DHANJAL INVESTMENT LTD…….....CLAIMANT/RESPONDENT

-AND-

KENINDIA ASSURANCE COMPANY LTD……RESPONDENT/APPLICANT

RULING

The respondent moved the Court by Chamber Summons dated 4th March, 2009 and filed on 6th March, 2009. The application was brought under s. 35(2) (a) (iii), (iv) and (v) of the Arbitration Act, 1995 (Act No. 4 of 1995) and rule 4(2) of the Arbitration Rules, 1997; and under s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The application carried prayers for orders, as follows:

(i) that the arbitral award of *Mr. Mulwa Nduya* dated 8th December, 2008 in the cause herein, be set aside;

(ii) that the said arbitral award and its accompanying proceedings, be declared null and void;

(iii) that such further or other orders be made as the Court may deem fit;

(iv) that costs be provided for.

The application was founded on certain basic grounds, as follows:

(a) that the respondent was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case;

(b) that the arbitral award deals with a dispute not contemplated by, or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration;

(c) that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the contract of insurance to which the claimant was also not a party;

(d) that the appointment of the said Mr. Mulwa Nduya as an arbitrator was not in accordance with the provisions of the Arbitration Act, 1995 and in particular contravenes s. 12(3)(b) thereof;

(e) that the appointment of the said *Mr. Mulwa Nduya* as an arbitrator did not follow the procedure outlined in the Public Liability Insurance Policy No. 107/052/11/00648/2000/06, which condition was

obligatory and necessary for lawful arbitration procedure;

(f) that the arbitration proceedings conducted by the said *Mr. Mulwa Nduya* were null and void *ab initio*;

(g) that the arbitral award was legally defective and incapable of being enforced;

(h) that it will be just and proper to set aside and/or nullify the said arbitral award;

(i) that it will be reasonable and in the interest of justice to allow the instant application.

The applicant gives pertinent factual statements in the depositions of *Regina Nzisa Mwangangi*, the legal officer of Kenindia Assurance Company Limited. The deponent attaches to her depositions various documents regulating the applicant's operations as an insurer, and, in brief, states as follows:

(i) the applicant had an insurance contract with one *Traveller's Mwaluganje Elephant Camp* (the insured), the insurance policy number being 107/052/11/00648/2000/06; and this policy covered the period *11th September, 1999* to *30th June, 2000*;

(ii) a binding contract was created between the respondent and the insured, "and privity of contract existed only between these two parties";

(iii) sometime about 3rd – 4th May, 2000 an incident of robbery took place at the insured's camp, and the insured claimed under the said insurance policy, on the basis that this was one of the risks contemplated under the operative terms and conditions;

(iv) the claimant, Dhanjal Investments Limited, is a stranger to the said contract of insurance and not a party to the insurance policy cover contract, and "there is no privity of contract between the claimant and the respondent"; and therefore the claimant has no *locus standi* in this matter – and so the arbitral proceedings are null and void," as the claimant has no legal basis to be a party in the arbitral process herein";

(v) the said insurance policy, by its 12th clause, provides for limitation of jurisdiction: any claim arising out of the policy is referable to arbitration only at the place of issue of the policy, and if triable by a Court of law, shall be tried and determined by the Court having jurisdiction over the place where the policy has been issued, and according to the laws of the country in which the policy is issued;

(vi) clause 10 of the said insurance policy provides for the procedure of appointment of an arbitrator: a consensual reference of any matter in dispute to "two new trial persons as arbitrators, one of whom shall be named by each party", or "an umpire who shall be appointed by the said arbitrators before entering [upon] the reference", and "in case the insured or his legal personal representatives shall neglect or refuse for the space of two calendar months after request in writing from the company to name an arbitrator, ….the company may proceed alone and no action or proceedings shall be brought or prosecuted on this policy until the award of the arbitrators, arbitrator or umpire has been first obtained."

(vii) the claimant has failed to follow the procedure provided for in the said clause 10 of the policy – and thus "contravened a material condition in the said policy"; "by not following the procedure outlined for appointment of an arbitrator, the claimant based the whole arbitral process on a wrong procedure, and the arbitral proceedings and the arbitral award herein are null and void….";

(viii) on 30th July, 2008 M/s. Timamy & Co. Advocates for the claimant, "sent a letter to the respondent stating that the claimant had unilaterally appointed an arbitrator, by name, *Mulwa Nduya*, to arbitrate for the claimant";

(ix) by s.12 of the Arbitration Act, if the claimant and the respondent failed to agree on an arbitration or arbitrators, the appointment of arbitrators should have been made upon application by a party, by the

High Court; and so, the arbitration proceedings were conducted by "an arbitrator who was appointed irregularly….."

