REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 71 of 2006

BAHARI TRANSPORT COMPANY …….PLAINTIFF

VERSUS

A.P.A. INSURANCE CO. LTD. ……..DEFENDANT

R U L I N G

The substantive matter in this dispute arose out of a contract of insurance entered between Bahari Transporters Company Ltd, the plaintiff herein and A.P.A. Insurance Co. Ltd, the defendant herein. What provoked the filing of this suit is the fact that the defendant disclaimed liability when the alleged risk insured attached.

When this suit came up for hearing, the defendant's preliminary point of law set out in the notice dated 12th March 2007 had to be disposed of first. The preliminary objection was expressed as follows:

"Take notice that the defendant will raise preliminary objection at the hearing of the suit …… that the defendant having disclaimed liability to the plaintiff for its claim under the policy of insurance referred to in the plaint the plaintiff's claim in the suit herein has for all purposes been abandoned and the same is not recoverable as the plaintiff has failed to refer the claim to arbitration within twelve calendar months from the date of the disclaimer on 16th December 2004."

It is the argument of Mr. Shikely, learned advocate for the defendant that the dispute should have been referred to arbitration in terms of Clause 9 of the policy once a disclaimer was made. The learned advocate urged this court at this stage to declare that the plaintiff's claim had been abandoned.

On his part, Mr. Swaleh, learned advocate for the plaintiff urged this court to dismiss the preliminary objection as the same was misconceived. Mr. Swaleh argued that the defendant lost the right to rely on the arbitration clause when it filed a defence instead of applying for an order of stay of proceedings pursuant to section 6 of the Arbitration Act. It is further the argument of Mr. Swaleh that the preliminary objection cannot be treated as such in view of these facts are disputed which can only be ascertained upon reception of evidence. It was also argued that the arbitration did oust the plaintiffs right of access to a court of law within the statutory period of 6 years from the date of breach of the contract.

I have carefully considered the competing arguments. I think this court has been challenged to interpret the effect of clause 9 of the policy which read as follows:-

"All differences arising out of this policy shall be referred to the decision of an Arbitrator to be appointed

in writing by the parties in difference or if they cannot agree upon a single arbitrator the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the Arbitrators before entering upon the reference. The umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company. 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 disclaim 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."

The above clause is the one the defendant relies on in its preliminary objection. This court has been urged to rule that the claim by plaintiff has been abandoned for non-compliance of clause 9 of the policy. What the defendant is indirectly saying is that the suit is not competently before this court for the same reason.

To begin with the pleadings placed before the eyes of this court do not indicate as to when the defendant disclaimed liability and or repudiated the policy. This is a material fact which the defendant did not point out. It is agreed that the defendant disclaimed liability but there is no settled date as to when the decision was made. On this account alone the preliminary objection must fail. Even if for a while it was agreed on the date the defendant disclaimed liability I do not think the preliminary point will succeed because evidence must be led as to whether or not the defendant was legally entitled to disclaim liability.

It is not disputed that the defendant filed a defence in this matter. It is admitted that all along the defendant know that there was an arbitration clause in the policy. It is trite law that the defendant was entitled to take advantage of the arbitration clause and seek for an order to stay proceedings after entering appearance and before filing a defence. The court of Appeal restated this position in the case of **Kisumuwalla Oil Industries Ltd. =vs= Pan Asiatic Commodities P.T.E. and Another (2) E.A.L.R. [1995 – 1998] 1.E.A 150(C.A.K.)** in which the court of Appeal said as follows:

"The appellant's application to strike out the plaint and dismiss the suit was a step in the proceedings and by not filing an application for stay of the legal proceedings the appellant had forfeited its right to rely on the arbitration clause."

I have also come to the same conclusion in this matter hence I do not see any merit in the preliminary objection.

The arbitration clause is contained in the policy document which is actually the insurance contract. My reading of the clause reveals that it did not oust the jurisdiction of this court or any other competent court. Even if there was such an express proviso ousting the jurisdiction of the court it will be of no effect because that will be against the provisions of the Limitation of Actions Act which sets the limitation period to institute a claim based on contract to 6 years.

Lastly, it has been asked on many occasions and in this matter as to what is the effect of arbitration clauses in contracts? The legal position is that they do not preclude parties from accessing courts of law. Let me conclude this issue by referring to Vol.25 Halsbury's Laws of England 4th Edition page 275 in which the position is stated as follows:

"515. Effect of arbitration clause on right of action. An arbitration clause does not necessarily preclude the assured from bringing an action to enforce his claim. The clause may be nothing more than collateral term of the contract between the parties by which a tribunal for determining disputes is provided. In this case there is a complete cause of action before the clause becomes operative, and if the assured brings an action the insurers are not relieved from liability, but they are entitled to apply under the clause to have the action stayed."

The sum total is that the worst that can happen is that the suit will be stayed but cannot be dismissed. Consequently issues touching on arbitration clauses cannot be argued by preliminary objections because

at the end of it all the action or suit will not be disposed of. The appropriate procedure is to file a substantive application in which the facts deponed on affidavits can be sorted out. In the preliminary objection before me, the defendants counsel had to literally hand over the policy document to this court from the bar with little objection from the plaintiffs counsel.

For the foregoing reasons the preliminary objection is ordered dismissed with costs to the plaintiffs. In order to discourage future objections of this kind, the defendant should also pay the plaintiff's attendance fees for the hearing of the case for 14th March 2007.

Dated and delivered at Mombasa this 30th Day of March 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Shikely for the defendant and Mr. Swaleh for the plaintiff.