



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 442 of 2008

JOHN ISAAC OBIYE.....PLAINTIFF/APPLICANT

VERSUS

STANDARD ASSURANCE (K) LIMITED....DEFENDANT/RESPONDENT

RULING

1. The application to which this ruling generally relates is the Chamber Summons dated 29/10/2008 by which the Applicant seeks ORDERS:-

1. *THAT this Honourable Court be pleased to certify the application as urgent and service of the same be dispensed with in the 1st instance and interim orders be granted ex-parte.*
2. *THAT this courts' file in respect of HCCC No.187 of 2006, Nairobi, and Rose Atieno Kitoyi –vs- John Isaac Obiye & Another be sent for, as the record therein is material to this suit.*
3. *THAT the Honourable Court be pleased to enter judgment on admission in respect of Prayer (iii) of the Amended Plaintiff and order settlement of the directed amount in NRB HCCC No.187 of 2006 forthwith or execution be directed against it instead of the Plaintiff.*
4. *THAT this Honourable Court be pleased to make any other order may be deemed just and expedients for ends or justice to be met. (sic)*
5. *THAT costs be in the cause.*

2. The application which is expressed to be brought under Order XII Rule 6 and Order XIII Rule 6 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law is grounded on the five grounds on its face and is also supported by the averments in the sworn affidavit of JOHN ISAAC OBIYE who says he is the owner of the motor vehicle registration No. KAL 288H; that the said vehicle was involved in an accident on 9/04/2004; that as a result of that accident, HCCC No.187 of 2006 was filed against him by the Plaintiff herein seeking damages for injuries sustained.

Before the application could be heard, the Defendant filed and served upon the Plaintiff a Notice of Preliminary Objection raising the following grounds:-

1. *That the policy of insurance provides that all disputes arising therefrom between the parties be referred to the decision of an arbitrator.*

2. *That the Defendant has already made an application to have the matter referred to arbitration pursuant to section 6 of the Arbitration Act. The said application is pending for determination.*
3. *The pleadings have not closed.*
4. *The alleged admission is neither unequivocal nor unconditional.*

3. Miss Ogonda who appears for the Defendant argued the Preliminary Objection on behalf of the Defendant and stated that the policy of insurance in respect of the subject motor vehicle provides for arbitration in case of any dispute between the parties. She stated further that the Defendant herein has already filed an application dated 27/10/2008 seeking an order of the court to refer the matter to arbitration in accordance with section 6(1) (b) of the Arbitration Act. Section 6 of the Arbitration Act provides:-

6. (1) *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 appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds -*

(a) *that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

In the alternative, she argued that this application should be stayed pending the hearing of the Defendant's application dated 27/10/2008.

4. Mrs. G. Matata, advocate for the Plaintiff opposed the Preliminary Objection citing the case of Muiruri –vs-Kimemia [2002] 2 KLR 677, Mrs. Matata contended that the instant case is not a proper case for a Preliminary Objection. She contended that in dealing with the Preliminary Objection in the instant application, this court has to exercise its discretion. She also contended that the court's power to stay any suit is a matter of discretion and that in the circumstances, it cannot be said that the points raised by the Defendant are pure points of laws.

5. The Muiruri case (above) restated what a Preliminary Objection is as set out in the Mukisa Biscuits Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1969] EA 696 where it was said that:-

“A Preliminary Objection is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. A Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Mrs. Matata also relied on The Law of Insurance, 3rd Edition by Raoul Colinvaux (Sweet & Maxwell Limited, 1970), paragraph 268 thereof dealing with stay of proceedings. The relevant portion of that paragraph states as follows:-

“The court's power to stay the action is purely discretionary. Where the arbitration is a condition precedent to the claim it ought generally to stay an action which could not succeed, (Freshwater v Western Australian Assurance [1933] 1KB 515, 528 per Rorer LJ) but a stay may be required where difficult questions of law are involved (Clough v Country Live Stock Insurance [1916] 85 L.J. K.B. 1185). A stay will normally be refused where questions of law only are in dispute, but where questions of both law and fact are in dispute stay will not be refused on the sole ground that a question of law is involved (Rowe Bus v Crossley (1912) 108 LT 11, 13, 14, 15.

The fact that the dispute mainly covers matters not within the arbitration clause is a ground for refusing a stay.”

6. Mrs. Matata also contended that in any event section 7 of the Arbitration Act offers protection to the

Plaintiff to which Miss Ogonda said that Section 7 of the Arbitration Act offers only interim protection whereas the instant application in her view seeks to dispose of the entire suit if the same is granted. Section 7 (1) of the Arbitration Act provides:-

7. (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

7. In the plaint that was filed contemporaneously with the application, the Plaintiff alleges that he filed suit against the Defendant being HCCC No.187 of 2006 as a consequence of the injuries he (Plaintiff) sustained in a road traffic accident involving the Defendant's motor vehicle on 9/04/2003; that the said suit was finalized by way of a consent judgment entered into between the Defendant's and the Plaintiff's lawyers. The Plaintiff also alleges that execution of the consent judgment was in progress, including proclamation and attachment. The Plaintiff prays for judgment against the Defendant for:-

- (i) *Damages for breach of contract*
- (ii) *Loss of business as pleaded in paragraph 12*
- (iii) *A declaration that the Defendant is fully liable to meet the decretal sums, costs, interest and audtioneer charges in Nairobi HCCC No.187 of 2006.*
- (iv) *Costs and interest of the suit.*
- (v) *Any further relief that this Honourable Court may deem fit to grant.*

8. I have carefully considered the pleadings as filed. I have also considered the submissions made by both counsel on the Preliminary Objection. I have also considered the law on the matter. After taking all the above into account, and noting that I do not have the benefit of the record in HCCC 187 of 2006, I have reached the conclusion that the Preliminary Objection cannot be sustained. The true position in this matter is that the Defendant is asking this court to exercise its discretion to stay this suit pending the outcome of some application seeking an order to refer this case to arbitration. The court has not even been given the advantage of seeing the alleged application. A request for stay of proceedings is not automatic. It has to do with the exercise of judicial discretion by the court. I think that it will not be possible for me to decide the Preliminary Objection without going into the nature of the consent judgment that was entered into between the Defendant and the Plaintiff in HCCC No.187 of 2006. It will also be necessary to enquire into the reasons why the issue of arbitration did not arise in HCCC No.187 of 2006. For these reasons, I would reject the Preliminary Objection at this stage.

9. In the result, I dismiss the Defendant's Preliminary Objection with costs to the Plaintiff.

It is so ordered.

Dated and delivered at Nairobi this 18th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiff/Applicant

.....For the Defendant/Respondent