REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 25 OF 2017

SAMSON WISUVE NDIKU.....APPELLANT

VERSUS

RAJA SUJAL.....1ST RESPONDENT

OICHAE ANTONA NGOME.....2ND RESPONDENT

(Being an appeal from the ruling and order of Murage, RM in Milimani CMCC No. 1078 of 2016 delivered on 13th January, 2017)

JUDGMENT

1. The suit in the lower court was brought by **Jubilee Insurance Company Limited** in the name of its insured **Samson Wisuve Ndiku** (the Appellant herein) pursuant to its alleged right of subrogation, to recover damages in the sum of Kshs. 264,394/-from **Raja Sujal** and **Oichae Antona Ngome** (the Respondents herein) in respect of an accident involving the Appellant's motor vehicle registration number **KBN 732S** and the Respondent's motor vehicle registration number **KBS 979K** which allegedly occurred on 28th February 2013.

2. The 2nd Respondent entered appearance in the suit on 22nd April 2016 and subsequently on 5th May, 2016 proceeded to file a chamber summons dated 4th May, 2016, under section 6 of the Arbitration Act seeking an order to stay of proceedings therein and reference of the matter to arbitration in accordance with the knock-for-knock agreement between the insurers of the Appellant (Jubilee Insurance Company Limited hereafter Jubilee) and of the Respondents (Intra Africa Assurance Company Limited). The motion was anchored on the key ground that the accident motor vehicles were insured by the respective insurers and that the arbitration clause in the knock-for-knock agreement between them applied to the suit. Although brought in the name of the 2nd Respondent, the motion was supported by the affidavit sworn by **Praful Chandulal Patel** described as a director of **Intra Africa Assurance Company Limited** (hereafter Intra Africa).

3. The Appellant opposed the motion by filing a notice of preliminary objection dated 5th August, 2016 and a replying affidavit. By a ruling delivered on 13th January, 2017 the lower court allowed the chamber summons.

4. That ruling provoked the instant appeal which is based on the following grounds:

> **1. The trial Magistrate fell into error and misdirected herself in law and in fact by not reading, appreciating, or carefully considering at all, any of the evidence adduced in the lower court including the replying affidavit of William Caesar Kandere and the entire provisions set out in the Knock for Knock Agreement. In the circumstance the Magistrate proceeded to make a wrong finding based on either, the Respondent's submission alone, or an entire misapprehension of the facts and evidence before the lower court.**
>
> **2. The trial magistrate fell into error and misdirected herself in law and in fact in failing to consider or appreciate the following from the pleadings evidence, submissions and authorities filed before the lower court, that;**
>
> > **i. The parties to the subject Knock for Knock Agreement were bound by the Agreement. As no claim relating to the proceedings in the lower court had been brought by the Respondent herein within the time limits set under Clause 14 of the said Agreement, any claim or dispute for referral to Arbitration under the Agreement was time barred, and therefore extinguished;**
> >
> > **ii. As no claim or dispute relating to the proceedings in the lower court was time-barred and extinguished, there existed no claim or dispute capable of being referred to Arbitration under Section 6 of the Arbitration Act;**

iii. No evidence had been tendered by the Respondent herein to show that any dispute within the scope of Clause 14 read together with Clause 17, in respect of the Interpretation and Implementation of the subject Knock for Knock Agreement had ever arisen between the parties; and

iv. In any event, any application for referral of the claim relating to the proceedings in the lower court to Arbitration offended the mandatory provisions of Section 6 of the Arbitration Act. Such non-compliance with Section 6 divested the lower court of jurisdiction to grant any of the orders sought in the application filed in the lower court.

3. The trial Magistrate fell into error by failing to return a finding that the claim relating to the proceedings in the lower court was time barred, when she acknowledged by her very same ruling that the parties were bound by the terms of the subject Knock for Knock Agreement.

4. The learned trial Magistrate fell into error and misdirected herself in law and in fact in failing to appreciate the difference between the parties under the Knock for Knock Agreement and the parties to the suit filed in the lower court.

5. The Magistrate misunderstood the rules that underlie the doctrine of privity of contract and subrogation in as much as these doctrines related to the subject Knock for Knock Agreement and the application under Section 6 of the Arbitration Act filed by the Respondent in the lower court.

