REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 883 of 2009

CENTRAL FARMERS GARAGE LTD. …….. PLAINTIFF
VERSUS
THE CO-OPERATIVE INSURANCE CO.
OF KENYA LIMITED …… DEFENDANT

R U L I N G

By this application, the Plaintiff prays for an order that the suit herein be stayed and the dispute between the parties be referred to arbitration and that an arbitrator be appointed from some three named Advocates of the High Court of Kenya. The application is brought under by a notice of motion dated 1st December, 2009 and is made under **Section 6** of the **Arbitration Act, 1995; Order L Rule 1** of the **Civil Procedure Rules; Section 3 A** of the **Civil Procedure Act** and all enabling provisions of the law.

The application is supported by the annexed affidavit of Mathew G. N. Mukhwana, the Applicant's Chief Accountant, sworn on 1st December, 2009 and, is premised on the grounds that -

1. ***This suit arises from a difference that arose between the Applicant and the Respondent in that the Respondent has failed to conclude investigations on a burglary claim forwarded by the Applicant.***
2. ***It is a term in Clause 12 of the Defendant/Applicant's Burglary policy that if a difference arose between the parties the same should be referred to arbitration.***
3. ***The Applicant made efforts to refer the matter to arbitration through correspondence and telecommunications with the Defendant but the Defendant has been reluctant and uncooperative.***
4. ***According to the Arbitration Act, 1995, where a matter contains an arbitration clause and a suit is filed, the suit should be stayed and the matter referred to arbitration.***
5. ***Since the Defendant/Applicants burglary policy contained an arbitration clause, then the matter should first be referred to an arbitrator and the suit herein be stayed pending arbitration.***

Opposing the application, the Defendant filed a replying affidavit sworn on 15th January, 2010 by one Benson Ogutu, a Claims Analyst in the employment of the Defendant in which he deposes that this matter should not be referred to arbitration in light of the fact that the Defendant does not admit liability and arbitration is only effective where liability has been admitted, and the main issue for determination is the amount of quantum payable. He contends in his affidavit that the issue of liability is a question law and the proper forum for determining such an issue is a Court of law rather than through arbitration. He also maintains that this Court should not grant the orders sought in the application as they have the effect of disposing of the instant suit in the interlocutory stage and instead prays that this matter do proceed to full hearing with the Defendants being given a chance to put forward its defence.

During the oral hearing of the application, Mr. Wandabwa appeared for the Applicant while Mr. Maingi appeared for the Respondent. After considering the pleadings, the submissions of Counsel and the authorities cited, I find that the main issues for determination are whether there is a dispute between the parties; whether such a dispute, if any, ought to be referred to arbitration; and whether stay of proceedings should be granted.

I note from the cause of action in this matter that the relationship between the Applicant and the Respondent is that of the insured and insurer. Clause 12 of the Insurance Policy between the parties reads as follows –

> ***"All differences arising out of this policy shall be referred to the arbitration of some person to be appointed by both parties or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each party and in case of disagreement between the arbitrators to the decision of an umpire who shall have been appointed in writing by the arbitrators before entering on reference and an award shall be a condition precedent to any liability of the company or any right of action against the company''. (****emphasis added).*

The underlined words are strong words and speak for themselves. Their plain meaning is that all differences arising out of the Policy between the parties shall be a condition precedent to any liability of the company, or any right of action against the company. In my respectful view, what this portends is that liability against the company has first to be established by the arbitration process, and once established, that liability becomes a condition precedent to enforcement of any right of action against the company. This is in keeping with the nature of **SCOTT v. AVERY** arbitration clauses. I find it strange for the Respondent to suggest that liability is a matter of law and that it ought to be determined in Court and not by the arbitrator. This contradicts the very wording of Clause 12 by which the parties freely agreed that "an award shall be a condition precedent to any liability of the company, or any right of action against the company." Since this Clause should be given its ordinary and natural meaning, the parties to this suit ought to have gone to arbitration even before they came to Court. It is the arbitrator who gives an award which is a condition precedent to liability. Therefore, the parties should first submit themselves to arbitration.

Whereas the Plaintiff is ready to face an arbitrator in terms of Clause 12, the Defendant is reluctant to do so. Indeed, not only is the Defendant reluctant, but it also gives the impression that it is premature for the parties to engage in the arbitral process since, according the Defendant, the liability should first be determined by a Court of law before the matter goes through arbitration. The wording of Clause 12 is clear that an arbitral award ***"shall be a condition precedent to any liability of the company or any right of action against the company".*** For this reason, it would seem to me that the starting point in this matter is for a reference to be made to an arbitrator or arbitrators to make an award which is a prelude to any right of action against the company. For that reason alone, I would have expected the Defendant to embrace the suggestion that the matter should be referred to arbitration. Instead of doing so, however, the Defendant now suggests that the issue of liability should be determined by the Court.

It is my considered view that such a proposition flies right in the face of the provisions of Clause 12 of the Policy. If that Policy is to have any force and effect, then it ought to be honoured by referring the matter to arbitration for an arbitrator's award which is "a condition precedent to any liability of the company".

In view of the foregoing, I find that reference of this matter to arbitration is not premature as the Defendant suggests, but is the only right thing to do in terms of the wishes and the expectations of the parties as clearly spelt out in Clause 12 of the Insurance Policy between them. I accordingly direct that the parties do honour Clause 12 in observance by referring the dispute to the arbitration of either a single arbitrator or two arbitrators as enshrined in that Clause. The proceedings herein are accordingly stayed pending that reference. The costs of this application shall be in the cause. Orders accordingly.

Dated and **delivered** at **Nairobi** this 13th day of May, 2010.

L. NJAGI
JUDGE