



**Dotwood Designs Limited v Njonjo (Civil Appeal E202 of 2022)
[2024] KEHC 13937 (KLR) (Civ) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13937 (KLR)

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

**CIVIL
CIVIL APPEAL E202 OF 2022**

**TW OUYA, J
NOVEMBER 7, 2024**

BETWEEN

DOTWOOD DESIGNS LIMITED APPELLANT

AND

ANDREW NGUGI NJONJO RESPONDENT

*(Being an appeal against the Ruling of the Hon. H.M. Nyaberi. (CM) delivered
on 1st March, 2022 in Nairobi Milimani CMCC No. E9459 OF 2021)*

RULING

Background

1. This appeal emanates from the ruling delivered on 01.03.2022 by the lower Court in Nairobi Milimani CMCC No. E9459 OF 2021. Andrew Ngugi Njonjo, (hereinafter the Respondent), the Plaintiff before the lower Court, initiated a claim by way of plaint dated 30.06.2021 as against Dotwood Designs Ltd, (hereinafter the Appellant), the Defendant before the lower Court seeking judgment in the sum of Kshs. 405,360/-, costs of the suit and interest on the above, in respect of a claim that arose as result of a road traffic accident that occurred on/ or about 02.07.2018 along Uhuru-Haile Selassie Avenue in Nairobi County.
2. It was averred that at all material times to the suit the Respondent was the registered owner and or beneficial owner of motor vehicle registration number KCK 552G while the Appellant was the registered and or beneficial owner and driver of motor vehicle registration number KAZ 549C. It was further averred that on the date in question, the Respondent was driving motor vehicle registration number KCK 552G when the Appellant and or its authorized driver so negligently drove, controlled, managed and or handled motor vehicle KAZ 549C that he caused and or allowed the said motor vehicle to collide onto the Respondent's motor vehicle. That as a result of the accident the Respondent's



- motor vehicle was extensively damaged and its insurer M/S Heritage Insurance Co. Ltd compensated the Respondent for the loss and damage suffered which it now seeks to recover the cost incurred under the doctrine of subrogation.
3. The Appellant entered appearance and concurrently filed a Chamber Summons application dated 27.09.2021 expressed to be brought pursuant to Article 159 of *the Constitution*, Section 6 of the *Arbitration Act* and Rule 2 of the Arbitration Rules seeking inter alia that the lower Court suit be stayed and the subject matter be referred to a sole arbitrator to be agreed between M/s Heritage General Insurance Ltd and M/s Intra Africa Assurance Co. Ltd.
 4. The grounds on the face of the motion were amplified in the supporting affidavit sworn by John Lee Wainaina, who cited being the Claims Manager of Intra Africa Assurance Co. Ltd, duly authorized to swear the affidavit in support. The gist of his deposition was that both M/s Heritage General Insurance Ltd and M/s Intra Africa Assurance Co. Ltd had comprehensively insured the suit motor vehicles that were respectively involved in the accident whereupon its occurrence, M/s Heritage General Insurance Ltd made a claim against M/s Intra Africa Assurance Co. Ltd. That the latter responded by asking whether the matter could be disposed of under the Knock for Knock Agreement (hereinafter the Agreement) as executed between the insurers wherein the former agreed to settle the matter under the said agreement. He deposed that notwithstanding Clause 14 of the Agreement, the same does not state that after the limitation period of eighteen (18) months after the accident, the said provision shall cease to apply nor does the Agreement provide that after eighteen (18) months from the date of the accident, the insurers can seek to recover their whole outlay apart from the initial excess. That in view of the difference in interpretation and application of the Agreement between the insurers, the honorable Court ought to refer the dispute in the suit to arbitration.
 5. The Respondent opposed the motion vide a replying affidavit dated 03.12.2021 deposed by Regina Ileri, who cited that being the Claims Specialist at Heritage General Insurance Ltd, duly authorized to swear the affidavit in opposition. On her part the gist of her deposition was that upon Heritage General Insurance Ltd confirming that the matter could be settled under the Agreement, it went ahead to request Intra Africa Assurance Co. Ltd to forward a discharge voucher of Kshs. 100,000/- being the applicable excess as per the Agreement. That since the said request Intra Africa Assurance Co. Ltd failed to respond thus prompting Heritage General Insurance Ltd to institute the lower Court suit under subrogation rights through the Respondent.
 6. She further deposed that the accident having occurred on 02.07.2018, pursuant to Clause 14 of the Agreement, the insurers had until November, 2019 to settle the claim whereas the time within which to settle the matter under the Agreement lapsed due to Intra Africa Assurance Co. Ltd failure to send the discharge voucher as requested by Heritage General Insurance Ltd. That despite additional attempts to settle the claim outside the Agreement the same did not bear fruit thereby prompting the filing of the lower Court claim in order for the cause of action not to be caught up by limitation. She deposed that Intra Africa Assurance Co. Ltd had all the time to settle the matter under the Agreement or otherwise, of which they did not honor, therefore cannot purport to have the willingness to settle the matter after Heritage General Insurance Ltd had moved to Court and incurred filing expenses. In conclusion she stated that the matter cannot thus be referred to arbitration as the dispute therein is neither on interpretation or implementation of the Agreement.
 7. The Appellant's motion was disposed of by way of written submissions. By way of a ruling delivered on 01.03.2022, the trial Court found the motion lacking in merit and proceeded to dismiss the same with costs to the Respondent.