6. The trial Magistrate fell into error and misdirected herself in law and in fact in arriving at conclusions detrimental to the Appellant without the benefit of any credible evidence.

7. The trial Magistrate fell into error by holding that the Respondent's application in the lower court had merit, proceeding to stay the proceedings in the lower court pending reference to arbitration and directing that each party bears its own costs".

5. The appeal was canvassed by way of written submissions as between the Appellant and the 2nd Respondent, who will henceforth be referred to as the Respondent. Counsel for the Appellant referring to Section 6(1) of the Arbitration Act and clauses 5 (iii) & (v), 6, 9 ,14 and 17 of the Knock- for- Knock Agreement stated that the lower court failed to address pertinent considerations in line with the legal requirements under section 6(1) (a) and (b) of the Arbitration Act. In that the trial court did not consider whether the Respondent had taken any step in the proceedings other than the steps allowed by section 6 of the Act; whether there existed a dispute between the parties capable of reference to arbitration; the identities of the parties to the dispute; and whether such dispute related to matters subject to arbitration under the Knock-for -Knock Agreement (hereafter the Agreement). The decisions in **Naizsons (K) Ltd v China Road & Bridge [2001] eKLR** and **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A 898,** were cited in support of the submission**.**

6. On the former issue counsel emphasized the provisions of section 6 (1) of the Act and faulted the trial court for failing to consider that the chamber summons before it was time barred having been filed 13 days after the 2nd Respondent filed his memorandum of appearance. He called to his aid several decisions including **Mt. Kenya University v Step Up Holdings (K) Ltd [2018] eKLR**, **Lavington Security Guards Ltd v Kenya Electricity Generating Company [2009] eKLR**, **Diocese of Marsabit Registered Trustees v Technotrade Pavillion Ltd [2014] eKLR** and **Lofty v Bedouin Enterprises Ltd EALR (2005) 2 EA**. Concerning the second, third and fourth issue it was argued that parties to the Agreement were bound by the terms thereof and that the court could not rewrite the parties' Agreement; that the Respondent's asserted claim under the Agreement was time-barred by dint of clause 14 of the Agreement. Counsel cited the decisions in **Kenya Breweries Limited v Kiambu General Transport Agency Limited [2000] eKLR**, **UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR**, **National Bank of Kenya Ltd v Pipeplastic Samekolit (K) Ltd [2002] EA 503**, and **Kenya Shell Limited v Njenga [2004] eKLR** in this regard.

7. Finally, relying on among others, the cases of **Shabbir Nassir Jamal & Another v Vrajkunver Manilal Gohil & 2 Others [2015] eKLR, Peras Limited v Esso (K) Limited [1997] eKLR,** and **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another [2016] eKLR** counsel asserted that the parties to the lower court suit differed from the parties to the Agreement and the Agreement between the latter parties did not bind the former. Hence, the Respondent lacked the requisite locus *standi* to invoke the arbitration clause in the Agreement before the lower court. The court was urged to allow the appeal.

8. The Respondent naturally supported the impugned decision of the lower court. Firstly, counsel referring to Section 6(1) of the Arbitration Act and the cases of **Adrec Ltd v Nation Media Group Ltd (2017)eKLR**, **Niazsons (K) Ltd v China Road and Bridge Corporation (K)Ltd [2001] eKLR** and **Corporate Insurance Co. Ltd v Wachira Gicheru [1996] eKLR** contended that the Respondent had not waived his right to apply and was entitled to file the summons for referral to arbitration as he had not delivered any pleadings after entering appearance, and that pursuant to the dicta in **Corporate Insurance Co. Ltd Wachira Gicheru** the filing of the chamber summons 13 days thereafter, could not defeat his right. Counsel further distinguished the decisions cited by the Appellant on this point based on the specific facts of this matter. Counsel however reiterated the holdings in authorities cited to support the proposition that parties are bound by the terms of their agreements and that the court could not rewrite such contracts.

