



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**MISC APPLI 969 OF 2007**

**ANTHONY ONESMUS NYAGA CHEGE.....PLAINTIFF**

**VERSUS**

**KENYA ORIENT INSURANCE LIMITED.....DEFENDANT**

**RULING**

The Plaintiff/Applicant has filed this originating summons dated 12<sup>th</sup> June, 2007. It is expressed to be brought under section 12(2) and (3) of Arbitration Act and Rule 3(1) of Arbitration rules, Order XXXVI rule 7 of Civil Procedure Rules. The Applicant seeks the following orders:

- 1) This application be certified urgent.
- 2) This honourable court do appoint an arbitrator to arbitrate in the dispute between the Plaintiff/Applicant and the Defendant/Respondent arising out of policy number 104060005/D in respect of Motor Vehicle Number KAV 946B and the theft claim therein arising out of the said motor vehicle about the 2.9.2006.
- 3) All necessary directions be given
- 4) The Respondent do meet the costs of this application.

The basis of the application is cited on the face of the application in the following terms:

**a) The Applicant proposed and the Respondent accepted and the parties consequently entered into a contract for insurance of the Applicant's motor vehicle KAV 946B pursuant to which contract the Respondent issued a comprehensive commercial vehicle insurance policy public service cover for the Applicant's motor vehicle KAV 946B valued and insured for a sum of Kshs.700,000/= for the period 11<sup>th</sup> February, 2006-10<sup>th</sup> February, 2007 for a consideration of a premium of Kshs.45,500/= which premium the Applicant fully paid to the Respondent.**

- b) In terms of the said contract of insurance between the Applicant and the Respondent the policy issued by the Respondent covered and cushioned the Applicant and the Respondent undertook to indemnify the Applicant amongst others for the loss of the motor vehicle KAV 946B through theft.**
- c) That on or about 2/08/2006 while the aforesaid motor vehicle insurance policy was in force vide Certificate of Insurance No. A2979400 the Applicant's motor vehicle was stolen and as a result the Applicant has been deprived of the ownership possession and use of the motor vehicle and has suffered loss and damage.**
- d) That the Applicant duly notified the Respondent of the loss of the Motor vehicle and lodged a claim for compensation for the loss of the vehicle and the Respondent declined to compensate the Applicant for the loss in breach of the contractual obligation of the Respondent under the terms of the insurance contract between the Applicant and the Respondent.**
- e) That the said insurance policy issued by the Respondent contains an arbitration clause that provides that all differences arising out of the policy shall be referred to the decision of an arbitrator to be appointed by the parties or two arbitrators one to be appointed by each party.**
- f) That the Applicant having differed with the Respondent over the repudiation of the claim the Applicant through his lawyers wrote to the Respondent on 6.2.2007 requiring it to submit to arbitration and nominating an intended arbitrator of the dispute in issue and by a letter dated 10/4/2007 the Defendant refused to submit to arbitration in violation of the terms of the policy.**
- g) That the Respondent is intent on continuing to breach the terms of the insurance contract and denying the Applicant his right to indemnify for the loss the applicant has suffered of the loss of the vehicle unless this honourable court compels the Respondent to comply with the terms of the contract and discharge its obligation under the insurance policy.**

There is a supporting affidavit by the Plaintiff in which

several documents are annexed.

The application is opposed. There is a replying affidavit sworn by **NJOGU MUNGAI**, Legal Officer of the Defendant Company.

When the summons came up for hearing, Ms. Chege represented the Plaintiff/Applicant while Ms. Kamau represented the Respondent.

I have considered the application, the affidavits sworn by both parties and the submissions by Counsel. From the onset, let me make an observation concerning the Respondent's replying affidavit. The Instant application seeks to have an arbitrator appointed by the Court since the Respondent has failed to nominate any, as agreed between the parties in the Insurance policy entered into by them, in order to have the dispute between them resolved.

The Respondent has instead addressed a totally different issue, which if it desired, should have been the subject of a different application. The Respondent through its officer has deponed that the insurance policy was repudiated by the Respondent. With due respect to the Respondent, that is neither here nor there. The fact the Respondent repudiated the Insurance Policy is precisely the reason the Plaintiff/Applicant seeks to have the matter referred to arbitration.

The issue between the Court is whether a dispute has arisen between the parties which is subject of an arbitration clause as per the insurance policy agreement. The Respondent according to the Applicant has

declined to produce the actual policy agreement signed by the parties. In absence of the original document, the Applicant has annexed a standard policy document marked **ANC 10** which he states is similar to the one entered into between the parties. The Respondent has not denied issuing the Plaintiff/Applicants vehicle or refusing to pay the claim. There is therefore no dispute that a dispute has arisen between the parties.

The second issue is whether the parties agreed on what should happen in case a dispute arises. The Applicant has annexed **ANC 10** and refers to clause of thereof which provides as follows:

This clause provides that any differences arising between the parties, including a situation where the Insurer has repudiated the Insurance Policy, should be referred arbitration. The clause provides the procedure to be adopted in the appointment of an arbitrator. In that regard the Plaintiff depones that he choose an arbitrator. In that regard the Plaintiff depones that he choose an abritrator and informed the Respondent in writing. The correspondences to that effect are **ANC 11**.

The first letter is dated 6<sup>th</sup> February, 2006 from the Plaintiff's Advcoates to the Defendant. At page 2 of the said letter, the Defendant is notified that the Plaintiff had nominated Mr. J. K. Mwangi Advocate to be the arbitrator.

There is a letter dated 10<sup>th</sup> April, 2007 in which the Defendant replies to the Plaintiff's Advocate letter of 6<sup>th</sup> and 9<sup>th</sup> February, 2007. It informs the Plaintiff's Advocate that the claim was declined for reasons already communicated. The spirit of the letter also clearly implies that the Defendant would not submit to arbitration.

In Ms. Kamau's submission in Court, it was implied that the Defendant had not declined to go for arbitration but that the Defendant was opposed to the arbitrator nominated by the Plaintiff. That is not contained in the replying affidavit. However, the Defendant's assertion that the Plaintiff had unilaterally nominated an arbitrator as arbitrator of the dispute is not without merit.

I find that the parties set out a clear procedure of nominating an arbitrator to any dispute arising between the parties. That process was not followed as stipulated. The Plaintiff cannot complain, as he did not follow the procedure as agreed. I must make it clear however that a dispute has arisen which should go for arbitration. I will grant order 3 of the Originating Summons in the following terms.

- 1) As agreed in the Policy Agreement,
  - a) Both parties to agree on a single arbitrator whom they should appoint in writing within 14 days from date herein.
  - b) In the event the parties cannot agree on a single arbitrator, each party to nominate one Arbitrator in writing and to inform the opponent of the nomination in writing, within 14 days from the last day in (a) above.
  - c) In the event the two arbitrators in (b) above do not agree, then the two arbitrators shall nominate an Umpire who will sit with them to preside over the matter.
  - d) Each party has leave to apply in case of default.
  - e) Since the Defendant/Respondent necessitated this suit, the costs of this Originating Summons shall be met by the Defendant/Respondent.

**Dated at Nairobi this 16<sup>th</sup> day of November, 2007.**

**LESIT, J.**

JUDGE

Read, signed and delivered in the presence of:

Miss Chege holding brief for Ms. Kimani

N/A for Respondent

**LESIT, J.**

JUDGE