

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL CASE NO. E010 OF 2025**

**GEMINIA INSURANCE COMPANY LIMITED.....**  
**PLAINTIFF**

**VERSUS**

**CHINA STATE CORPORATION**  
**ENGINEERING CORP (K) LIMITED.....**  
**.....DEFENDANT**

**R U L I N G**

**Brief facts**

1. Coming up for determination is the defendant's Notice of Preliminary Objection dated 17<sup>th</sup> July 2025 on grounds that the Honourable court lacks jurisdiction to hear and determine the plaintiff's suit as condition 9 in the insurance policy provides for parties to refer disputes to a mediator within 30 days of the dispute and/or in the alternative to a single arbitrator agreed upon them within 30 days of the dispute. The policy further provides that in the event the parties did not agree on an arbitrator, they would refer the matter to the Chairman Institute of Arbitrators (Kenyan Branch) whose decision shall be final.

2. Parties put in written submissions.

### **The Defendant's Submissions.**

3. The defendant refers to the decisions in **Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1**; **James Heather Hayes vs African Medical and Research Foundation (AMREF) [2014] eKLR** and **Dock Workers Union Limited vs Messina Kenya Limited [2019] eKLR** and submits that the suit offends **Section 6 of the Arbitration Act** and **Article 159(2)(c) of the Constitution** as condition 9 of the insurance contract provides a binding resolution mechanism requiring the parties herein to first submit any dispute to mediation within 30 days and if unresolved, to arbitration before a single arbitrator or one appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch). The defendant further submits that no exceptional circumstances have been demonstrated to warrant the court's intervention.

### **The Plaintiff's Submissions**

4. The plaintiff argues that plaintiffs in various suits mentioned in the plaint have sued the defendant as passengers in the defendant's motor vehicle and that the defendant driver was negligent. Pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, upon judgment by the said plaintiffs against the defendant, they have a matter of right to proceed to file declaratory suits

against it. The plaintiff argues that the only known legal avenue provided by the law for it to avoid multiple declaratory suits after judgment is to comply with Section 10(4) of the Act. Thus there cannot be any clause under any agreement or contract which can

circumvent Section 10(4) of the Act as it has no other window to avoid satisfying declaratory suits seeking judgments against it by parties not covered under the policy.

5. The plaintiff further submits that there is no clause in the insurance contract being policy number MCV/NBI/2017/077827 that parties agreed to circumvent the laws of the land including Section 10(4) of the Act. Further, personal injury claims or death resulting from any accident are governed by Cap 405 Laws of Kenya and no contract or agreement can push aside the law.
6. The plaintiff relies on the case of **Mt. Kenya University vs Step up Holding (K) Ltd [2018] eKLR** and argues that the defendant has already submitted itself to the jurisdiction of the court as it entered appearance and filed a defence. Furthermore, the plaintiff argues that the defendant has not brought any application to refer the matter for mediation or arbitration thus in contravention of Section 6(1) of the Arbitration Act.

### **The Law**

### **Whether the preliminary objection is sustainable.**

7. The case of **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696** is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

**.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of**

**pleadings and which if argued as a preliminary point may dispose of the suit.**

8. Sir Charles Newbold P. stated:-

**A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.**

9. Similarly the Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** held that:-

**A preliminary objection consists of a point of law which has been pleaded or which arises by clear**

**implication out of pleadings and which if argued as a preliminary point may dispose of the suit.**

10. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-

**Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.**

11. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

12. The respondent argues that the instant court lacks jurisdiction to hear the applicant's suit on the grounds that it offends Section 6 of the Arbitration Act.

13. **Section 6(1) of the Arbitration Act** provides:-

**1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies, not later than the time when that party enters appearance or otherwise acknowledges the claims against which the stay of proceedings is**

**sought, stay the proceedings and refer the parties to arbitration unless it finds-**

**a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or**

**b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**

**2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter agreed to be referred to arbitration.**

**3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.**

14. I have perused the insurance contract between the parties and noted that Clause 9 provides for amicable resolution by way of mediation or arbitration at the first instance in the event of a dispute.

15. The plaintiff herein instituted the suit by way of Plaint dated 19<sup>th</sup> December 2024 on 11<sup>th</sup> January 2025 seeking for judgment against the defendant for a declaration that the defendant breached the terms of policy of the insurance policy number MCV/NBI/2017/077827-COMP issued by the plaintiff specifically excluding carrying of employees of the defendant as passengers in motor vehicle registration number KCN 823Z and a declaration that the plaintiff is not liable under policy number MCV/NBI/2017/077827-COMP to indemnify the defendant or make payment to any persons for any loss, damage or injuries arising from the accident involving motor vehicle registration number KCN 823Z on 27/1/2024.

16. The defendant entered appearance on 20<sup>th</sup> January 2025 and filed a Statement of Defence dated 28<sup>th</sup> January 2025. Thus the issue for determination is whether the defendant has submitted to the jurisdiction of this court by entering appearance and filing a

defence. In the case of **Corporate Insurance Co. vs Wachira (1995-1998) 1EA 20** the court held:-

**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.**

17. Further in **Fairlane Supermarket Limited vs Barclays Bank Limited Nai HCCC No. 102 of 2011** Odunga J (as he then was) held that:-

**The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of Corporate Insurance Co. vs Wachira (1995-1998) 1EA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence.....any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.**

18. Thus, by filing a statement of defence after entering appearance, the defendant herein had acceded to the jurisdiction of this court and therefore waived its right to refer the dispute to mediation or arbitration under the agreement as provided for in Section 6(1) of the Arbitration Act. The defendant ought to have entered

appearance and filed an application for stay of proceedings and reference to arbitration. The Court of Appeal stipulated the same in **Mt. Kenya University vs Step Up Holding (K) (Ltd) [2018] eKLR** referred to the

case of **Adrec Limited vs Nation Media Group Limited [2017] eKLR** where the court stated as follows:-

**Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.**

19. Consequently, I find no merit in the preliminary objection dated 17<sup>th</sup> July 2025 and it is hereby dismissed with costs to the plaintiff.

20. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED  
AST THIKA THIS 18<sup>TH</sup> DAY OF DECEMBER 2025.***

**F. MUCHEMI  
JUDGE**