



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 602 of 2007

JOEL KAMAU KIBE.....PLAINTIFF

VERSUS

THE KENYAN ALLIANCE INSURANCE CO. LTD.....DEFENDANT

R U L I N G

The defendant insured the plaintiff's motor vehicle Registration No. KAN 835Y. The motor vehicle was comprehensively insured. On 18th July 2007, the said motor vehicle was involved in an accident along Kiambu Road. According to the plaintiff, the motor vehicle was written off as a result of the said accident. The plaintiff lodged a claim with the defendant. A dispute arose on the manner which the defendant proposed to settle the said claim. The plaintiff disagreed with the defendant's proposed settlement. On 15th November 2007, the plaintiff filed suit against the defendant seeking *inter alia*, Judgment be entered in his favour for the sum of KShs.6,610,000/= being the value of the said motor vehicle that was insured less the excess fee of KSh.100,000/=. The defendant was served with summons to enter appearance together with a copy of the plaint. The defendant instructed the firm of Mbugwa, Atundo & Macharia Advocates to act on its behalf in the suit. The said firm of advocates duly filed a memorandum of appearance on behalf of the defendant on 28th November, 2007.

On 13th December, 2007, the defendant filed a notice of motion under **Sections 4 & 6** of the **Arbitration Act** seeking to stay the proceedings in the suit herein pending reference of the dispute to arbitration. The application is supported by the annexed affidavit of Saul Mwadeghu, the head of Claims and Technical department of the defendant. He deponed that the defendant issued a private car insurance policy No.11/MC 023722 in respect of motor vehicle registration No. KAN 835Y, Toyota Lexus. He stated that according to clause 10 of the policy document, all the disputes arising out of the policy would be referred to arbitration before any party files suit in court. The application was opposed by the plaintiff who filed grounds in opposition to the defendant's application. In the said grounds, the plaintiff stated that the application was fatally defective since it offended the express provisions of **Section 6(1)** of the **Arbitration Act, 1995**. The plaintiff stated that the defendant had already taken further steps in the suit and was therefore not entitled to invoke the arbitration clause in the policy document. It was the plaintiff's contention that the defendant had failed to sufficiently give reasons to enable the court stay proceedings herein pending reference of the dispute to arbitration.

At the hearing of the application, I heard rival submissions made by Mr. Macharia on behalf of the defendant and by Mr. Kang'ethe on behalf of the plaintiff. The two counsel, apart from citing several authorities, basically reiterated the contents of the pleadings filed by the parties in court. The issue for determination by this court is whether the defendant established a case to enable the court stay proceedings herein pending reference of the dispute to arbitration. **Section 6(1)** of the **Arbitration Act**,

1995 provides that:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters an appearance or files any pleading or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds –

- a) *that the arbitration agreement is null and void, inoperative or incapable of being performed; or*
- b) *that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”*

A party who desires to stay proceedings in court pending determination of a dispute by arbitration must establish the existence of an arbitration agreement. Such a party must not take any steps in the proceedings and must, not later than the time such a party enters appearance or files any pleadings, apply for proceedings to be stayed pending reference of the dispute to arbitration.

In the present application, the defendant established the existence of an arbitration clause in the policy document that entitled it to refer the dispute to arbitration. Although Mr. Kang’ethe argued that the plaintiff had not signed the specific policy document annexed in the affidavit in support of the defendant’s application for stay of proceedings, upon evaluating the facts of this case it was clear that there is no requirement for an insured to sign or execute a policy document. The insurance agreement is deemed to have been entered into at the time the insured presents a duly filled proposal form to the insurance company and pays the required premium. Once an insurance cover is issued by the insurance company, the insurance contract is deemed to have been entered into between the insured and the insurance company. The insured, by accepting the insurance cover, is deemed to have accepted the terms and conditions of the said insurance policy. In the case of the plaintiff, he was deemed to have accepted the terms and conditions of the private car policy of the defendant. The plaintiff cannot therefore claim that he was not bound by the arbitration clause in the policy document. I find the objection by the plaintiff on this ground to be without merit.

As to the issue whether the defendant had taken steps before filing the application to stay proceedings herein, the plaintiff in objecting to the defendant’s application is on firmer ground. The defendant should have filed the application seeking to stay proceedings herein *“not later than the time when [the defendant] enters appearance or files any pleadings or takes any other steps in the proceedings...”* (see **Section 6(1)** of the **Arbitration Act**). In the present application, the defendant should have filed the application staying proceedings on 28th November, 2007 when it entered appearance. By filing the application for stay of proceedings two weeks after entering appearance, the defendant had taken steps in the proceedings and was therefore disentitled to seek and be granted the order staying proceedings pending reference of the dispute to arbitration. The Court of Appeal in **Charles Njogu Lofty vs. Bedouin Enterprises Ltd [2005] eKLR** cited with approval the decision of Githinji J (*as he was then*) in **Bedouin Enterprises Ltd vs. Charles Njogu Lofty & Anor Nairobi HCCC No. 1756 of 2007** (*unreported*) where he held that:

*“In my view, **Section 6(1)** of the **Arbitration Act, 1995**, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of **Section 6(1)** of the **Arbitration Act, 1995**, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings. **Section 6(1)** of the **Arbitration Act, Cap 49** (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. **Section 6(1)** of the **Arbitration Act, 1995**, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed.”*

The above decision of the Court of Appeal was quoted with approval by Lesiit J in a recent case of **Treadsetters Tyres Ltd vs. Elite Earth Movers Ltd Nairobi HCCC No. 440 of 2005 (Milimani)** (*Unreported*). It is therefore clear that the defendant cannot invoke the provisions of **Section 6(1)** of the **Arbitration Act 1995** to stay proceedings herein pending reference of the dispute between itself and the plaintiff to arbitration. Once the defendant entered appearance and failed at the same time to file an application staying the proceedings herein pending reference of the dispute to arbitration, the defendant was deemed to have waived its rights for the matters in dispute herein to be determined by arbitration as provided by the policy document.

In the circumstances therefore, I hold that the defendant failed to establish that it is entitled to have the proceedings herein stayed pending reference of the dispute to arbitration. The application dated 11th December, 2007 is hereby dismissed with costs to the plaintiff. The defendant is granted leave to file its defence within seven (7) days of today's date. The defendant may file any other pleadings within the said period. The plaintiff shall be at liberty to fix application dated 8th May, 2008 for hearing.

DATED at NAIROBI this 18th day of JUNE, 2008.

L. KIMARU

JUDGE