



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appeal 100 of 1995

**KISUMUWALLA OIL INDUSTRIES LIMITEDAPPELLANT
AND
PAN ASIATIC COMMODITIES PTE LIMITED1ST RESPONDENT
EAST AFRICAN SHORTAGE COMPANY LIMITED.....2ND RESPONDENT**

(Appeal from an order of the High Court of Kenya at Mombasa (Justice Mbaluto) dated 25th May, 1993)

IN

H. C. C. C. NO. 84 OF 1993)

JUDGMENT OF OMOLO, J. A.

I had the advantage of reading in draft form the judgment of Pall, J. A. and Bosire, Ag. J. A. I am in entire agreement with them. Mr. Inamdar for the appellant, strenuously pressed upon us that this Court’s recent decision in CORPORATE INSURANCE COMPANY VS LOISE WANJIKU WACHIRA, civil Appeal NO. 151 OF 1995. (Unreported), was erroneous and that the court ought to depart from it. That decision was a reserved and well considered verdict of this Court. It considered Section 6 of the then Arbitration Act in relation to what are commonly known as SCOTT VS AVERY arbitration clauses. The Court concluded in the CORPORATE INSURANCE COMPANY case, supra, that such clauses though framed in wide and mandatory terms, are nevertheless subject to the provisions of Section 6. That is undoubtedly correct and I personally find it strange that Mr. Inamdar should contend to the contrary. As Bosire, Ag. J. A. correctly points out in his judgment, in England SCOTT VS AVERY clauses have assumed the status of long-standing common law and can only be altered by direct legislation by Parliament. In Kenya, common law is only applicable subject to statutes passed by the National Assembly and subject to the circumstances of the inhabitants of Kenya. The courts in Kenya are not obliged to apply wholesale the substance of the common law as applied by their counter-parts in England. In my view, it is very brave of anyone to ask this Court to overturn a well considered decision of its own merely because the party against whom the decision has been rendered thinks that the decision is in conflict with some long-settled interpretation given by England courts. We will continue to give English or any other foreign decisions, particularly on commercial matters, their due place of honour, but it is unreasonable for any one to expect that we will slavishly apply those decisions without looking at our own Statutes and circumstances. I have myself no doubt that the CORPORATE INSURANCE COMPANY Case was correctly decided in accordance with our law as it then stood. That being the unanimous view of the three of us and further that being the only substantial point raised before us, this appeal fails and the order of the Court shall be that it be dismissed with costs as proposed by Bosire, Ag. J. A.

Dated and delivered at Nairobi this 14th day of February, 1997.

R. S. C. OMOLO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, PALL J.J. & BOSIRE AG. J.A.)
CIVIL APPEAL NO. 100 OF 1995**

BETWEEN

KISUMUWALLA OIL INDUSTRIES LIMITED.....APPELLANT

AND

1. PAN ASIATIC COMMODITIES PTE LIMITED.....1ST RESPONDENT

2. EAST AFRICAN STORAGE COMPANY LIMITED...2ND RESPONDENT

(Appeal from an order of the High Court of Kenya at Mombasa (Justice Mbaluto) dated 25th May, 1993

IN

H.C.C.C. NO. 84 OF 1993)

JUDGMENT OF PALL J.A

This is an appeal from the order of the High Court at Mombasa (Mbaluto J) dated 25th May, 1993 in Civil Case No. 84 of 1993.

Facts briefly are as follows:

Pan Asiatic Commodities PTE Ltd (the Plaintiff) have sued Kisumuwalla Oil Industries Ltd (the 1st Defendant) and another in the said H.C.C.C. No. 84 of 1993. In the year 1992 the Plaintiff agreed with the 1st Defendant to sell to it 500 tons of crude palm oil on the terms and conditions set out in a proforma invoice sent to the 1st Defendant (the contract). One of the terms and conditions of the contract was that the 1st Defendant was to make payment for the goods by opening an irrevocable letter of credit with a prime bank in Singapore and the payment would be made in terms of the letter of credit upon the Plaintiff presenting relevant shipping documents to the said bank. The Plaintiff shipped the goods in September, 1992 and presented the shipping documents to the 1st Defendant's said bank for payment. The 1st Defendant's bank pointed out some minor discrepancies in the shipping documents and required the Plaintiff to obtain confirmation from the 1st Defendant allowing it to pay notwithstanding the said discrepancies. The discrepancies were such that the 1st Defendant could have overlooked them if it so wished without any loss or prejudice to it. However the 1st Defendant said that it would accept the shipping documents notwithstanding the discrepancies only if the bill was drawn at 90 days from 20th September, 1992. It thus sought to create a new term in the contract between the parties. The Plaintiff rejected the new term so proposed. Meanwhile the goods arrived at Mombasa. In order to avoid incurring demurrage the Plaintiff arranged with the owners of the ship carrying the goods that the cargo should be discharged into the storage tanks of the 2nd Defendant. The 1st Defendant although it had not paid the purchase price at all demanded release of the goods to it. The Plaintiff therefore filed this suit seeking an injunction restraining the 1st Defendant from taking delivery of the said goods.

