



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

**Civil Suit 332 of 2006**

**MARGE ENTERPRISES LIMITED ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA ALLIANCE INSURANCE COMPANY LTD ..... DEFENDANT/APPLICANT**

**RULING**

By a Chamber Summons dated 9<sup>th</sup> May, 2006 expressed to have been brought under order VI Rule 13(1) (b) and (d), and 16, Order XLIV Rule 5 of the Civil Procedure Rules, Rules 1 and 2 of the Arbitration Rules and Section 6 of the Arbitration Act as well as Section 3A of the Civil Procedure Act, the Defendants seek orders of this court, inter alia, for:

- (i) Staying the time for filing their Defence pending the determination of the application.**
- (ii) Enlargement of time for the filing of such defence to 15 days after the application is determined**
- (iii) The striking out of the Plaint dated 20<sup>th</sup> March, 2006 for being vexatious, frivolous and an abuse of the process of court.**
- (iv) Any other or further orders as the court may deem just to grant.**
- (v) Costs of the application be provided for.**

The application is premised on three grounds which are that:

- 1. The Plaint is vexatious, frivolous and abuse of the process of court as the suit**

**contravenes Rule 3 of the Arbitration Rules.**

**2. That the Defendant Insurance Company having repudiated liability on 31<sup>st</sup> October, 2005 in terms of Clause 9 of the relevant policy of Insurance, which requires that differences arising out of the policy be referred to arbitration, the suit is vexatious.**

**3. That the Defendant would be deprived of its right to have the Arbitration Clause invoked if required to file a Defence before the present application is heard and determined.**

Mr. Thuo appeared for the applicants and Mr. Apondo for the Respondent.

The application was argued before me in the absence of a Replying Affidavit which the Respondents had not filed within the prescribed period for reasons not satisfactory to the Court. The Respondents were however allowed to respond to the application on points of law, which they did.

The court has considered the submissions by both parties and the authorities cited in support of their respective positions both in the form of case law and statutory provisions and is of the considered view that the application must fail for the following reasons.

**1. “The applicant has not shown how the filing of this suit contravenes Rules 3 of the Arbitration Rules.**

**2. Section 6 of the Arbitration Act does not render a suit filed in the existence of arbitration agreement frivolous or an abuse of the process of court in light of Order VI Rule 13 of the Civil Procedure Rules but gives an opposing party a right to have those proceedings stayed and if found appropriate by the Court, to have the matter in dispute referred to arbitration.**

I am inclined to accept the Respondents’ submission that the court ought to have been asked to stay proceedings under that section 6 of the Arbitration Act, a request which counsel for the Respondent graciously made but was surprisingly rejected by the counsel for the applicant who is his Reply submitted, inter alia, as follows:-

“1. The matter cannot be stayed when there is no application for stay

2. Section 6 (of the Arbitration Act can only be invoked by way of a formal application.”

With due respect I find that Mr. Thuo’s submissions that a party to an Arbitration Agreement cannot file a suit in court unless an award has been rendered in arbitral proceedings quite erroneous. Where a party wishes that an existing arbitration Clause be invoked and arbitration procedure be adopted for the settling of a dispute but the opponent files a suit, the proper procedure is to apply for a stay of those proceedings pending the arbitration if one is referred. The Applicant need not take any steps in the suit and need not ask for enlargement of time to file a Defence to the action if his intention is that the matter be referred to arbitration.

Looking at the application before me, the orders sought and the submissions made on behalf of the applicant, it is not exactly clear to the court what the applicant would wish this court to do as the orders sought herein are, in my view neither warranted nor available under the procedure adopted.

In the circumstances, the application is refused and the same is hereby dismissed inter costs in the cause.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of November, 2006

**M. MUGO**

JUDGE

**RULING delivered in the presence of**

**Mr. Thuo for Defendant/Applicant**

**Mr. Ongoya holding brief for Opondo for Plaintiff/Respondent**