



THE JUDICIARY



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCOMM/E401/2019

CITATION: WILSON CHEGE VS ASIF KARIM (THE ARBITRATOR) AND BRITAM GENERAL INSURANCE COMPANY

RULING

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Introduction

1. The factual chronology of events which triggered these proceedings is essentially common ground or uncontroverted. It is common ground that BRITAM GENERAL INSURANCE COMPANY (the plaintiff/applicant), is an insurer and vide a comprehensive insurance cover valid for the period 4th October 2014 to 3rd October 2015, it insured Mr. WILSON CHEGE 's (defendant's) motor vehicle registration number KBV 244T, Toyota Mark X. There is no dispute that the Insurance Policy constituted a valid agreement between the parties. The insured vehicle was involved in a road traffic accident on 8th March 2015 as a consequence of which it was damaged and the defendant lodged a claim with the insurer for compensation under the said policy but the Plaintiff repudiated liability.

2. The defendant sought the intervention of the Insurance Regulatory Authority which rendered an opinion on 19th January 2017 agreeing with the Plaintiff. Dissatisfied with the said opinion, the defendant filed Civil Suit Number 7404 of 2017 at Nairobi against the Plaintiff herein. However, the Plaintiff (the defendant in the said suit) applied under section 6 of the Arbitration Act (herein after referred to as the Act) for stay of the said proceedings and for the dispute to be referred to arbitration on grounds that the insurance policy provided for resolution of disputes under the policy by way of arbitration. The court allowed the said application and the Interested Party was appointed as the sole arbitrator.



3. However, at the preliminary hearing before the arbitral tribunal on 22nd July 2019, the Plaintiff objected to the jurisdiction of the arbitrator on grounds that the arbitration proceedings were time barred because the agreement between the parties provided a time limit of one year for institution of arbitration proceedings. The arbitrator disallowed the objection.

The Instant application

4. Aggrieved by the arbitrator's refusal to uphold its objection, the Plaintiff moved to this court vide an application dated 11th November 2019 the subject of this ruling expressed under Sections 17 & 35 of the Act and Sections 1A, 1B, 31 and 63 of the Civil Procedure Act and all enabling sections of the law seeking orders that this court sets aside the tribunal's findings on the jurisdiction published on 3rd October 2019 and an order that this court terminates the arbitral proceedings before the arbitrator Mr. Aasif Karim for lack of jurisdiction. In the alternative, the applicant prays that the court grants any orders it may deem necessary to meet the ends of justice. Lastly, it prays for costs to be provided for.

5. The application is founded on the grounds listed on the face of the application and the supporting affidavit of Caroline Kimeto, the applicant's Legal Manager. Essentially, the grounds are that the Arbitrator has no jurisdiction to hear or determine the dispute because the insurance policy agreement contained a dispute resolution clause which provided that any disputes shall be referred to arbitration within one year. The applicant also states that the arbitrator did not evaluate the significance of Clause 10 of the policy agreement which provided for arbitration. Lastly, the applicant states that the continued pendency of the arbitral proceedings before the arbitrator is contra-statute, null and void and a blatant violation of the agreement between the parties.

Respondent's Replying affidavit

6. Mr. Wilson Chege, the Respondent's response is that after the applicant repudiated liability, he appealed to the Insurance Regulatory Authority (IRA) on 30/05/2016 and on 17/01/2017 he received its opinion basically agreeing with the Plaintiff. He states that his appeal to IRA was on the bona fide belief that IRA had the requisite mandate to resolve the dispute and that he could not institute legal proceedings before IRA made its decision.

7. He states that he received IRA's reply on 19/01/2017 which was the effective date when the Plaintiff's disclaimer of liability became effective, and he filed Civil Suit No. RMCC NO.7404 of 2017 on 09/10/2017. Further, he contends that the period between 19/01/2017 when he received IRA's



reply and 09/11/2017 when he filed the suit is less than nine (months), hence, it is was within the time stipulated in the arbitration agreement.

