



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 315 OF 2014 (O.S)

IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF AN ARBITRATOR

BETWEEN

PAN AFRICAN PAPER MILLS (EAST AFRICA)

LIMITED (IN RECEIVERSHIP)PLAINTIFF

AND

FIRST ASSURANCE COMPANY LIMITED..... DEFENDANT

R U L I N G

INTRODUCTION

1. The Application before this Court is the Plaintiff's Originating Summons dated **18th July 2014** and filed in Court on **21st July 2014**. It is expressed to be brought under **Section 12 of the Arbitration Act, 1995 Rule 3 (1) of the Arbitration Rules** and under the inherent powers of the Court.
2. The Application is based on the grounds stated in the application and is supported by the Affidavit of IAN SMALL, one of the joint receivers and managers over the Plaintiff and is sworn on **18th July 2014**.
3. The application is seeking for one main order that this honourable court appoints Mr. Mwaniki Gachoka Advocate to act as a single arbitrator to hear and determine the dispute between the Plaintiff and the Defendant.

THE PLAINTIFF'S CASE

4. The Defendant was the Plaintiff's insurer for a number of insurance covers including insurance issued under the Work Injury Benefits Act. Upon the expiration of the policy relating to the cover under the Work Injury Benefits Act on **16th November 2012**, the Plaintiff compiled declaration schedules and forwarded them to the Defendant for purposes of calculating refund premiums which were due to the Plaintiff. The Plaintiff requested the Defendant to remit the funds to it.
5. However, the Defendant indicated that it could only deal with the Ministry of industrialisation of the Government of Kenya on the issue of the refund of premiums. The Defendant's contention was that

the policy of insurance was procured by and the premiums paid for by the Ministry. It is the Receiver's assertion that the Principal Secretary of the said Ministry wrote to the Defendant's managing director confirming the Receiver's authority to collect the premiums refunds. Despite this confirmation and meetings between the parties, the Defendant has failed to process the refunds of the premiums.

6. In view of the foregoing, a dispute arose between the parties under an insurance policy and by a letter dated **5th March 2014**, the Plaintiff gave the Defendant notice of its intention to commence arbitration as provided under the insurance policy. The Plaintiff's Advocates proposed the appointment of Mr. Mwaniki Gachoka or Mr. Arthur Igeria for appointment as an arbitrator and called upon the Defendant to propose additional names if it wished to.

7. It is the Plaintiff's case that under the insurance policy, all differences arising out of the policy are to be referred to the decision of an arbitrator who is to be appointed in writing by the Parties. However, the Plaintiff's efforts to obtain agreement on the appointment of an arbitrator have been unsuccessful hence the current application. There has been no response from the Defendant on the issue of the appointment of the arbitrator.

THE DEFENDANT'S CASE

8. The Defendant opposed the application. There is a Replying affidavit sworn on **13th October 2014** by **Janerose Gitonga**, described as the Legal manager of the Defendant.

9. The deponent avers that the application is misconceived and potentially an abuse of the Court process aimed at coercing the Defendant into committing to a payment that has not been tabulated. She further avers that on **24th May 2010**, the Defendant entered into an agreement with the Ministry of industrialisation for provision of insurance services for the benefit of the Plaintiff's employees.

10. It is the deponent's assertion that the issue of contention, if any between the parties was not on payment of the premiums but as to who the principal to the insurance contract was and therefore to whom the payments were to be made. It is averred by the Defendant's Legal manager that nevertheless the Defendant requested the Plaintiff to provide outstanding declarations for previous years to enable them compute the premium adjustments. It is the deponent's position that without such declarations, the premiums to be refunded cannot be ascertained. On that premise, it is the Defendant's position that a dispute cannot arise since there has not been a refusal to pay but simply a delay occasioned by misunderstandings on who should be part of the negotiations and the documentation required to make the requisite tabulations. It is therefore the Defendant's case that the request for the matter to be referred to a specific arbitrator is premature.

11. It is the deponent's assertion that the Defendant had proposed the matter be referred to the Chairman of the Chartered Institute of Arbitrators to appoint an independent Arbitrator with the requisite qualification to adjudicate on the matter. It is the Defendant's case that a unilateral appointment of an arbitrator could lead to anxiety and consequential applications to this Court. Therefore, the Defendant urges this Court to refer the parties to the Chairman of the Chartered Institute of Arbitrators for the appointment of an independent arbitrator.

