



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 521 of 2008**

**ZAHRA S. MOHAMMED.....1<sup>ST</sup> APPLICANT**

**ANDRE KONGOLO.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**INSURANCE CO. OF EAST AFRICA LTD.....RESPONDENT**

**RULING**

This is an originating motion brought by the applicants seeking to invoke this court's jurisdiction under **Section 12 (4)** of the **Arbitration Act** and **Rule 3(1)** of the **Application Rules** to compel the respondent to appoint an arbitrator in accordance with the provisions of the policy of insurance. It was the applicants' case that their motor vehicle registration No. KAX 132W make Honda Accord was comprehensively insured by the respondent against any loss or damage. The policy of the insurance covered the periods between 7<sup>th</sup> August 2007 and 6<sup>th</sup> August 2008. On 16<sup>th</sup> April 2008, the insured motor vehicle was involved in an accident near Westlands in Nairobi. The motor vehicle was extensively damaged. The applicants lodged their claim with the respondent. The insured motor vehicle was assessed by Motech Assessors & Valuers Limited who determined the cost of repair of the said motor vehicle would be KShs.285,696/=. The motor vehicle was delivered to Dalex Motors Limited for repairs. The said garage was unable to repair the motor vehicle on account of the fact that spare parts that were to be replaced in the said motor vehicle were not available in the local market.

The respondent was willing to pay for the costs of repair of the motor vehicle but in view of unavailability of the said spare parts in the local market, the respondent chose to exercise its option as provided under Section 1-1 of the Policy of Insurance by paying the sum of KShs.285,696/= less excess of KShs.17,500/= i.e. KShs.268,196/= in cash to the applicants. The applicants were unwilling to accept payment of the said cost of repair in cash. According to the applicants, the policy of insurance, particularly Section III of the Policy, provided that in the event the spare parts are unavailable locally, the insurance company would liable to pay the costs for importation of the said spare parts including any import duty that would be required to be paid. The respondent was not persuaded by the interpretation given to the said clause of the policy of insurance by the applicants. It sent a discharge voucher to the applicants requiring their signature in the same to enable it pay the assessed sum of KShs.268,196/= in full and final settlement of the applicants' claim.

The applicants declared a dispute and pursuant to **Clause 11** of the Policy of Insurance and sought to refer the dispute to arbitration. The applicant suggested the names of two persons they proposed to be arbitrators. The respondent however was of the firm view that there existed no dispute between itself and the applicants capable of being referred for determination by arbitration. It was the respondent's case that the matters which the applicants claim constitute a dispute were not in fact a justiciable issue capable of being referred to arbitration in accordance with the policy of insurance. It was this reluctance by the respondent to recognize the existence of a dispute and further its reluctance to participate in the appointment of arbitrators that prompted the applicants to file the present suit.

Having read the pleadings filed by the parties herein in support of their respective opposing positions, and further having considered the written submissions filed by counsel of the parties to this suit, the issue of determination by this court is whether the applicants have established a case to entitle this court compel the respondent to participate in the arbitration proceedings. That there is an arbitration clause in the policy of insurance is not in dispute. Clause 11 of the Policy of Insurance provides that any dispute between the parties to the policy shall be referred for determination by arbitration. The clause envisages that the parties to the policy agreement would agree on a single arbitrator. In the event the parties are unable to agree on a single arbitrator, each party would appoint one arbitrator who in turn would appoint an umpire.

According to the applicants, a dispute had arisen between the applicants and the respondent. The dispute was occasioned by the respondent's decision to refuse to pay for the costs of repair of the motor vehicle but instead opting to pay an amount in cash that was not equivalent to the cost of the repair of the motor vehicle. It is also apparent that the applicants seek to be paid for the loss which they allege is consequential to the respondent's refusal to repair the said insured motor vehicle in time. On the other hand, the respondent was of the view that it acted in accordance with the terms of the policy of insurance when it offered to pay the applicants' cash in lieu of repairing the motor vehicle in light of the

assessor's report which was to the effect that the spare parts of the motor vehicle were unavailable in the local market. The respondent is of the view that there is no discernable dispute capable of being referred to arbitration in view of its offer to pay cash to the applicants.

It is evident that the respondent's refusal to participate in the appointment of an arbitrator was influenced by its belief that there exists no dispute between itself and the applicants. In its attempt to prove that no such dispute exists, the respondent delved into the evidence that ideally is the province of the arbitrator to determine. This court in determining the application before it cannot enter the arena of considering the merits of the evidence unless such evidence supports the assertion by one of the parties that there exists no clause in the agreement that forms the basis of the relationship between the two disputing parties that provides for resolution of any dispute between them by arbitration. I think, with greatest respect to the respondent, the issue as to whether the applicants have a valid claim in accordance with the terms of the policy of insurance, can only be determined by the person who will be appointed as an arbitrator.

It appears that the respondent is confusing the validity of the applicants' claim with the question whether there exists a dispute between itself and the applicants that is capable of being referred for determination by arbitration. It is trite that where parties have put in place a mechanism for resolving any dispute that may arise in the course of their business relationship, and which mechanism ousts the jurisdiction of the courts in the first instance, this court has no alternative or option but to give effect to the wishes of such parties. In the present application, it was clear that, notwithstanding the expenses that will be involved in the arbitration that the parties herein had agreed to have any dispute that may arise during the period that the policy was in subsistence to be referred for determination by arbitration.

Under **Section 12 (4)** of the **Arbitration Act 1995** where under procedure agreed by the parties for the appointment of an arbitrator or arbitrators one of the parties failed to act as required under such procedure, the aggrieved party may apply to the High Court to take the necessary measure for securing compliance with the procedure agreed upon by the parties. I therefore hold that the applicants have established a case for this court's intervention in compelling the respondent to participate in the appointment of an arbitrator or arbitrators as provided under Clause 11 of the Policy of Insurance. The applicants and the respondent are hereby directed to agree, within fourteen (14) days of the date hereof, on a single arbitrator to arbitrate on the declared dispute between them. In default thereof, in accordance with the said clause, the applicants and the respondent shall each appoint one arbitrator who in turn shall appoint an umpire to arbitrate over the dispute. Such appointment shall be made within fourteen (14) days after the expiry of the first fourteen (14) days.

The applicants shall have the costs of this suit. Either party shall be at liberty to apply.

**DATED** in **NAIROBI** this **28<sup>TH</sup>** day of **OCTOBER 2009**.

**L. KIMARU**

**JUDGE**