IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & SICHALE, JJ.A.)

CIVIL APPEAL NO. 98 OF 2016

BETWEEN

EZRA ODONDI OPAR.....APPELLANT

AND

INSURANCE COMPANY OF EAST AFRICA LTD.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Kisumu (Chemitei, J.) dated 18th May, 2016

in

Misc. Civil Case No. 213 of 2015)

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JUDGMENT OF THE COURT

1. This appeal arises from a ruling of the High Court at Kisumu, (***Chemitei, J.***) delivered on 18th May 2016 allowing the respondent's application dated 9th August 2015 to set aside an arbitral award given on 13th August 2004. By that arbitral award, stemming from a dispute arising from a motor vehicle insurance policy, the arbitrator, Mr. John Olago Oluoch, awarded the appellant Kshs.484,500.00 as the value of the insured vehicle lost in a fire; Kshs.2,095,000.00 as damages for loss of use of the vehicle; Kshs.902,835.00 as interest computed up to the date of the award; further interest to accrue at the rate of 14% p.a from the date of the award until payment in full and costs of the arbitration.

2. The appellant has in this appeal faulted the learned Judge for setting aside the arbitral award. The appellant complains that the Judge erred in dealing with proceedings which were directly and substantially in issue in previously instituted proceedings between the same parties on the same subject matter; failing to appreciate that the application dated 9th August 2015 to set aside the arbitral award was filed out of time; failing to uphold the appellant's contention that the respondent was estopped from asserting that the arbitrator exceeded his jurisdiction.

3. The background, in brief, is that the appellant insured motor vehicle registration number KAK-317-H with the respondent under motor vehicle insurance policy. On 23rd January 2002, during the currency of the policy, the insured motor vehicle was destroyed in a fire. The respondent lodged a claim with the respondent to be indemnified for the loss of the vehicle under the insurance policy. The respondent

repudiated liability on the basis that the appellant had breached his duty of utmost good faith, among other reasons given.

4. The appellant filed suit against the respondent before the Magistrates Court. He sought judgment for Kshs.510,000.00 being the value of the insured vehicle; damages for loss of use of the vehicle; and costs. The respondent filed a defence in that suit and denied the appellant's claim. The respondent also made an application to have the dispute the subject of that suit referred to arbitration in accordance with the arbitration clause contained in the insurance policy. That is how the matter ended up before Mr. John Olago Oluoch, as the sole arbitrator.

5. After hearing the parties, the arbitrator gave his arbitral award in favour of the appellant in terms already mentioned. As regards costs of the arbitration, the arbitrator ordered "*counsels* (sic) *for the parties to either agree on claimant's counsel's costs or the same to be filed before me for assessment at the convenience of the parties*." We will advert to that later.

6. The respondent was aggrieved by the arbitral award. By an application dated 3rd September 2004 filed on 21st September 2004 in the High Court at Nairobi in Misc. Civil Application No. 1253 of 2004, the respondent sought, amongst other reliefs, an order to set aside the arbitral award, on grounds, inter alia, that the arbitrator had exceeded the scope of his jurisdiction. In particular, the respondent complained that the award by the arbitrator for damages loss of use of the vehicle was in the nature of consequential loss which was expressly excluded under the terms of the policy. The appellant opposed that application.

7. In a ruling delivered on the 18th of October 2006, ***Kubo, J***. declined the respondent's application dated 3rd September 2004 and held that the application was premature because, in his view, the arbitral proceedings were yet to be concluded because the issue of costs of the arbitration had not been concluded. In his ruling, ***Kubo J.*** noted that the arbitrator had given direction "*to the advocates for the parties that they either agree on claimant's counsel's costs or, failing such agreement, claimant's counsel to file his costs for assessment by the arbitrator*." The Judge went on to say that, "*the issue of costs was the last event which would have concluded the arbitration proceedings"* before expressing that:

> ***"It was incumbent upon the parties to facilitate conclusion of the arbitral process by complying with the arbitrator's direction on finalization of the issue of the claimant's costs, which would then lead to filing of the arbitral award in court. In my respectful view, it is after the arbitral process has been finalized and the arbitral award filed in court that any party aggrieved by the arbitral award can legitimately challenge the arbitral award-in its totality. The hurried measures apparently embarked upon by the applicant herein constitutes jumping the gun. In the premise, I find the present notice of motion application dated 3 rd September 2004, on the evidence before me, premature and the same is hereby dismissed with costs."***

8. Dissatisfied with that ruling of 18th October 2006, the respondent filed Civil Appeal No. 271 of 2006 before this Court. During the pendency of that appeal, the parties resolved the issue of costs of the arbitration by entering into a consent dated 11th December 2006 under which the appellant's costs of the arbitration were agreed at Kshs.76,590.00. According to the respondent, that consent could not however be presented to the arbitrator for adoption as the arbitrator had since moved on to politics. Thereafter, the respondent withdrew Civil Appeal No. 271 of 2006.

9. Subsequently, the appellant filed an application before the High Court in Misc. Civil Application No. 17 of 2007 for judgment to be entered in terms of the arbitral award. That application resulted in an order given on 9th February 2007 entering judgment in terms of the award. On 12th March 2007, the respondent applied to set aside that judgment on grounds that it was entered *ex parte*. It is not entirely clear from the record before us how the proceedings in Misc. Civil Application No. 17 of 2007 were concluded, though it would appear that the judgment entered pursuant to the arbitral award was stayed pending appeal.

10. Subsequently, by its application dated 9th August 2015 the respondent filed Misc. Civil Application

No. 213 of 2015 seeking orders: that the consent on costs dated 11th December 2006 be adopted upon which the arbitral proceedings before the arbitrator should be deemed completed; and that the arbitral award dated 13th August 2004 be set aside. As already noted, ***Chemitei, J***. in his impugned ruling of 18th May 2016 found merit in that application. He allowed it with the result that the arbitral award in favour of the appellant was set aside in its entirety. The appellant was aggrieved and lodged the present appeal.

11. Urging the appeal before us, learned counsel for the appellant, ***Mr. Bosire Gichana***, submitted that the learned Judge had no jurisdiction to entertain the respondent's application dated 9th August 2015 as a similar application was pending before the court and the matter was therefore *sub judice*; that under Section 35 of the Arbitration Act, the respondent had three months within which to apply to set aside the arbitral award; that it took the respondent eight years to apply and the court did not therefore have jurisdiction to entertain the application; that the respondent was in any event estopped from challenging the jurisdiction of the arbitrator. Counsel urged that the appellant's appeal should be allowed, and the ruling of the High Court be set aside.

12. Opposing the appeal, learned counsel ***Ms. Karen Chesoo*** for the respondent, submitted that the contention that the Judge should not have entertained the application dated 9th August 2015 as the matter was *sub judice* has no merit; that the application that was pending before the High Court was the appellant's application for recognition and enforcement of the award under Section 36 of the Arbitration Act which is distinct from the respondent's application to set aside the award under Section 35 of the Arbitration Act; that the application was not out of time as the arbitration proceedings could only be deemed to have been finalized upon adoption of the consent on costs, which was not done until 18th May 2016 when the impugned ruling was delivered; that the judge was right in setting aside the arbitral award as the arbitrator exceeded his jurisdiction in making an award for consequential loss which was expressly excluded under the policy.

13. We have considered the appeal and submissions by learned counsel. The first issue is whether the Judge lacked jurisdiction on the basis that the matter was *sub judice*. If we understand the argument correctly, the appellant's case is that, because there was already a pending application for recognition and enforcement of the arbitral award in Civil Application No. 17 of 2007, it was not open to the Judge to entertain an application for setting aside the same award in a different action, namely, High Court Misc. Application No. 213 of 2015.

14. The doctrine of *sub judice* on which the appellant relies is based on Section 6 of the Civil Procedure Act, expressing the principle that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. As noted in **Mulla on the Code of Civil Procedure**, 14th edition, volume 1, the object Section 6 of the Civil Procedure Act, whose marginal note is *"stay of suit"* is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue.

15. The record of proceedings in High Court Civil Application No. 17 of 2007 is not before us. However, based on the material in the record, it would appear that after the parties reached a consent on costs of the arbitration on 11th December 2006, the appellant applied to the High Court in Civil Application No. 17 of 2007 on 16th January 2007 for the recognition and enforcement of the arbitral award, following which the arbitral award was adopted as a judgment of the court; the respondent then applied to set aside that judgment so as to have an opportunity to make representations why the award should notbe recognized or enforced. It is not clear from the record how the proceedings in Civil Application No. 17 of 2007 ended.

16. Counsel for the appellant states in his written submissions that "*the respondent having obtained consent orders by consent of the parties went further again to apply for stay of further proceedings pending the hearing and determination of the appeal in Nairobi Civil Appeal No. 271 of 2006 in the court of appeal*." We understand that submission to mean that the order recognizing the award that had been given in Civil Application No. 17 of 2007 was set aside by consent. If that be the case, it would seem that by the time the resndent presented its application dated 9th August 2015 in High Court Misc. Application

No. 213 of 2015, the applicant's application for recognition and enforcement of the arbitral award in Civil Application No. 17 of 2007 was still pending.

17. The two applications sought directly opposed outcomes. Whereas the appellant's application in Civil Application No. 17 of 2007 sought the recognition and enforcement of the award, the respondent's application in Application No. 213 of 2015 sought the setting aside of the award. In effect, the disposal of one would automatically affect the outcome of the other. Indeed, the grounds upon which the court is called upon to consider an application for setting aside an arbitral award under Section 35 of the Arbitration Act are to a large extent similar to those set out under Section 36 of the Arbitration in relation to an application for recognition and enforcement of an award. There is, therefore, an overlap in the grounds for setting aside an arbitral award under Section 35 of the Arbitration Act with the grounds for refusal of recognition or enforcement of an arbitral award under section 37 of the Arbitration Act. It would have been desirable and expedient therefore, for Misc. Civil Application No. 17 of 2007 and Misc. Application No. 213 of 2015 to have been consolidated and heard together, given that similar questions arose for consideration in the two applications.

18. That said, it was incumbent upon the appellant to seek consolidation of the two applications or to seek a stay of the proceedings in Misc. Application No. 213 of 2015 or indeed to raise objection to those proceedings. It is not apparent from the record that the appellant urged the learned Judge of the High

> Court not to entertain the respondent's application in High Court Misc. Application No. 213 of 2015 on the basis of that there was pending another application in Civil Application No. 17 of 2007.

19. In the appellant's counsel's written submissions before the High Court dated 9th December 2015, there was reference to another application without indication that there was objection to the respondent's application seeking the setting aside of the award on that basis. The appellant's submission in that regard was as follows:

> ***"Pursuant to the ruling parties agreed by consent on costs at Kshs.76,590/= on 11th December 2006 (see exhibit EOO-1) the award was finally filed in High Court of Kenya at Kisumu in Miscellaneous Civil application No. 17 of 2007 on 16th January 2007 and adopted as a judgment of the court, before the applicant sought to have the judgment set aside and be given an opportunity to give representations on why the award should not be recognized and or enforced. That application notwithstanding the applicant filed another application seeking for stay of proceedings pending the hearing and determination of Nairobi Civil Appeal No. 271 of 2006, which application was granted on terms."***

20. Besides the fleeting reference in those submissions to proceedings in Misc. Civil Application No. 17 of 2007, no objection was taken before the Judge that he could not entertain the application dated 9th August 2015 on the basis that the matter was the subject of other pending proceedings. It is not surprising, therefore, that there is no mention of the matter by the learned judge in the impugned ruling. Consequently, we are not persuaded that the Judge can be faulted for having entertained the respondent's application in Misc. Application No. 213 of 2015. The Judge cannot be blamed for not having addressed a matter that was not raised before him. There is therefore no merit in this complaint.

21. The next issue is whether the application to set aside the arbitral awards was filed out of time. Section 35(3) of the Arbitration Act provides that:

> ***"An application for setting aside the arbitral award <u>may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award</u>, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award."*** *[Emphasis]*

22. The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition

and finality in arbitration. As the Supreme Court of Kenya recently noted in ***Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015*** *"the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes" "in a manner that is expeditious, efficient…"* while also observing that Section 35 of the Act, "*also provides the time limit within which the application for setting aside should be made*.

23. The three months period within which an application for setting aside an arbitral award may be made is to be computed from the date the award is received. Clearly, the initial application by the respondent dated 3rd September 2004 seeking to set aside the arbitral award was presented within three months in accordance with Section 35(3) of the Arbitration Act. That notwithstanding, ***Kubo, J.*** as already noted, in his ruling of 18th October 2006 held that, that application was premature because the issue of costs of arbitration had not been concluded because costs of the arbitration had neither been assessed or agreed upon. Although an appeal lodged from the ruling of ***Kubo, J***. of 18th October 2006, was later withdrawn, the effect of it would appear to be in conflict with Section 35(3) of the Arbitration Act.

24. In those circumstances, and particularly in view of the direction by ***Kubo, J***. that the issue of costs should be concluded before any challenge to the award could be mounted, we take the view that ***Chemitei, J***. was entitled to accede to the respondent's application to, in effect extend the time for filing the subsequent application for setting aside the arbitral award. In order to accord with the ruling of ***Kubo, J.*** the time for applying to set aside the award under Section 35 of the Arbitration Act, could not, practically, be reckoned from the date the respondent received the award, as dictated by Section 35(3) of the Arbitration Act. The learned Judge was therefore correct in concluding in the impugned ruling thus:

> ***"Going back to the arbitral award, the arbitrator directed the counsel for the parties to either agree on claimant' counsel's costs or the same to be filed before him for assessment at the convenience of the parties. The parties agreed on the issue of costs and filed a consent in court but the same was never brought before the court for adoption. The applicant now prays that the same be adopted. The parties have followed the directions of the court and the applicant now seeks adoption of the consent so as to enable him challenge the award. It is my finding therefore that the application is not out of time as it is only upon adoption of the consent that the arbitral process would be said to be complete. I therefore proceed to adopt the consent on costs dated 11th December 2006 and deem the arbitral proceedings herein as complete."***

25. In effect, the first prayer in the appellant's application that the arbitration proceedings be deemed completed upon adoption of the consent on costs was, for all practical purposes, an application for extension of the time limited by Section 35(3) of the Arbitration Act for applying for setting aside an arbitral award. We conclude therefore that the Judge was right in declining to uphold the appellant's contention that the application was out of time.

26. What remains is the complaint that the Judge failed to appreciate that respondent was estopped from asserting that the arbitrator exceeded his jurisdiction. In upholding the contention by respondent that the arbitrator's award of damages for loss of use of the vehicle was outside the mandate of the arbitrator in view of the terms of the Policy, the learned Judge expressed:

> ***"The arbitrator had jurisdiction and authority over the reference; that is, all matters within the scope or falling within the reference and the arbitration agreement. But, he had no jurisdiction or authority over matters not falling within the scope of the reference and arbitration clause. As soon as the arbitrator stepped outside the margins set by the arbitration clause, he had gone out of the boundaries of his realm. Any award on the particular matters complained of, in so far as it is severable from the other items, is to be set aside. See The Indian Case of Associated Engineering Co. vs. Govt of Andhra Pradesh and another (1992) AIR 232…"*** [Emphasis added]

27. As already indicated, the appellant commenced action founded on the policy of insurance before the Magistrates' court. The policy contained an arbitration clause on the basis of which the dispute was referred to arbitration. The relevant part of Clause 11 of the Private Motor Car Policy provided that "*all differences arising out of the policy shall be referred to the decision of an arbitrator*". The scope of the

arbitrator's authority was thus limited to differences arising out of the policy. The extent of the appellant's liability under the policy in the event of risk attaching during the period of insurance was to indemnify the respondent "*for loss or damage to the Motor vehicle*". The Policy expressly provided that the appellant "*shall not be liable for consequential loss*". There was reference in the appellant's statement of defence that the claim fell within the excepted risks although no specific reference was made in the defence to the claim for loss of use.

28. In his analysis, the learned Judge considered the provisions of the policy and relevant case law and correctly reached the conclusion that the award for damages for loss of use of the vehicle was not a matter that was contemplated under the policy as the same was expressly excluded. Section 35(2)(a)(iv) of the Arbitration Act provides that an arbitral award may be set aside by the High Court if it deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or contains decisions on matters beyond the scope of the reference to arbitration.

29. The claim by the appellant, and the award in his favour by the arbitrator for Kshs.2,095,000.00 as damages for loss of use of the vehicle was outside the ambit of the policy. It was liable to be set aside by the High Court under Section 35(2)(a)(iv) of the Arbitration Act. Considering that aspect of the arbitral award and the interest awarded on the same is severable from the remainder of the arbitral award, the learned Judge should, in our view, have allowed the application to set aside the award to that extent only. There was no basis for setting aside the award in favour of the appellant for Kshs.484,500.00 and interest thereon awarded as the value of the insured vehicle lost in the fire. To that extent only, we are inclined to interfere with the ruling and order of the High Court.

30. In the result, we modify the decision of the High Court given on 18th May 2016 as follows:

a. The order for the adoption of the consent on costs dated 11th December 2006 and for the arbitral proceedings to be deemed as completed upon such adoption is hereby upheld.

b. The award of damages by the arbitrator in favour of the appellant for Kshs.2,095,000.00, and interest thereon for loss of use of the insured vehicle is hereby set aside.

c. The award in favour of the appellant for the value of the insured vehicle lost in the fire of Kshs.484,500.00, and interest thereon at the rate of 14% p.a from the date of the arbitral award is hereby upheld.

d. Each party shall bear its own costs of the appeal. Orders accordingly.

Dated and delivered at Nairobi this 7th day of August, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIAr

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR