Karen Provisions Stores Ltd & another v Insight Management Consultant (Civil Appeal E173 of 2022) [2025] KEHC 8122 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E173 OF 2022

REA OUGO, J

JUNE 5, 2025

BETWEEN

KAREN PROVISIONS STORES LTD ..... 1ST APPELLANT

LAWY SOMAIYA ..... 2ND APPELLANT

AND

INSIGHT MANAGEMENT CONSULTANT ..... RESPONDENT

(An appeal from the Ruling of Hon. Selina N. Muchungi SRM delivered on the 21st February 2022 in CMCC No. 4734 of 2020 Nairobi)

JUDGMENT

1. The background of this appeal is as follows: the respondent filed suit against the appellants on the 28th of June 2019 in respect of an accident that occurred on 2/11/2017 between the respondent's motor vehicle KCD 444U and the appellant's vehicle KAS 973B. The appellant entered an appearance and subsequently filed a chamber summons application dated 1st August, 2021, requesting that the suit be settled under a knock-for-knock agreement. The application was opposed, and on 21/2/2022, the trial court dismissed the application. The Ruling provoked this appeal.

2. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle is set out in the Court of Appeal decision of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123.

3. The appellant has thirteen (13) grounds of appeal, which I summarise as follows: whether the trial court erred in dismissing the appellant's application for stay and reference of the subject matter to arbitration.

4. The appellants in its application dated 8.1.2021, sought the following orders;

i. That the applicants' insurance company pays the respondent's insurance company its excess amount as earlier agreed between the two companies.

ii. That alternatively, the suit be stayed and the matters in dispute herein be referred to a sole arbitrator to be agreed upon by the parties

iii. That the respondent do pay the costs of the application and costs of the suit which costs are being unnecessarily incurred when the matter was settled.

5. According to the appellants, the respondent sought to recover payments allegedly made by Sanlam General Insurance Limited, their insurer, for damage to their vehicle. The method of resolving the dispute was outlined in clauses 9 and 10 of the knock-for-knock agreement binding Sanlam General Insurance Limited and Intra Africa Assurance Company Limited. Intra Africa Assurance Company Limited consented to resolve the dispute under the aforementioned knock-for-knock agreement with Sanlam General Insurance Limited. It was a term of the agreement, as stated in Clause 17, that any disputes arising from the interpretation and implementation of the provisions of the agreement would be referred to an arbitrator. The appellants sought to have the court enforce the arbitration clause stated in the knock-for-knock agreement.

6. The application was opposed. The respondent admitted that Sanlam instructed the firm of Anne Kimani & Co. Advocates to institute a suit under the respondent's subrogation rights. The filing of the suit resulted from the refusal of the appellants' insurer to settle the claim under a knock-for-knock agreement. Sanlam was willing to settle the matter under the said agreement. Before filing the suit, Sanlam attempted to reach out to Intra Africa to settle the matter in accordance with the agreement, but to no avail. Sanlam even went so far as to request a discharge voucher from Intra Africa in an effort to push for a settlement, again to no avail. Intra Africa, despite various correspondences, did not take any steps to settle the matter. Their advocate warned them that the limitation period was about to lapse. The time to resolve the agreement lapsed. The agreement stipulated that the members seeking knock-for-knock had to agree within a maximum period of 18 months from the date of the accident. The accident occurred on 2/11/2017. The respondent argued that the request to have the matter referred to arbitration could not be granted as the time to settle the agreement had already lapsed..

7. The appellants responded that the knock-for-knock agreement did not provide for the filing of a suit if the concerned insurers did not sort out the claim within 18 months from the date of the accident.

8. The trial magistrate, in her ruling, stated as follows:

> " It Is not contested that prior to filing this suit parties attempted to settle the claim under the knock for knock agreement. The defendant's applications' insurer agreed to settle the amount owed to the plaintiff 's insurer but they failed to. The plaintiff demonstrated their efforts to have the said amount paid by the applicant's insurers and have the matter concluded out of court by producing several letters written to their counterparts which went unanswered. It is evident that the applicant's insurers frustrated the attempts to have the matter settled under the agreement.
>
> Allowing the defendants' insurer at this stage to pay the initial excesses as was agreed with the plaintiff's insurer will occasion an injustice on the plaintiff's insurer because they have since incurred expenses in filing this suit after the defendants' insurer failed to make good its promise to pay the amount agreed upon. As per the agreement, costs arising from suits are not covered.

