



IN THE COURT OF APPEAL

AT NYERI

(Coram: Gachuhi, Kwach & Akiwumi JJ A)

CIVIL APPEAL NO. 87 OF 1993

BETWEEN

KENINDIA ASSURANCE COMPANY LIMITED.....APPELLANT

AND

PATRIC MUTURI.....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Meru (Mr Justice Kuloba) dated 11th day of May, 1993

in

HCCC No 114 of 1990)

JUDGMENT

The appellant, an insurance company, had insured the respondent's commercial vehicle, a Toyota Hilux pick up, for a maximum sum of 350,000/=. The related insurance policy which is in common form, provided that in case of damage to the pick-up that required to be repaired, the respondent would pay 10% of the cost of repairs. The policy, as is normal in such policies, also provided in clause 9 thereof, which is commonly referred to in the trade as an "all differences" clause, for the reference of all differences arising out of the policy to, in this case, two arbitrators appointed one each in writing, by the parties to the dispute. Clause 9 also goes on further to make the following important provision, that:

"and the making of an award shall be a condition precedent to any right of action against the company".

Shortly after the policy came into effect, the respondent's pick up was involved in an accident as a result of which, it was extensively damaged. The appellant agreed to have the pick up repaired and the respondent paid to the appellant 10% of the repairs, in this case estimated at 35,000/=. The respondent claimed that the appellant was taking an inordinately long time in repairing the pick up and that what repairs had been done were of poor quality and unsuitable and that the delay in repairing the pick up and to a proper standard, badly affected his business as a supplier of vegetables and fruits to many customers. In spite of several requests made by the respondent, the appellant failed to have the pick up properly repaired or until then, to supply the respondent with another vehicle so as to enable him to carry on his

business. And so, the respondent sued the appellant seeking general and special damages for the loss of the use of his pick up. The plaint was filed on 12th April, 1990. Appearance for the appellant must have been entered, for about two months later on 18th June, 1990, the matter came before Ojuk, J where both parties were represented by counsel. Mr Mithega for the respondent then informed the judge thus:

“We have a consent order to record in this case as follows:

‘By consent proceedings in this suit be stayed. Costs to the applicant in respect of this application’”

Mr Ghadialy for the appellant, then significantly retorted as follows:

“I agree. The suit is premature. I would have liked the costs of this suit”. (underlining ours)

Though the record of proceedings for that day is not clear on the point, the order for stay was made in order that the provisions of clause 9 of the policy should first be complied with, if the respondent was to have any cause of action against the appellant at all. Indeed, three days after the making of the consent order, advocates for the respondent wrote to the appellant’s advocates *inter alia*, that:

Following the order for stay of the proceedings in this case we are now requesting you to have this matter sent for arbitration as per condition 9 of policy No 115/030/100/621/39/9» (presumably the policy covering the respondent’s pick up with the appellant).

Correspondence exhibited in the matter show that in February, 1991, the

appellant appointed Mr B J Hawkes of B J Hawkes, Advocates, as its arbitrator. The respondent having first unsuccessfully sought to appoint the Commissioner of Insurance as his arbitrator, finally, appointed in May, 1991, Mr J M Mwarania of Mbae Mwarania & Co, Advocates, as his arbitrator. There can be no doubt that the stay of proceedings had been ordered so that the dispute could go for arbitration.

Thereafter, there ensued an exchange of correspondence between the arbitrators and between them and the advocates of the parties. As does happen in such cases, the hearing of the arbitration proceedings was delayed. It appears from the correspondence that the parties having failed to draw up agreed issues for consideration by the arbitrators, it was agreed by Mr Mwarania in his letter of 12th February, 1992, that the arbitration proceedings should be conducted in accordance with the following proposals contained in Mr Hawkes’ letter of 18th November, 1991, addressed to him:

“It seems to me that the facts are not in dispute and the argument involves assessing the facts in conjunction with the policy.

