



**Intra Africa Assurance Company Limited v Owiti & another (Civil Case E002 of 2024) [2025] KEHC 4688 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL CASE E002 OF 2024  
LN MUTENDE, J  
APRIL 8, 2025**

**BETWEEN**

**INTRA AFRICA ASSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**CALVIN OWITI ..... 1<sup>ST</sup> DEFENDANT**

**DARSON TRADING LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a plaint dated 16<sup>th</sup> April, 2024, the Plaintiff, a Limited Liability Company insured motor vehicle Registration No. KDK 683B (subject motor vehicle) between 14<sup>th</sup> January, 2023 and 9<sup>th</sup> November, 2023 which injured three persons on or about 25<sup>th</sup> August, 2023, an accident that was stated to have been beyond the purview of the insurance policy hence the claim for a declaration that the Plaintiff is entitled to avoid the policy of insurance between the Plaintiff and Defendants on the ground that it was not used for the benefit of the Defendants and also that it could not indemnify any person out of the incident of 25<sup>th</sup> August, 2023 involving the subject motor vehicle.
2. The 2<sup>nd</sup> Defendant filed a statement of defence dated 30<sup>th</sup> April, 2024, denied the allegations and averred that it had sold the subject motor vehicle to the 1<sup>st</sup> Defendant at the time of the accident in question hence a stranger to contents of the plaint. The 2<sup>nd</sup> Defendant admitted the jurisdiction of the court to determine the suit.
3. The 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection stating that Clause 9 of the Private Motor Vehicle Policy between the Plaintiff insurance company and the 1<sup>st</sup> Defendant provided for a dispute resolution mechanism by way of arbitration hence lodging he suit was premature, bad in law and misconceived.



4. On the said date (6<sup>th</sup> June, 2024) the 1<sup>st</sup> Defendant filed a statement of defence seeking dismissal of the case, where it is urged inter alia that the insurance policy between the Plaintiff and himself provided for a dispute settlement mechanism by way of arbitration, an avenue that has not been exploited by the Plaintiff before filing this case to avoid settlement, hence the matter ought to be referred to arbitration forthwith. However, the 1<sup>st</sup> Defendant admitted that the cause of action arose within the jurisdiction of this court.
5. The Preliminary Objection was disposed through written submissions. It is urged by the 1<sup>st</sup> Defendant (Applicant in the Preliminary Objection) that the relationship between the Plaintiff and 1<sup>st</sup> Defendant was regulated by a Private Motor Insurance Policy which had a clear provision on dispute resolution between them by way of arbitration. That what is clear is that this court has no jurisdiction to entertain the suit for the reason that the entire suit offends the doctrine of exhaustion. Reliance is placed on the Court of Appeal decision in *Geoffrey Muthinjja & Another v Samuel Muguna Henry & 1756 Others* [2015] eKLR where it was held that;

“We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs’ disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.”

6. And, *Lilande v Heri Development Limited & 2 Others* ELC E147 of [2021] KEELC 13261 (KLR) where the court held that;

“The Parties in this case by their agreement chose to have all their disputes and differences resolved through arbitration. I must remind the parties that they are bound by the terms of their contract. The Court of Appeal in the case of *Hesamuddin Gulambussein Pothiwalla Admin, Trustee and Executor of the Estate of Gulambussein & Ebrahim Pothiwalla -vs- Kidogo Basi Housing Co-operative Society Ltd & 31 others (Civil Appeal No. 330 of 2003)* held that:-

“A Court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”



7. That this court lacks jurisdiction to hear and determine the suit; parties ought to submit themselves for arbitration as stipulated in Clause 9 of the Private Vehicle Policy between the Plaintiff and 1<sup>st</sup> Defendant.
8. In response, the Plaintiff (Respondent in the Preliminary Objection) relied on County Government of Kakamega v Mumias Distributors Limited [2021] eKLR where the Court stated thus;

“In view of the Judicial pronouncements made above on Section 6 of the *Arbitration Act*, it is my finding that the motion, dated 18<sup>th</sup> February 2021, fails, on account of Section 6(1) of the *Arbitration Act*, for the stay of proceedings and reference of the matter to arbitration was not sought after the entry of the appearance, and that the Defendant went ahead to file a defence.”
9. That the 1<sup>st</sup> Defendant filed a defence in the suit therefore cannot seek the matter to be referred to arbitration.
10. Further, that it seeks declaration that it has no liability to indemnify the Defendants following the collision that occurred on 25<sup>th</sup> August, 2023. That the Defendants’ driver deliberately injured three pedestrians, determination of the suit may affect rights of third parties, hence the court is the appropriate forum to try the issues raised.
11. The Plaintiff (Respondent) urges that the 1<sup>st</sup> Defendant filed a defence in the suit hence he cannot seek to have the matter referred to arbitration. Reliance is placed on the case of County Government of Kakamega v Mumia Distributors Limited [2021] eKLR where the court held that;

“In view of the Judicial pronouncements made above on Section 6 of the *Arbitration Act*, it is my finding that the motion, dated 18<sup>th</sup> February 2021, fails, on account of Section 6(1) of the *Arbitration Act*, for the stay of proceedings and reference of the matter to arbitration was not sought after the entry of the appearance, and that the Defendant went ahead to file a defence.”
12. That this is the right forum to try issues raised as the determination in the suit will affect rights of third parties.
13. I have considered rival arguments. I have also perused the Private Motor Insurance Policy issued. Clause 9 which is in respect of disputes arising between parties stipulates thus;

“If any dispute arises between you and us on any matter relating to this policy such dispute will be referred to;

  - a. A single mediator to be agreed between you and us within thirty (30) days of the dispute arising and the mediation process to be finalized not later than thirty (30) days thereafter, or
  - b. A single arbitrator agreed between us, to be appointed within thirty (30) days of the dispute arising. If we cannot agree, either party will refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) whose decision will be binding on you and us. The arbitral award will be final. If the dispute is not referred to the arbitration process within twelve (12) months we will assume you have abandoned the claim.”



14. With such a clause in existence that provides for dispute resolution mechanism and guides parties, the courts would be reluctant in moving too fast to deal with issues arising unless otherwise.

15. Section 6 of the *Arbitration Act* provides that;

“(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall; if a party not later than the time when that party enters appearance or otherwise, acknowledges the claim against which the stay of proceedings is brought, stay the proceedings and refer the parties to arbitration unless it finds

(a) That the arbitration agreement is null and void, in operative or incapable of being performed or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provisions of the arbitration agreement to the effect that an award is a condition precedent to the bringing of the legal proceedings in respect of any matter is of no effect in relation to those proceedings.”

16. In *Fairlane Supermarket Limited v Barclays Bank Ltd, Nairobi HCCC No. 102 of 2011* Odunga J (as he then was) held that;

“The opinion to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence.” In the case of *Corporate Insurance Company v Wachira 1995 – 1998 EA – 20* it was held that “if the appellant had wished to invoke the claim, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence. Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”

17. The 1<sup>st</sup> Defendant should have explored the issue of complying with the law as provided by Section 6 of the *Arbitration Act*. Having filed a defence and conceded to the jurisdiction of the court, he cannot turn around to argue that this court lacks jurisdiction to determine the suit.

18. In the premises, the Preliminary Objection fails. Accordingly, it is dismissed.

19. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF APRIL, 2025.**

.....  
**L.N. MUTENDE**  
**JUDGE**

