



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

Misc Civ Appli 520 of 2005

HON. CHRYSANTHUS BARNABAS OKEMO.....
APPLICANT

VERSUS

APA INSURANCE COMPANY LTD.....
.....RESPONDENT

R U L I N G

This is an application for the enforcement of an arbitration award. Since it was filed in court on 5th July 2005, there have been several noteworthy developments.

First, the respondent had lodged the arbitral award in Court. That cause is No. 241/05. Within that cause, the respondent herein filed an application to set aside the award.

When the applicant in this cause felt that there was some unreasonable delay in prosecuting the application in Cause No. 241 of 2005, he moved this court, for the enforcement of the award. That application was heard by the Hon. Azangalala J., who delivered his reasoned decision on 21st September 2005. By his decision, the said learned judge adjourned this application pending the hearing and determination of the application in Cause No. 241 of 2005.

In due course, the application in Cause No. 241 of 2005, which was for the setting aside of the arbitration award was heard and determined, by me. In a ruling delivered on 24th November 2005, the application was dismissed with costs.

In a supplementary affidavit sworn by Mr. Ashok Shah, the Chief Executive of APA Insurance Company Limited, the court has been informed that after the dismissal of the application to set aside the award, the respondent paid to the applicant herein, a total of KShs.2, 673, 680/=.

There is no dispute about the said payment as the respondent has exhibited the applicant's acknowledgement of the same.

When the applicant's advocates received payment, they insisted that the amounts remitted were not sufficient to settle the award. They therefore wrote back to the respondent's advocates, on 19th December

2005, demanding the outstanding interest, as per the award. In his further affidavit, which was sworn on 4th May 2006, the applicant reiterated his demand for the interest which was granted to him by the arbitrator.

It is the applicant's case that once an award is made, the court cannot make alterations to it. His submission is that the court can only enforce an award in the same Form and substance as it was handed down by the arbitrator.

Therefore, as the arbitrator herein awarded compensation in the sum of KShs.2.2 million, the applicant submits that it was not open to the respondent to seek deduct therefrom, the sum of Kshs.150,000/=, on account of an alleged policy excess.

Any endeavour by the respondent to deduct the said excess is said to amount to unauthorised alterations to the arbitration award. Therefore, the applicant asked this court to decline the respondent's invitation to alter the award. He also emphasized that the issue of the policy excess was fully canvassed before the arbitrator. Therefore, by seeking to re-introduce the issue of the said excess, through an objection to this application for enforcement of the award, the respondent is said to be trying to re-open the arbitration proceedings through the back door.

It was further submitted that the arbitrator could have ordered that the policy excess be deducted from the compensation, if he had intended it to be so, especially considering that he had the opportunity of hearing all the witnesses testifying before him.

In the circumstances, the applicant submitted that the award ought to be enforced without any alternations or variations whatsoever.

In response, the respondent concedes that interest is payable as per the award. The only issue that remained to be addressed, as far as the respondent was concerned, was in relation to policy excess, amounting to KShs. 150,000/=.

In that regard, the respondent exhibited the policy of insurance, in which it was provided as follows, in relation to "**Excess All Claims Clause**";

"It is hereby understood and agreed that notwithstanding anything to the contrary contained in Section I and II of this policy the insured in respect of each and every event shall be responsible for the first 5% of value (Min. KShs.15,000/=) and Shs. 3,000/= respectively....."

From the arbitrator's award, it is clear that the value of the applicant's motor vehicle at the date of the accident was KShs. 3,000.000/=. Therefore, by my calculations of 5% of the said value would be KShs. 150,000/=.

In the light of that provision in the policy document, should I or should I not order that the policy excess should be deducted from the sum awarded by the arbitrator?

To my mind, if I were to interparte the provisions of the insurance policy in the manner I understand it, that would imply that I would be replacing the arbitrator's adjudication with my own thoughts on that issue. That would be improper. It is my considered view that if the respondent had wished to have the policy excess taken into account when the compensation was being calculated, it should have sought to persuade the arbitrator. In that respect, it is clear to me, from a perusal of the Award that the issue of the excess definitely featured during the proceedings before the arbitrator. Consequently, I do find that the respondent has had its opportunity to try and persuade the arbitrator that it was necessary to deduct the policy excess from the sum awarded as compensation. Therefore, if the respondent did not succeed in persuading the arbitrator, it cannot now ask this court to re-open the issue.

The arbitrator held as follows:-

“On the totality of the evidence, including the disparate valuations, I consider the sum of KShs. 2.2 million a reasonable, fair and just compensation for the Claimant. There is no counterclaim or outstanding premiums pleaded or particularised against the claim under this policy and so the reference to a set-off seems half-hearted. The sum of KShs. 2.2 million is therefore awarded to the claimant in settlement of the central claim.”

The arbitrator awarded the sum of KShs. 2.2 million as compensation to the applicant herein. Whether or not he failed to take into account the policy excess of KShs. 150,000/=, is not very clear, although he did say that there was no counter-claim or set-off. That suggests that if the respondent herein had wanted to have the policy excess knocked-off the final sum, it should have pleaded it by way of either a counterclaim or a set-off. Having failed to make out that case to the arbitrator, it is not now open to them to do so before the court. Therefore, the respondent must pay the full compensation without deducting the policy excess.

And as the respondent concedes that interest is payable, so it shall be.

Finally, the costs of the application dated 30th June 2005, are awarded to the applicant, and the applicant may proceed to enforce the award. It is so ordered.

DATED and Delivered at Nairobi this 21st day of July 2006.

FRED A. OCHIENG

JUDGE