8. He stated that he disputed the validity of the arbitration clause which reduced the period of limitation to 1 year, and, that, section 4 (1) (a) of the Limitation of Actions Act provides for a limitation period of 6 years for actions founded on contract while Section 39(1) of the Act provides that arbitrations are subject to the provisions of the Act. Aggrieved by the said ruling the Plaintiff instituted these proceedings. The defendant also states that the Limitation of Actions Act does not give parties leeway to contractually limit the periods prescribed under the Act, hence, any contract purporting to limit the limitation periods prescribed by the Act is null and void for attempting to override statute. He also contends that the arbitration agreement is invalid.

9. The defendant states that if the instant arbitration agreement is capable of being severed into complete and coherent parts, some of which are legitimate, and some of which are not; then on application of the Doctrine of Severability, the parts which are legitimate may be given effect and the parts which are invalid may be expunged, hence, if the court finds that the arbitration agreement is invalid in its entirety, then the court should refer the matter back to the subordinate court for determination or order that the arbitration proceeds before the interested party.

10. Further, the defendant pleads that the policy is a standard contract which he played no role in its development and he would not have accepted the terms if he had a choice. Further, he states that limiting the limitation period to 1 year from the statutorily prescribed period of 6 years through the arbitration agreement is an unlawful attempt to deny him access to justice. That he filed the suit in the lower court within the limitation period provided for by the arbitration agreement and the law and therefore there were no laches on his part. Lastly, that it is in the interest of justice and fairness that his suit be heard on its merits.

The Plaintiff's/applicant's advocates submissions

11. The applicant's counsel submitted that at the preliminary sitting before the applicant challenged the tribunal's jurisdiction on grounds that the dispute was time barred as per clause 10 of the policy agreement, that the objection was raised within the time envisaged under section 17 (2) (3) (4) (5) (6) and (7) of the Act. He submitted that the validity of the policy agreement is not in question and that the policy agreement created a contractual relationship between the parties which was binding and parties cannot choose which terms are binding and which are not. He submitted that the



Respondent is bound by the terms of the contract and cannot seek to deviate from the same when they do not favour him. Counsel submitted that the parties chose the mode of dispute resolution and are bound by the timelines set therein.

12. Counsel argued that Clause 10 provided a time limit within which a dispute should be referred to arbitration and the consequences of non-compliance. Counsel submitted that the disclaimer was communicated to the claimant on 11th April, 2016 from which date time under Clause 10 began to run and that the defendant was bound to submit to an arbitration process within the stipulated period. He submitted that the Plaintiff was guilty of laches and that under Section 12 of the Act and the policy agreement he had all the authority to appoint an arbitrator with or without the participation of the applicant.

13. Counsel submitted that equity aids the vigilant and not the indolent and that the Respondent was caught up by the doctrine of laches citing *Alton Homes Limited & Another v Davis Nathan Chelogoi & 2 others*. He also cited *Total Kenya Ltd v Joseph Ojiem* for the holding that parties are bound by the terms and conditions of a contract which they voluntarily enter into. He argued that the parties herein are bound by the terms of the agreement dated 4th August 2009 and cited *National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & Another* which held that a court cannot re-write a contract between the parties except on proven grounds of coercion, fraud or undue influence. He also cited *Musimba Investments Limited v Nokia Corporation* which held that “one of the principles of contractual interpretation is that parties have the freedom to contract; to contract even to resolve their disputes away from the courts: and that courts should not re-write terms of a contract for them.” (Also cited *Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahimji Pothiwalla v Kidogo Basi Housing Corporative Society Limited & 31 others* and *Fina Bank Limited vs. Spares & Industries Limited*).

14. He also cited *Kenya Tea Development Agency Ltd. & Others v Savings Tea Breakers Ltd* in which it was observed: -

“... the jurisdiction of the Arbitrator is tethered by the arbitration agreement, reference and the law. The express words used in the arbitration agreement or as interpreted with reference to the subject matter of the contract...”