The Appeal

8. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -

- “1. That the learned Magistrate erred in failing to find that the Respondent’s insurer and the Appellant’s insurer had agreed to resolve material damage claims according to the knock for knock agreement and not outside the terms of that agreement.
2. That the learned Magistrate erred in failing to consider that the Respondent’s insurer had agreed its whole loss under the knock for knock agreement hence it had no right to file a suit to claim its loss.
3. That the learned Magistrate erred in failing to consider that the Respondent’s insurer had agreed under the knock for knock agreement to seek recovery limited to excess payable under the policy.
4. That the learned Magistrate erred in finding in effect that the Respondent’s insurer could file a suit for material damage claim whereas under the knock for knock agreement litigation is not a means of dispute resolution.
5. That the learned Magistrate erred in not finding that there were disputes over the interpretation and application of the knock for knock agreement when the Respondent’s insurer was claiming its whole loss through litigation, both of which contradict the provisions of the knock for knock agreement.
6. That the learned Magistrate erred in finding in effect that time was of the essence under the knock for knock agreement whereas there is no such stipulation under the said agreement.
7. That the learned Magistrate erred in holding in effect that time had passed for applying the arbitration clause under the knock for knock agreement whereas the said clause has no time limitation within which disputes over interpretation and implementation of the knock for knock agreement can be referred to arbitration pursuant thereto.
8. That the learned Magistrate erred in finding in effect that eighteen months after an accident, the knock for Knock agreement ceased to apply, whereas there is no such stipulation.
9. That the learned Magistrate erred in finding in effect that failure to settle a claim within eighteen months from the date of the accident, entitled the Respondent’s insurer to file a suit to a claim its whole loss contrary to the said insurer having agreed to bear its whole loss under the knock for knock agreement.
10. The learned Magistrate erred in interpreting provisions of the knock for knock agreement whereas that jurisdiction is reserved for an arbitrator under the agreement.



11. That the learned Magistrate erred in failing to apply Article 159(2)(c) of *the Constitution*, requiring Courts to promote alternative forms of dispute resolution, including arbitration.
 12. That the learned Magistrate erred in disregarding the Appellant’s affidavit and submissions.” (sic)
9. In light of the afore-captioned itemized grounds, the Appellant seeks before this Court orders to the effect: -
- “ 1. That the order made by the subordinate Court be set aside.
 2. That the Appellant’s application dated 27th September, 2021 be allowed with costs.
 3. That the Appellant be provided with costs of this appeal.” (sic)
10. Before this Court, directions were taken on disposal of the appeal by way of written submissions of which parties had an opportunity to highlight meanwhile this Court has duly considered the said submissions in their totality.

