IN THE COURT OF APPEAL
AT NAIROBI

CORAM: O'KUBASU, GITHINJI, JJ.A. & DEVERELL, AG. J.A.

CIVIL APPLICATION NAI NO. 204 OF 2004

BETWEEN

UAP PROVINCIAL INSURANCE CO. LTD ….…….……APPLICANT

AND

MICHAEL JOHN BECKETT …….. RESPONDENT

(An application for stay of proceedings pending the hearing and determination ofan appeal from the ruling of the High Court of Kenya, Milimani Commercial Courts, Nairobi (Mr. Justice O. K. Mutungi) dated 27th April, 2004

In

H.C.C.C. NO. 1310 OF 2001)
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RULING OF THE COURT

This is an application for stay of proceedings pending the hearing and determination of an appeal from the ruling of the High Court of Kenya at Milimani Commercial Court (Mr. Justice O.K. Mutungi) dated April 27, 2004 in High Court Civil Case Number1310 of 2001.

The application in the superior court that gave rise to the ruling by Mutungi J. was an application for stay of proceedings in the High Court pending arbitration under the Arbitration Act of 1995. In his ruling dated April the 27th 2004 Mutungi J refused to grant the stay.

The hearing in the High Court is due to take place on November 1, 2004. If no stay is granted by this court before that date the hearing will proceed in the High Court and the appeal against the ruling of Mutungi J. will be futile or so it is contended by the applicant before us.

In order for the applicant to succeed in an application of this nature before us it is necessary for the applicant to satisfy us, firstly, that the pending appeal is an arguable one, which is not frivolous, and, secondly, that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise. We will first deal with the first issue as to whether or not the appeal is an arguable one.

It is not disputed that the applicant in the present application, UAP Provincial Insurance Co. Ltd.

("UAP") issued a motor insurance policy to Mr. Beckett (“Beckett") the Respondent. Nor is it in dispute that the policy contained an arbitration clause stipulating that "*All differences arising out of this policy shall be referred to the decision of an arbitrator.. … *".

It was alleged by the applicant that the vehicle insured by the policy was stolen in Shimoni in the Coast Province in December 1993.

UAP repudiated liability under the policy on the 18th November 1994 in a letter from UAP to Beckett which read as follows:-

> ***"You are aware that following the above loss of your Mitsubishi "Shogun" we requested you to forward to us various documents including the logbook, shipping document and the Customs receipts.***
>
> ***Acting in the normal course of duty we made inquiries as to the authenticity of the documents submitted. This was necessitated by the fact that a contract of insurance is one based on the duty of Utmost Good Faith on the part of both parties. As a result of those investigations, we have good reason to believe that the documents submitted are not genuine. This is a breach of the principle of utmost good faith and therefore liability under the policy is hereby repudiated.***
>
> ***Yours faithfully,"***

Beckett did not accept this repudiation.

We consider that it is clear that at this stage in November 1994 there were clearly differences in existence between UAP and Beckett, which arose out of the policy.

If at that stage Beckett had sued UAP, UAP would certainly have been able to obtain a stay from the High Court pending arbitration by invoking the arbitration clause and the dispute between the parties would have had to be resolved in arbitration unless the parties otherwise agreed.

Instead of suing at that time Mr. Beckett entered into protracted negotiations with UAP. These negotiations eventually resulted in an alleged binding agreement between Beckett and UAP under which UAP was to pay to Beckett Shs.6,000,000 in full settlement of his claims.

UAP has subsequently refused to pay the Shs.6 million to Beckett and Beckett has filed HCCC No1310 of 2001 claiming that sum from UAP.

It is in that suit that UAP applied for stay of those proceedings pending arbitration which application Mutungi J refused to grant..

The argument between the parties before Mutungi J can be briefly summarized as follows.

UAP contend that the agreement to settle arose directly out of the claim under the policy and the refusal to pay the settlement amount was due to breaches of the policy by Beckett. UAP further contended that the settlement agreement was a nudam pactum or agreement without any consideration moving from Beckett since his claims if any were already worthless because Beckett was out of time to challenge the repudiation of the claim by UAP in its letter dated 18th November 1994 set out above.

Beckett contends that the settlement agreement arose out of a number of claims by Beckett against UAP of which his claim under the policy was only one. Beckett claims that his suit is based solely on the concluded settlement agreement in which there was no arbitration clause. The critical letter in this connection was that dated 16th July 1996 from Beckett’s advocates to UAP’s advocates which made it clear that at that stage Beckett was claiming a total of Shs.10 million of which only half was claimed in respect of the insurance on the car. The other half related to Beckett’s claim for damages for alleged malicious prosecution of Beckett (on charges of which he was eventually acquitted) alleged to have been

at the instigation of UAP and costs etc.

Beckett had a further argument supported by passages from The Law and Practice of Compromise 3rd Edition by David Foskett QC to the effect that: - "*Once a without prejudice offer is accepted, a complete contract is established which is binding on both parties*."

It is not for us in this type of application to go too deeply into the merits of the pending Appeal. We are required to decide whether there is an arguable appeal, which is not frivolous.

We have come to the conclusion that there is. We then turn to the second matter for our consideration. This is whether or not the pending appeal would be rendered nugatory if the stay applied for was not granted.

If there is no stay of proceedings in the High Court pending the appeal against Mutungi J's refusal of a stay for arbitration the case will come for hearing in the High Court, probably in November 2004.

If judgment is given in favour of Beckett, UAP will be able to appeal against that judgment if they wish. If UAP succeed on such an appeal they will have lost nothing except possibly costs. If they fail on appeal against such judgment it will be because their case is found in the end to be untenable.

UAP have expressed concern that they may lose at the High Court hearing on the basis of res judicata founded upon the earlier findings against them by Mutungi J in his ruling dated 27th April 2004 against which they have an appeal pending. If they eventually succeed in the appeal against that ruling in overturning the findings relied upon as res judicata they will also in all probability succeed in an appeal against an adverse ruling in the imminent hearing of the case in the High Court. If UAP lose on either or both appeals, which is certainly possible, they would have lost nothing due to the lack of a stay since they were going to lose whether they had a stay or not.

Applying this logic which this Court has approved in a number of decisions and in particular in the Silverstein v Chesoni [2002] 1KLR 867 we have come to the conclusion that the applicants have failed to show that, without the stay applied for, they will suffer irreparable loss.

The application is therefore dismissed with costs.

Dated and delivered at Nairobi this 22nd day of October, 2004.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

…….

JUDGE OF APPEAL

W. S. DEVERELL

……..

AG. JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR