Geminia Insuarance Company Limited v Nyaga (Miscellaneous Civil Application 169 of 2023) [2023] KEHC 24854 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24854 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION 169 OF 2023

EC MWITA, J

OCTOBER 13, 2023

BETWEEN

GEMINIA INSUARANCE COMPANY LIMITED ..... APPLICANT

AND

JOSPHAT KINYUA NYAGA ..... RESPONDENT

RULING

1. This is a notice of motion applicant under sections 17(6) (7) and 39 of the *Arbitration Act* (the Act), seeking to set aside the Interim Award No. 1 dated 9th February, 2023.

2. The application is premised on the grounds that the arbitral proceedings were commenced outside the agreed period and, therefore, the cause of action is time barred. The result is that the arbitral tribunal lacks jurisdiction to hear and determine the claim.

3. The basis of the arbitral proceedings was dispute between the parties which arose out of an insurance Policy No. MPC/CBD/2018/090797 through which the applicant had comprehensively covered the respondent's motor vehicle KCB 677U. Clause 9 of the policy provided for a dispute resolution mechanism in the event of disagreement between the parties arising from the terms of that policy.

4. On 6th May, 2019, an accident occurred that triggered the compensation claim anticipated under the policy. The applicant however declined to settle the claim for the reason that the respondent was in breach of some of the conditions in the policy.

5. The dispute was referred to arbitration and Mr. Shafiq Taibjee was appointed the sole arbitrator following the respondent's request to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch).

6. The arbitral tribunal held a preliminary meeting attended by advocates for both parties and gave several directions. Thereafter, the applicant filed and served a preliminary objection dated 19th September 2022 on grounds that the arbitral tribunal lacked of jurisdiction since the arbitral process had been initiated outside the time provided for in clause 9 of the policy.

7. The arbitral tribunal issued its decision through Interim Award No. 1 delivered on 9th February 2023, dismissing the preliminary objection. The arbitral tribunal took the view, that the *Limitation of Actions Act* provides for limitation period of six years for contractual claims thereby overriding the agreed period of twelve months in clause 9.

8. It is the applicant's case that clause 9 (b) of the policy provided that if a dispute is not referred to arbitration process within twelve months, the applicant would assume that the respondent had abandoned his claim.

9. The applicant asserted that the dispute arose on 8th October 2019, when the respondent's agent was informed that the claim had been declined through letter dated 7th October 2019. According to the applicant, the dispute should have been referred to arbitration on or before 7th October 2020.Despite this, the applicant was informed that the respondent had commenced arbitral proceedings through letter dated 12th October, 2021.

10. The applicant argued that the arbitral tribunal failed to distinguish between contractual limitation and statutory limitation and apply the contractual principle that parties are bound by the terms and conditions of the contract they have willingly entered into. The applicant stated that contractual limitation is distinct from statutory limitation so that where a contract provides for a dispute resolution mechanism and stipulates a time frame within which the dispute should be resolved, parties to the contract are bound by the agreed timelines. Where one is guilty of laches, he or she cannot invoke statutory limitation.

11. The applicant asserted that where the intention of the parties to an agreement is clear, such intention must be given effect to without deviation. The applicant relied on Agricultural Finance Corporation & another v Kenya Alliance Insurance Co. Ltd & another (HCCC No. 1882 of 1999) for the position that there is nothing unreasonable, unfair or unconscionable in clauses limiting the time within which parties must make their claims on the contract between them. The principle of freedom of contract ought to prevail over subjective considerations.

12. The applicant again relied on Republic v PMS Innovateus Ltd & 2 others (HCCC Misc. Application No. 241 of 2018) [2019] eKLR, that if a dispute arises from an agreement that is still in force and legally binding and the agreement has prescribed a clear dispute resolution mechanism for disputes under the agreement, that is the extinguishing mechanism for the said argument.

13. Similarly, where the agreement between parties is clear, it is not the business of the Court to assist parties avoid their obligations under a valid agreement.

14. The applicant urged that where parties willfully agree to be bound by the arbitration clause and the *Arbitration Act*, the dispute under the agreement is triggered the moment parties disagree and a dispute is declared. In such cases time under the agreement begins to run when a dispute is declared.

15. To support this argument, the applicant cited the decision in Peter Puma Onyango v Mats Karlsson (Misc. Application No. E1219 of 2020) [2021] eKLR that parties are free to concoct their own procedural recipe within the limits of mandatory provisions of arbitration legislation and the arbitrator controls the procedure of the arbitration within the limits of the arbitration agreement.

16. Citing the decision in West Mount Investments Ltd v Tridev Builders Ltd (HCCC No. 230 of 2016 (OS) [2017] eKLR, the applicant relied on the principle that courts will not and should not interfere with contractual time bar clauses especially where the parties have equal bargaining strength. If claims fall a foul of such limitation clauses the claim or the arbitral process may be barred even where it appears to have been a bad bargain.

17. The applicant asserted that it complied with section 17 (2) of the *Arbitration Act* by pleading that the claim was contractually time barred. The arbitrator also granted leave to file a preliminary objection pursuant to section 17 (4) of the Act which empowers the arbitrator to admit a preliminary objection at a later stage.

