MISCELLANEOUS CIVIL CASE NO. 001 OF 2020; CYRUS NYORI NDUNGU MBUGUA VS CIC GENERAL INSURANCE LIMITED

- Applicant – Cyrus Nyori Ndungu Mbugua
- Respondent – CIC General Insurance Limited
- Judge(s) – Maureen A. Odero
- Date of delivery of the Judgment: 5th February 2021
- Court: High Court of Kenya at Nairobi City (Milimani Commercial Courts Commercial and Tax Division)

SUMMARY OF FACTS

The Applicant herein signed a medical insurance cover with the Respondent. A dispute arose in respect of a claim for payment by the Applicant. The dispute was then referred to arbitration pursuant to the existence of an arbitration clause in the insurance cover. The Arbitrator published the award in favour of the Applicant.

The Applicant then filed then filed an Application to have the award adopted as a judgment of the High Court whereas the Respondent subsequently filed an application seeking to have the said award set aside.

The Respondent submitted that the award was contrary to justice and morality as it allowed for the unjust enrichment of the Applicant which was inimical to the public policy of Kenya. On their part, the Applicant denied that the award unjustly enriched them to the detriment and prejudice of the Respondent.

ISSUES

Whether the award ought to be set aside on the ground that it violates the public policy of Kenya

ANALYSIS/DETERMINATION

The court made reference to Section 35(2) of the Arbitration Act which sets out the conditions under which an arbitral award may be set aside and noted that strict proof must be relied upon to satisfy any of the prescribed grounds for setting aside an award. The basis of strict proof was elucidated in the case of ***Christ of All Nations vs Apollo Insurance Co. Limited (2002) EA***.

The court subsequently was of the view that the Respondent did not prove that the arbitration was not contrary to the public policy of Kenya. The fact that the Arbitrator arrived at their own independent and impartial decision did not mean that there was justification to set aside the award given that the court would arrive at a separate decision. In other words, the court held that they ought not to review the merits of an arbitral award and/or sit on appeal over the decision of the Arbitrator.

RULING/HOLDING

Consequently, the court held that the Respondent's application had no merit and was subsequently dismissed in its entirety. The Applicant's Application for the recognition and enforcement of the award and for the award to be taken as a judgment of the court was allowed.

RATIONALE

The Judge adopted a very narrow/strict interpretation of the public policy ground for setting aside an arbitral award prescribed by Section 35(2) of the Arbitration Act in order to respect the integrity of arbitral proceedings.

In order to satisfy the existence of the public policy ground, a party would have to strictly prove that the manner in which the arbitral proceedings were conducted or the manner in which the decision was arrived at was contrary to public policy.

In this matter, the Respondent did not prove so and thus, their Application was dismissed. The bone of contention ended up being in respect of the merits of the award, of which the court ought not to intervene as was held in the case of ***Nyutu Agrovet vs Airtel Network Limited and Others (2019) eKLR*** and ***Cape Holdings Ltd vs Synergy Industrial Credits Ltd. (2016) eKLR***.

CASE RELEVANCE

- Section 35(2) of the Arbitration Act sets out the conditions under which an Arbitral Award may be set aside.
- The case of ***Christ of All Nations vs Apollo Insurance Co. Limited*** is the landmark precedent regarding the public policy ground for setting aside an arbitral award.
- It is NOT the role of the court to review and/or sit on appeal over the decision of an Arbitrator. This limit is prescribed by Section 35 of the Arbitration Act. The leading precedent is ***Nyutu Agrovet vs Airtel Network Limited and Others.***

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MISC. CIVIL CASE NO. 001 OF 2020
IN THE MATTER OF AN ARBITRATION UNDER THE CHARTERED INSTITUTE OF ARBITRATORS (KENYA BRANCH)

BETWEEN

CYRUS NYORI NDUNGU MBUGUA ..... APPLICANT

VERSUS

CIC GENERAL INSURANCE LIMITED ..... RESPONDENT

JUDGMENT

(1) Before this Court are two (2) applications for determination. First is the Notice of Motion dated **8th January 2020** by which **CYRUS NYORI NDUNGU MBUGUA** (hereinafter **"the Claimant"**) seeks the following orders:-

> **"1. THAT the Arbitration Award dated 27th September 2019 be adopted as a Judgment of the Court.**
> **2. THAT Judgment be entered against the Respondent for Kshs. 4,300,000/- together with**

interest at 12% per annum from 24th December 2019 till payment in full.

