



MOHAMED HASHAM ALI MOHAMED =====PLAINTIFF

VERSUS

A.A.R HEALTH SERVICES LTD ===== DEFENDANT

RULING

This is an application under section 6 of the Arbitration Act and rule 2 of the Arbitration Rules.

It is an application brought by the defendant, who seeks the stay of these proceedings, so that the dispute between the parties should be referred to arbitration.

The defendant says that the suit herein involves a contract between the parties. Under paragraph 16 of the said contract, the defendant points out that the parties had agreed between themselves that all disputes arising from the contract would be referred to arbitration.

The defendant recognizes that ordinarily, the plaintiff has a right to seek redress in court. But once the parties had contracted to refer all

disputes to arbitration, the defendant submits that that did not take away the plaintiff's legal rights. It was deemed by the defendant that the enforcement of that term of the contract would be giving effect to the contractual rights of the parties.

In bringing this application, the defendant says that it has complied with the provisions of Section 6 of the Arbitration Act, as the application was filed before the defendant had filed the defence.

The defendant relied on the authority of **NIAZSONS (K) LTD V CHINA ROAD AND BRIDGE CORPORATION (K) [2001] 2 E.A. 502**, to support its contention that it had taken steps to have the matter referred to arbitration. The said step was taken by the filing of this application, said the defendant.

The defendant also placed reliance on the case of **ALLIANCE MEDIA KENYA LTD VS MONIER 2000 LIMITED [2005] e KLR**, to back its contention that if a contract contained a mandatory provision requiring a dispute to be referred to arbitration, the court would refer the matter to arbitration.

In answer to the application, the plaintiff pointed out that the policy of insurance which governed the contractual relationship between the parties to this suit did not contain the arbitration clause.

Although the defendant had exhibited a contract between the two parties herein, the plaintiff

submitted that that contract was not in force at the material time.

Secondly, the plaintiff drew the court's attention to the fact that before he instituted these proceedings, he had issued a notice to the defendant, requiring the defendant to comply with the terms of the policy. It is only after the defendant failed to respond to the notice that the plaintiff decided to file suit.

It is the plaintiff's submission that had the defendant believed that the dispute fell under an arbitration clause embodied in the policy, the defendant would have responded to the notice by offering to have the matter resolved through arbitration.

As the defendant did not offer to go to arbitration at that early stage, the plaintiff believes that the current application is only an afterthought.

Furthermore, the plaintiff is convinced that the defendant had failed to show that the dispute between the parties falls squarely within the arbitration clause.

When called upon to reply to the plaintiff's submissions, the defendant said that the phrase "**critical illnesses**" which is to be found under the terms and conditions of the policy whose benefit the plaintiff was seeking, would be a subset of the broader phrase "**any medical condition**", which is cited in the contract executed in 1997.

The first issue that would need to be resolved is whether or not the phrase "**any medical condition**" was broad enough to encompass "**critical illness.**" There is a dispute over that issue because the defendant says that the cover for "**critical illness**" was only introduced by the company in the year 2003. Therefore, that would imply that critical illnesses were not covered under the policy of insurance dating back to the year 1997.

But it is not for me, at this stage, to determine the issue.

In the case of **HALKI SHIPPING CORP. VS SOPEX OILS LTD [1997] 3 ALL ER 833**; which case was cited with approval by the Hon. Kasango J. , in **ALLIANCE MEDIA KENYA LTD V MONIER 2000 LIMITED** (above-cited), it was held as follows;

" Where the parties to a contract agreed to refer any dispute arising therefrom or in connection therewith to arbitration, any subsequent claim made by one of the parties in relation to the contract, which the other party refused to admit or did not pay, was relevant dispute which the claimant was both entitled and bound to refer to arbitration, notwithstanding the fact that the respondent did not have a sustainable defence to it."

That being the legal position, if I should come to the conclusion that in the contract between the parties, there was an arbitration clause, I would then be obliged to refer the dispute herein to arbitration.

In the case of **NIAZSONS (K) LTD V CHINA ROAD AND BRIDGE CORPORATION (K)** (above-cited), the Court of Appeal said;

" whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide."

The court will then be obliged to consider three basic aspects. First, whether the Applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred."

The section that the Court of Appeal made reference to was section 6 (1) of the Arbitration Act, 1995.

And, in the case of **ESMAILJI VS MISTRY SHAMJI LALJI & CO. [1984] KLR 150**, the Court of Appeal held that;

“ . . . before the court will exercise its discretion and make an order staying the proceedings, the applicant must satisfy the court not only that he is, but also that he was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration. ”

In that case, the defendant had argued that they were not required to say that they wanted to go to arbitration, because the parties knew that they were bound by the arbitration clause. Madan JA. found that argument to be incorrect.

The learned judge made it clear that the proper moment in time to ask for the dispute and the differences to be referred to arbitration;

“ was when there was a letter of demand and there was notice of the contractor’s intention to sue instead of merely saying that the employers would defend themselves in any proceedings taken against them.”

(see page 154).

In the same case, the Hon. Law J.A. expressed himself as follows, at page 155;

“ . . . the party moving for a stay has to show that the dispute is within a valid and subsisting arbitration clause.

It is only when that has been achieved that the burden of

showing cause why effect should not be given to the agreement to submit is upon the party opposing the application for stay.”

In support of the application herein the defendant has exhibited a **“Membership Application”** dated 09/12/97. On the face of that application form, it is indicated that the membership was valid upto 17/12/98. Therefore, on a prima facie basis, that application could not be deemed to be the basis for a contract that was in force between the parties herein, in the year 2005, when the plaintiff suffered a heart attack.

So far, neither of the parties has placed before the court, a copy of the policy of insurance which was in force at the material time.

As the burden is on the defendant, (being the party seeking stay of these proceedings), to show that the dispute was within a valid and subsisting arbitration clause, I hold that the defendant had failed to discharge the said onus.

Secondly, I find that the defendant did not indicate its willingness to be bound by the arbitration clause, at the earliest opportunity. It should

have given its indication of the desire and readiness to go to arbitration as soon as there arose a dispute, and when the plaintiff had given notice of his intention to sue, if the defendant did not meet the claim.

Accordingly, I find that the defendant has failed to meet the requirements for the grant of an order staying these proceedings, with a view to having the dispute referred to arbitration. In the result, the defendant’s application dated 30/11/06 is dismissed with costs.

Dated and Delivered at Kitale, this 23rd day of January, 2008.

FRED A. OCHIENG

JUDGE