9. Citing clauses 9,13 and 14 of the Agreement and the **Niazsons (K) Ltd** case, counsel argued that the Agreement was valid and enforceable under clause 13 and that a claim having been lodged within the timelines envisaged under clause 14 thereof, there was a dispute arising in relation to matters subject to the arbitration clause which is not subject to limitation. Regarding privity of contract, it was submitted that the suit in the lower court was brought by Jubilee against the Respondent under the right of subrogation but in the name of its insured as required by the law; that the Respondent's insurer Intra Africa and Jubilee were parties to the Agreement; that in the circumstances, Intra Africa was entitled to invoke the arbitration clause in the name of its insured. In conclusion, counsel pointed out that the Appellant's arguments regarding privity of contract contradict arguments made in support of ground 2 of the appeal which implicitly admit the application of various clauses of the Agreement. The Respondent therefore asserted that the appeal is without merit and ought to be dismissed.

10. The court has perused the record of the lower court, considered the grounds of appeal, and the material canvassed in respect of the appeal.

The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11** and **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278.**

11. The Court of Appeal stated in **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** that:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2EA 212* wherein the Court of Appeal held, *inter alia*, that: -**
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> > ***"On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

12. The appeal emanates from a ruling delivered on 13th January, 2017 with reference to a chamber summons dated 4th May, 2016 filed by the Respondent. The chamber summons was expressed to be brought under Section 6 of the Arbitration Act. There is no dispute that Jubilee and Intra Africa were some of the parties to the Knock-for -Knock Agreement which contained an arbitration clause (clause 17). Clause 9 of the Knock for Knock agreement provides 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 failing 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."**

13. It is not in dispute that the Appellant's suit against the Respondent arose from a collision between the parties' vehicles insured by Jubilee and Intra Africa respectively, and that by the suit Jubilee while suing under the Appellant's name was seeking to recover material damages. By his chamber summons in the lower Court, the Respondent 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."**

14. The Respondent's application in the lower court was anchored on the provisions of section 6 of the Arbitration Act which is in the following term 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 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."

15. On this appeal, as in the lower court, parties took rival positions as to whether, on the pertinent facts of the case, the summons pass mustered the legal impediments envisaged in section 6 (1) (a) and (b) above. To my mind however, this appeal turns on the sole question whether the application in the lower court was brought in compliance with the requirements of section 6(1). On a plain reading of that subsection, the application for reference to arbitration is to be brought "*not later than the time when that party enters appearance or otherwise acknowledges the claim* ". The application in the lower court was filed some 13 days after the entry of the appearance by the Respondent.

16. The Court of Appeal in **Mt. Kenya University v Step Up Holdings** (supra) cited with approval the dicta in **Niazsons(K) Ltd versus China Road & Bridge** (supra) **c**oncerning the court's obligation upon being moved under section 6 of the Arbitration Act by stating that:

> "**All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:**
>
> **(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;** (Emphasis added)
>
> **(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and**
>
> **(c) Whether the suit intended concerned a matter agreed to be referred to arbitration"**

17. Further, the court proceeded to state that:

> **"In Corporate Insurance Company versus Wachira (supra) the court held *inter alia* that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings…**
>
> **"We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter." [**Emphasis added**]**

18. Earlier, in **Charles Njogu Lofty v Bedouin Enterprises Ltd. (2005) eKLR**, the same Court stated regarding the provisions of section 6(1) of the Arbitration Act, that:

> **"On the plain reading of that section, before the court can consider the issues raised in paragraphs (a) and (b of section 6 (1) of the Act, the court has to satisfy itself that the party applying for reference to arbitration has applied to the court:- "…… not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings ……"**
>
> **In Civil Case No. 1756 of 2000 between BEDOUIN ENTERPRISES LTD. V. CHARLES NJOGU LOFTY AND JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS which constituted another aspect of the present dispute now before us, GITHINJI, J, as he then was, had rejected the argument that an application for reference to arbitration can be made at three stages, namely at the stage of entering appearance or at the stage of filing any pleadings or at the time of taking any step in the proceedings. The learned Judge had there held that: -**
>
> > ***"In my view, section 6(1) of the Arbitration Act, 1995, which court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance. It seems that the object of section 6(1) of the Arbitration Act, 1995, was, inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings.***
>
> ***Section 6(1) of the Arbitration Act, Cap 49 (now repealed) allowed applications for stay of proceedings to be made at any time after the applicant has entered appearance. Section 6(1) of the Arbitration Act, 1995, has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance. That is the only aspect of the law that has been changed."***

19. **The Court concluded by stating:**

> **"We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings**. (Emphasis added)