Submissions

11. Counsel for the Appellant condensed his grounds of appeal on two (2) cogent issues. Addressing the provisions of the Agreement, counsel relied on Clause 4 & 9 of the Agreement and the decision in *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] eKLR to contend that the insurers limited their right to claim damages in common law therefore the learned Magistrate erred in failing to arrive at this conclusion contrary to the natural and ordinary meaning of the said Clauses.
12. Concerning whether the insurer could file suit and or recover the whole outlay, is a dispute over the interpretation and implementation of the agreement. Counsel anchored his submissions on Clause 17 and this Court’s decision in *Patel v Nthiga* [2023] KEHC 20549 (KLR) to submit that the learned Magistrate’s conclusion that the agreement ceased to apply after eighteen (18) months after the accident was not based on any provision of the agreement. That when the insurers limited their right to claim damages under Clause 9 & 14, the defence of limitation arising eighteen (18) months after the accident was an issue for the arbitrator to determine if the Respondent’s insurer has a claim after the said duration. In conclusion, counsel relied on the decision in *Amuga & Company Advocates v Kisumu Concrete Products Limited* [2021] eKLR in urging the Court to allow the appeal as lodged, in order to breathe life into Clause 17 of the Agreement.
13. On the part of the Respondent, counsel anchored his submissions on the principles espoused in the decision in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on the duty of the Court as a first appellate Court meanwhile condensed the Appellant’s grounds of appeal on a singular issue. Submitting on whether the trial Court’s decision was in error, counsel posited that Clause 14 of the Agreement made it mandatory on settlement of claims within a maximum period of eighteen (18) months from the date of the accident however the same was frustrated by the Appellant thus prompting the Respondent to file suit under the doctrine of subrogation. That the Clause 14 did not provide for any extension on time therefore the instant appeal offends the Agreement. In summation, counsel relied on the decision in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 to assert that this Court ought not



interfere with the trial Court's decision as the same was based on evidence meanwhile the Appellant has failed to demonstrate that the lower Court acted on wrong principles.

Analysis and Determination

14. The Court has duly considered the Record of Appeal, the Supplementary Record of Appeal, the original record as well as the respective parties' submissions. It is trite that the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123 and *Ephantus Mwangi* (supra).

15. The Appellant's motion before the lower Court was saliently expressed to be brought pursuant to Section 6 of the *Arbitration Act* and Rule 2 of the Arbitration Rules. The trial Court in disallowing the Appellant's motion stated in part that;

“I have considered the parties rival submissions and the annexures thereof the issue for determination is that:

Whether there is a dispute in interpretation of the Knock for Knock agreement?

There is no dispute that the insurers of the parties to the suit are members of the Knock for Knock Agreement. The Knock for Knock Agreement shall mean an Agreement between two insurers whereby each member agrees to pay its own policy holders' vehicle irrespective of responsibility for the accident.

In the instant case it is admitted that the insurers for the parties had first engaged themselves to settle this matter answer the above provision as evidence in their communications to the support affidavit. However, claims of this nature should be settled within 18 months from the date of the accident as provided under Clause 14 of Limitation period. The accident occurred on 2/7/2018 and under the arrangement of Knock for Knock Agreement this claim should have been settled by 2/1/2020. When time lapsed, I find and hold that there is no dispute in interpretation of agreement by the parties herein.

