



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL SUIT NUMBER 53 OF 2015**

**PIRISIRA WAMBUI MATHENGE..... PLAINTIFF**

**VERSUS**

**PHOENIX OF EAST AFRICA ASSURANCE CO. LTD.....DEFENDANT**

**RULING**

1. The defendant by its Chamber Summons application dated 10<sup>th</sup> August 2015 seeks for an a order that the dispute between the parties be referred to arbitration and that all proceedings hereof be stayed pending hearing and determination of the arbitration.

It is premised on **Section 6(1) of the Arbitration Act No. 4 of 1995 and the Arbitration Rules 1997.**

Upon service of the plaint and summons to enter appearance, the defendant entered appearance and on the same day brought the application hereof.

2. The dispute arose from a Commercial Motor Vehicle Insurance policy between the parties entered into sometimes in the month of February 2014.

Clause 9 of the said policy provided that if a dispute between the two parties arose relating to the policy, it would be referred to a single mediator to be agreed between them within 30 days of the dispute and the dispute to be finalised within 30 days thereafter. It further provided that should they not agree, either party shall refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) whose decision will be binding, and would be final.

3. It further provided that if the dispute is not referred to the arbitration process within 12 months, it would be assumed that the claim is abandoned.

It is upon the express provisions of the policy that the defendant seeks referral of the dispute to the Arbitration.

4. The plaintiff though not quite opposed to referral of the dispute to Arbitration is worried, as expressed in the Replying Affidavit that she may be caught up by time limitation stated in **Paragraph 9(a) and (b)** thereof.

It is her averment that she was not aware of the terms of the policy as the policy document was never given to her by the defendant and was served to her upon filing of this suit.

5. I have considered written submissions by both parties. There is no denial by the defendant that the policy document was served upon the plaintiff when she served the court papers upon it.

Time limitations were set in the policy document and as the plaintiff was never provided with the said document it would be a travesty of justice if the timeliness that were not in the knowledge of the plaintiff, expressly or otherwise, would be imposed upon her.

6. The court has wide discretion to extend time for ends of justice to be met. Further **Article 159(2) (d)** of the Kenya Constitution implores courts to dispense justice without undue regard to technicalities.

7. The dispute under consideration arose on the 14<sup>th</sup> May 2014 when the subject commercial vehicle was stolen and a report of the theft reported to the insurer. The vehicle was not recovered prompting the plaintiff to raise a claim for compensation under the terms of the policy **No. 214/ACV/00661/01 720P Isuzu Dmax**.

Despite demand and notice of intention given, it appears that the defendant failed to compensate the plaintiff leading to the suit being filed on the 16<sup>th</sup> July 2015.

This was obviously outside timeliness set out in the policy document.

8. For the above reasons, the court finds that the timelines for taking action in respect of a dispute arising interms of the policy document as stated in clause 9 of the Policy document should be interpreted in favour of the plaintiff to the extent that such timelines shall not apply should the dispute be referred to Arbitration, save to that which the court shall determine.

9. **Section 6(1) of the Arbitration Act Chapter 49 Laws of Kenya** empowers the court to refer a dispute to Arbitration if it is subject to an Arbitration agreement when a party applies not later than the time the party enters appearance, and seeks stay of further proceedings.

10. The court is to make a finding whether or not there is indeed a dispute that is capable of being referred to arbitration and whether or not the agreement is null and void, inoperative or incapable of being performed.

11. I have considered the policy document. I find that there is indeed a dispute that ought to be referred to an Arbitration. As I have stated above, the only issue that I need to expressly state is the timelines set in the policy document. They are inoperative. I shall proceed to set timeliness for the proceedings. I am satisfied that the dispute is one that ought to be referred to arbitration and such finding is hangered upon the terms of the policy that in essence binds the parties save for the time set in Clause 9 thereof.

12. I therefore proceed to allow the Defendants application dated 10<sup>th</sup> August 2015 in terms of Prayer 3, that this suit is stayed and the dispute between the parties be and is hereby referred to Arbitration. It is further directed that a single mediator/Arbitrator shall be agreed upon by the parties within a period of 30 days of this ruling, and thereafter the arbitration process shall forthwith commence and be finalised within another 30 days of commencement. The Arbitrator shall file the Arbitral award within 10 days after conclusion of the arbitral proceedings.

13. In terms of Clause 9 of the policy document, if the parties cannot agree on a single Arbitrator, any of the parties shall be at liberty to refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya branch) who within the 30 days period stated above will appoint an impartial and neutral arbitrator who will arbitrate the dispute within 30 days and file the ward within 10 days after completion of the proceedings.

It is so ordered.

**Dated, Signed and Delivered this 19<sup>th</sup> Day of January 2017.**

**JANET MULWA**

**JUDGE**