



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E079 OF 2020**

**METROPOLITAN CANNON GENERAL INSURANCE LIMITED.....PLAINTIFF**

**VERSUS**

**LEVITTESS INTERNATIONAL REINSURANCE BROKERS LTD....DEFENDANT**

**RULING**

**Introduction**

1. The Plaintiff herein instituted these proceedings through the Plaintiff dated 10<sup>th</sup> March 2020 seeking, *inter alia*, special damages in the sum of Kshs. 41,316,938. On the 21<sup>st</sup> August 2020 the Defendant filed a notice of preliminary objection to the entire suit contesting the jurisdiction of this court to hear this matter on the grounds that the Plaintiff had not exhausted the dispute resolutions mechanisms under the Insurance Act and that the plaintiff's claim, to that extent, was not yet ripe for this court's intervention.

2. Through a Notice of Motion dated 23<sup>rd</sup> September 2020 the Defendant sought orders to stay this matter pending arbitration, pursuant to the provisions of Section 6(1) of the Arbitration Act. The motion is predicated on the ground that this matter is the subject of an arbitration agreement between the parties herein dated 6<sup>th</sup> August 2012 (hereinafter "**the Agreement**") and should therefore be stayed pending the intended arbitration.

3. The Plaintiff filed the application dated 23<sup>rd</sup> November 2020 in response to the Defendants application to stay these proceedings.

**Application**

4. Through the application dated 23<sup>rd</sup> November 2020, the plaintiff/applicant seeks orders that a Government Handwriting Specialist be ordered to examine and make a report on the authenticity of the signatures contained in the Agreement attached to the defendant's application filed on 23<sup>rd</sup> September 2020 before the said application or preliminary objection dated 21<sup>st</sup> August 2020 can be heard.

5. The application is supported by the affidavit of the plaintiff's advocate and is premised on the following grounds: -

*i. THAT the defendants filed a notice of motion dated 23/9/2020 in which they attached an alleged contract that is purported to have originated from the Plaintiff alleging that any disputes between the parties would be referred to Arbitration.*

*ii. THAT upon perusal of the same, the plaintiffs advocate called for the complete documents and were informed that that was the whole document which sounded very suspicious as the same did not take the format of a typical contract.*

*iii. THAT the individual purported to have signed the document, though no longer an employee of the plaintiff denied having appended the signature contained in said contract stating that the same was a forgery and that at no point in the scope of his duties whilst in the plaintiff company was he responsible for contract execution.*

*iv. THAT it is crucial that the authenticity of the alleged document be validated before the application that greatly relies on the existence of said document is determined by this honorable Court.*

6. The Defendant opposed the application through the Replying Affidavit sworn by its Chief Executive Officer, **Ms Esther Muhindi**, who

states that she was present when Mr. John Kariuki signed and stamped the Agreement on behalf of Cannon Assurance Company, the predecessor of the Plaintiff Company, on behalf of the Plaintiff.

7. The respondent's deponent states that the Agreement is complete, has all the elements of a contract and is the contract that the parties voluntarily signed on the 6<sup>th</sup> August 2012. She further states that counsel for the plaintiff is not a party to this case and cannot therefore swear an affidavit on contentious matters and proceed produce evidence purportedly on behalf of her Client. She contends that the Plaintiffs Application is fatally defective, unmerited and should therefore be struck out *in limine*.

8. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the Government Handwriting Specialist should examine and make a report on the authenticity of the signatures contained in the contract attached to the defendant's application filed on 23<sup>rd</sup> September 2020 before the said application or Preliminary Objection dated 21<sup>st</sup> August 2020 can be heard.

9. The gist of the applicant's case is that the Agreement that the defendant attached as an annexure to its application filed on 23<sup>rd</sup> September 2020, and that forms the basis for the defendant's application to refer the matter to arbitration, is questionable and incomplete on the face of it. The applicant contends that the alleged signatory to the said contract one Mr. John Jackson Kariuki has denied having appended his signature to the said contract. The applicant argues that the said contract needs to be authenticated before the defendant's application can be heard and determined.

10. On its part, the respondent took issue with the validity of the affidavit in support of the application on the basis that it was sworn by an advocate on record instead of the plaintiff. The respondent further submitted that the application is an afterthought and is intended to delay or frustrate the inevitable arbitration proceedings as proposed by the parties in the Agreement. It is the respondent's case that the applicant appears to be on a doomed fishing expedition in the hope that the handwriting expert would somehow raise something which they can cling on to frustrate the speedy and expeditious hearing of this matter. It was submitted that the application is an abuse of the court process and a mockery of the overriding objectives of Civil Procedure Act which is to ensure that litigation and dispute resolution process is fair, fast and inexpensive.

11. On the issue of the validity/admissibility of an affidavit sworn by an advocate on record, I note that courts have taken the position that an affidavit sworn by an advocate on behalf of the client is admissible in as far as the facts deponed are well within the knowledge of the advocate swearing the subject affidavit. This is the holding that was made in ***Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR***.

***“There was no contention that the facts deposed to by the advocate could not have been within the advocate's knowledge, being the advocate having the personal conduct of the suit on behalf of the deceased plaintiff since its institution in 2009. In my view, therefore, the trial magistrate acted on wrong principles of law in striking out the advocate's affidavit.***

***Furthermore, there is no law expressly prohibiting an advocate from swearing an affidavit on behalf of his client in a client's cause, on matters which he as an advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause.”***

12. In the present case, I note that the applicant's deponent was categorical that the averments contained in the subject affidavit arose from the communication that she had with the plaintiff and counsel for the defendant. Order 19 Rule 3 of the Civil Procedure Rules stipulates as follows: -

***3(1) “affidavits shall be confirmed to such facts as the deponent is able of his own knowledge to prove.”***

13. Guided by the above cited authority and provision of the Civil Procedure Rules, I find that the defendant's objection to the affidavit sworn by the applicant's advocate is not merited.

14. Turning to the issue of whether or not a handwriting expert should examine the contract produced by the defendant in the September application, I find that the issues raised by the applicant regarding the authenticity of the contract in question are valid and can only be debunked by a handwriting expert. The defendant did not state that it will suffer any prejudice if the disputed document is subjected to such scrutiny.

15. On the respondent's claim that the instant application is a delaying tactic, I find that the application was filed in November 2020 barely 2 months after the respondent's application to stay these proceedings and refer this matter to arbitration on the basis of an arbitration clause contained in the disputed agreement. In the circumstances of this case, I am unable to find that there was an inordinate delay, on the part of the applicant herein, in instituting the instant application.

16. For the reasons that I have stated in this ruling, I find that the application dated 23<sup>rd</sup> November 2020 is merited and I therefore allow it as prayed with orders that costs shall abide the outcome of the main suit or arbitration whichever venue the parties shall elect.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 15<sup>th</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Ms Wangombe for Plaintiff/Applicant.

Mr. Omondi for Respondent.

Court Assistant: Sylvia.