20. The parties to this appeal have referred to the case of **Adrec Ltd v Nation Media Group Ltd [2017] eKLR** in their respective submissions**.** Although the respondent in that case had only filed a notice of appointment before seeking referral to arbitration, the Court of Appeal made observations pertinent to the application of section 6 of the Arbitration Act when it stated that:

> **"14….The suit brought in the High Court by the appellant relates to a matter which is the subject of an arbitration agreement, vide clause 16 of the Distributorship Agreement. Consequently, in pursuance with Section 6(1) of the Arbitration Act, it was open to the respondent to apply "not later than the time when the respondent entered appearance or otherwise acknowledged the claim against which the stay of the suit was sought". The record shows clearly that the respondent merely filed a notice of appointment of advocates and proceeded to apply for stay of the suit. Once a defendant, in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment of advocates filed on its behalf and prior thereto or contemporaneously with such of the notice of appointment or entering of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and to refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6(1) of the Arbitration Act….**

15. In FAIRLANE SUPERMARKET LIMTED VERSUS BARCLAYS BANK LTD NBI HCCC NO.102 OF 2011, this court held that –

> ***"the option to refer to 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 VS. WACHIRA (1995-1998) IEA 20, it was held that if the appellant had wished to invoke the clause, 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."**

16. In this appeal the learned judge was entitled to deal as a matter of priority with the issue of stay as it related to jurisdiction. In the memorable words of justice of appeal Nyarangi JA in the case of OWNERS OF MOTOR VESSELS LILIAN V. CALTEX OIL KENYA LTD [1989]

> ***"...jurisdiction is everything. Without it, a Court has no power to make one more step... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

21. In its ruling the trial court stated *inter alia* that:

> ***"……. I have considered the Application, Preliminary Objection, Grounds of Opposition, replying Affidavit and the rival written submission and authorities by both parties. I have read the Knock for Knock Agreement and the letters annexed to the Applicant's supporting Affidavit….***
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> ***……. Having read the Knock for Knock Agreement annexed , it is clear that both the Jubilee Insurance and Intra Africa Assurance Company Limited are in the schedule of participating member companies.***
>
> ***It is not in dispute that the motor vehicle registration number KBN 732S Nissan X-trail was insured by Jubilee while the motor vehicle registration number KBS 979K was insured by Intra Africa Assurance Company Limited who are parties to the Knock for Knock Agreement annexed herein and as such they are bound by the terms of the said Agreement.***
>
> ***The Plaintiff herein has sued on behalf of his insurers who are the beneficiaries of the outcome of the suit.***
>
> ***It is not clear that the matter had been dealt by an arbitrator before being filed in court as such, the application herein has merit. The dispute is to be referred to arbitration as stipulated by the knock for knock agreement. Proceedings herein are therefore stayed. The application dated 4th May, 2016 is hereby allowed. Each party to bear their own costs."***

22. The Appellant had in his submissions before that court raised the question whether the chamber summons was filed in compliance with the timelines and or events envisaged in section 6(1) of the Arbitration Act. The trial court did not address itself to the matter, instead proceeding to consider the matters envisaged by sub-section (a) and (b) of section 6 (1) of the Arbitration Act. As stated by the Court of Appeal in the cases of **Mt. Kenya** and **Niazsons(K) Ltd** the lower court was obligated when presented with a motion of this nature to consider the question whether the applicant had taken any steps in the proceedings other than the steps allowed by the section. That is an elementary consideration.

23. The Appellant has argued on this appeal that chamber summons seeking stay of proceedings pending arbitration was time barred having been filed 13 days after the Respondent filed his memorandum of appearance and complained that the trial court failed to consider all the matters urged before it in this regard. The complaint is merited; the court erred by failing to consider the material placed before it by the Appellant. Had the trial court addressed its mind to the submissions touching on the requirements in section 6 (1) of the Arbitration Act, it would have concluded that the chamber summons was time-barred.

24. Consequently, this appeal must be allowed with the result that the ruling of the lower court is hereby set aside. This court substitutes therefor an order dismissing the motion dated 4th May 2016 with costs. The costs of this appeal are awarded to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 4TH DAY OF NOVEMBER 2021

C.MEOLI

JUDGE

In the presence of:

MS. MAINA H/B FOR MR KARUTI FOR THE APPELLANT

MRS NGALA FOR THE RESPONDENT

C/A: Carol