In conclusion, the application by the defendant/applicant lacks merit and it is hereby dismissed with costs to the plaintiff/respondent.” (sic)

16. With the above in reserve, the pertinent and undisputed facts as can be garnered from the record before this Court are as follows:- that motor vehicles registration number KCK 552G and KAZ 549C were comprehensively insured by M/S Heritage Insurance Co. Ltd and M/s Intra Africa Assurance Co. Ltd respectively when the same were involved in an accident on or about 02.07.2018; that the insurers herein, among others, had entered into an Agreement, known as a “Knock for Knock Agreement” wherein it was generally agreed and or contracted that in the event of an accident between any motor vehicle(s) insured by the insurers under the said Agreement, they agreed to settle the matter under the said Agreement. It is further undisputed that within the said Agreement existed an Arbitration Clause of which this Court will later address in this judgment.

17. To contextualize the undisputed facts, Clause 9 of the Agreement, which concerned the “Scope of Agreement” provided that: -

“It is agreed amongst the members that the Agreement shall cover material damage caused to vehicles;



- a. As a result of collision or attempt to avoid collision;
- b. By the loading or unloading of a vehicle and;
- c. By goods falling from a vehicle.

Each member shall bear its own loss (if any) within the limits of its policy, in respect of such damage to vehicle irrespective of legal liability between the vehicles involved, provided always that;

- i. It shall be each member's responsibility to give immediate notice of its interest and the amount of excess under each policy declared forthwith.
- ii. The Member that has no liability as per the terms of its policy will not be bound by this agreement."

18. It can be reasonably stated that the Respondent suit was fashioned under the doctrine of subrogation wherein M/S Heritage Insurance Co. Ltd while suing under the Respondent's name was seeking to recover material damages as against M/s Intra Africa Assurance Co. Ltd. From the material canvassed before the trial Court, it appears that prior to institution of the suit, the insurers attempted to settle the matter under the Agreement however the said efforts did not come to fruition as expected. Consequently, upon the Respondent instituting the lower Court suit, by its chamber summons, the Appellant was invoking Clause 17 of the Agreement which provided that:

"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 the arbitrators before entering on the reference, and whose decision shall be binding on both parties."

19. That said, Section 6(1)(a) & (b) of the Arbitration Act, provides as follows: -

- "(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)
- (3)"

20. On this appeal, as in the lower Court, parties took rival positions on the matter. This Court gathers to be the Appellants argument that by reading of Clause 4, 9, 14 & 17 of the Agreement, Clause 14 does



not state that after the limitation period of eighteen (18) months after the accident, the said provision shall cease to apply nor does the Agreement provide that after eighteen (18) months from the date of the accident, the insurers can seek to recover their whole outlay apart from the initial excess. That in view of the difference in interpretation and application of the Agreement between the insurers, the lower Court ought to have referred the dispute in the suit to arbitration. The Respondent on the other hand contended that Clause 14 of the Agreement provided a limitation period within which to settle the claim whereas the time within which to settle the matter under the Agreement lapsed due to M/s Intra Africa Assurance Co. Ltd failure to send the discharge voucher as requested by M/s Heritage General Insurance Ltd. That the matter cannot thus be referred to arbitration as the dispute therein is neither on interpretation or implementation of the Agreement.

21. Having, captured the above, to my mind, this appeal turns on the question whether there was a dispute capable of being referred to arbitration and whether the trial Court erred in arriving at the decisions it did? Relevant to the above question is Section 6(1)(b) of the *Arbitration Act*. The Court of Appeal in UAP Provincial Insurance Company. Ltd v Michael John Beckett [2013] KECA 209 (KLR) while addressing itself on the import of Section 6(1)(b) of the *Arbitration Act* observed that; -

“It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6 (1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.”

22. Thus, to place into context the disputed fact, reference must be made to Clause 14 and Clause 17 of the said Agreement. The latter had earlier been set out in this judgment whereas the former provides that: -

“If a member fails to make a claim within eighteen (18) months from the date of the accident then 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.”

23. In totality of the above, the trial Court in its ruling, indeed appeared to address itself to the question arising out of Section 6(1)(b) of the *Arbitration Act*. However, in this Court’s view rather than address itself to the purport of Clause 17 as read with Clause 14 and the Agreement in its entirety, the trial Court proceeded to solely interpret Clause 14 in exception of Clause 17 and the entire the Agreement. As purposefully observed by the appellate Court in UAP Provincial Insurance Company Ltd (supra), it was incumbent upon the learned Magistrate to “..... ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration...”
24. The Respondent has subjectively argued before the lower Court and this Court that the Agreement was more or less ‘frustrated’ by the Appellant’s non-compliance to pay excess upon request, therefore, so as not to be caught up by statutory limitation, the lower Court suit had to be filed. The Appellant meanwhile asserted that the ‘frustration’ of the Agreement was not deliberate whereas Clause 14 of the Agreement did not ouster arbitration in favour of litigation, in the event of a dispute between the insurers.



25. Reviewing the totality of the rival arguments and material relied on, this Court must fault the learned Magistrate's decision, that when time lapsed per Clause 14 of the Agreement there was no dispute in respect of interpretation of the Agreement by the parties. It must be remembered that Clause 17 of the Agreement provides that "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 Appellant has obviously agitated the case that by reading of Clause 14 meanwhile the Respondent having proceeded to file suit, there was a live question on interpretation and implementation of the Agreement particularly on whether the latter provision ousted the dispute from arbitration upon the lapse of eighteen (18) months from the date of the accident. It seems that the Appellant had its own interpretation of the Clause 14 as juxtaposed as against the entirety of the Agreement.
26. As is, this Court is inclined to believe, by the Respondent's action of filing suit on the backdrop of the existence of the Agreement, the same was a dispute by reading of the Knock for Knock Agreement. Further, as to the question of interpretation and implementation of the said Agreement, the Court is equally inclined to agree with Appellant that the question of interpretation of Clause 14 was a dispute the parties had agreed to be referred to arbitration by dint of Clause 17. It would be pertinent to remember that what was before the Court was a reference application towards arbitration and not just a reference to ouster the trial Court's jurisdiction to entertain the suit, on the premise of Clause 14 of the Agreement. Therefore, the trial Court was obligated not singularly read the provisions of Clause 14 without reading the same as against the entire Agreement and Section 6(1)(b) of the Arbitration Act.
27. In light of the foregoing, this Court is inclined to agree with Meoli. J in Patel v Nthiga [2023] KEHC 20549 (KLR) wherein while addressing herself to a similar issue, observed that:-

Of particular relevance in the said clause, was the reference to "Any dispute arising from the interpretation and implementation of the provisions of this Agreement". Clause 17 is to be read with Clauses 6, 7, 9 & 11 of the Knock for Knock agreement. Reviewing the reasoning of the lower court, this court is of the view that the lower court appropriately applied itself to the law when it observed that "The fact that the claimant's insurer filed the suit is a dispute contemplated under Clause 17 of the Agreement" (sic). Evidently, it was the intention of the parties, as rightly observed by the trial court, that if a dispute arose in respect of the Knock for Knock agreement, the first port of call was arbitration and not litigation before the courts. To that end the lower court's finding on the issues was on point and cannot be faulted."

28. In view of the foregoing, this Court reasonably believes it has sufficiently addressed itself to the issue. Therefore, it would be difficult in the circumstance not to find that the trial Court erred in its finding. Thus, it is my considered deduction that the trial court failed to properly exercise its discretion and arrived at an incorrect decision by dismissing the Appellant's reference before it.

Determination

29. Consequently, the Court finds merit to the instant appeal and will allow the same with the attendant costs in favour of the successful party.
- i. This Appeal is allowed as prayed.
 - ii. Costs are awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER, 2024



ROA 14 days.

HON. T. W. Ouya

JUDGE

For Appellant.....Kamau

For Respondent.....Njoroge

Court Assistant.....Martin