> The prayer sought in the alternative for staying the suit and referring the matter to arbitration on the other hand is not practical since the time prescribed for referring disputes to an arbitrator under the said agreement has since lapsed. Clause 14 which provides for the limitation period states that if a member fails to make a claim within 18 months from the date of the accident limitation will apply. Further the clause stipulates that
>
> members shall sort out knock for knock claims within a maximum of 18 months from the date of the accident. No doubt the period of 18 months from the date of the accident has already lapsed.
>
> The other reason why I am of the opinion that the matter should not be referred in arbitration is on an account of the defendants' conduct.
>
> Having become aware of the claim, they dragged the settlement process without my keenness on settling the same . They cannot now turn around after the filing of the suit and claim to be interested and ready to pay only that which they owed at the time. They waited for the suit to be instated for them to bring the present application. The application was not brought in good faith".

9. Parties canvassed the appeal through written submissions. I have read and considered the submissions. The only issue for determination is whether the trial magistrate erred by not allowing the case to be referred to arbitration under the knock-for-knock agreement. It is acknowledged that the parties had a knock-for-knock agreement. From the attached correspondence, it appears that the parties attempted to resolve the claim under this agreement. The respondent argues that it was frustrated by the appellants' conduct, prompting them to move and file suit. The appellants contend that they did not frustrate the process.

10. Clause 14 of the Knock- for Knock agreement states as follows; " If a member fails to make a claim within eighteen months (18) months from the date of the accident than limitation applies. However, if a claim is lodged within the period, limitation shall not be pleaded. It is further agreed that members shall sort out knock-for-knock claims within a maximum period of eighteen (18) months from the date of the accident. " . Clause 17 states as follows; Any dispute arising from the Interpretation and Implementation of the provisions of this Agreement, shall be settled amicably between the parties , and in case of disagreements, the disputes shall be referred to an arbitrator. The Members concerned shall agree on a single arbitrator. If they cannot agree upon a single arbitrator the decision shall be referred to two arbitrators one to be appointed in writing by each party. In case of a disagreement between the arbitrators the matter shall be referred to an umpire who shall be appointed in writing by the arbitrators before entering on the reference, and whose decision shall be binding on both parties.

11. The respondent argued that the 18-month limitation period was about to expire, so they filed suit. The appellant moved the court to refer the matter for arbitration. I agree with the appellants' submission that Clause 14 specifies the limitation period but is silent on what happens after 18 months. The respondent claims that they filed the suit to avoid being caught by the limitation period. The appellants, on the other hand, argue that they did not frustrate the case and that, due to a dispute between the parties, Clause 17 should come into play. Parties to an agreement are bound by the terms of that agreement. I concur with the appellants' submission that if there were a dispute regarding the interpretation and implementation of the provisions of the agreement, then Clause 17 would be applicable. Under Article 159 (2) (c) of *the Constitution* of 2010, courts are required to encourage parties to explore alternative means of dispute resolution. That is the purpose of the Knock-for-Knock agreement. Furthermore, according to the doctrine of exhaustion of remedies, parties must exhaust all available non-judicial remedies before seeking judicial intervention. This means that before a party

can bring a case to court, they must first attempt to resolve the dispute through other means, such as administrative appeals or alternative dispute resolution mechanisms. In this case, the parties chose arbitration as a dispute resolution mechanism. In the case of Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal stated that:

> " 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 fora of last resort and not the first port of call the moment a storm brews...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 the Courts. The ex parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution".

12. In my view, the trial magistrate erred by failing to refer the matter to arbitration as stated in clause 17 of the agreement. The trial court should have stayed the proceedings and referred the matter to arbitration. I, therefore, set aside the trial court's ruling dated February 21, 2022. The suit is stayed, and the dispute between the parties is referred to a sole arbitrator to be agreed upon by the parties, if they fail to agree, then the subsequent provisions of Clause 17 shall apply. This shall be done within 21 days from the date of this judgment. Costs of the application and appeal shall abide the outcome of the arbitration.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 5TH DAY OF JUNE 2025.

R.E.OUGO

JUDGE

In the presence of:

Mr. Kamau -For the Appellant

Miss Obwori - For the Respondent

Brenda C/A