(x) the arbitrator accepted his appointment on *30th July, 2008* and concluded the arbitration process without due process, and without the consent of the respondent;

(xi) the respondent was not allowed a fair chance of presenting its case, and the arbitral proceedings went on *ex parte*;

(xii) the essence of an arbitral process is to allow both parties a fair chance to present their case, this was not the case herein;

(xiii) the arbitrator went beyond the pecuniary limit allowed by the policy, namely the sum of Kshs. 10 million;

(xiv) the arbitrator failed to note that the claimant was not party to the insurance policy contract, and therefore no privity of contract existed between the claimant and the respondent, and the claimant had no *locus standi* in the arbitral process.

To the respondent/applicant's depositions, the claimant/respondent has made elaborate statements, in affidavits, and he has undertaken (quite rightly, as a matter of civil procedure) to speak only on "matters of fact raised by the applicant" (para. 3 of the affidavit of 21st May, 2009)

(i) *Nirmal Singh Dhanjal*, the Managing Director of the claimant/respondent admits that the claimant/respondent was making a claim on the basis of the insurance policy correctly identified in the respondent/applicant's supporting affidavit, namely No. 107/052/11/00648/2000/06. The deponent contradicts the applicant's deposition and states:

"*contrary to the allegations of the applicant, the contract of insurance was entered into between the [respondent]/applicant and the [claimant]/respondent …..*"

It is deponed that the insurance claim which the claimant made on the respondent/applicant, bore on its face elements properly falling under the insurance policy contract between the parties herein:

(a) the applicant had been insuring the claimant/respondent from the month of *September, 1999*, after taking over this obligation from another insurer known as Fidelity Shield of Kenya Ltd;

(b) there had been no insurance forms filled, defining details of the relationship between insured and insurer; but a working method had emerged: "it was at all times understood betwixt *the applicant* and the [claimant]/respondent that it was the [claimant-respondent], which trades, among others, in the names of *Mwaluganje Elephant Camp*, and *Travellers Beach Hotel*, that was being insured, and which was responsible for payment of premiums";

(c) the material insurance policy was running from 12.00 noon on 11th September, 1999 – but the respondent-applicant "did not issue any policy documents to the [claimant-respondent];" and no such policy document had been issued at the material time, the *night of 3rd-4th May, 2000* when a robbery took place;

(d) even though the claimant-respondent did write letters to brokers of the insurer seeking "the original policy document", "none was ever given or issued by the [respondent-] applicant, and no such original document has been given to it to-date";

(e) all such inquiries referred to *Dhanjal Investments*, as the subject of a plurality of insurance covers given by the respondent-applicant herein.

(ii) The claim arose following a robbery which took place during the night of *3rd -4th May, 2000*; and by that time, "the [respondent-]applicant had not issued any policy to the respondent"; the subject policy was issued on *24th May, 2000* – though only certified copies were availed to the claimant-respondent.

(iii) Even though the claimant-respondent, by its letter of *24th March, 2000* sought policy documents "pertaining to the Dhanjal Investments", the respondent-applicant elected to give out the policy document in the name of *Mwaluganje Elephant Camp*.

(iv) When the claimant-respondent wrote to the respondent-applicant on *30th July, 2008* and acknowledge the policy issued, the letter bore the following wording:

"*We refer to the above matter and policy number 107/058/11/00648/2000/06 issued to Dhanjal Investments Limited (Mwaluganje Elephant Camp) by yourselves"*.

And this format of written communication will also be found in a letter of *29th July, 2008*.

(v) In the light of the relationship existing between the parties and as shown in the various letters herein exemplified, the deponent avers that "the…..[respondent-applicant]is not being candid in labeling the

[claimant-]respondent a stranger."

(vi) following the incident of robbery on the night of 3rd -4th May, 2000 a claim was made in the Queen's Bench Division, High Court of Justice in England, against the claimant-respondent herein; and the claimant-respondent's advocates then, M/s. Pandya & Talati Advocates, wrote to the respondent-applicant herein providing information as necessary, indicating that the claimant-respondent will defend against the claim in England, and inviting the insurer herein to instruct counsel in England as well, as necessary. The claimant-respondent's advocates also provided information to the applicant herein, on the statement of claim thus lodged in England.

(vii) the respondent-applicant, on 31st July, 2007 wrote to the claimant-respondent expressing its refusal to make any payment under the insurance contract; and the reasons given were thus stated:

"*the claimant herein filed suit in the United Kingdom.*

"*Under the terms and conditions of the policy we are unable to participate in legal proceedings instituted out of the country"*.

(viii) Just as it is clear the policy issued to the claimant-respondent contained a jurisdiction clause, the arbitration process took place at Mombasa, and the award was filed in the High Court of Kenya at Mombasa where the policy itself had been issued; so, it is deponed, "the [claimant-respondent] fully complied with the said requirements of clause 12 of the policy, by initiating all proceedings related thereto in Mombasa.

(ix) Reference to arbitration was made not by the insurer, but by the insured; so clause 10 of the insurance policy was not followed, but recourse was had to *clause 11* thereof, which provides:

"*If the [insurance] company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder"*.

(x) The insurer, by their letter of *31st July, 2007* disclaimed all liability to the insured; and so the

claimant-respondent relied on the enabling provision of *clause 11*, to invoke the arbitral process.

(x) The respondent-applicant was accorded "every opportunity to present its case at all stages of the arbitral proceedings".

The deponent, on 15th June, 2009 filed a further affidavit, only for the purpose of annexing a major document intimated in his replying affidavit: his statement of claim with all its annexures, as received by the applicant in connection with the arbitration process, on 6th October, 2008.

The legal Officer of the respondent-applicant, *Regina Nzisa Mwangangi,* on 10th June, 2009 filed her own affidavit which is significant, especially in relation to some of the averments made by *Nirmal Singh Dhanjal* on behalf of the claimant-respondent. The deponent deposes that she has read the affidavit by *Nirmal Singh Dhanjal* and –

"……*having investigated the matter, I accept that Dhanjal Investments Ltd. Was the insured under Policy Number 107/058/11/00648/2000/06 ….and that the respondent [i.e., the applicant] issued the said policy in the name of Mwaluganje Elephant Camp, the latter being the claimant's trade name for the camp"*.

The deponent makes a further admission:

"*….I also accept that the said policy was issued on 24th May, 2000, some twenty days after the incident giving rise to the claimant's claim in this matter."*

The questions at the core of the application were the subject of protracted submissions by counsel before me, on 16th September, 2009.

As already noted, the respondent-applicant conceded some ground in relation to the factual depositions; but now they still conceded more: learned counsel *Mr. Amoko* for respondent-applicant, in relation to his client's supporting affidavit (para.5) which reads:

"*THAT the claimant herein Dhanjal Investments Limited is a stranger to the above-mentioned contract and not a party to the insurance policy cover contract as there is no privity of contract between the claimant and the respondent. Therefore, the claimant has no locus standi in this matter and the arbitral proceedings are null and void as the claimant has no legal basis to be a party in the arbitral process herein" -*

now changed his client's stand as follows:

"*We have abandoned that line of argument. We now accept that Dhanjal [Investment Limited] was indeed insured."*

Mr. Amoko, besides, conceded that "the factual basis of the application is largely uncontested"; "what's in dispute is the inferences to be drawn from these facts, and the legal significance of those facts, [especially] in the light of the insurance policy".

Learned counsel submitted that certain communications between the parties, lay at the centre of the dispute: the claimant's advocates' letter of 27th August, 2006, notifying the respondent-applicant that the claimant would defend against a suit filed in England; the claimant's letter of 13th July, 2007 to the respondent-applicant, complaining that there had been no reply to the claim already made by the claimant; the respondent-applicant's letter of *31st July, 2007* informing the claimant that the respondent-applicant will not participate in legal proceedings abroad; the proceedings in England Went on, and judgment was subsequently entered against the claimant herein.