PLAINTIFF'S REPLY

12. In reply, the Plaintiff filed an undated Supplementary affidavit on **4th November 2014** sworn by **Patrick Ndungu Maina**, described as a senior manager working with the joint receivers and managers of the Plaintiff.

13. The deponent avers that the information on outstanding declarations requested for by the Defendant was supplied to them as shown in the affidavit of IAN SMALL filed on 21st July 2014. He reiterated that the Defendant refused to pay the premiums refund leading to a declaration of a dispute.

14. He further avers that the procedure for appointment of an arbitrator is provided for at clause 11 of the Policy. It is the deponent's position that there is no provision for appointment of an arbitrator by the Chairman of the Chartered Institute of Arbitrators as proposed by the Defendant. He also avers that it is not correct that there is no dispute to be referred to arbitration or that the procedure that has been used by the Plaintiff in seeking the appointment of an arbitrator is improper.

15. It is the Plaintiff's case that the Defendant has had more than sufficient time to process the refunds and ought not to attribute its failure to a lack of documents which it has been in possession of for close to two years. The Plaintiff urges this Court to allow the Application.

ANALYSIS

16. I have considered the application, the affidavits in support and opposition to the application as well as the rival submissions filed by Counsel. Having done so, I take the following view of the matter.

17. From the above pleadings, the main issue for determination is whether a dispute has arisen between the two parties with regard to the insurance policy to warrant the appointment of an arbitrator.

18. The Plaintiff has declared a dispute following the Defendant's refusal to refund premiums due to it. On the other hand, it is the Defendant's contention that no dispute has arisen between the parties and therefore the Plaintiff's request for the matter to be referred to a specific arbitrator is premature. The Defendant's position is that they have not refused to refund the claims. The contention is that there has simply been a delay occasioned by misunderstandings on who should be part of the negotiations and the documentation required to make the requisite tabulations.

19. The Defendant in its replying affidavit indicated that there was a contention as to who the principal of the insurance contract was. However in the Defendant's submissions it is submitted that this issue was clarified. Though the Defendant's are not being clear, I believe the position is that the same was resolved. The Plaintiff has indicated that the Ministry of Industrialization wrote to the Defendant's Managing Director confirming that the Receivers and Managers of the Plaintiff had authority to collect the premium funds. There is nothing to show that the Defendant defied or disputed this directive from the Ministry. The Defendant went ahead to request for some declarations from the Plaintiff for purposes of the premium refunds vide their Advocates' letter dated 17th March 2014. (*See page 24 of the Plaintiff's bundle*)

20. It is however worthy to note that the aforesaid letter came after the Plaintiff had declared a dispute under the policy as relates to the non-payment of the premium refunds vide its letter dated **5th March 2014**. From the Court records and in particular the Plaintiff's bundle, it is evident that the Plaintiff sent the Defendant various correspondences with regard to the premium refunds but there was no positive response. Therefore, at that point, the Plaintiff was justified to declare that a dispute had arisen under the policy. Back to the Defendant's letter dated 17th March 2014. The same was requesting for some declarations with regard to the premium refunds. The Plaintiff's Advocate responded vide their letter dated 2nd April 2014 and noted that the period in respect of which the Defendant sought for declarations was outside the period of the policy in question. Nevertheless, the Plaintiff's Advocates went ahead and attached the declarations in question. Unfortunately, the Plaintiff forgot to attach the said declarations.

Moving forward, it is evident from the record that following the Plaintiff's letter, the Defendant never responded with regard to the aforesaid declarations. As a result, the Plaintiff wrote to the Defendant seeking their response on the issue of proposed arbitrators but the Defendant never responded hence the current application.

