REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 345 of 2001

PETER KEMBOI CHEMAGAT…….....…..…..PLAINTIFF

VERSUS

KENYA ALLIANCE INSURANCE CO. LTD….....…1ST DEFENDANT

SUMMER BUSINESS SERVICES LTD …..... 2ND DEFENDANT

RULING

This is an application made **under Order VI Rule 13(1)(b) and (d) of the Civil Procedure Rules** by the 1st defendant seeking the orders of this court to have the plaintiff's suit struck out with costs. The grounds in support of the application are that the plaintiff was seeking to enforce a contract of insurance whose terms provided that if the insurance company disclaimed liability and no claim was lodged by the plaintiff (*insured*) within twelve months, then the said claim would be deemed to have been abandoned and shall not thereafter be recoverable under the insurance policy. The 1st defendant states that, it repudiated the insurance policy under which the plaintiff had filed his claim on the 23rd of May 1997. The 1st defendant states that the plaintiff's suit had not been filed within a year after the said repudiation, instead the plaintiff had filed the suit on the 5th of October 2001. The 1st defendant stated that under the insurance contract, the plaintiff was therefore deemed to have abandoned his claim. The application is supported by the annexed affidavit of Antony Thuo, a Legal Assistant of the 1st defendant company.

The application is opposed. Peter Kemboi Chemagat, the plaintiff has sworn a replying affidavit in opposition to be said application. In essence, the plaintiff depones that he had invoked the clause in the insurance contract to have the said dispute between himself and the insurance company referred to arbitration within the requisite period. The plaintiff further depones that inspite of being invited to appoint an arbitrator to enable the dispute to be heard and determined, the 1st defendant prevaricated to the extent that the plaintiff was forced to seek the appointment of an arbitrator by himself. The plaintiff depones that, it is after the failure by the 1st defendant to co-operate in having the said dispute referred to arbitration that the plaintiff resolved to file the present suit before court. The plaintiff urged the court not to allow the 1st defendant to benefit from a set of circumstances that it itself created. The plaintiff urged the court to dismiss the 1st defendant's application with costs.

At the hearing of the application, I heard the submissions made by Mr Mutua, Learned Counsel for the 1st defendant and Mr Kiplenge, Learned Counsel for the plaintiff. Having carefully considered the said submissions made and the contents of the affidavit evidence filed in support and in opposition of the application, the issue for determination by this court is whether clause 9 of the insurance policy agreement should be upheld by this court with the result that the plaintiff's suit will be dismissed for having been in breach of the said clause. What does the said clause state? It provides 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 to 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 to 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 reference. The umpire shall sit with the arbitrators and preside at the meetings and the making of an award shall be***

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 disclaimer 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."

Mr Mutua for the 1st defendant has submitted that this clause should be applied and the suit filed by the plaintiff be dismissed as it was filed more than twelve months after the expiry of the twelve month period subsequent to the 1st defendant disclaiming liability. According to the pleadings filed in this case, it is not denied that the 1st defendant disclaimed liability on the 23rd of May 1997. If the said date were to be used to be the commencement date of the twelve month period, then the plaintiff was required to have referred the dispute to arbitration by the 22nd of May 1998. According to the plaintiff's affidavit filed in reply to this application, immediately after receiving the said letter of disclaimer by the 1st defendant, he requested the 1st defendant to appoint an arbitrator so that the dispute could be resolved. The 1st defendant did not appoint the arbitrator as requested by the plaintiff, hence the plaintiff decision to file suit before this court.

To succeed in the application, the 1st defendant has to establish that it raised the issue of the disclaimer and twelve month restriction period in its defence. The 1st defendant further has to further establish that the plaintiff was a signatory to the said insurance policy agreement containing the clause in question. I have seen the defence filed by the 1st defendant. The said defence filed on the 23rd of November 2001, apart from denying that the 1st defendant ever entered into any insurance agreement with the plaintiff, did not raise any issue of the disclaimer of the insurance policy. Indeed in the said defence, the 1st defendant averred that it was a stranger to the plaintiff. Although the 1st defendant attempted to amend its defence by an application dated the 30th of June 2004 (*which application was allowed by consent of the parties to this suit*), the 1st defendant did not abide by the terms of the consent order by paying the requisite court fees. As it were, the said amended defence was not filed. The 1st defendant having not pleaded the issue of disclaimer, it cannot raise the same in the application now before court. From the plain reading of the said defence, it is clear that the 1st defendant completely disowned the plaintiff. What the 1st defendant was stating in its defence is that the plaintiff was a complete stranger to it. The 1st defendant cannot now claim that there existed an insurance policy agreement between itself and the plaintiff. To do so would be contrary to its pleading filed in this court.

The 1st defendant has further not established that the plaintiff duly signed the policy agreement and the clause 9 in particular that the 1st defendant is seeking to invoke. I have perused the said policy agreement annexed to the 1st defendant's application. The said policy agreement annexed is a standard insurance agreement which was not signed by the plaintiff. The plaintiff only signed the proposal form which contained a questionnaire which the plaintiff duly filed. The plaintiff did not sign the annexed conditions which would have bound him in the event that the insurance policy was repudiated. In the circumstances therefore, the 1st defendant's application cannot succeed. The said application is dismissed with costs to the plaintiff.

DATED at NAKURU this 3rd day of August 2005.

L KIMARU

JUDGE