Counsel submitted that the most critical letter in the communications between the parties was that of M/s Timamy & Co. Advocates for the claimant, to the arbitrator, copied to the respondent-applicant herein, and dated *29th July, 2008.*

This letter, in part, thus states:

"*By a policy of insurance issued to our client, Dhanjal Investments Limited (Mwaluganje Elephant Camp) hereinafter 'the claimant' by Kenindia Assurance Company Limited hereinafter 'the company' being policy number 107/058/11/00648/2000/06, it was expressly agreed that should the company for any reason disclaim liability to the insured, then such dispute/difference should be referred to arbitration.*

"*The policy containing the relevant arbitral clause is herein enclosed for your ease of reference.*

"*Such dispute has now arisen, and pursuant to the said arbitral clause, we HEREBY appoint you as such arbitrator on behalf of our client."*

The recipient advocates, M/s Mulwa Nduya Advocates & Arbitrator, replied by their letter of *30th July, 2008* copied to the respondent-applicant herein, in these terms:

"*I acknowledge receipt of a letter dated 29th July, 2008 from M/s. Timamy & Co. Advocates on behalf of the claimant M/s. Dhanjal Investments Limited appointing me a sole arbitrator in this dispute.*

"*I do hereby accept the said appointment.*

"*In the meantime I would appreciate [receiving] a copy of the document forming the basis of my appointment.*

"*unless I am told in writing by both parties that they do not wish me to proceed for the time being, I propose to convene a preliminary meeting shortly in my offices.….*

"*Kindly ensure that no document which is, or which refers to a without prejudice matter is put before me and that all communications to me are copied to the other party.*

"*My fees which I propose to charge for the arbitration to cover for the preliminary meeting, the hearing and the award is Kshs. 650,000/00….or 2% of the claim in dispute whichever is higher……"*

The core of the respondent-applicant's case is that M/s. Mulwa Nduya Advocates & Arbitrator, in their letter of 30th July, 2008 had said:

"*….I would appreciate [receiving] a copy of the document forming the basis of my appointment";*

Mr. Amoko, on this point, submitted that the arbitrator was lacking an essential document – and so this meant he had been *unilaterally* appointed. And counsel contended that there was no conceivable inference that the respondent-applicant was party to the appointment of the arbitrator; in counsel's words: "The mere fact of copying letters [to respondent-applicant] has little significance; and hence, counsel admits, "the [respondent-applicant] ignored the arbitral process." Counsel went on to urge: "The mode of appointing the arbitrator was not in accord with the provisions of [the insurance] policy".

Counsel based his argument on the terms of clause 10 of the policy, which provided that where a dispute between insurer and insured arose, the matter was to be placed before two neutral persons as arbitrators – and the costs of arbitration would be met as directed by the arbitrators.

Counsel urged that the terms of clause 10 of the policy would not come into operation failing: (i) the existence of a dispute; (ii) the respondent-applicant's election, regarding a recourse to arbitration; (iii) the establishment of a mechanism for arbitration – and he urged that all those requirements did not come to

exist, and so the ground wasn't set for any arbitration in the first place.

Mr. Amoko contested the claimant's stance, that clause 10 was not the sole avenue to a recourse to arbitration. In counsel's submission, clause 11 had an entirely different design and could not help the claimant herein. Counsel submitted that *clause 11* of the insurance policy was only a time-bar, but was not constitutive in nature, rather it was "consequential" only, and gave the claimant no such rights as the claimant claims. Counsel submitted that by a plain reading, there was no basis upon which a party can purport to constitute an arbitral tribunal and then proceed to hearing, under the said clause 11 of the policy. Counsel said:

"*We don't accept their interpretation of clause 11"; "they appointed an arbitrator without relying on any clause; they then claim [the respondent-applicant's] letter [of 31st July, 2007] was one of disclaimer and so clause 11 was applicable"*.

The respondent-applicant impugns the fact that the arbitrator's award relies on clause 11 of the insurance policy.

Learned counsel urged that on account of the provisions of the Arbitration Act, 1995 s.35(2)(a)(v), the composition of the arbitral body was contrary to law. Counsel submitted that the insurance policy entailed certain detractions from the scheme set out in the Arbitration Act, 1995 which made it incorrect for the claimant to take the position that the respondent-applicant's failure to act, did trigger the appointment of an arbitrator; for "it was an option of the [respondent-applicant] to have or not to have such arbitration, and no obligation was imposed upon the [respondent-applicant]."

Counsel further argued that the claimant could not have used s.12 of the Arbitration Act as a basis for the appointment of an arbitrator, as that provision requires Court orders where one of the parties shows recalcitrance.