15. The applicant’s counsel also cited *Food Corporation of India v Surendra & Mahendra Transport Company* for the holding inter alia that the “restriction in arbitration contracts is a corner stone of the arbitration process and cannot be argued to be an impediment to access of justice where



arbitration is itself voluntary and that when parties expressly exclude court intervention in their arbitration agreement, then they should honour it and embrace the consequences. They cannot turn round and claim that the very law they have freely chosen to govern their business is unconstitutional.”

16. He submitted that the arbitrator exceeded his mandate by expanding the limit within which the arbitration was to take place and donated to himself authority beyond what was contemplated in the contract. To buttress his argument, he cited *Airtel Networks Limited v Nyutu Agrovet Limited* in which the court faulted an arbitrator for expanding the scope of his mandate.

The defendant’s advocates submissions

17. The defendant’s counsel while conceding the validity of the arbitration agreement submitted that the attempt to limit the period of limitation is unlawful and therefore it renders the agreement void because it restricts the defendant’s rights. He cited section 4 (1) (a) and 34 (1) of the Limitation of Actions Act and submitted that the terms of a contract cannot supersede the express provisions of a statute. He submitted that section 4 (1) (a) provides for a six-year limitation period from the date of the cause of action and argued that there is no provision permitting contracting parties to reduce the limitation period by an agreement.

18. Counsel submitted that an arbitration agreement should conform to the Limitation of Actions Act for it to be valid. He submitted that there is no valid arbitration agreement, and, that the defendant filed Civil Suit No. NAIROBI RMCC NO.7404 OF 2017 against the Plaintiff/applicant after it repudiated his claim but the Plaintiff/applicant applied to refer the dispute to arbitration. He submitted that the defendant’s claim is not statute barred and even if the court is to consider the 1-year limit imposed by the arbitration agreement, it would still not be time barred because the plaintiff repudiated liability on 11/04/2016. He submitted that the defendant appealed the decision to the Insurance Regulatory Authority (IRA) on 30/05/2016 and received IRA’s opinion on 17/01/2017. He argued that the appeal to IRA was made in bona fide belief that IRA had the requisite mandate to resolve the dispute. He submitted that the defendant would not have, in good conscience, proceeded to institute legal proceedings against the plaintiff before his appeal to IRA was determined. He argued that the defendant received IRA’s reply on 19/01/2017 which to him was the effective date when time began to run and he then filed RMCC No. 704 OF 2017 within time.



19. Counsel submitted that the arbitrator's jurisdiction is drawn from the arbitration agreement, and, that the plaintiff is estopped from denying the validity of the said agreement. He submitted that the question of time bar was canvassed before the arbitral tribunal and disposed of by its ruling of 03/10/19, and, that, the only question for consideration would therefore be whether the ruling of the arbitrator is valid at law, which itself turns on the question of the limitation of time. Lastly, counsel submitted that the applicant's application is not grounded on law and it has no merit.

Determination

20. The general approach on the role and intervention of the court in arbitration in Kenya is provided for in section 10 of the Arbitration Act. This section provides that except as provided in the Act, no court shall intervene in matters governed by the Act. The section, in peremptory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. It epitomizes the recognition of the policy of party's "autonomy" which underlies the arbitration generally and in particular the Act.

21. Section 10 of the Act articulates the need to restrict the court's role in arbitration so as to give effect to that policy. The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps to achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

22. Section 10 permits two possibilities where the court can intervene in arbitration. One, is where the Act expressly provides for or permits the intervention of the court. Two, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot be construed as ousting the inherent power of the court to do justice, a position appreciated by the Supreme Court in *Nyutu Agrovets Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) which observed that this judicial intervention can only be countenanced in exceptional instances. However, the Supreme Court stressed the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

23. The Supreme Court was emphatic that Section 10 of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may



intervene. It follows that parties who resort to arbitration must know with certainty instances when the jurisdiction of the courts may be invoked. Under the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction.

24. Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice. However, by agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in Act, and, by necessary implication, they waive the right to rely on any further grounds of review, "common law" or otherwise.