On 15.2.1993 Mbaluto J. granted an ex parte injunction restraining the Defendant from taking delivery of the goods and ordered the Defendant to be served for inter-partes hearing on 25.2.1993. On 23.2.1993 the 1st Defendant entered appearance to the summons. On 25.2.1993 Mr Nanji appeared for the 1st Defendant on the hearing of the said application and the application was stood over to 15.3.1993.

On 15th March, 1993, the 1st Defendant applied by a chamber summons under O.VI r 13(1) (a) (b) and or (d) and under inherent powers of the court for the following orders:-

- (a) that the plaint be struck out.
- (b) and that the suit as well as the Plaintiff's application for interlocutory injunction be dismissed with costs.

The 1st Defendants application was based on clause 29 of the current edition of the Contract of the Federation of Oils Seeds and Fats Association Ltd which contract the parties had mutually agreed to be binding upon them. Clause 29 read as follows:

“Any dispute arising out of this contract including any question of law arising in connection therewith shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of the Arbitration and Appeal of the Federation of Oils Seeds and Fats Association Ltd in force at the date of this contract of which both Parties shall be deemed to be cognizant.

Neither party hereto nor any person claiming under either of them shall bring any action or other legal proceeding against the other of them in respect of any such dispute until such disputes shall first have been heard and determined by the Arbitration and Appeal of the Federation and it is hereby expressly agreed and declared that the obtaining of an award from the arbitrators Umpire or Board of Appeal (as the case may be) shall be a condition precedent to the right of Either of them to bring any action or other Legal proceedings against the other of them in respect of any such dispute.”

The 1st Defendants’ grounds for its application were that there was a dispute existing between the Plaintiff and the 1st Defendant. However the nature of the dispute was not defined by the Defendant. It was simply alleged that the dispute arose out of the aforesaid contract. It was also alleged that as neither the plaint nor the affidavit of Rajkumar Shah in support of the Plaintiff’s application for an interlocutory injunction contained any averment that the said dispute, albeit unidentified by the 1st Defendant, had been heard of determined in consequence of a reference to arbitration in terms of the said clause 29 nor that the plaint or the said affidavit contained any averment that the Plaintiff had obtained an award in terms thereof against the Defendant, the Plaintiff had no cause of action against the Defendant and its suit was therefore frivolous and vexatious.

Mbaluto J heard counsel on both sides and by his considered ruling given on 25th May, 1993 dismissed the 1st Defendant’s said application with costs. The 1st Defendant has now appealed against that order.

On 22nd January 1996 the appeal came up for hearing before a differently constituted bench of this court. While adjourning the appeal in order to enable Mr Gautama for the respondent to regularise his appearance before the court, the court intimated to the parties that the decision of this court in the case of Corporate Insurance Company vs. Loise Wanjiru Wachira Civil Appeal No.151 of 1995 (unreported) might have a direct hearing on the appeal. The appeal was thereafter mentioned in the court not before the present bench on 29th April, 1996 when Mr Inamdar for the appellant said that the appellant perceived that the decision of the court in the Corporate Insurance case, so far as it concerned the Scott v Avery clause was erroneous in law. He urged the court to constitute a bench of five Judges to hear the appeal. But the court declined to make arrangements for the appointment of a bench of five Judges to hear the appeal and ordered that the appellant could argue this point before a different bench of 3 Judges who would hear the appeal.

When this appeal came up for hearing before us on 24th January, 1997 Mr Inamdar for the Appellant opened by saying that in the first instance he would like to address us on the said point of law namely that the Court’s decision in the Corporate Insurance Company vs. Loise Wanjiru Wachira (supra) was faulty so far as Scott v Avery Clause is concerned and we should not be bound by it. If he failed in that effort he said he would endeavour to satisfy us that the said decision was distinguishable from the facts of this appeal. If he failed on both limbs, he said, his appeal should be dismissed with costs. With Mr Gautama’s concurrent we allowed Mr Inamdar to address us on that point of law in the first instance.

A Scott vs. Avery clause is named after the leading case of the House of Lords (Scott vs. Avery 25 L.J. Ex. 308) in which a mutual assurance company inserted in all its policies a condition that when a loss occurred the suffering member should give in his claim and prove his loss before a committee of members appointed to settle the amount; that if a difference arose between the committee and the suffering member the matter should be referred to arbitration and that no action should be brought except on the award of the arbitration. The House of Lords held that this condition was not illegal as ousting the jurisdiction of the courts.

In Corporate Insurance Co. vs. Wachira (the Corporate case) the Corporate Insurance Company (the Corporate) by a policy document agreed (inter-alia) to indemnify the policy holder Mrs Loise Wanjiru Wachira (Mrs Wachira) against all loss or damage to Mrs Wachira’s vehicle KVF 090 during the subsistence of that policy Clause 10 of the policy provided that all differences between the parties

were to be referred to arbitration and that the making of an award was to be a condition precedent to any right of action against the Corporate.

On 25th December, 1987 while the policy was subsisting Mrs Wachira sent her car to a garage in order to have a leak in its exhaust repaired. An apprentice in the garage repaired the leak and against the express instructions of the garage owner took the vehicle out on the road in order to test if the leak had been effectively repaired. The apprentice did not hold a driving licence and he crashed into an electric power pylon causing extensive damage to Mrs Wachira's vehicle. He was charged and convicted of careless driving and driving a motor vehicle without a driving licence. Mrs Wachira submitted a claim to the Corporate to be indemnified of her loss or damage arising from that accident. But the Corporate disclaimed its liability. Notwithstanding the fact that the insurance policy contained the said clause for arbitration and before any reference was made Mrs Wachira filed a suit against the Corporate claiming damages for breach of contract. The Corporate entered appearance and also filed a defence denying liability on three grounds namely (a) that at the time of the accident the vehicle was driven by an unauthorised driver in breach of the policy (b) that the suit was premature and incompetent because of the said clause in the policy and (c) that the Corporate had repudiated the claim. Some four years after the filing of the said defence and when the suit came up for hearing the Corporate raised a preliminary objection and asked for the suit to be struck out on the ground that it had been prematurely brought without the dispute being referred to arbitration as stipulated by clause 10 of the insurance policy. The Judge in the superior court overruled the objection because he found as a fact that the mandatory provisions of s.6 of the then Arbitration Act (Cap.49) had not been complied with as the Corporate, after entering appearance, had delivered a defence and made no application for stay.

S.6 of the Arbitration Act (Cap. 49) which is now repealed and replaced with a new Act but was in force at the material time read as follows:

“6(1) if a party to an arbitration agreement or any person claiming through or under him commences any legal proceedings in any court against any party to the agreement or against a person claiming through or under him in respect of a matter agreed to be referred –

- (a) any party to those proceedings may at any time after appearance and before delivering any pleading or taking any other steps in the proceedings apply to the court to stay the proceedings and

- (b) that the court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings.”

Sub section 6(2) of the Act is not relevant here.

So far as judicial policy is concerned as Sir Charles Newbold in *Dodhia vs National & Grindlays Bank Ltd and another* (1970) E.A. 195 said:

“This court as the final court of appealwhile it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course exercise this power only after careful consideration of the consequences of so doing and the circumstances of the particular case but I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be best left to the discretion of the court at the time it was up for consideration.”

In the Corporate case, Mr Muthoga for the Corporate had submitted that although the Corporate was a party to an arbitration agreement within the meaning of S.6 of the Arbitration Act and the arbitration clause was what is commonly known as a Scott vs. Avery clause, the appellant was not bound to apply for stay of proceedings under s.6 of Arbitration Act but could raise it as a defence to the respondent's claim. Similarly, Mr Inamdar's submission here is that as there was a Scott vs Avery arbitration clause in the insurance policy in the Corporate case the Corporate had two options; either to apply for stay of proceedings in accordance with s.6 of the Arbitration Act or use the said clause as a defence to the Plaintiff's action. Similarly he said clause 29 of the agreement in this case expressly stipulates that the obtaining of an award from the arbitrators or the Board of Appeal as the case may be shall be a condition precedent to the right of

either party to bring any legal action against the other in respect of any dispute arising under the agreement. Thus he said the Scott v Avery clause in both cases made the obtaining of an award a condition precedent to the Plaintiff's right of action. He cited a number of authorities in support of his submission.