Counsel, in effect, argued that the act of the claimant in appointing an arbitrator was a lawless, self-help scheme which should be declared null; and he brought several case-authorities in aid of his contention. Counsel cited the High Court's decision in *Siginon Maritime Ltd V. Gitutho Associates & others*, Mombasa H. Ct. Misc. Civ. Appl. No. 719 of 2004 in which *Mwera, J* considered the conduct of a party in relation to s.35 of the Arbitration Act, and held that:

(i) "By the parties agreeing that proceedings be kept in writing, [it] meant that they would refer to them if they wanted. Accordingly Mr. Mandhry was obliged as per [the] agreement of 18th February, 2002 to preserve the proceedings and permit parties to have or see them. By not doing so, the arbitrator did not act in accord with the arbitration agreement of the parties."

(ii) "So on this basis this Court is satisfied that the award herein was arrived at by conducting proceedings contrary to the parties' arbitration agreement".

Counsel cited another High Court decision, *Spencon Kenya Limited*, Nairobi Milimani Commercial Courts, Civil Case No. 204 of 2007 in which *Lesiit, J* thus held:

"*Any further step taken in furtherance of the said agreement was void. In that regard the 1st and 2nd respondents' letter to the chairman of the Chartered Institute of Arbitrators to appoint an arbitrator because the parties had failed, was void. That letter further compounds the matter because it was written without the input of the applicants. It defeated the very principle of arbitration, that the parties to the arbitration must be willing and in agreement to participate in the arbitration process …..The decision by the 1st and 2nd respondents to unilaterally approach [the Chartered Institute of Arbitrators] to appoint the arbitrator went against the principle [of consensus]."*

Responding to the submissions for the respondent-applicant, learned counsel *Mr. Buti* urged that the claimant, in appointing the arbitrator, had complied with the law and the terms of the insurance policy in

every respect: all claims were to be brought before the Court at the place of issue of the policy, and this was Mombasa; the matter was filed at Mombasa; the claimant was only *sued* in England, but brought no suit in England.

Of clause 10 of the insurance policy, counsel first noted its content; it only comes into effect when a dispute arises, and is activated by the insurer; any such dispute –

"*if required by the company be referred to the decision of two neutral persons as arbitrators"*.

Counsel submitted that clause 10 does not say what is to happen if it is the insured who seeks to go to arbitration; and the insured can only proceed under clause 11 which provides:

"*if the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder"*.

Counsel submitted that clause 11 of the insurance policy was silent on the number of arbitrators who may be appointed; but para. 2 of that clause stated the number of to be *one*, where the matter was not determined otherwise – and so it was in all respects proper to have just one arbitrator.

Counsel urged that if the said insurance policy would be found to be ambiguous, then the *contra proferentem* rule should be applied, and construction must be against, rather than in favour of the respondent-applicant who drew that policy. For as considered in *Kim Lewison, The Interpretation of contracts* (London: Sweet & Maxwell, 1989), S.6.07 (p.134),

"*Where there is a doubt about the meaning of a grant, the doubt will be resolved against the grantor. Similarly words in a contract (particularly exclusion clauses)are construed against the person for whose benefit they are inserted."*

The same point is clear from the English case, *Houghton V. Trafalgar Insurance Company Ltd.* [1953] 2AII E.R. 1410:

"*Any clause or provision that purports to have that effect ought to be clear and unambiguous so that the motorist knows exactly where he stands. This provision is neither clear nor unambiguous. If applied to a private motor car I have not the least idea what it means."*

And in *John Lee & Son (Grantham) Ltd & others V. Railway Executive [*1949] 2AII ER 581 the following passage appears (per *Sir R. Evershed, MR*.)

"*We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended that, on the view for which they argued, it has a remarkably, if not an extravagantly, wide scope, and I think that the rule contra proferentem should be applied and that the result is that the present claim is not one which obliges the first plaintiffs to give to the defendants a release and an indemnity"*.

Counsel noted that the arbitrator had been appointed by letter from his firm dated 29th July, 2008 and on 30th July, 2008 his firm of advocates had duly informed the respondent-applicant of the appointment; on the same day the arbitrator himself had written a letter to each of the parties herein, duly informing them of his acceptance of appointment in that capacity. Counsel noted that the arbitrator had specifically invited the parties to raise any objections, if either of them was reluctant to have him perform the arbitral role; and "the [respondent-applicant] never at any time responded rejecting the arbitrator"; hence, it was urged, there was no basis for resorting to clause 12 of the policy which only comes into play when there is disagreement

Counsel submitted that clause 11of the insurance policy had set out no procedure to be followed in the appointment of an arbitrator: and paragraph 11 (a) thereof provided that a single arbitrator would perform the arbitral function, where there was no agreement. Counsel urged to be significant, the fact that the arbitrator after being appointed, asked to be informed by the parties if he was unwanted; but no such indication was made by the respondent-applicant. A relevant case-authority in this regard was cited:

Tradax Export S.A. V. Volkswagenwerk A.G. ("La Loma") [1970]1Q.B.537 where the issue, as in the instant case, was the appointment of an arbitrator. In that case *Lord Denning, M.R.* stated (p.544) the position as follows:

"*So we have to decide: what is necessary to constitute the appointment of an arbitrator? I think the answer is this: First, it is necessary to tell the other side. That is plain from Tew V. Harris (1847) II Q.B. 7. Second, it is necessary to tell the appointee himself. That is obvious because he often has to start acting at once. Third, it is necessary that he should be willing to act and have intimated his willingness to accept the appointment. In Russell on Arbitration, 17th ed. (1963), at p.160 it is said: 'Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment'."*

In the *Tradax* case *Salmon, L.J.* thus stated (pp. 545-546) the position:

"*We know from all the evidence in this case that as a general rule anyone who desires to appoint an arbitrator under this clause gets in touch with the proposed arbitrator to ascertain whether he is willing to act in the dispute in question. If he is willing to act, then the party authorizes him to act and communicates with the other party, notifying him of the name of the arbitrator …..In my judgment, three things are necessary in order to make an effective appointment under this clause: first of all, the arbitrator must be communicated with and asked if he is willingness to act. Secondly, he must express his willing and be clothed with authority to act. And thirdly, ….in order to perfect the appointment the other side must be notified of the name of the arbitrator. Sometimes these steps are taken by letter or by cable. There is nothing to prevent them being taken over the telephone or by telex."*

Learned counsel relied on the principles emerging from the *Tradax* case, and submitted that, in the instant case, as the claimant had to refer the matter to arbitration within a defined period of twelve months as from *31st July, 2008*, they did set the process in motion without delay, on *29th September, 2008*; and he doubted that the respondent-applicant had good grounds for complaining about the arbitration process as commenced. When the arbitrator was appointed, this fact was communicated to the respondent-applicant; the name of the arbitrator was given; the arbitrator needed to act without delay; he indicated his willingness to act as arbitrator; the letters of 29th and 30th July, 2008 show all the relevant steps taken; the arbitrator communicated with the parties, and asked the relevant questions; the arbitrators informed the parties of the actions he was taking.

Where an arbitrator assumes the arbitral role, what powers does he enjoy? The relevant authority is *Bremer Vulkan Schiffbau Und Maschinenfabrik V. South India Shipping Corpn* [1981] 1AII E.R. 289 (H.L.); and the following passage in the judgment of *Lord Diplock* (at p.301) is relevant:

"*I turn then to consider what the mutual obligations of the parties are in a private arbitration. By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular procedural rules, the parties make the arbitrator the master of the procedure to be followed in the arbitration…..[He] has a complete discretion to determine how the arbitration is to be conducted from the time of his appointment to the time of his award, so long as the procedure he adopts does not offend the rules of natural justice."*

Counsel in the instant case submitted that the respondent-applicant had chosen to ignore the arbitrator's letter; and he urged that such conduct was unlawful; the insurance policy had not given the procedures of arbitration – and therefore the master of the process was, in law, the arbitrator himself, so long as he observed rules of natural justice. Counsel urged that the one who appears to have offended the rules of natural justice was the respondent-applicant, but not the claimant-respondent. What each party should do, once the arbitration commenced, it was urged, was as described (p.304) by *Lord Fraser of Tullybelton in*

the Bremer Vulkan case:

"*Once the tribunal has been chosen …, proceedings in the arbitration, like those in litigation, are in most cases…..…adversarial in character. It is therefore for each party to act in what he conceives to be his own interest, subject of course to any agreement or procedure that may have been made between them, and to the relevant statutory provisions including the obligation to obey orders made by the arbitrator".*

From such obligations flowing from the role and authority of the arbitrator, counsel urged, the respondent-applicant is not excused by any ambiguous clauses that *he*, the respondent-applicant, has drafted; and moreover, it was submitted, the respondent-applicant by its conduct, had waived its rights of objection to the arbitral process. Section 5 of the Arbitration Act, 1995 thus provides:

"*A party who knows by any provision of this Act from which parties may derogate or any requirement under the arbitration agreement [that a requirement] has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, shall be deemed to have waived the right to object".*

Some of the grounds of the application have already resolved themselves. In particular it is no longer disputed that the two parties did indeed have an *insurance contract* binding them, and the claimant-respondent was not "a stranger": it is also now acknowledged by the respondent-applicant that the suit filed in England was against the claimant-respondent, and that the claimant-respondent did not *file any suit* in a foreign jurisdiction, so as to fall outside the terms of the insurance policy.

This leaves just one main question as the basis of the application: *did the claimant-respondent name the arbitrator unilaterally*? The law, of course, is clear – an arbitrator is to be named within the terms of the governing agreement, and his appointment, and his name, must be known to both parties before the arbitral process begins; and then, in the absence of any agreed operational arrangements, the arbitrator becomes the master of the process, and what is required of him is to uphold rules of *natural justice*.

The framework for any valid arbitration process has been set up in the Arbitration Act, 1995 (Act No. 4 of 1995).

Section 4 of that Act provides as follows:

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if it is contained in –

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegram or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document

containing an arbitration clause shall

constitute an arbitration agreement if the

contract is in writing and the reference is

such as to make that arbitration clause part

of the contract."

As already noted, the respondent-applicant has expressly acknowledged in Court that, indeed, there *was* an insurance policy contract which bound the two parties herein together; there was, in this regard, a privity of contract; and the parties carried their respective rights and obligations on the basis of the said contract.

It follows that the document supplied to the claimant-respondent by the respondent-applicant, being Public Liability Insurance Policy No. 107/052/II/00648/2000/06, was in every sense a document of agreement, the arbitration clauses of which bound the parties. The relevant clauses are set out under *Conditions*, and the critical paragraphs thereof are No. 10 and No. 11 Condition No. 10 thus provides:

"*If any dispute shall arise as to whether the Company is liable under this policy or as to amount of its liability, the matter shall if required by the Company be referred to the decision of two neutral persons as Arbitrators one of whom shall be named by each party or an umpire who shall be appointed by the said Arbitrators before entering on the reference and in case the insured or his legal personal representatives shall neglect or refuse for the space of two calendar months after request in writing from the Company to name an Arbitrator the Arbitrator of the Company may proceed alone and no action or proceedings shall be brought or prosecuted on this Policy until the award of the Arbitrators Arbitrator or Umpire has been first obtained."*

Just as learned counsel for the claimant-respondent urged, the foregoing condition in the insurance policy is in the first place to be activated at the instance of the *insurer*, namely *Kenindia Assurance company Limited*.

Condition No. 11 thus provides:

"*If the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to Arbitration under the provisions herein contained then the claims shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder"*.

Condition 11, in my opinion, carries a residual opening for reference to arbitration; and since the insurer has its reference-to-arbitration space under condition No. 10, the residual opening will be the natural one for the *insured*; and I am in agreement with counsel for the claimant-respondent, that it falls within the terms of the policy for them to seek arbitration by virtue of condition No. 11. All that will be required is for the appointment of the arbitrator to be *notified to the insurer*, and the insurer given an opportunity to express agreement or disagreement; and in this case the insurer chose to remain mute. Since the arbitration clauses are designed to serve an important dispute-settlement purpose, the insurer's silence on the question will only lead to a *vacuum in the dispute settlement process*, an end which the policy behind the law cannot be taken to allow; and consequently, I hold that the decision taken by the claimant-respondent to appoint an arbitrator was perfectly within the law. It follows that when the respondent-applicant chose to ignore communications from the arbitrator as the arbitrator conducted his task, the law was not on the insurer's side.

I must, in the circumstances, reach a decision not in favour of the application, which I hereby dismiss. I will make specific orders as follows:

(1) *The respondent-applicant's prayer that the*

Arbitral Award of Mr. Mulwa Nduya dated 8th

December, 2008 be set aside, is refused.

(2) The respondent-applicant's prayer that the Arbitral proceedings and the award herein be declared null and void, is refused.

(3) The respondent-applicant shall pay the claimant-respondent's costs in this application, in any event.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 16th day of October, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Respondent-Applicant: *Mr. Amoko, Mr. Nurani*

For the claimant-Respondent: *Mr. Buti*