



**Mwai v Uap Insurance Company Limited & another (Civil Case E106 of 2022) [2024] KEHC 4593 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL CASE E106 OF 2022  
DAS MAJANJA, J  
APRIL 16, 2024**

**BETWEEN**

**JOSEPH RWAMBA MWAI ..... PLAINTIFF**

**AND**

**UAP INSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MINET KENYA INSURANCE BROKERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff has filed an application dated 22.01.2024 in which it has invoked Article 159(2)(c) of the Constitution seeking an order, “That the dispute herein be referred to arbitration.” In his supporting deposition of the same date, the Plaintiff states that under Clause 10 of the policy subject of the suit provides that all differences arising out of the policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference. He further refers to the UAP Old Mutual Customer Service Charter and the Kenya GI/Health Complaints Management Standard Operating Procedure which provide that where the customer is not satisfied with the resolution of a complaint, the matter may be referred to arbitration. The Plaintiff depones that he has written to the 1<sup>st</sup> Defendant on several occasions seeking to have the matter referred to arbitration but to no avail. The Plaintiff therefore seeks to have the matter referred to arbitration.
2. The Respondents oppose the application through their respective grounds of opposition dated 30<sup>th</sup> January 2024 and 4<sup>th</sup> February 2024. The thrust of their opposition is that the application is an abuse of the court process on the ground that the Applicant is the one who filed suit and the Respondents have filed their defences and taken part in the proceedings by filing and opposing various applications.
3. The Plaintiff has invoked Article 159(2)(c) of the Constitution which requires the court to promote alternative forms of alternative dispute resolution including arbitration. In this case, it is common ground that the dispute relates to a motor vehicle policy which contains an arbitration clause hence



the Arbitration Act, 1995 applies to this case. In his written submissions, the Plaintiff has referred to section 6 of the Arbitration Act. The pertinent section 6 (1) of the Act provides as follows:

6(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds -

- (a) That the arbitration agreement is null and void, inoperative 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 provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

4. The import of the aforesaid provision is that the court will ordinarily stay an action if the pre-conditions for grant of stay are met on an application by a party who opposes the suit on account of an arbitration agreement (see UAP Provincial Insurance Company Limited v Michael John Beckett NRB CA Civil Appeal No. 26 of 2007 [2013] eKLR and Eunice Soko Mlagui v Suresh Parmar and 4 Others NRB CA Civil Appeal No. 276 of 2014 [2017] eKLR).

A reading of the provision contemplates that the application is made by the opposing party who enters appearance or otherwise acknowledges the claim. It obviously does not apply to a case where the party seeking reference to arbitration has filed the suit. This position is fortified by the decision in Pamela Akora Imonje v Akora ITC International Ltd and Another [2007]eKLR where the plaintiff had filed suit and applied for stay of the suit pending arbitration. The court had this to say:

The Plaintiff's application is wholly misconceived. Having chosen to file suit instead of invoking the arbitration clause in the Articles of Association of the 1<sup>st</sup> Defendant, she cannot now purport to have recourse to section 6 (1) of the Arbitration Act, 1995. That provision is available only to the Defendants. The very wording of the sub-section makes this plain and obvious. Having made her bed, as it were, the Plaintiff must lie on it. She chose to file suit; she must fall or stand by it.

5. It must be recalled that arbitration is a consensual process and the court's intervention is limited under the Arbitration Act (see Goodison Sixty One School Ltd v Symbion Kenya Ltd [2017]eKLR). Clause 10 of the Agreement between the parties provides the arbitrator must be appointed by both parties in writing. Where there is default in appointment, section 12 of the Arbitration Act provides for the manner of appointment failing which by the court. By failing to follow the procedure provided under the Arbitration Act and filing the plaint, the Plaintiff is deemed to have waived its right to refer the matter to arbitration and must now take the consequences of bypassing the arbitration agreement.
6. The application dated 22.02.2024 is dismissed with costs to the Respondents.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL 2024.**

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**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango

The Plaintiff in person.

Ms Mureithi instructed by KN Law LLP Advocates for the 1<sup>st</sup> Defendant

Mr Awino instructed by Cootow and Associates Advocates for the 2<sup>nd</sup> Defendant.

