

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**HCCA NO. E955 OF 2022**

**VITA FOAM PRODUCTS**

**LTD.....APPELLANT**

**VERSUS**

**PAREKH JAYENDRAKUMAR**

**RAMESHANDRA.....RESPONDENT**

***(Being an Appeal from the Ruling and order of Hon. M. W. Murage SRM, delivered 14<sup>th</sup> November 2022 in Milimani CMCC NO E2893 OF 2021.)***

***ARISING FROM***

**VITAFORM PRODCUTS LTD.....PLAINTIFF**

**VERSUS**

**PAREKH**

**JAYENDRAKUMAR**

**RAMESHCHANDRA.....DEFENDANT**

## JUDGEMENT

### A. Background

1. The Appellant filed the primary suit seeking damages to the tune of **Kshs.222,404/=**, being costs of material damage repair and assessors fee arising from a road traffic accident which occurred on 26<sup>th</sup> April 2018. It was the appellants contention that on the material day at about 12.00pm their motor vehicle registration Number **KBT 121G ( hereinafter referred to as the suit motor vehicle)** was lawfully parked off the road, next to a Mosque, along 3<sup>rd</sup> parklands Avenue, when the respondents motor vehicle registration Number **KCH 745S( hereinafter referred to as the 2<sup>nd</sup> suit motor vehicle)** being driven by the respondents authorized driver, employee and/or agent did loss control of the said 2<sup>nd</sup> suit motor vehicle and caused it to ram into the 1<sup>st</sup> suit motor vehicle, consequent of which it caused it extensive damage.
2. Upon being served with summons, the respondent filed a chamber summons Application dated 12<sup>th</sup> October 2021, seeking to stay the suit and to have the dispute referred to a sole Arbitrator to be agreed upon between M/S GA Insurance Company Limited and M/S Intra Africa Assurance

Company Limited. The basis of the said application was that M/S GA Assurance Company Limited, had filed the suit on behalf of the plaintiff but based on knock-to-knock agreement with the respondent's insurer, M/S Intra Africa Assurance Company Ltd the parties had to go for arbitration to resolve their dispute as provided therein.

- 3.** In response, the appellants insurer indicated that the claim was for recovery of special damages brought under the doctrine of Subrogation and had nothing to do with the knock-to-knock agreement, which was a non-binding memorandum of understanding between member of Association of Kenya Insurers. It was also to be noted that both insurance companies involved in this dispute were not signatories thereto and further the same did not extend to the insured of the insurer, who had filed the suit.
- 4.** Without prejudice to the above position, the appellant noted that the agreement had provided that members were required to sort out knock for knock claims within a period of 18 months from the date of the said accident. In this instance the said period had passed without the respondent settling the claim thereby forcing the applicant to file the primary suit on the last day of the statutory period provided. They reiterated that they were not privy to the said knock-to-knock agreement and therefore could not be forced to go for arbitration. They thus urged the court to dismiss the application filed and allow the suit to be heard on merit.

**5.** The respondent in their response pointed out that the said knock to knock agreement was signed by the plaintiff's insurer representative at number 15, while their representative signed at Number 22 of the schedule of participating members and by so executing the said agreement, they were bound by it and could not run away from their obligations/ arising therefrom.

**6.** Finally, the respondent further pointed out the following:

At

- (i) Clause 9; the insurers agreed to bear the whole loss irrespective of legal liability of the vehicles involved.
- (ii) Clause 10; It was further agreed that the member insuring/indemnifying the party at fault bears the full excess of the party not at fault
- (iii) Clause 14; claims had to lodged within 18 months of the accident, and failure to do so would render the claim time barred.

**7.** The appellants insurer had failed to lodge their claim on time and had thus filed the suit in bad faith to avoid a binding contract without lawful cause. They thus urged the court to resist opening the back door for the appellant to lay this claim, which touched on interpretation and implementation of the said contract, the same therefore had to be referred for arbitration as provided for under clause 17 therein.

**8.** The trial Magistrate did consider the said application, the responses and submissions filed and proceeded to allow the

said application; by staying the suit and sending the parties for Arbitration.

9. The Appellant herein, being dissatisfied with the Ruling/Orders of the trial Magistrate filed their memorandum of Appeal raising the following grounds of Appeal: -

- i. That the Learned Magistrate erred and misdirected herself in law and in fact by not reading or considering the evidence adduced in the lower court including the Replying Affidavit of Symon Lariak submissions and the entire provisions set in the Knock for knock agreement, hence making a wrong finding.***
- ii. That the trial Magistrate erred in law and in fact in finding that the knock for knock agreement is a contract capable of being enforced.***
- iii. That the Learned Magistrate erred in law and in fact by finding that there was a valid arbitration agreement between parties to the suit hence the matter be referred to arbitration.***
- iv. That the trial Magistrate erred in law and in fact in failing to appreciate the difference between the parties under knock for knock agreement and the parties to the suit filed in the lower court.***
- v. That the trial Magistrate erred in law and fact by holding that the respondent's application in the lower court had merit, proceeding to stay the proceedings in the lower court pending reference to arbitration.***

## **B. SUBMISSIONS**

### **(i) Appellant's Submissions**

- 10.** The appellant submitted that the said knock to knock agreement was not binding upon the parties to this claim since none of the parties were signatories to the said agreement and further that it did not extend to the insured. The Appellant emphasized that his claim had been filed on behalf of GA Insurance Co Ltd, to recover costs used to indemnify him as they had repaired his motor vehicle to his satisfaction as evidenced by the satisfaction note he had signed. Reliance was placed in the case of **Indemnity Insurance Co. of North America and Another vs. Kenya Airfreight Handling Ltd and Another [2004] 1 EA 52** to support this contention.
- 11.** It was the Appellant's further contention that as the insured, he was not a party to the knock for knock agreement and as such it is only right that he be allowed to prosecute the matter under the doctrine of subrogation and not through arbitration as proposed by the respondent. Reliance was placed in **Civil Appeal NO. 206 OF 2008; City Council of Nairobi vs Githua Associates & Nairobi City Water & Sewerage Co. LTD** where the court cited **Agricultural Finance Corporation v Lengetas, 1982-88 1 KAR 772** which stated that "***a contract affects only the parties to it....***"
- 12.** Further at clause 14 of the said agreement, members were required to sort out knock for knock claims within a maximum period of 18 months from the date of the accident.

The Claimant had sent a demand letter dated 30<sup>th</sup> April 2021 to the respondent, but his insurer failed to settle or respond to the claim within the aforesaid period hence the Respondent and his insurer could not protect themselves under the knock for knock agreement in a bid to deny him his right to access to justice. Guidance was placed on by **Hobbs v Marlowe [1978] AC 16** where Lord Diplock stated that ***“An assured under a policy insuring him against loss or damage of a chattel, on being indemnified by his insurer for a loss he sustained, does not thereby lose his right to action against the wrong doer who caused the loss.....”***

**13.** The appellant thus urged the court to find that the Appeal filed had merit and be pleased to allow the same.

**(ii) Respondent’s Submissions**

**14.** The Respondent relied on their submissions dated 12<sup>th</sup> June 2024, where it was submitted that the Appellant’s insurer stepped into the Appellant’s shoes, under the doctrine of subrogation and while there, retained its distinct legal personality and gained additional rights as codified under the Knock for knock agreement, to which they were a signatory. Reliance was placed in the case of **Monicah M. Musyimi v Richard Macheru Irungu [2014] eKLR** where **Sergon J** cited **K.I. Laibuta; Principles of Commercial Law** at Page 254, where the author stated that under the

doctrine of subrogation, one-person substitutes another, so that the person substituted succeeds to and assumes the rights of the other person.

- 15.** Further, the nature of the agreement/obligations was defined in Clause 5 (iii), 9 and 10, where the Appellant's insurer gave up the right to claim its whole loss from the party to blame for the material damage except for the excess fee, which the insurance of the party at fault would reimburse. Equities rank in order of time, and he who is first in time has the stronger right. Thereby the knock for knock agreement did supersede the subrogation rights advanced by the appellant insurer and ought to be enforced. Reliance was placed in the case of ***John Mburu v Consolidated Bank of Kenya [2018] eKLR***, where the court applying the decision by Lord Denning, in ***M.R. in D & C Builders v Sidney Rees (1966) 2 QB 617*** reiterated that parties equitable rights were enforced in ranking of time.
- 16.** Secondly, the respondent further emphasized that the matter in question was a dispute as governed by clause 14 as read with clause 17 of the knock for knock agreement as it was not in doubt that GA Insurance in sub-rogatory capacity had gone to court against Intra Africa Assurance company, the respondents insurer without ever approaching (intra) save for the demand letters by its lawyers. 8The suit therefore was wrongly instituted before court and in non-compliance with the above-mentioned provisions of the

knock for knock agreement. Reliance was placed in the case of **Ani V. Patel v Newton Njue Nthiga HCCA E431 of 2021 and P. N. Gichoho Ngugi v County Government of Laikipia & another [2017] eKLR** which upheld the finding in **Alghussein Establishment v Elton College (1991) 1 All ER 267** and **Cheall v Association of Professional Executive Clerical and Computer Staff (1983) 1 ALL ER** that a defaulting party cannot rely on its own fault to defeat/frustrate the contract terms entered into.

17. The respondent thus urged the court to find that the trial Magistrate was right in directing the parties go for arbitration and be pleased to dismiss this Appeal.

### **C. ANALYSIS AND DETERMINATION**

18. This being a first appeal, this Court is duty-bound to reconsider the material that was placed before the trial court and to arrive at its own independent conclusion, while bearing in mind that it did not have the advantage of seeing or hearing the parties. The principles governing a first appeal are well settled in **Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123**, where the Court of Appeal held that an appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, though giving due allowance for the fact that it neither saw nor heard the witnesses.

19. That was the holding of the Court of Appeal in *Mkube v Nyamuro [1983] LLR at 403*, where *Kneller JA & Hancox Ag JJA* held that-

***“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”***

20. Having considered the grounds of appeal, the ruling of the learned magistrate, the record, and the submissions of counsel, the only issue that arise for determination is whether the arbitration clause in the knock to knock agreement signed by the respective insurance companies is applicable to the suit filed.
21. It is common/ undisputed grounds that the plaintiff filed the primary suit through it insurer, M/S GA Insurance Co Ltd seeking to recover costs incurred in repairing the 1st suit motor vehicle and expected the respondent’s insurer M/S intra Africa Assurance Co Ltd to indemnify them as the insurer of the 2nd suit motor vehicle.
22. In response to the suit filed, the respondent filed their application seeking stay of the primary proceedings and for the same to be referred to arbitration on the basis of clause 17

of the knock-to-knock agreement signed between the various insurance companies under the aegis of the association of Kenya insurers.

23. In response thereto it was the appellants contention that the parties to the suit were not signatories to the said agreement, they too had not executed the said agreement and that the 18 month period within which the respondent was to indemnify them under the said agreement had lapsed and thus their only recourse was to have the suit determined before a court of law.
24. The appellants argument that they are not signatories to the knock-to-knock agreement rings hollow as a cursory glance of the said agreement confirms that both principal officers of the respective insurance companies did execute the said agreement. Secondly it is an undisputed fact that the suit has been filed by GA Insurance Co Ltd under the doctrine of subrogation, seeking to recover costs incurred in repairing the 1<sup>st</sup> suit motor vehicle from the insurer of the 2<sup>nd</sup> suit motor vehicle, which was at fault.
25. The primary parties named in the suit notwithstanding, the interest directly at stake concerns the two-insurance company that insured both suit motor vehicles and thus issue of privity of contract does not arise, because it is not the owner of the 1st suit motor vehicle claiming refund, but his insurer, who filed the suit under the doctrine of subrogation, and seeks refund from the 2nd suit motor vehicle insurer.

26. Finally on the main issue arising in this appeal, regarding applicability of the arbitration clause stated in the knock-to-knock agreement, the Court of Appeal in **UAP Provincial Insurance Company Ltd Vs Micheal John Beckett (2013) eklr (Nairobi CA No 26 of 2007)**, while addressing itself on the import of **Section 6(1)(b) of the Arbitration Act**, observed that;

***“ It is clear from this provision that the enquiry that the court undertakes and is required to undertake under Section 6(1)(b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, Whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.”***

27. Clause 4 of the said agreement binds all signatories thereto, who are motor underwriters and at clause 6 & 7 states that it applies to policies that are comprehensive relating to material damage claim, which include; damage to motor vehicle, damage to accessories and other properties fix on the vehicle,

fee chargeable on assessment and re-inspection of the damage, towing charges covered under the policy and payable for police abstract.

28. Further clause 9 & 10 provide that it is agreed amongst the members that the agreement shall cover material damage caused to motor vehicles as a result of collision and that each member would bear its own loss (if any) within the limits of the policy in respect of such damage irrespective of legal liability arising between the parties with the exception being that insurance party that is to blame following the said accident would bear the full excess of the party not at fault.
29. Finally at clause 17 (the Arbitration clause) provided that, ***“Any dispute arising from the interpretation and implementation of the provisions of this agreement shall be amicably settled between the parties and in case of disagreement the dispute will be referred to an arbitrator.”*** Evidently the parties intention in the said knock to knock agreement were clear and the trial court cannot be faulted for sending them to the arbitrator as the first port of call to determine their dispute. Also see ***Ani V Patel Vs Newton Njue Nthiga, HCCA E431 of 2021 ( Unreported)***

### **C. DISPOSITION**

30. This Appeal therefore has no merit and the same is dismissed with costs to the respondent.

31. The said costs are assessed at **Kshs.120,000/=** all inclusive.

32. It is so ordered.

**Dated, signed, and delivered** in open court at **MARSABIT**  
this **16<sup>th</sup>** day of **FEBRUARY 2026**.

**FRANCIS RAYOLA OLEL**  
**JUDGE**

Delivered on the virtual platform, Team this **16<sup>th</sup>** day of  
**FEBRUARY, 2026**.

**In the presence of: -**

N/A.....Appellant

N/A..... Respondent

Mr. Jarso..... Court Assistant