stay of this suit pending the commencement and determination of proceedings in respect of the issues herein. It also seeks for leave for the Defendant to file its defence out of time. Finally, it seeks for orders that the defence annexed herein be deemed to be properly filed subject to payment of court fees.

The supporting affidavit is sworn by the Mr. Wilson Kalya Advocate who s under the instruction of the Defendant's advocate Mr. Sharad Rao. He depones that in view of the nature of the prayers sought in the plaint, it is important that the Defendant be given leave to defend the claim. The dispute between the parties arise out of an insurance contract. The Plaintiff seeks for orders to nullify the policy No.94 CL/WCA/2537/5 M which contends that it is not the contractual document between the parties among other prayers. The Applicant further contends that is was a term of the contract that any dispute be referred for arbitration. The Applicant prays that for this reason, the suit be stayed pending reference and determination to arbitration.

The application was opposed by the Plaintiff through grounds of opposition filed by its advocate Cyprian Wekesa. It was contended that the Defendant has failed to comply with section 6 (1) of the Arbitration Act for failure to file an arbitration notice. The application is therefore a nullity for non-compliance. The Respondent/Plaintiff was not given a copy of the police document which the Defendant purports to rely on. It would be inappropriate to force the Plaintiff to be governed by a document that was alien to it.

I have carefully analysed the facts before me in this application. The first prayer is grounded on section 6 (1) of the Arbitration Act 1995. The provision requires that a party applies for a case to be referred for arbitration before it enters appearance in the suit. It is not denied herein that the Defendant entered appearance before he applied for stay of proceedings in this case. This confirms the allegation of non-compliance with the said provision. The Defendant has infact filed defence in this case which estops him from asking for the case to be referred for arbitration. The Defendant's prayer seems to be an afterthought. I agree with the Respondent that this prayer cannot succeed due to failure to present it at the right time. The defence has failed to annex any agreement which gives authority for arbitration.

The Plaintiff's claim disputes the legality of the policy document. The Plaintiff had consented to filing the defence out of time before

this application was heard and given 27/04/1997 as the deadline. It appears that this was not possible on the part of the Defendant. The Defendant filed its defence out of time and it now seeks for extension of time. This claim is a very contentious one and it is in the interests of justice to allow the Defendant to defend the suit.

For the foregoing reasons, I refuse to grant prayer (a) of the application. The annexed defence is hereby deemed filed on payment of the requisite court fees.

**F. N. MUCHEMI**  
**JUDGE**

Dated, Delivered and Signed at Bungoma this 29 day of April 2010.  
In the presence of ...Mr Sichangi for Makali for plaintiff and Mr Ocharo for Mr. Kalya for defendant.