He went on to submit that the Court of Appeal in the Corporate case agreed that Scott v Avery clause stipulates that "the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract, so that a party has no cause of action in respect of the claim falling within the clause unless and until a favourable award has been obtained." Yet, said Mr Inamdar, the Court of Appeal erroneously said:

"While we agree that a Scott v Avery clause can provide a defence to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing the defence the appellant lost its right to rely on the clause."(underlining provided)

The Court of Appeal cited with approval the following passage at p.165 of the Law and Practice of Commercial Arbitrations in

England by Mustill and Boyd. (2nd Ed):

" A Scott v Avery clause performs two different functions. First it creates an obligation to arbitrate: and as such it creates a condition precedent to the Plaintiff's right to apply for a stay of the proceedings. Second it creates a condition precedent to the Plaintiff's right of action; and as such it gives the Defendant a substantive defence to the claim. A Defendant sued in breach of a Scott vs Avery provision thus has a choice of remedies. In law, he is entitled to bide his time and rely on the Scott v Avery point at the trial. But the court does not approve of this procedure because it wastes the costs of the action. The right course is for him to apply for a stay." (underlining provided)

The same passage goes on to say as follows:

"Upon hearing of the application (for stay) all questions of the applicability of the arbitration provisions can be dealt with along with any issue whether the clause ought in the circumstances to be declared of no effect. If it is held that the clause does not apply then the action will be stayed and the matter can proceed to arbitration no further costs being incurred in the action."

Again at page 162 the learned authors say:

"It has been said that such a clause postpones but does not annihilate the right of access to the court."

At page 14 of the same text the learned authors further say:

'Such a clause does not bar the jurisdiction of the court, but it does provide a defence to the action, where there has been no arbitration and no award. In theory the Defendant is entitled to let the action run on and use the clause to defeat the claim at the trial. This is rarely done in practice and the usual course is to employ the clause as a ground for obtaining a stay.' (underlining provided).

According to s.6(1)(b) of the Arbitration Act in order to take advantage of the arbitration clause, the party applying has to satisfy the court that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. There was nothing in the Corporate case to indicate that the appellant either at the time the legal proceedings were commenced or at any time thereafter indicated that it wished to take the advantage of the arbitration clause and desired the

matter to be referred to arbitration. The arbitration provision does provide a remedy of specific performance. However one cannot ask for specific performance of an agreement by the other side unless he has been and still is ready to perform his part of the agreement. There was nothing even in the defence of the Corporate to show that it had ever been ready and willing to refer the matter to arbitration. On the other hand Corporate had in fact waived the right to refer the matter to arbitration and have the legal proceedings stayed in the meantime by filing a defence particularly as two of the defences were that the vehicle in question was being driven by an unauthorised driver in breach of the policy and that the Corporate had repudiated liability. The Corporate's conduct therefore disentitled it from relying on the Scott v Avery clause.

Mustill and Boyd at page 164 say as follows:-

"The second situation where a Scott v Avery clause is not available as a defence exists where the conduct of the Defendant disentitles him from relying on it. The reported cases disclose two distinct instances-

1. Where the Defendant has waived reliance on the clause by defending the action without relying on the clause or by himself instituting proceedings in breach of it."

The other instance is not relevant here as it relates to the conduct of the Defendant during the arbitration.

The parties can of course expressly agree to ignore or disregard the clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the court they cannot blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause.

At p.137 Russel on the Law of Arbitration 18th Ed. Says:

"If the court has refused to stay an action or if the Defendant has abstained from asking it to do so, the court has seisin of the dispute and it is by its decision and by its decision alone that the rights of the parties are settled."

Again at p.138 Russel says

"It would seem that even where it is provided in the contract that no action shall be brought until an award is made or except upon the award of the arbitrator a party still has a right to bring an action and jurisdiction of the court is not ousted. The court may stay the action either under 4(1) or on the ground that it is frivolous and vexatious. Alternatively the court has discretionary power to order that the provision making the award a condition precedent cease to have effect."

Mr Inamdar has also relied upon the following judicial authorities.

1. Woodall vs Pearl Insurance Co. Ltd. (1919) 88 L.J. K.B.706. In it a dispute had arisen as to the validity of the insurance policy. The insurance company had required the other side under the arbitration clause that the dispute be referred to arbitration. But the appellant brought an action on the policy. It was held that as the insurance company had required under the arbitration clause the obtaining of an award a condition precedent to right of action the insurance company was entitled to rely upon the arbitration clause as a defence to the claim.
2. W. Bruce Ltd vs J. Strong (1951)1 All ER. 1021 In this case there was an application for stay of proceedings which is neither the case here nor was it the case in the Corporate case and
3. In Hardwick Game Farm v S. A. P.P.A Ltd (1964) 2 Lloyd's Report's 227 it was held either party has the right to apply to the court for a stay if he has not waived his right (emphasis provided).

All these cases are distinctly different on facts from those in the Corporate case or those in the present appeal. I think it is also relevant here to point out that under s.26(4) of the Arbitration Act the court had a discretion in a proper case to hold that a condition precedent to the bringing of an action shall cease to have effect as regards any particular difference. S.26(4) reads:

"where it is provided (whether by means of a provision in the arbitration agreement or otherwise that an award under an arbitration agreement is a condition precedent to the bringing of an action with respect to any matter to which the agreement applies. The High Court if it orders (whether under this section or under any other law) that the agreement shall cease to have effect as regards any particular difference may further order that the provision making an award a condition precedent to the bringing of an action shall cease to have effect as regards that dispute."

I therefore find no reason to depart from the previous decision of this court in the Corporate case. By the same token in this appeal if the 1st Defendant/Appellant wished to take advantage of clause 29 of the contract, it was obliged to apply for stay of proceedings after entering appearance which it never did. Also there is no evidence that the 1st Defendant/Appellant had ever written to the Plaintiff that there was any dispute between them regarding the terms and conditions of the contract and if so what the dispute arising out of the contract was. It never ever before the suit had been filed indicated to the Plaintiff that it wished to rely upon clause 29 of the contract and desired the matter to be referred to arbitration.

After entering appearance the 1st Defendant could have applied for stay of proceedings. Instead of applying for stay of proceedings the appellant/1st Defendant applied to the court by a chamber summons seeking, as I have already said, that the Plaintiff should be struck out and the suit as well as the Plaintiff's application for interlocutory injunction should be dismissed. Also Mr Nanji for the Appellant/1st Defendant participated in the court proceedings on the Plaintiff's application for injunction by appearing at the inter partes hearing of that application on 25.2.1993 when the application was stood over to 15.3.1993 and his client was ordered to pay the adjournment costs.

Mr Inamdar's second point is that the Corporate case can be distinguished from the present appeal because in the Corporate case the appellant had taken a step in the proceedings by filing its defence whereas in this case his client immediately after entering appearance applied for striking out the plaintiff and dismissal of the suit for non compliance with clause 29 of the contract. Again he has submitted that the Appellant/1st Defendant cannot be said to have yet taken a step in the proceedings which could disentitle it from the advantage of the said clause.

According to Lord Denning M.R. in Eagle Star vs Yuval (1978) 1 Lloyds Reports 358 at page 361, A step in the proceedings is

"A step by which the Defendant evinces an election to abide by the court proceedings and waives his right to ask for an arbitration."

Again at p.363 Geoff L.J. said:

"The authorities show that a step in the proceedings means something in the nature of an application to the courtsome step such as taking out summons or something of that kind which is in technical sense a step in the proceedings."

Shaw L.J. at p.364 said

"I am by no means of the view that the summons to strike out a claim is not generally to be regarded as a step in the action to which it relates. A step may in the direction of promoting the progress of the action or of

impeding the action or of extinguishing it."

In *Motokov v. Auto Garage Ltd* (1970) E.A. 249 Georges C.J. at p.252 (c) said:

"I would hold that any application to a court for an order in respect of the proceedings can be described a step in the proceedings."

In the present case the Appellant's application to strike the plaint and dismiss the suit cannot be anything but a step in the proceedings. Moreover by not filing an application for stay of the legal proceedings the Appellant has disentitled itself of clause 29 of the contract.

Mr Inamdar cited Hanessian vs Lloyd Triestino Societa (1951) vol. 68 Weekly notes in which the Defendant had applied for striking out the claim and in the alternative for stay of the proceedings under s.6 of the Arbitration Act of 1992. The Court of Appeal held that the Defendant had not taken any step within the meaning of the Arbitration Act but stayed the proceedings. In

Kuwait Airways Corporation vs. Iraq Airways and the Republic of Iraq (1995)1 Lloyds Reports 25. The Plaintiff sued the Defendant for damages and the Defendant applied for the action to be discontinued claiming immunity under the State Immunity Act of Iraq without filing any defence. The Court of Appeal of England held that the Defendant had not submitted to the jurisdiction of the court by claiming immunity from the jurisdiction of the court. These two cases are obviously different on facts and are of no assistance to the Appellant.

My view is that in the Corporate case the Corporate took a step in the proceedings by filing a defence to Mrs Wachira's case whereas in the instant case the Appellant/1st Defendant took a step in the proceedings by filing the said chamber summons to strike out the plaint and dismiss the Plaintiff's suit. In both cases there was no application for stay of proceedings. I therefore do not agree with Mr Inamdar that the present appeal is different on facts from the Corporate case. I further hold that the Corporate case is good law. There is no error in it and I am bound by that decision.

As Mr Inamdar's point of law fails on both scores, I on my part hereby dismiss the Appellant/1st Defendant's appeal with costs as proposed by Bosire Ag. J.A

Dated and delivered at Nairobi this 14th day of February, 1997.

G.S. PALL
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

**IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, PALL J.J.A & BOSIRE AG. J.A.)
CIVIL APPEAL NO.100 OF 1995**

**BETWEEN
KISUMUWALLA OIL INDUSTRIES LTD.....APPELLANT**

AND

**PAN ASIATIC COMMODITIES PTE LIMITED
EAST AFRICAN STORAGE COMPANY LIMITED.....RESPONDENTS**

(Appeal from an order of the High Court of Kenya at Mombasa (the Hon. Mr. Justice Mbaluto) dated the 25th day of May, 1993)

IN

CIVIL CASE NO. 84 OF 1993)

JUDGMENT OF BOSIRE AG. J.A

This is an interlocutory appeal from an order of the superior Court (Mbaluto, J.) dated 25th May, 1993, in its Civil Case No. 84 of 1993, in which he declined to strike out the plaint in the suit and an application for an interlocutory injunction which was pending in the suit.

There are three parties to this appeal, the appellant and two respondents. The appellant is a limited liability company incorporated and registered in Kenya, and so is the 2nd respondent, East African Storage Company Limited. The two companies were named as the first and second defendants in the above suit in which the 1st respondent herein, Pan Asiatic Commodities PTE Limited, a Singaporean company, was the plaintiff.

The suit was based on an agreement between the 1st respondent and the appellant in which the former agreed to sell to the latter 500 tons of Crude Palm Oil at an agreed price which was to be paid before shipment of the oil from Singapore to the Kenyan Port of Mombasa. Among the other terms of the agreement was clause 29, which made arbitration and the rendering of an award thereof as a condition precedent to the bringing of any action concerning any dispute or difference stemming from the agreement. The 1st respondent filed the above suit before obtaining an arbitration award as stated above, which act prompted the appellant to move the superior Court under Order VI rule 13 (1)(a), (b) and (d) of the Civil Procedure Rules, and therein contended that the suit having been filed before the 1st respondent had obtained an arbitration award, it was premature and, therefore, frivolous, vexatious and abuse of the process of the Court. Consequently, it sought an order striking out the plaint and, also, an application which was pending in which the first respondent had sought interlocutory injunctive reliefs against both the appellant and the second respondent. That application was filed after the appellant had entered appearance but before delivering a written statement of defence.

The second respondent was made a party in the suit because when the contract oil reached Mombasa it required immediate discharge to obviate increased demurrage charges. So it was, by mutual agreement between the 1st respondent and the appellant, discharged into 2nd respondent's storage tanks where it was lying as at the date of the suit. The suit and the injunction application by the 1st respondent were provoked when the applicant took steps to take delivery of the oil from the 2nd respondent even before it made due payment for it.

The appellant's application to strike out the 1st respondent's plaint was unsupported by any affidavit. The appellant stated in that it would rely on facts as had been stated by the 1st respondent both in the plaint and the affidavit in support of the injunction application. In effect, therefore, there was no dispute on the facts upon which both the suit and the application for injunction were based. At the hearing of the appellant's application it was common ground that clause 29, above, contained a Scott v. Avery type of arbitration clause. It is an arbitration clause which is at times included in a contract making it a condition precedent to the enforcement of a claim under the contract that the claimant shall have taken the matter to arbitration and obtained a favourable award before suit.

After hearing submissions from counsel appearing for the parties, Mbaluto J. did not think the appellant had made out a case for striking out. In his view the appellant did not show that there existed a dispute which warranted a reference to arbitration and, that the application was merely a ploy to delay payment for the crude palm oil. In effect he concluded that the application was an abuse of the process of the Court as in his view the plaint clearly disclosed a reasonable cause of action and, by the appellant seeking to rely on a subordinate term of the contract to avoid fulfilling a fundamental term it had repudiated the contract with the result that a reference to

arbitration was rendered infructuous and otiose. He then proceeded to dismiss the application with costs. That provoked this appeal.

Several grounds have been set out in the memorandum of appeal but it is not necessary to state them here in light of the course the appeal took when it was finally heard. The appeal first came for a hearing before a differently constituted bench of this Court, which called the attention of all counsel appearing to the earlier decision of the court, on a similar or related issue to the one raised by this appeal, to with Corporate Insurance Company v. Loise Wanjiru Wachira Civil Appeal No. 151 of 1995 (unreported). Judgment in that case was delivered at Nyeri, on 11th January, 1996, about 11 days before this appeal first came for a hearing. None of the advocates appearing had had the opportunity of reading that judgment. The Court considered it desirable to and adjourned the hearing of the appeal to enable the advocates to look for and read the judgment before this appeal could be relisted for hearing.

Messrs Inamdar and Nanji, counsel on record for the appellant, after reading the judgment in Corporate Insurance Company v. Loise Wanjiru Wachira, Supra, did not think the case was correctly decided. They wanted it reviewed by a bench of five Judges of this Court, a request which, on the direction of the Hon. The Chief Justice, was considered by that bench but was rejected in a considered ruling in the following terms:

"Consequently, the application to make the necessary arrangements for a bench of five judges of this Court to hear the appellant's appeal fails and the determination of whether or not the decision of this Court in Corporate Insurance Company v. Loise Wanjiru Wachira, Supra, in so far as it concerned the Scott v. Avery clause is wrong must, if still pursued, be left to the bench of three judges of this Court which shall hear the appellant's appeal At Mombasa as indicated earlier in this ruling."