21. As regards the declarations requested by the Defendant, Counsel for the Defendant submits that the Defendant received the same from the Plaintiff. However, it is the Defendant's case that the same were uncertified. It is therefore Counsel's submission that without the Plaintiff providing the requested information, it was not possible for the Defendant to complete its computations and reconcile its accounts. I must say that I find it difficult to comprehend what the Defendant's issue is with regard to the

declarations. The fact that the said declarations were not certified does not mean they did not provide the required information. If it was necessary that the same were to be certified, nothing would have been easier than to get back to the Plaintiff and request the same. It seems to me that the Defendant is being non-committal as regards the premium refunds.

22. It is evident from the foregoing account that a dispute has arisen under the policy as relates to the non-payment of the premium refunds. I have perused **clause 11** of the Insurance Policy which is titled “**Arbitration of Disputes under this Policy**”. The said clause reads in part as follows:-

“All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties...” underlining supplied

From the above provision, it is clear that there was no specification as to what kind of dispute would be referred to arbitration. It provided that all differences arising out of the policy would be referred to an arbitrator. There is a dispute between the parties as regards the documentation required for tabulation of the premium refunds. The same has not been resolved and as result the premium refunds remain unpaid. Therefore a difference(s) has arisen out of this policy as envisaged under the aforesaid clause.

23. Having established that a dispute has arisen, it follows that the same should be referred to the decision of an arbitrator. However, it seems that the parties are not in agreement as to how such an arbitrator should be appointed. The Plaintiff seeks for orders that the Court appoint Mr. Mwaniki Gachoka as a single arbitrator to determine the dispute. On the other hand it is the Defendant’s submission that the issue be referred to the Chartered Institute of Arbitrators to consider an appropriate impartial arbitrator.

24. The relevant clause, which I have already referred to above, provides that the arbitrator will be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties. It is plain that the parties herein have failed to agree on a single Arbitrator. The next option provided for under the clause is that the dispute can be referred to the decision of two arbitrators one to be appointed in writing by each of the parties. I do not think the parties explored this option.

25. The Plaintiff proposed to the Defendant two persons for appointment as a single arbitrator and gave them the option to propose additional names. The Defendant however squandered the chance and can therefore not be heard to raise issues of impartiality. An Arbitration Clause is an agreement like any other. In that case, the Court will respect the autonomy that comes with such agreements. It is trite law that the duty of the Courts is to enforce agreements and not rewrite the same. The Arbitration Clause in the policy provided for the mode of appointing arbitrators. Nowhere in the said clause is it provided that the Chartered Institute of Arbitrators would be involved in the appointment of an Arbitrator. The parties to the Arbitration agreement were the ones tasked with the appointment of an Arbitrator.

26. Besides the Arbitration Agreement, the law on appointment of Arbitrators is provided for under **Section 12** of the Arbitration Act. In its application, the Plaintiff invoked **Section 12 of the Arbitration Act, 1995** which was in force at the time the parties entered into the Policy Agreement. Under **Section 12 (4)** of the said Act, any party may apply to the High Court to take the necessary measures where a party fails to act as required under a procedure agreed upon by the parties for the appointment of an arbitrator(s).

27. In view of the foregoing and taking into account **Article 159 2 (c)** of the Constitution in which this Court is enjoined to promote alternative forms of dispute resolution, I am satisfied that this Court can grant the orders for the appointment of a sole arbitrator. In making such appointment, the Court is enjoined to take into account qualifications required of an arbitrator by the agreement of the parties. The Court will also ensure the appointment of an independent and impartial arbitrator. *See Section 12 (6) of*

the Arbitration Act 1995 (Currently Section 12 (9) of the Arbitration Act, Cap 49).

28. The Arbitrator proposed is an Advocate of the High Court of Kenya and is the former chairman of the Procurement Review Board as described by the Plaintiff. I see nothing technical in the dispute at hand that would require a specific expertise. The dispute is simply non-payment of premium refunds. With regard to the impartiality of the proposed Arbitrator, there is nothing on Court record to show that he would be biased or there is a conflict of interest. The Defendant has not shown that they will suffer any prejudice if the said Arbitrator is appointed.

29. In the upshot, I allow the Plaintiff's Originating Summons dated **18th July 2014** and filed in Court on **21st July 2014**. The costs of the Application shall be for the Plaintiff.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 6TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Omondi for the Plaintiff

M/s Nadia Aziz holding brief for Awino for the Defendant

Teresia – Court Clerk