3. **THAT the costs of this application be awarded to the Applicant."**

(2) The application which was premised upon **Section 36** of the **Arbitration Act 1995** and **Order 46 Rule 17** of the **Civil Procedure Act**, was supported by the Affidavit dated **9th January 2020** sworn by the Claimant.

(3) The second application or consideration is the Notice of Motion dated **3rd February 2020** by which **CIC GENERAL INSURANCE LIMITED** (hereinafter **"the Respondent")** seeks the following orders:-

"(a) THAT this Honourable Court be pleased to set aside the Arbitral Award rendered by Honourable Mbiriri Nderitu (Arbitrator) and dated the 27th day of September 2019 in the Arbitration proceedings between Cyrus Nyori Ndungu Mbugua and CIC General Insurance Limited.

(b) THAT costs of the application be awarded to the Applicant."

(4) The application was premised upon **Section 35(2) (b) (ii), Section 35(3)** of the **Arbitration Act, 1995** as Amended in 2009, **Section 3A** of the **Civil Procedure Act** and all other enabling laws as supported by the Affidavit of even date sworn by **JOSEPH BOROME** the Operations Manager of the Respondent Companys Medical Division. The two applications were canvassed by way of written submissions. The Respondent filed written submissions dated **2nd May 2020** whilst the Claimant filed written submissions in reply to the Respondent's submissions.

BACKGROUND

(5) On **18th May 2012** the Claimant signed a Medical Insurance Cover known as **Medisure Family Health Plan** with the Respondent and was issued with the Policy Document **No. IND/19/001005/2012**. The Policy was renewed on **21st March 2016**. On **26th October 2015**, during the validity of the Policy, the Claimant was admitted at the **Aga Khan University Hospital** where he underwent open heart surgery. Thereafter the Claimant made a claim for payment of his hospital bill. The Respondent only paid an amount of **Kshs. 700,000/-** and

declined to pay the balance of the insured sum of **Kshs. 5,000,000/-** on grounds that the Claimant had been admitted in hospital due to undisclosed pre-existing condition which was excluded under the Policy.

(6) **Clause 6.14** of the Insurance Policy Agreement provided that any dispute arising between the parties would be referred to Arbitration. In accordance thereto and by consent of the parties through a Letter of Appointment dated **8th November 2018** the dispute was referred to Arbitration. **Hon. Mbiriri Nderitu (Arbitrator)** heard the matter and vide the Award published on **27th September 2019** found in favour of the Claimant as follows:-

> **"ACCORDINGLY I HEREBY AWARD AND ORDER IN FULL AND FINAL DETERMINATION OF THE DISPUTE**
>
> **(a) That the Respondent shall pay to the Claimant total sum of Kenya Shillings Four Million, Three Hundred Thousand (Kshs. 4,300,000/) being the balance of the total assured amount under the medical insurance contract IND/19/001005/2012 dated 18th May 2012 in full and final settlement of the claim herein.**

(b) That if the above amounts remain unpaid for a period of forty five (45) days from the date this award is released to the parties, the same shall attract simple interest at the rate of 12% per annum from the date of the award until payment in full.

(c) That each party shall bear their own costs and expenses incurred in this arbitration and in taking up the award."