It was pursuant to that ruling that we became seised of this appeal. When the appeal was called, counsel for the appellant indicated that they would attempt to persuade us, as a preliminary issue to the appeal, that the decision in Corporate Insurance Company v. Loise Wanjiru Wachira, Supra, in so far as it concerned the Scott v. Avery clause was wrongly decided, or otherwise it is distinguishable from this matter on facts, and to, in effect, abandon the appeal if we find against them on these two aspects. Mr Satish Gautama, for the 1st respondent did not, as was expected, agree with them that the case in question was wrongly decided. With the leave of the Court, and with the concurrence of the appellant's counsel, he filed a notice of grounds for affirming the superior Court's ruling. The only ground contained in the notice was that in view of the Corporate Insurance Company case the appellant should have applied for stay of the suit before the superior Court in terms of the arbitration clause.

I earlier stated that the Scott v. Avery clause is a special type of arbitration clause in a contract making arbitration and the rendering of an award thereof as a condition precedent to the enforcement of a claim under the contract. Corporate Insurance Company v. Loise Wanjiru Wachira, Supra, concerned a policy of insurance which contained such a clause. No arbitration award was rendered before the suit. The defendant entered appearance and delivered a defence raising, inter alia, the Scott and Avery clause as the defence. At the trial of the suit a preliminary point was raised based on that clause but which the trial judge overruled. The case was heard and judgment was pronounced against the Insurance Company, which was the defendant in the suit. It was dissatisfied and appealed against it to this Court. As far as is material to this appeal, the Court in its judgment said:

'Arbitration clauses such as clause 10 in the policy are known as 'Scott v. Avery' arbitration clauses named after a leading case decided by the House of Lords in

England way back in 1856 in which their efficacy was considered and have long been accepted as valid. These clauses do more than provide that disputes shall be referred to arbitration. They also stipulate that the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract; so that a party has no cause of action in respect of a claim falling within the clause, unless and until a favourable award has been obtained.

While we agree with the proposition that a Scott v. Avery arbitration clause can provide a defence to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.

The Procedure in

England in relation to these clauses is summarised at page 165 in The Law and Practice of Commercial Arbitration in England by Mustill and Boyd (2nd Ed) as follows:

"A Scott v. Avery clause performs two different functions. First, it creates an obligation to arbitrate; and as such, it gives the defendant in a High Court action the right to apply for a stay of the proceedings. Second, it creates a condition precedent to the plaintiff's right of action; and as such, it gives the defendant a substantive defence to the claim. A defendant sued in breach of a Scott v. Avery provision thus has a choice of remedies. In law he is entitled to bide his time and rely on the Scott vs. Avery point at the trial. But the Court does not approve of this procedure, because it wastes the costs of the action. The right course is for him to apply for a stay."

That is what the appellant should have done and that is what this Court said should be done in the case of Kenindia Assurance Company Ltd v. Patrick Muturi (Civil Appeal No. 87/93) (unreported). In our view, therefore, the Judge was right to reject the appellant's

preliminary objection. This ground of appeal accordingly, fails."

It is the part of the judgment where the Court said that the Scott vs. Avery clause is subject to the provisions of s.6 of the Arbitration Act, Cap 49 Laws of Kenya, which counsel for the appellant contend is wrong. What is the basis of their conclusion?

Mr. Inamdar, who as I said earlier appeared with Mr. Nanji for the appellant, submitted before us, inter alia, that section 4 of the English Arbitration Act, is in Pari Materia with our section 6, above and, that the passage from Mustill and Boyd, cited with approval in the Corporate Insurance Case, Supra, having been written before section 4, above, was amended, it followed that this Court applied English decisions in the Corporate Insurance Case. In effect Mr. Inamdar was trying to lay a basis for citing English and other decisions from other jurisdictions to persuade us that, in light of those decisions, the Corporate Insurance Case was wrongly decided with regard to the efficacy of the Scott v. Avery clause.

To my mind, the main thrust of Mr. Inamdar's submissions on the efficacy of the Scott v. Avery clause was that it is a special clause which takes a dispute outside the ambit of the provisions of S.6, above. Section 6 provides, in pertinent part, as follows:

"6(1) If a party to an arbitration agreement or a person

claiming through or under him, commences any legal proceedings in any Court against any other party to the agreement, or against a person claiming through or under him, in respect of a matter agreed to be referred –

(a) any party to those proceedings may at any time after appearance, and before delivery of any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings."