It seems to me it might be possible for the two sides to agree a bundle of documents and to submit such bundle to you and to me without the necessity of giving evidence which will save considerable expense in this matter”.

In disregard of this agreed mode of conducting the arbitration proceedings, the respondent’s advocates, without informing the appellant’s advocates, sent to the arbitrators their own, not agreed, bundle of documents, together with their then unasked for, written submissions. Mr Hawkes wrote on 19th February, 1992, to the appellant’s advocates expressing his surprise at this, and in a subsequent letter of 18th September, 1992, addressed to Mr Mwarania and copied to the Deputy Registrar of the High Court at Meru, deplored Mr Mwarania’s actions and what he saw as wrongful steps being taken to have the suit heard at that stage. The appellant’s advocates protested against the steps taken by the respondent’s advocates which led to a dispute between these advocates as to who had acted improperly and who was causing the delay in the arbitration proceedings. But it seems to us that the advocates of the respondent cannot escape some measure of blame.

Then on 9th June, 1992, Mr Mwarania took it upon himself, alone, and wrote on his own behalf, to the appellant’s advocates and copied to his fellow arbitrator and the respondent’s advocates, a letter which contained the following cynical sentence which pays no respect to the agreed mode

of the arbitration proceedings:

“As no submissions have been made by you we are afraid that we are unable to proceed with this matter and by copies of this letter we are informing the interested parties that they can recall for (*sic*) order for arbitration and have the matter adjudicated upon by Court”.

This uneducated and contrived advice was probably what the respondent’s advocates were waiting for, for they lost no time in informing the appellant’s advocates that they intended as a result of Mr Mwarania’s letter, to apply to the High Court for further directions. On 7th July, 1992, Mr Mithega had the matter placed before Oguk, J only for the limited purpose of taking a hearing date for the disposal of the suit notwithstanding the provisions of clause 9 of the policy and the fact that Mr Ghadialy had on 18th June, 1992, written to Mr Mwarania, the respondent’s arbitrator, and copied to Mr Mithega, remonstrating with Mr Mwarania, we think quite rightly, that:

“There is no shortcut and the matter cannot go back to the Court without the other party being informed of any agreement reached by the arbitrators or one arbitrator and the party appointing him.”

Mr Mithega without having filed a formal application, informally, submitted to Oguk, J that a hearing date for the disposal of the suit by the Court be fixed since Mr Mwarania could not proceed with the arbitration. It would perhaps have been more appropriate if an application had been made under section 9 or 12 of the Arbitration Act, to replace an arbitrator who had refused to act. However, counsel then holding brief for the appellant’s counsel, Miss Mwangi, asked for an adjournment as Mr Ghadialy was engaged elsewhere and pointed out significantly, that the suit had been stayed by consent of both parties and if a hearing date were to be taken, it should be by consent of both parties. She might well have added that a true consent order could only be set aside by consent. But the learned judge did not accede to this request and in a ruling in which he concedes that the matter had been stayed so that the dispute may be arbitrated upon, and without making a specific order setting aside the order of stay, proceeded to pronounce himself in the following manner:

“It appears that it has become impossible to proceed with arbitration in this case. In the circumstances the suit is now listed for hearing on 12th of October, 1992. Costs in the cause”.

He further ordered that hearing notice be served on the appellant.

But what is the effect of this order on the order of stay of proceedings that was made on 18th June, 1990, so that the dispute between the parties might be determined by arbitration under the “all differences” clause 9 of the policy? As already shown, the making of an award after an arbitration is what shall give rise to any right of action against the appellant. In other words, if no arbitration is first carried out, no matter how dilatory the tactics of a party to it may be, in its determination, the insured cannot bring an action against the insurer arising out of the policy of insurance unless perhaps it can be shown as is not the case here, that the insurer was fraudulently and deliberately frustrating the determination of the arbitration proceedings.

Furthermore, the Arbitration Act which governs arbitration proceedings, contains provisions which are relevant to the dispute between the parties. Section 6 of the Act provides that if a party to an arbitration agreement such as the respondent within the context of clause 9 of the policy, commences any legal proceedings in any Court against the other party to the arbitration agreement such as the appellant, in respect of matters agreed to be referred to arbitration such as the dispute between the parties which is covered by the “all differences” clause 9 of the policy, any party such as the appellant, may at anytime, after entry of appearance and before delivering any pleadings such as a statement of defence, apply to the High Court for stay of proceedings. In compliance with the provisions of section 6 of the Act, the appellant after entry of appearance and without being required to file its defence, properly obtained by consent, stay of proceedings of the suit filed by the respondent.

Although the Act does not make any provisions concerning the setting aside of an order of stay obtained under section 6, it contains other provisions giving the High Court various other powers with respect to

the conduct of an arbitration which are not relevant to the matter now before us. The answer to the question how a stay granted by consent so as to enable an arbitration to take place, can be set aside, must therefore be looked for elsewhere.

So what powers therefore, has the High Court to set aside a stay of proceedings that is ordered by consent so that a matter in dispute can be referred to arbitration? The setting aside of a consent judgment was considered by the East African Court of Appeal, the predecessor to this Court, in the case of *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 267. In that case, it was held that a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the Court to set aside

an agreement. This principle would in our view, apply with equal force to a consent order such as the one made on 18th June, 1990. It can only be set aside by consent, unless upon proper application having been made, it can be shown, as is not the case here, that the consent order was obtained by fraud or collusion. Indeed, it was counsel for the respondent who had applied to the High Court for the consent order to be made. Indeed, he had supplied the wording of the order. But does the evidence in this matter also show that the appellant has acted in any way that would justify a Court setting aside an agreement, with respect to the consent order of stay of proceedings? We would say no. But a matter that bears repetition is that the informal application before the learned judge on 7th of July, 1990, was for the fixing of a hearing date, a matter which is quite different from the setting aside of the fundamental and substantial order of stay of proceedings which in any case, was not applied for or even mentioned by counsel for the respondent in his submissions or even by the learned judge in his ruling. The substantive order of stay of proceedings cannot be set aside by a side wind within the context of an informal application for the fixing of a hearing date, when the setting aside of the stay of proceedings was not specifically in issue or cogent reasons advanced in support of it. It must also not be forgotten that in compliance with the provisions of section 6 of the Act, stay had been ordered before the appellant filed its defence, and it would be unreasonable to fix a hearing date without even giving the appellant the opportunity of filing its defence. The lack of a defence was to be unfairly and improperly exploited by Kuloba J when he came to hear the suit.

It is clear to us that the order of Oguk, J did not amount to a setting aside of the stay of proceedings then before the High Court. It was also a futile order since, without the completion of the arbitration and the making of an award, no right of action could in terms of clause 9 of the policy, accrue to the respondent. This being so, the proceedings in the suit in the High Court remained stayed and the suit could not have gone on for hearing and what hearing took place was null and void. This really concludes the matter before us. But it is instructive to consider what took place after the fixing of the hearing date by Oguk J.

On 24th February, 1993, the suit came up for hearing before Kuloba, J and Mr Ghadialy for the appellant raised preliminary objections to the hearing of the suit. These were that since the order of stay of proceedings had been made by consent, it was wrong for the suit to be set down for hearing as Oguk, J had ordered on 7th of July, 1992, on the unilateral application of counsel for the respondent; and that the delay in commencing the arbitration proceedings was caused by the respondent and in any case, the

completion of the arbitration proceedings and the making of the award therein, was a condition precedent to the right of action in Court accruing to the respondent. Mr Mithega for the respondent opposed the preliminary objections saying that an application to review the so called order setting aside the order of stay should have been made; that Mr Ghadialy was fully represented by Miss Mwangi when Oguk, J directed that the suit be listed for hearing; and that the delay in proceeding with the arbitration proceedings was due to the actions of the appellant.

Kuloba, J overruled the preliminary objections raised *inter alia*, on the grounds that he, having no jurisdiction to hear an appeal against the order of Oguk, J setting aside the stay of proceedings, he could not even if he wanted to, set that order aside; that clause 9 of the policy could be exploited to delay or frustrate the resolution of the matter in dispute and that this factor, and there is no evidence at all to support this, had influenced Oguk, J in making his order setting aside the order of stay of proceedings. Kuloba, J then overruled Mr Ghadialy's objections. With respect, if the learned judge had only taken the trouble to consider carefully the proceedings before Oguk J on 7th July, 1992, he would not have failed to

come to the conclusion that even though Oguk, J had made an order fixing a date for the hearing of the suit, he had certainly not made an order, which incidentally, had not been applied for, setting aside the consent order of stay of proceedings. Mr Ghadialy then sought an adjournment to enable him to file a defence which he had not been required to file in view of the fact that stay of proceedings had been ordered by consent within the context of section 6 of the Arbitration Act. This reasonable request was refused.

A third submission by Mr Ghadialy that the suit was unmaintainable because no award had been made as a result of the arbitration proceedings which could then give rise to a cause of action by the respondent, was also brushed aside by Kuloba, J. His reason for doing this, *inter alia*, and which we find wholly untenable, was that the jurisdiction of his Court could not be ousted by “the simple devise of an unguardedly phrased arbitration clause”, which is well known to be common form in the trade, and that this was particularly so, when it had not been shown that the parties had equal bargaining power in the drawing up of the contractual clause in question. But firstly, there is little room for bargaining, as the learned judge himself, must know when it comes to insurance policies in respect of motor vehicles. Next, the learned judge refused Mr Ghadialy’s fourth application for leave to withdraw from the suit. Kuloba J then proceeded to hear the evidence of the respondent. No witness was called on behalf of the appellant and Kuloba J then reserved judgment to a date to be notified.

In his reserved judgment, he found for the respondent emphasising as if he did not know why, that since no defence had been filed within fourteen days of entering appearance, the appellant must be taken to have admitted the averments in the respondent’s plaint. Having thus as it were, justified what he intended to do, the learned judge in a long winded and verbose judgment concluded by awarding the respondent general damages in the sum of 2,000,000/-, a sum far in excess of the maximum amount for which the respondent’s pick up was insured, Shs 2,256,000/- by way of special damages “plus costs to be agreed upon and interest at the usual rates and from the usual respective dates until the satisfaction of the judgment.”

It has come as no surprise at all to us that the appellant has appealed against the judgment of Kuloba, J on the ground that the supposed order of Oguk, J setting aside the consent order of stay of proceedings being bad in law and of no effect, could not be relied upon by Kuloba, J as conferring jurisdiction on him to hear and determine in the high-handed and oppressively hasty manner, the suit that the respondent had filed. On 16th July, 1993, the appellant obtained a stay of execution of the judgment of Kuloba J and undertook to deposit into an interest bearing account in the joint names of the appellant and the respondent, the decretal sum arising out of the judgment of Kuloba J.

Mr Mithega for the respondent could only make the feeble submission that though the informal application before Oguk, J on 7th July, 1992, was for the fixing of a hearing date, it was by implication, also an application for the setting aside of the consent order staying proceedings in the suit before the High Court.

As we have already concluded, there was no valid order setting aside the consent order staying the proceedings in the suit before the High Court. This latter order still stands and the hearing of the suit by Kuloba, J was a nullity and of no effect. The appeal against his judgment is allowed and the decretal sum deposited by the appellant as a result of the ruling of this court dated 16th July, 1993, in the case of *Kenindia Assurance Company Limited v Patric Muturi* Civil Application No NAI 107 of 1993 (44/93 UR), together with the interest earned, shall forthwith be released to the appellant who shall also have its costs of this appeal.

Dated and Delivered at Nyeri this 31st day of May 1994.

J.M.GACHUHI

.....

JUDGE OF APPEAL

R.O.KWACH

.....

JUDGE OF APPEAL

A.M. AKIWUMI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR