REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 314 OF 1976

RKNS COMPANY.....PLAINTIFF

VERSUS

PROVINCIAL INSURANCE COMPANY LTD.....DEFENDANT

RULING

It is agreed between the parties in this suit that by a Goods-in-Transit Policy of Insurance the defendant in consideration of the agreed premium paid to it by the plaintiff insured the plaintiff, *inter alia*, against loss of goods as provided for in the policy of insurance.

The plaintiff has filed this suit claiming the sum of Kshs 65,413.75 being the value of goods the plaintiff says were lost on March 7, 1974 within the meaning of the policy, such loss having been insured by perils insured against.

The defendant has moved the court for orders that under Section 6(1)(a) of the Arbitration Act and rules 12 and 13 of the Arbitration Rules, a permanent stay of this suit be granted on the grounds contained in the affidavit filed in support of the motion; secondly and if appropriate, this suit be dismissed with costs to the defendant with costs of the application.

Section 6(1) of the Arbitration Act, 1968 provides:

> "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 delivering any pleadings ... apply to that court to stay the proceedings; and
> b) that court, if it is 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."

The affidavit concerned directs attention to condition 9 of the policy which reads 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 within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree, of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the

making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within 3 calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

The deponent of the affidavit has stated that the defendant disclaimed liability in respect of this claim during August, 1975 and it was not within three months thereafter referred to arbitration. Accordingly, differences exist between the parties as to whether the defendant is liable in any way in respect of this claim and, if so, to what extent. It is further deponed that the defendant has at all times since August 1975 and still remains ready and willing to do all things necessary for the proper conduct of the arbitration in accordance with the provisions of the policy but the plaintiff never attempted to submit this dispute to arbitration.

The defendant's disclaimer of liability came with a letter dated August 13, 1975, written by the defendant to the plaintiff saying that in view of the breach of condition 3 there was no liability under the terms of the policy in respect of this loss. The letter concluded:

"We have now filed our papers on this subject."

The defendant wrote another letter to the plaintiff on August 20, 1975 in which it referred to its previous letter of August 13, saying that it had repudiated liability in respect of all claims arising out of the accident which occurred on March 7, 1974.

The next step in this dispute was a letter dated October 14, 1975, written by the plaintiff's advocates to the defendant referring to the loss of goods on March 7, 1974 and the claim for Kshs 65,415.75 with a warning that unless this claim was met within seven days legal proceedings would be instituted against the defendant. There was no mention of any intention to refer the dispute to arbitration.

At this stage, the defendant's advocates entered the arena and they on October 24, 1975 replied to the letter of the plaintiff's advocates, confirming that the defendant's position as conveyed in its letter of August 13, remained unaltered and also that the defendant was unwilling to pay the sum claimed by the plaintiff.

The plaintiff's advocates wrote their reply to the above quoted letter from the defendant's advocates stating that they were proceeding to institute the necessary suit and inquired whether the defendant's advocates were authorised to accept service on behalf of the defendant. Again, there was no mention of any readiness or willingness on the plaintiff's part to refer the dispute to arbitration.

The defendant's advocates replied specifically on November 5, 1975 stating they were authorized to accept service on behalf of their client.

This was the end of the correspondence between the parties and the present suit followed having been instituted on February 12, 1976.

This seems a straightforward case to me. The plaintiff entered into a contract to refer to arbitration any dispute arising between the plaintiff and the defendant under the policy in manner stated in condition 9 thereof. The plaintiff failed to do so within the stipulated period.

In an affidavit sworn in these proceedings by Mr Shah, a partner of the plaintiff, it is stated that the defendant never suggested or attempted the dispute be referred to arbitration. Why should the defendant have done so? No such obligation rested upon the defendant. It was not for the defendant to say to the plaintiff: please make sure that you comply with the conditions of the policy.

It is also stated in this affidavit that the defendant is not, in law or equity, entitled to rely on the arbitration clause. Well, why not? I would think the defendant is entitled to rely on all clauses in the policy which

may suit its purpose, or enable the defendant to defeat the plaintiff's claim. It may not be morally right for an insurance company to do so in a case like this after it has swallowed the insurance premium, but this is not a court of unenforceable morals.

It has further been submitted that the defendant is estopped from pleading the arbitration clause. Estopped by what? For not inviting the plaintiff to suggest arbitration (there was no obligation on the defendant's part to do so); for not slinging a noose over a bough to put its neck into it to hang itself? I can see no estoppel operating here.

The plaintiff's learned counsel has submitted that the defendant is deemed to have waived the arbitration clause by its conduct, that this is the correct inference to be drawn from the defendant's conduct. Sympathetic though I am to the plaintiff's position, I cannot see in what manner the defendant waived the arbitration clause. Like the plaintiff, it never referred to the arbitration clause. It was entitled to remain silent about it. The nearest, counsel did not refer to it, that the defendant may be said to have come to it is the statement in the defendant's letter dated August 13:

> "We have filed our papers on this subject."

This is an innocuous statement, at worst a pompous statement but in no way indicative that the defendant was not ready to accept arbitration. It or anything does not suggest a waiver by conduct on the defendant's part. There was nothing in the defendant's conduct to justify the plaintiff in thinking that the defendant was not interested in arbitration. This sentence spells finality but it is not a waiver of any clause in the policy. In my opinion, the defendant's conduct was blameless in so far as the question of waiver is concerned. There is no suggestion in the affidavit of Mr Shah that the plaintiff thought or relied or acted upon any representation made by the defendant that the arbitration clause had been waived. The correspondence does not even refer to the possibility of referring the dispute to arbitration. The simple fact of the matter is that the plaintiff never referred to the question of arbitration. A waiver cannot take place by itself. It cannot occur in the abstract.

What happened must be that either the policy was not fully read, or the existence of the arbitration clause was forgotten at the time of filing of this suit. In my opinion, there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement between the parties, and 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 will be an order staying this suit pending the result of arbitration proceedings between the parties, if any. It is a forlorn hope but the defendant may well decide not to invoke the arbitration clause when approached on the subject.

Costs are reserved.

Dated and delivered at Nairobi this 6th day of April , 1976.

C.B Madan

JUDGE