Mr. Inamdar submitted that notwithstanding that in

England and other jurisdictions there is a provision similar to section 6, above, Courts there have held the Scott v. Avery clause provides a defendant with a choice. First, he may apply for a stay of proceedings, in effect invoking the statutory provision or; secondly, he may use the clause as a defence to the merits of the action. That may well be so in England. But the question which immediately springs into mind is whether the same applies to Kenya.

A matter which Mr. Gautama obliquely touched on but, which to my mind may possibly answer the question and, which I think is central in the determination of the preliminary issue raised, is the relevance if any, of the English decisions on the issue in view of the circumstances and the law of this country. Most if not all the cases cited to us in this matter are based on the common law of England. The common law is the law declared through judicial pronouncements of the Common Law Courts in England as distinct from statute law. It exists side by side with statute law and, unless specifically changed by an Act of Parliament the policy of the Courts there is to give effect to

it. For instance, in the English case of Leach v. Rex [1912] AC 305, the House of Lords held that common law cannot be changed by mere statutory implication. In that case the appellant was tried for an offence under the Punishment of Incest Act, 1908, and was convicted. At the trial his wife was compelled to testify against him despite her objection based under S.4 of the Criminal Evidence Act, 1898 (1). That ruling was upheld on appeal to the Court of Criminal Appeal. On further appeal to the House of Lords, Lord Atkinson said:

"The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case."

The Earl of Halsbury, also stated, in the same case, as follows:

".....and speaking for myself, as an ordinary person, I should have asked, when it was proposed to call the wife against the husband, "will you show me an Act of Parliament that definitely says you may compel her to give evidence? Because since the foundations of the common law it has been recognized that that is contrary to the course of law." If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, in the sense that everybody would say 'to call a wife against her husband is a thing that cannot be heard of-' to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous."

The Scott v. Avery clause dates back to 1856. It is ingrained in the English common law and, English Courts have sustained its application over the years. Its application has not been specifically restricted or changed by statute. It should be remembered that in

England the common law, in certain instances, Occupies a more prominent position than statute law. In some cases a law commission has to be set up to consider and to effect any change if it is considered necessary.

To my mind, therefore, that would explain why the authorities cited talk about a defendant having a choice whether to invoke the provisions of the Arbitration Act or the Scott v. Avery clause in situations where a suit has been instituted in breach of the Scott v. Avery Clause.

In Kenya, however, the circumstances and the law are different from those obtaining in England. The common law occupies a subordinate position to statute law and its application is subject to statute law. S.3(1) of the Judicature Act, Cap 8 Laws of Kenya, provides as follows:

"The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:

- (a) The constitution
- (b) Subject thereto all other written laws including the Acts of Parliament of the United Kingdom cited in Part I of the schedule to this Act, modified in accordance with Part II of that schedule;
- (c) Subject thereto and so far as those written Laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England

on the 12th August, 1897.....

But the common law..... shall apply so far only as

the circumstances of

Kenya and its inhabitants permit and subject to such qualifications as these circumstances may render necessary." (Emphasis supplied)

In view of the foregoing it is quite clear that English common law is not necessarily to be applied in Kenya wholesome and indiscriminately. Moreover, section 3(1), above, makes it abundantly clear, that common law principles are subject to the statute law of

Kenya. That being so and in light of the fact that our Arbitration Act has no classification of arbitration clauses, I do not hesitate at all to state that a Scott v. Avery clause when looked at in light of the Kenya law and circumstances is not any different from any other arbitration clause. Hence the clear provisions of s. 26(4) of the Arbitration Act, which empowers the High Court, in an appropriate case, to order that such a clause cease to have any effect with regard to a given dispute.

Having come to the above conclusion I am unable to agree with Mr. Inamdar that where, as here, a plaintiff brings an action in breach of a Scott v. Avery clause the right to apply for the stay of proceedings in that action is only a preferred course. In view of the reasons I have endeavoured to state, above, and in light of the clear provisions of Section 6 of our Arbitration Act, unless a defendant waives his right to rely on such a clause, he would be obliged to apply for a stay of proceedings. Consequently, this Court was bound to come to the conclusion it did in Corporate Insurance Company v. Loise Wanjiru Wachira, supra, contrary to the appellant's counsel's assertion. I would therefore, dismiss the preliminary point in its entirety, and in view of the fact that the appellant's appeal, was, by its counsel's indication at the beginning, to be determined only on the basis of the preliminary issue, I would also dismiss the appeal with costs to the 1st respondent. The 2nd respondent having not taken part in this appeal I would make no order as to costs respecting the appeal against it.

Dated and delivered at Nairobi this 14th day of February, 1997.

S.E. O. BOSIRE

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JUDGE OF APPEAL