(7) The Claimant now seeks to have the award dated **27th September 2019** adopted as a Judgment of this Court whereas the Respondent seeks to have the said Award set aside.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the two (2) applications before me, the affidavits in support as well as the submissions filed by both parties. The fact that the Claimant had been issued with a Medical Cover by the Respondent is not disputed. A copy of the Policy Documents is annexed to the Supporting Affidavit dated **9th January 2020** (Annexture **"CN1"**). It is conceded that a dispute later arose between the parties following the hospitalization of the Claimant in **October 2015** and his claim for reimbursement of his

medical costs. Instead of paying out the full insured sum of **Kshs. 5.0 million** the Respondent only paid a sum of **Kshs. 700,000.00. Clause 6.14** of the Policy document which provided for Arbitration as a dispute resolution mechanism read as follows:-

> **"6.14 Arbitration: should any difference arise between CID Insurance and the Insured regarding the amount to be paid, liability or otherwise having been accepted, the same will be referred to arbitration in accordance with the Statutory provisions for the time being in force applicable thereto and obtaining of an insured shall be a condition precedent to the liability of CID Insurance under this Policy."**

(9) In conformity with the above Arbitration Clause the dispute between the parties was referred to an Arbitrator for hearing and determination. **Section 35(2)** of the **Arbitration Act** sets out the conditions under which an Arbitral Award may be set aside as follows:-

> **"An arbitral award may be set aside by the High Court only if:-**
>
> **(a) The party making the application furnishes proof-**

(i) That a party to the arbitration agreement was under some incapacity; or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the Laws of Kenya; or

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) The arbitral award deals with a dispute not contemplated by or not falling with the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate;

or failing such agreement, was not in accordance with this Act; or

(vi) The making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) The High Court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) The award is in conflict with the public policy of Kenya."

(10) The Respondent submits that the Award made by the Arbitrator which awarded the Claimant the sum of **Kshs. 4,300,000/-** is contrary to justice and morality as it allowed for the unjust enrichment of the Claimant which is inimical to the Public Policy of Kenya.

(11) On his part the Claimant denies that the award unjustly enriches him to the detriment and prejudice of the Respondent. The ground of Public Policy was expounded in the case of **CHRIST FOR ALL NATIONS –VS- APOLLO INSURANCE CO. LIMITED (2002)E.A.** where Hon. Justice Aaron Ringera (as he then was) held as follows:-

"An award could be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

The learned Judge went on to hold that:-

"I also do not accept the Applicant's contention that the award is contrary to justice. To accept the Applicant's contention would be tantamount to accepting a most dangerous notion that whenever a tribunal adopts an interpretation of a contract contrary to the understanding of one of the parties thereto, injustice is perpetrated. <u>Justice is a double edged sword. It sometimes cuts the Plaintiff and other times the Defendant. Each of them must be prepared to bear the pain of justice cut with fortitude and without condemning the law's justice as unjust</u>." [own emphasis]

(12) Similarly in **MAHICAN INVESTMENTS LIMITED –VS-GIOVANNI GAIDI & 80 OTHERS** the Court held that:-

> **"A Court will not interfere with the decision of arbitration even if it is apparently a misinterpretation of contract, as this is the role of the Arbitrator. To interfere would place the Court in the position of the Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties." [own emphasis]**

(13) The Respondent seeks to have the Award published by the Arbitrator set aside on grounds that the same is contrary to Public Policy. The Respondent submits that at the inception of the Insurance Policy the Claimant was suffering from hypertension (high blood pressure) which according to the Respondent was a pre-existing condition. The Respondent further contents that the Claimant knowingly concealed and/or failed to disclose the fact that he was suffering from hypertension at the time of signing the proposal forms for the Medical Policy. Accordingly the Respondent's position is that the payment of **Kshs. 700,000/-** was the maximum cover limit payable for a declared pre-existing condition.

(14) However the Respondent states that this payment of **Kshs. 700,000/-** was made erroneously and cannot be taken to amount to an admission. The Respondents submits that the Award published by the Arbitrator contravened Public Policy in Kenya in that the Award facilitated the unjust enrichment of the Claimant. In the case of **CONTINENTAL HOMES LTD –VS- SUNCOAST INVESTMENTS LTD [2018]eKLR** the Court held that:-

> **"In order for this Court to set aside the award for contravening Public Policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the Arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This Court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this Court would have arrived at a different conclusion from that reached by the Arbitrator." [own emphasis]**

(15) In **Commercial Arbitration 2nd Edition pg 47, Musyoki** commenting on mistakes of law stated as follows:-

"By submitting their disputes to arbitration, the parties consent to run the risk that the chosen tribunal will prove unequal to its task. The position is the same as regards errors of law, and that the Court will not order remission or setting aside, even where it is quite obvious from the terms of the award that the Arbitrator made a mistake. <u>If the losing party has any remedy it must take the shape of an appeal and this will be available only if it has not been validly excluded by consent</u>." [own emphasis]

(16) It is pertinent to note that the Arbitrator did consider the question of whether disclosure of the pre-existing condition was material to the Policy Contract between the Claimant and the Respondent. (See paragraph **66-70** of the Final Award dated **27th September 2019**). At paragraph **70** the Arbitrator found as follows:-

"From the evidence placed before, I have already made a finding that the Claimant knew that he had a blood pressure issue when he took up cover with the Respondent in 2015 but he did not disclose the same. He did explain that the agent filled the form but even years later, his evidence was that he was not hypertensive and therefore the information on the

form is correct. I had already dealt with this aspect earlier and concluded that from the evidence of Dr. Kisyoka that the Claimant was hypertensive. Whether the information given by the Claimant was done deliberately or innocently the law does not draw a line and it is stated that an insurer is entitled to avoid the contract ab initio. It is my finding therefore that disclosure of a pre-existing condition as material to the formation of the contract of insurance between the Claimant and the Respondent. As at the time of hearing, the Respondent had the opportunity to avoid the contract but it had not done so, a fact admitted in its evidence and submission and to that extent, the contract remained valid as between the parties at all material times."

(17) The Respondent is asking that the Award be set aside on grounds that it will unjustly enrich the Claimant. However by paying out the **Kshs. 700,000/-** in light of the Claimant's failure to disclose the pre-existing condition the Respondent themselves opened the door for the payment of the full insured sum of **Kshs. 5.0 million**. I do not buy the Respondent's claim that this **Kshs. 700,000/-** was paid out in error.

(18) It is not the role of this Court to review and/or sit in appeal over the decision of the Arbitrator. In **NYUTU AGROVET –VS- AIRTEL NETWORK LIMITED AND OTHERS (2019)eKLR** the Court held as follows:-

> **"... the parties to an Arbitration do not have a right to a 'correct' decision from the arbitral tribunal that can be vindicated by the Court in ..." in the light of their limited role in arbitral proceedings, the Courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an Arbitral Award." [own emphasis]**

(19) Likewise in **CAPE HOLDINGS LTD –VS- SYNERGY INDUSTRIAL CREDITS LTD (2016)eKLR** the Court held thus:-

> **"The Court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this Court is not sitting on an appeal from the decision of the Arbitrator when considering whether or not to set aside the Award."**

(20) This Court declines the invitation being extended to it by the Respondent to go into the merits of the decision made by the Arbitrator and/or to sit on appeal over the decision of the

Arbitrator. I am not persuaded that the Award in any way contravenes Public Policy of Kenya.

(21) Accordingly I find no merit in the Notice of Motion dated **3rd February 2020** seeking to set aside the Arbitral Award.

(22) Having declined to set aside the Arbitral Award, the Court is obliged to allow the application seeking to enforce said Award. In conclusion therefore this Court makes the following orders:-

(1) The Notice of Motion dated 3rd February 2020 is dismissed in its entirety.

(2) Costs of that application are awarded to the Claimant.

(3) The Notice of Motion dated 8th January 2020 is allowed in terms of prayers (1) and (2) thereof.

(4) Costs are awarded to the Claimant.

It is so ordered.

Dated in **Nairobi** this...5th.....day of February **2021**.

.....Odero.....

MAUREEN A. ODERO

JUDGE