25. The objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

26. It is beyond doubt that an arbitrator's jurisdiction derives from the parties' agreement. For an arbitrator to have jurisdiction, all the following must apply: - (i) There must be a binding agreement to arbitrate. (ii) The arbitrator must have been validly appointed. (iii) There must be a dispute that the parties had agreed to arbitrate. Both parties admit the existence of a valid agreement. Both parties agree that the agreement contained an arbitration clause 10 which provided that "...if the company shall disclaim liability for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provision herein contained the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."



27. The dispute was referred to Arbitration after the Plaintiff successfully moved the court under section 6 of the Act. The Plaintiff objected to the arbitrator's jurisdiction and on 3rd October 2019 the arbitrator ruled he had jurisdiction. Aggrieved by the arbitrator's findings, the Plaintiff approached this court. Jurisdiction can be challenged by attacking the agreement's validity or on the tribunal's jurisdiction over the subject matters, among other challenges.

28. Section 17 of the Act provides for the doctrine of kompetenz-kompetenz, a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it. The doctrine of kompetenz-kompetenz is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules. Article 16(1) of the Model Law and Article 23(1) of the Arbitration Rules both dictate that "the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

29. The plea for lack of jurisdiction should be raised before submitting the statement of defence. In the instant case it was raised at the preliminary meeting. Where the issue is that the tribunal has exceeded the scope of its authority, the plea must be raised as soon as the matter alleged to be beyond scope is raised during the proceedings. The tribunal decides the matter either as a preliminary question or in an arbitration award on the merits. Any party aggrieved by the ruling can apply to the High Court within 30 days to decide the matter. The High Court's decision is final and not capable of appeal.

30. Section 17 is a wide provision conferring on the Arbitral Tribunal the power to rule on all jurisdictional issues pertaining to its own competence to adjudicate on the matter. However, for a better understanding of this provision, it is important to know what falls within the ambit of the Arbitral Tribunal's jurisdiction. It is important to note that there is no jurisdiction given to the Arbitral tribunal as a matter of right or inherence or by the statute. Rather, the jurisdiction of the Arbitral Tribunal is derived through the Arbitration Clause or Arbitration Agreement between the parties. The jurisdiction of an Arbitral Tribunal is, thus, determined in accordance with the Arbitration Agreement between the parties and subject to the provisions of the Arbitration Act.

31. Section 17 (1) of the Act specifies that the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose— (a) an arbitration clause which forms part of a contract shall be



treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

32. The word “including” in the above provision is indicative of the fact that the provision is inclusive in nature. Some of the factors considered to be within the jurisdiction of an Arbitral Tribunal are the existence or the validity of an Arbitration Agreement can be determined by the Arbitral Tribunal as per Section 17. The existence and validity of the Arbitration Agreement is left to be determined by the Arbitral Tribunal, amongst other jurisdictional issues. If the subject matter of the dispute falls within the category of a non-arbitrable dispute, the Arbitral Tribunal has no jurisdiction to adjudicate the dispute and an objection can be raised under Section 17 stating that the subject matter of the dispute is beyond the jurisdiction of the Arbitral tribunal.

33. The Arbitral Tribunal is a creature of the Arbitration Agreement between the parties. Therefore, the scope of the Arbitral Tribunal is determined in accordance with what is stated in the Arbitration Agreement. If the reference to Arbitration is on an issue that is not mentioned in the Arbitration agreement or falls beyond the bracket of disputes the parties have agreed to refer to Arbitration, an objection can be raised stating that the Arbitral Tribunal does not have jurisdiction to decide on the issue since it is beyond the scope of its authority.

34. Section 17 (2) of the Act which provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator. The above position was upheld by the Supreme Court India in M/s MSP Infrastructure Ltd v/s M.P. Road Development Corporation Ltd which held that it is undoubtedly clear that an objection that the Arbitral Tribunal lacks jurisdiction must be raised before or at the time of submission of the Statement of Defence. However, I must hasten to point out that the Arbitral Tribunal may admit a plea of objection at a stage later than the stages mentioned above. An example is where the Arbitral Tribunal exceeds the scope of its authority in the course of the proceedings.

35. Section 17 elaborates on the time within which a plea objecting to the jurisdiction can be raised. The party making such a plea is strictly required to adhere to this time bracket. However, apart from the excepted circumstances mentioned in the said section, any objection that goes beyond the confines of section 17 precludes the party from raising such an objection by means of waiver under The Judiciary of Kenya



Section 5 of the Act which enshrines the provision to waiving the right to object. It provides that a party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

36. The arbitration clause was explicit on the time frame within which the dispute would be referred to arbitration. Contrary to defendant's advocates submissions, there is a clear distinction between jurisdiction as contemplated under section 17 and limitation of actions. Generally, jurisdiction refers to the legal authority of an adjudicatory body to decide a legal dispute and render a decision. It is the power to hear and determine a cause. Jurisdiction in law, is the authority of a court to hear and determine cases, the authority which a court has to decide matters that are litigated before it or take cognisance of matters presented in a formal way for its decision. Under each of these definitions, jurisdiction is conceived of granting to judicial fora the authority or competence to rule on a matter before them.

37. In their simplest form, jurisdictional challenges are those that call into question the competence of an adjudicatory body to exercise its adjudicatory powers on both the claimant and the claim. Decisions on jurisdictional questions normally have far-reaching effects, as they can potentially put an end to claims before they are heard on the merits. For instance, arbitration is a consent-based process; consequently, if a party challenges the existence of an arbitration agreement, the party is arguing that it did not consent to arbitration, which calls into question the competence of the tribunal to adjudicate the substance of the claim. Similarly, where parties wilfully contract and agree on the period within which to institute arbitration proceedings, the court cannot void such an agreement except on grounds permitted under the Act. It follows that whether parties agree on shorter or longer periods than those provided under the limitation of Actions Act, the agreement being consensual will still be valid. In fact, parties to an arbitration agreement can limit the period the dispute is to be referred to arbitration.

38. Limitation of actions refers to the period of time in which a person has to file a case in court or a tribunal. The limitation defines time periods following the accrual of the right of action in which a litigant must assert his claim. The terms jurisdiction and limitation are totally different. Limitation only limits a party's right to institute a claim which is statute barred. Absence of jurisdiction as contemplated under section 17 of the Arbitration Act connotes that the court or tribunal has no



power to entertain the case. Flowing from the foregoing discussion and the distinctions highlighted above between jurisdiction and limitation of actions, it is clear that the defendant's attempt to invoke the provisions of the Limitation of Actions Act is legally impermissible and unsustainable. It flies on the face of the valid arbitration contract and the principle of party autonomy which the Arbitration Act seeks to promote and protect.

39. An arbitrator's jurisdiction flows from an arbitration agreement. It follows that if the parties voluntarily contracted and limit the period within which to refer their dispute to arbitration, the arbitrator has no jurisdiction to extend the period. By entertaining the dispute, the arbitrator exceeded his jurisdiction. True to the principle of party autonomy, the tribunal's statutory powers can be excluded or modified the party's agreement a clear affront to the established position that the arbitrator's jurisdiction flows from the arbitration clause. Where parties to an arbitration agreement limit time within which to refer the dispute to arbitration, such a limitation, like all other voluntary consensual agreements cannot be said to offend the provisions of the Limitation of Actions Act not can the court re-write the parties contract.

40. In view of my analysis of the law, authorities, discussion and conclusions arrived at herein above, it is my finding that the applicant's application dated 11th November 2019 is merited. I allow the said application and set aside the tribunal's award on the jurisdiction Published on 3rd October 2019. I further order that arbitral proceedings before the arbitrator Mr. Aasif Karim be and are hereby terminated for lack of jurisdiction. The Respondent shall pay the applicant the costs of this application.

Orders accordingly

Signed and Dated at Nairobi this 23rd day of April 2021

John M. Mativo
Judge

SIGNED BY: HON. JUSTICE J. M. MATIVO



THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT



