IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, OUKO & GATEMBU JJ.A.)

CIVIL APPEAL NO. 26 OF 2007

BETWEEN

UAP Provincial Insurance Company Ltd..........................APPELLANT

AND

Michael John Beckett..RESPONDENT

(Appeal from the Order of the High Court at Nairobi (Mutungi J.) dated 27th April 2004 at the High Court of Kenya, Milimani Commercial Courts Nairobi

in

CIVIL CASE NO. 1310 OF 2001)

JUDGMENT OF THE COURT

1. This is an appeal from the ruling of the High Court (O. K. Mutungi J.) given on 27th April 2004 dismissing the appellant's application against the respondent for stay of proceedings under section 6 of the Arbitration Act.

Background

2. The facts, as they emerge from the record are that in 1993 Michael John Beckett (Beckett) the respondent, insured his vehicle, a Mitsubishi Pajero then bearing English registration number K941 VFC and subsequently registered in Kenya as vehicle registration number KAD 193K (the insured vehicle), with UAP Provincial Insurance Company Limited (UAP) the appellant, under a comprehensive private car policy (the Policy).

3. On 18th December 1993, during the currency of the policy, the insured vehicle was stolen. Beckett lodged a claim with UAP on 20th December 1993. As Beckett waited for satisfaction of the claim, he received a letter dated 24th March 1994 from UAP requesting for documentary proof of payment of import duty for the insured vehicle as well as for a copy of the registration book. According to Beckett the receipt with respect to the import duty paid was furnished to UAP by one

Mr. Swaleh, a representative of the clearing and forwarding firm that cleared the insured vehicle for Beckett on importation to Kenya.

4. By a letter dated 18th November 1994, addressed to Beckett, UAP repudiated liability under the Policy on the basis that the documents he submitted in support of the claim were not genuine, which was in breach of his duty of utmost good faith.

5. Based on a complaint by the Branch Manager of UAP in Mombasa, Beckett was in November 1994 arrested and subsequently charged with two counts of the offence of making false documents, namely import duty entries and customs receipt, without authority contrary to section 357(a) of the Penal Code. A third count was that Beckett attempted to obtain money by false pretences contrary to section 313 of the Penal Code in that he attempted to obtain cash from UAP by falsely pretending that the claim under the Policy for his stolen vehicle was genuine and valid. On 25th November 1995, Beckett was acquitted on all those three counts.

6. Thereafter Beckett instructed his advocates to pursue the claim for loss of the insured vehicle with UAP. According to Beckett, negotiations between the parties culminated in a settlement agreement under which UAP agreed to pay him Kshs.6, 000,000.00.

7. Upon failure to pay that sum, on 26th August 1997, Beckett filed Mombasa, High Court Civil Case No. 263 of 1997 to enforce the settlement agreement and sought judgment against UAP for, inter alia, Kshs.6, 000,000.00. The suit was subsequently transferred from Mombasa High Court to the High Court at Milimani Commercial Court, Nairobi and assigned High Court Civil Suit No. 1310 of 2001.

8. Following the institution of that suit by Beckett, on 30th September 1997 UAP filed an application dated 29th September 1997 under Section 6 of the Arbitration Act, to stay that suit on the basis that under clause 10 of the Policy all differences between the parties were to be referred to arbitration. That application was heard and dismissed by the Honourable Mr. Justice Mutungi (as he then was) in a ruling dated 27th April 2004 in which the judge held that:

> "***I decline to stay the proceedings herein as there is nothing to be referred to arbitration. There is no dispute between the parties. All there is is the Plaintiff's right to be paid as per the agreement, and that has nothing to do with the policy document***."

9. Aggrieved by that decision, UAP instituted the present appeal.

Grounds of appeal

10. In its memorandum of appeal dated 20th February 2007, UAP listed 7 grounds of appeal. The complaints by UAP against the decision of the High Court are that the learned judge of the High Court erred in not differentiating between the words "differences arising…" and "disputes arising" as used in the arbitration clause; that the judge erred in finding that there was no dispute between the parties for reference to arbitration; that the judge erred in finding that all there was between the parties was Beckett's right to payment when the issue of whether any payment was due to Beckett was not before him; that contrary to the judge's holding, the question of Beckett's right to payment arose from and is connected to the Policy; that the judge overlooked the fact that the question of payment was dependent upon whether the settlement agreement reached between the parties was tainted with illegality and unenforceable.

Submissions by counsel

11. O. P Nagpal & Company advocates for UAP in their written submissions filed on 31st October 2011 submitted that the Policy under clause 10 of the conditions of the Policy contains a **Scott and Avery clause** under which all differences arising out of the policy are to be referred to

arbitration; that the cause of action in the suit UAP sought to stay was founded and rooted in the Policy; that the differences between the parties were within the ambit of the arbitration clause and the suit should have been stayed; that the negotiations leading up to the settlement agreement that Beckett sought to enforce in the suit were commenced more than one year after UAP had repudiated the claim and the same is therefore deemed to have been abandoned under clause 10 of the Policy; that the judge was not required to go into the merits of the differences or disputes between the parties when dealing with the application before him and all that he was required to decide was whether there was any dispute or difference between the parties capable of being referred to arbitration.

12. Counsel for UAP went on to submit that the proper forum for going into the merits would have been before the arbitrator if the application was allowed or before the court in the course of hearing the summary judgment application; that the finding by the learned judge that there was no dispute between the parties was not sustainable in view of the disputes and differences subsisting between the parties which were brought to the attention of the judge; that the judge overlooked that UAP challenged the validity of the settlement agreement and the same was tainted with illegality, a position supported by a decision of this Court in the case of **Provincial Insurance Co of East Africa v Kivuti [1995-1998] 1 E A 283**; that Beckett's right to be paid had everything to do with the Policy and the settlement agreement for payment of Kshs. 6,000,000.00 was not a stand alone agreement but one that arose from the Policy; and that the settlement agreement was in any event a nudum pactum and against public policy and unenforceable.

13. Inamdar & Inamdar Advocates for Beckett, in their written submissions filed on 22nd November 2011 submitted that by entering into the settlement agreement, UAP abandoned its prior repudiation of liability under the Policy; that in declining to grant a stay of that suit, the learned judge was eminently correct and well founded in that the existence of a dispute is a condition precedent for reference to arbitration and that the court must be satisfied, under section 6(1)(b) of the Arbitration Act that there is a real dispute before staying a suit.

14. Counsel for Beckett went on to submit that the supposed distinction between a difference and a dispute as used in the Policy is spurious and a red herring and that that matter was in any event not argued before the learned judge of the High Court; that there is no difference between the parties as all differences were resolved when Beckett accepted the global offer by UAP of the sum of Kshs.6,000,000.00; that the argument that the settlement agreement is *nadum pactum* and tainted by illegality is not available to UAP as it was not raised before the High court when the application for stay was argued; that even if those arguments were available they would constitute possible defences against Beckett's suit for enforcement of the compromise but not as a basis for staying the proceedings as the question of whether or not the settlement agreement was binding or enforceable is not and cannot be a difference arising out of the Policy; that the case of **Provincial Insurance Co of East Africa v Kivuti [1995-1998] 1 E A 283** has no application and is distinguishable from the facts in the present case.

ANALYSIS

15. In his decision, Mutungi J. determined, under section 6 of the Arbitration Act, that UAP had agreed to settle Beckett's claim for Kshs. 6,000,000.00. After hearing the parties on UAP's application under Section 6, Mutungi J. had this to say:

> " ***… I hold that there is no dispute between the parties to warrant reference, to arbitration. The differences, if any, were sorted out by the parties themselves, prior to the agreement concluded on 13th November 1996 in the terms therein. The existence of the arbitration clause in the Insurance Policy in this case is no bar to the action before this court in respect of the admitted claim of Kshs. 6million. It is illogical for the Defendant to seek stay of proceedings simply because there is an arbitration clause in the policy document, unless he can demonstrate that there is a dispute.***

As was held in ABDUL AZIZ SULEIMAN V. SOUTH BRITISH INSURANCE CO. LTD. Civil Appeal No. 779 of 1964 [1965] E.A. 66, at page 70, where the parties have reached a settlement, there is nothing to be referred to arbitration. The parties in this case agreed to settle the claim for the specified sum of kshs. 6million.

The upshot of all this is that I decline to stay the proceedings herein as there is nothing to be referred to arbitration. There is no dispute between the parties. All there is is plaintiff's right to be paid as per the agreement, and that has nothing to do with the policy document."

16. In our view, the issue with which Mutungi J. was concerned when dealing with the application under Section 6 of the Arbitration Act was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the Arbitration Act under which UAP's application for stay of proceedings was presented provides in the relevant part:

> ***"6. (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 claim 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) …***
>
> ***(3) …" (our emphasis)***

17. 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.

18. The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

19. The provisions in Section 6(1)(b) of the Arbitration Act are similar to the provisions of Section 1(1) of the Arbitration Act, 1975 of England before its amendment by the Arbitration Act, 1996. Section 1(1) of the English Arbitration Act of 1975 provided:

"***If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperable or incapable of being performed <u>or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred</u>, shall make an order staying the proceedings.”*** [Emphasis]

20. In interpreting that provision which, as we have said is somewhat similar to the provision in our statute, English courts have held that the court need not stay proceedings in cases where there was no “real dispute”. Lord Swinton Thomas LJ, captured the significance of the words “***there is not in fact any dispute between the parties***” as used in the 1975 English Arbitration Act, and which appear in our section 6(1)(b), in the English case of **<u>Halki Shipping Corpn v Sopex Oils Ltd [1998] 1 W L R 726</u>** which presents striking similarity with the circumstances in the present appeal. We bear in mind that that case was decided under the 1996 Arbitration Act of England.

21. In **<u>Halki Shipping Corpn v Sopex Oils Ltd</u>**, shipowners applied for summary judgment against charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties and the charterers applied to stay those proceedings pending reference to arbitration. The issue in that case was whether there was a dispute within the meaning of the arbitration clause. Lord Swinton Thomas LJ stated at page 755 that:

“***The words used in clause 9 of the charterparty in relation to a referral to arbitration were “any dispute.” The words in section 1 (1) of the Act of 1975 are: “there is not in fact any dispute between the parties.” To the layman it might appear that there is little if any difference between those words. However the legislature saw fit to draft section 1 using the phrase “not in fact any dispute.” The legislature did not use the words “there is no dispute” and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrase “any dispute” and “not in fact any dispute” is of central importance in understanding what underlies the cases that preceded the Act of 1996. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of Order 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words “not in fact any dispute” as opposed to “no dispute” have from time to time been interpreted by the courts as meaning “no genuine dispute,” “no real dispute,” “a case to which there is no defence,” “there is no arguable defence”, and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed “is indisputably due.” The approach of the courts has on occasions been similar to that adopted by them in Order 14 proceedings in cases where there is no arbitration clause.***

In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C., Ord. 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence.”

22. In the English case of **<u>Ellis Mechanical Services Ltd v Wates Construction Ltd (Note) [1978] 1 Lloyd’s Rep 33</u>** which was determined on the basis of the1975 English Arbitration Act, Lord Denning, M. R at page 35 had this to say:

“***There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able , on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by***

simply saying that there is a difference or dispute about it. If the court sees that there is a sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration, as indeed the master did here."

23. Bridge L.J in the same case at page 37 captured the same principle as follows:

"***To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the court that at least £X is presently due from the defendant to the plaintiff? If it is, then judgment should be given to the plaintiff for that sum, whatever X may be, and in a case where, as here, there is an arbitration clause the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £X is indeed because there is no issue or difference, referable to arbitration in respect of that amount***."

24. We identify fully with those pronouncements by English courts. The words "*that there is not in fact any dispute between the parties*" appearing in Section 6(1)(b) of the Arbitration Act are in our view not superfluous and require the court to consider whether there is in fact a genuine dispute when considering an application for stay proceedings. As we have held, under Section 6(1)(b) of the Arbitration Act, 1995, the issue whether the dispute or differences between the parties had any merit was a matter properly before Mutungi J.

25. In our view, the learned judge was right in finding that the suit before him was for enforcement of the settlement agreement under which Beckett was pursuing his right to payment and that having regard to the settlement agreement there was no dispute between parties capable of being referred to arbitration.

26. We are also persuaded that the arguments that the settlement agreement was a *nadum pactum* and or tainted with illegality and therefore unenforceable were not canvassed before the learned judge. The learned judge cannot be faulted for not considering matters that were not raised before him.

27. The result is that the appeal fails and is dismissed with costs.

Dated at Nairobi this 4th day of October 2013.

D. K. MARAGA

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JUDGE OF APPEAL

W. OUKO

…………………

JUDGE OF APPEAL

S. GATEMBU KAIRU

………………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR