



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Appli. 721 of 2004**

WILLIAM OLUANDE.....APPLICANT

-VERSUS-

**AMERICAN LIFE INSURANCE COMPANY (K) LIMITED.....
RESPONDENT**

JUDGEMENT

The applicant’s Originating Summons, dated 7th June, 2004 and filed on 9th June, 2004 was brought under S. 12(4) of the Arbitration Act, 1995; rule 3(1) of the Arbitration Rules, 1997; Order XLV, rule 5(1) (a) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The application carried the prayer that the Court do determine -

- (a) *whether the applicant is entitled to an order of the Court requiring the respondent to appoint an arbitrator in the dispute, in terms of the agency agreement dated 1st January, 2002 between the parties;*
- (b) *whether the applicant is entitled to costs in this application.*

The grounds for the application were firstly, that the applicant and the respondent had, on or about 1st Janaury, 2002 entered into an *agency agreement*. Secondly, it was a term of the said agreement that any dispute or difference of any kind arising between the applicant and the respondent, was to be referred to *two arbitrators and an umpire* to be appointment in accordance with the terms of the said agency agreement. Thirdly, a dispute has now arisen between the parties: the respondent has not honoured its part of the contract, by not paying the applicant the outstanding amount owing to him. Fourthly, the applicant has constantly reminded the respondent of the provisions of clause 21 of the said agreement which provides for arbitration, but the respondent has been reluctant to take the necessary action.

The applicant depones in his supporting affidavit that, pursuant to the agency agreement of 1st January, 2002 he had secured business for the respondent and, on that account, became entitled to *payment of a commission*. However, the respondent has refused to pay commission as expected, and this has precipitated a *dispute*. The applicant deposes that it was a term of the contract that any dispute or difference of any kind arising between the applicant and the respondent shall be referred to arbitration by two arbitrators to be appointed by the parties, and an umpire to be appointed by the arbitrators. He further depones that on many occasions, he has reminded the respondent of the provisions on arbitration, but the respondent has taken no action on such reminders. The deponent avers that it is fair, just and expedient that an arbitrator be appointed to resolve the dispute between the parties.

The advocate for the applicant, *Mr. Chacha Odera*, too, swore an affidavit, dated and filed on 4th

October, 2004 in which he avers that the parties to the agency agreement of 1st January, 2002 require an interpretation of the terms and the effect of various clauses of the agreement, as a way to solve the dispute.

Mr. Odera's submissions were based on the applicant's affidavit. The main element in the submissions was the deponent's reference to clause 21 in the *Agency Manager Agreement* signed by the parties in September and October, 2002. Clause 21 reads as follows:

“Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration. Each party shall appoint in writing an arbitrator and the arbitrators appointed shall select in writing an umpire. The arbitrators and the umpire shall each be individuals who at the time of arbitration are employees, Agency Managers, Unit Managers or Agents of the Company, or any of its related or affiliated companies. The arbitrators, without the umpire, shall arbitrate and their decision shall be final and binding on the parties hereto. In the event, however of disagreement between the arbitrators, only the points of disagreement shall be submitted to the umpires, in which case a decision of the umpire and one arbitrator shall be final and binding on the parties hereto. The arbitrators and the umpire are not to be bound by any strict rules of legal procedure or evidence. They shall decide in accordance with prevailing practices in the company and with what they think is the fair and right thing to be done between the parties from a business point of view. The parties hereto will each pay for their own arbitration expenses, and will share equally in the cost of the umpire. The parties shall elect in writing a mutually agreed location for the arbitration.”

Learned counsel submitted that the existence of the said agreement was not the subject of dispute. He stated that the applicant, who had secured business for the company, was entitled to payment of a commission – but this was not paid. Counsel submitted that the Company's belief that the applicant was not entitled to payment of a commission touched on the very core of a dispute, which by clause 21 of the Agreement ought to be placed before arbitrators, for resolution.

The essence of the Company's objection is contained in the Managing Director's letter to the applicant, dated 10th March 2004. The letter (in part) reads as follows:

*“.....following the receipt of your letter of December 17, 2004 I entertained a lengthy interview and discussion with you where you outlined more or less the matters represented in your letter. I had then pointed out that **the company regarded the business submitted as having been placed directly notwithstanding any involvement you may have had with the client in either that or any other connection.**”*

The mere existence of those two *opposed* positions, Mr. Odera submitted, was the demonstration that a *dispute existed*. Counsel submitted that clause 21 of the Agreement was wide enough to cover many matters, including *breach of agreement*; and so any dispute such as may arise between the parties ought to go to arbitration.

Learned Counsel submitted that under the agreement duly made between the parties, the instant dispute was a matter for arbitration, and thus there was a contractual duty placed upon the respondent to appoint one arbitrator. Counsel found the supporting legal principle in *Chitty on Contracts*, 26th ed, Vol. 1 (London: Sweet & Maxwell, 1989); it is there (para 822) stated:

*“Intention unequivocally expressed. On the other hand, where, even by the use of general words, the intention of the parties is clearly and unequivocally expressed, the court is bound by it, however capricious it may be, unless it is plainly controlled by other parts of the instrument. So in *Barton V Fitzgerald (1812) 15 East 530* it was held that the generality of a covenant for title in an assignment of a lease was not limited by other covenants which went only to provide for or against acts of the assignor himself or those who claimed under him. There was no intention disclosed to limit the general words.”*

The significance of the above passage, to my mind, is that it underlines the sanctity of contract, and states

that it *behoves the Court to give effect, so far as possible, to the purpose and intent of the parties*; to the essence of the *agreement* between the parties. Therefore, learned Counsel urges that the intent of the parties in the instant matter, was that *emerging disputes be submitted to arbitration*; and so, it is urged, the applicable principles of law dictate that the respondent be required to appoint an arbitrator, and such arbitrator to be part of the arbitration panel resolving the substantive dispute herein.

Mr. Odera submitted that clause 21 of the agreement (quoted above) was expressed in clear terms, and did manifest the intention of the parties; and there was *no need to refer to any other clause*.

Learned Counsel then addressed himself to the arbitrator's jurisdictional remit. He relied on the work, the *Law and Practice of Commercial Arbitration in England*, 2nd ed. (London: Butterworths, 1989) by Sir Michael J. Mustill and Stewart C. Boyd, on the following passage (p.13):

“Next, there is the notice of arbitration, by which the claimant invokes the option to arbitrate. The notice of arbitration, read in conjunction with the arbitration agreement, determines the scope of the dispute referred to arbitration, and hence the jurisdiction of the arbitrator. It also forms part of the mechanism for constituting the tribunal. If the reference is to a sole arbitrator, the claimant gives notice to his opponent calling upon him to concur in the choice of a nominee. If the agreement contemplates a tribunal of two arbitrators, one appointed by each side, with an umpire or third arbitrator chosen by the two appointees, the claimant:

- (i) invites a person to act as an arbitrator:***
- (ii) obtains the assent of that person;***
- (iii) notifies the appointment to the other party”***

Mr. Odera submitted that the applicant had acted on the lines set out in the above passage, and given due notice to the respondent – but the respondent has declined to respond as necessary. Learned counsel urged the Court to adopt, in the circumstances, the principle in the High Court of Tanzania decision in *Shamji V Treasury Registrar, Ministry of Finance* [2002]1 E.A. 269 (HCT). In that case *Nsekela, J* had held (p.278):

“As a matter of general principle, it has been stated that where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the Court would direct that the parties should go before the specified tribunal and should not resort to the courts. The parties herein very clearly chose arbitration to be the modality of settling their disputes but the petitioners want to resile from what was previously agreed upon, on the pretext that there was fraud and misrepresentation.....

“I am fully aware that there are no hard and fast rules as to how judicial discretion should be exercised, but taking into account all the surrounding circumstances, I am not inclined to revoke the submission of the parties to arbitration. ‘Any dispute’ should not be read as excluding disputes involving fraud or misrepresentation. It is not the function of the Court to re-write and insert provisions which the parties could have agreed to deal with in a situation which might arise.”

Nsekela, J in his decision had lodged his reasoning in principles already set out in the English case, *Harbour Assurance Co. (U.K.) v Kansa General International Assurance Co., Ltd* [1993] 3 All E.R. 897 (at p.915 – *Hoffman, L.J.*):

“.....it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. There are, first, the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one-stop adjudication, or in other words, the inconvenience of having one issue resolved by the court and then, contingently on the outcome of that decision, further issues to be decided by the arbitrator.”

These principles, learned Counsel submitted, provided a justification for the respondent to be compelled to go to arbitration. Although it had been deposed on behalf of the respondent that the applicant's case was tainted with fraud, learned counsel submitted that such a claim did not, in law, preclude the instant matter from going to arbitration, in terms of the agreement made between the parties. To buttress this point counsel invoked this Court's decision (*Ringera, J* – as he then was) in *Telkom (K) Ltd v Kamconsult Ltd* [2001] 2 EA 574. The Learned Judge held that (p.575):

“An arbitrator does not lose jurisdiction to handle a matter by the mere allegation of fraud in the pleadings. The arbitrator would be entitled to hear evidence and determine whether fraud had been established. It would be against public policy to enforce a contract, including an arbitration clause, where fraud was established. However it would defeat the purpose of the legislature if the mere allegation of fraud, no matter how mischievous, was enough to oust the arbitrator's jurisdiction.”

In a more recent case of this Court (*Azangalala, J*), *Karuna Holdings Ltd v Lonrho Agri-business (E.A) Ltd.*, Civil Suit No. 762 of 2003 (O.S) it was also held:

“There are allegations of fraud, misapplication of funds and misappropriation of funds. These allegations are denied by the applicant. The arbitrators are not bound to accept the claimant's allegations nor are they bound to accept the applicant's denials. But the arbitrators have jurisdiction to consider the rival allegations. The arbitrators are able to determine whether or not the rival allegations did affect the shares.”

The same approach to the jurisdiction of an arbitrator, once parties have reached agreement to go to arbitration, is also apparent in another decision of this Court (*Waweru, J*), in *John Okuku Odwora & Another V Madison Insurance Co. (K) Ltd & Another*, HCCC NO. 162 of 2004.

When learned counsel for the respondent raised the point that an order was on record to the effect that the instant matter be disposed of both through depositions and *viva voce* evidence, the applicant was sworn, and was cross – examined on the content of his affidavit. He testified on the two agreements which had been made between himself and the respondent – the *Carrier Agreement of 1st July, 1991* and the *Agency Manager Agreement of 1st January, 2002*. By the second agreement, the applicant was designated Agency Manager for the Respondent – and the terms of this agreement were set out in detail. The applicant was not an employee, but was accorded facilities by the respondent: his responsibilities included *recruitment, training and marketing*. As an exclusive agent under the agreement, the applicant *secured contracts between third parties and the respondent*, and the one link in this category which has led to the instant dispute, was *between the respondent and World Vision – Kenya*. The applicant testified that he is the one who procured the said contract for the respondent; the respondent disputed this. He testified that, as agency manager he negotiated that contract and availed it to the Defendant, and in this way he became entitled to payment of a *commission*.

Learned Counsel Mr. Nyachoti submitted that the dispute herein did not fall within the ambit of the Agency Manager Agreement of 1st January, 2002 – and consequently the applicant could not properly invoke clause 21 of the said agreement. In the words of counsel:

“Agency to World Vision Kenya was given upon a direct application by World Vision to the Respondent; if the applicant decided to participate thereafter it was not within the framework of an agency agreement.”

The applicant's case is founded upon what, in my view is a coherent statement of facts – in affidavit and in *viva voce* evidence. From these facts it is clear that there was a systematic scheme of dealings between the parties, and that the applicant was contractually engaged as an Agency Manager. Pursuant to the agreement of 1st January, 2002 the applicant was involved in the securing of an important business contract for the respondent – whether or not some other link also helped to secure the same. On that basis *there is a relationship between the parties which, where it ends in a dispute, gives a legal framework for reference to arbitration by virtue of clause 21 of the said agreement*. I have not been persuaded by the weight of fraud claims emanating from the respondent, as reason enough for limiting the application of

the arbitration clause. In my judgment, this is a matter the merits of which ought to go to arbitration, in fulfilment of the consensual act of the parties, embodied in the said agreement.

I will, therefore, direct and order as follows:

1. *The applicant is entitled to an order of this Court requiring the respondent, American Life Insurance Company (K) Limited, to appoint an arbitrator in terms of the agency agreement between the applicant and the respondent dated 1st January, 2002.*
2. *The respondent shall, within 30 days of the date hereof, appoint an arbitrator in the terms of the first direction herein.*
3. *The respondent shall bear the applicant's costs in this application.*

Orders accordingly.

Dated and delivered at Nairobi this 10th day of February, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang J.

Court Clerk: Mwangi

For the Applicant: Mr. Chacha Odera, instructed by M/s. Oraro & Co. Advocates

For the Respondent: Mr. Nyachoti, instructed by

M/s. Raffman Dhanji Elms & Virdee Advocates.