18. The applicant argued that in terms of the decisions in Agricultural Finance Corporation, PMS Innovateus [supra] and West Mount Investments Ltd cases [supra], the arbitrator does not have jurisdiction to hear and determine the dispute because the claim is contractually time barred.

Response

19. The respondent opposed the application arguing that the applicant had not presented sufficient materials to warrant interfering with the arbitral process. The respondent took the view that the, the subject matter of the arbitral proceedings, continues to be held and accumulates storage charges at the applicant's authorized yard. It is in the interest of justice that the dispute between the parties be resolved to avoid delay and expense.

20. According to the respondent, section 17(8) of the Act allows parties to commence, continue and conclude arbitral proceedings, but no award in such proceedings should take effect until the application is determined.

21. It is the respondent's position that parties were engaged in mediation process instituted by the Insurance Regulatory Authority (IRA) and the applicant abandoned the process on the 7th June 2021 crystallizing the dispute, thus the cause of action accrued from that date.

22. The respondent maintained that the cause of action is not time barred as the limitation of actions for contracts is 6 years. Parties to contracts cannot set timelines outside those in a statute.

23. The respondent took the view, that the applicant's preliminary objection dated 19th September was filed on 29th September 2022 more than 3 months after the applicant delivered its response dated 13th June 2022. Under section 17(2) of the Act the issue of jurisdiction ought to have been dealt not later than at the time of submission of the defense. The preliminary objection did not therefore comply with section 17(2) of the Act.

24. The respondent relied on Kenya Hotels and Allied Workers Union v Armo Aquarius Ltd t/a Lily Palm Resort [2021] eKLR and Gladys Omato v Independent Electoral and Boundaries Commission [2021] eKLR that any assertion which claims to be a preliminary objection yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not a true preliminary objection which the court should allow to proceed.

25. The respondent urged that the interim award of 9th February 2023, should not be set aside because the arbitrator considered the submissions and decisions cited by the parties in coming to the conclusion that the preliminary objection was not merited.

26. The respondent posited that as long as parties were engaged in dialogue there could not have been a dispute. The dispute arose after the applicant sent an email to the respondent on 7th June 2021, declining the offer to settle the matter. Clause 9 of the policy cannot also oust statutory provisions where a statute provides that limitation period in contracts is six years. Parties cannot impose a shorter limitation period than that provided for by statute.

27. The respondent relied on Republic v PMS Innovateus Limited & another Exparte PZ Cussons Limited [2017] eKLR that a dispute is declared the moment parties disagree; Geo Miller and Company

Pvt. Ltd v Chairman, Rajasthan Vidyut Utpadan Nigam Ltd (2019) SCC SC 1137(No. 6), that limitation period does not run as long as parties are negotiation and the period of limitation would commence from the date of the last communication between parties.

28. Reliance was also placed on Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge [2018] eKLR, that an arbitration clause will be considered illegal in an instance where it is contrary to the provisions of the *Limitation of Actions Act* which sets out the period within which a claim based on contracts should be filed.

29. Relying on section 7 of the *Consumer Protection Act*, the respondent argued that since insurance policies are standard contracts that are not pre-negotiated, any ambiguity should be resolved against the insurer.

Determination

30. The core issue for determination in this application is whether the arbitral tribunal has jurisdiction to determine the dispute before it. Put differently, whether the dispute is time barred. The applicant took the view that it does not while the respondent maintained that it does.

31. As already pointed out, the genesis of this application is the arbitral tribunal's interim award No. 1 dated 9th February 2023. The tribunal dismissed the challenge to jurisdiction holding that it had jurisdiction as dispute is not time barred and that limitation of actions in contractual agreements is six years as provided for in the *Limitation of Actions Act*.

32. The applicant had challenged the tribunal's jurisdiction arguing that the contract between the parties provided for timeline within which to start arbitral proceeding but the respondent was late in initiating the proceedings, thus the dispute was time barred.

33. The respondent on his part contended that the dispute is not time barred, the arbitral tribunal has jurisdiction and the challenge to jurisdiction was properly rejected.

34. An application to this Court under section 17(6) the Act calls on the Court to evaluate the evidence, analyze it and make its own independent conclusion on the issue while making reference to the arbitration agreement. The task of the Court really, is to determine whether in its independent consideration the arbitral tribunal has or does not have jurisdiction to determine the dispute as the parties claim in their respective arguments.

35. As the court stated in West Mount Investments Ltd v Tridev Builders Ltd (HCCC No. 230 of 2016 (OS) [2017] eKLR:

> (24) [F]or any application under Section 17(6) of the Act the court is to consider four substantive issues. First, is whether there is a valid arbitration agreement. Secondly, is whether the arbitral tribunal is properly constituted and, thirdly, whether matters have been submitted to arbitration in accordance with the arbitration agreement. Finally, is whether the matters submitted to arbitration fall within the scope of the arbitration agreement.

36. There is no doubt in this application that the policy contained an arbitration agreement in clause 9. There is no claim that the arbitral tribunal was not properly constituted as that was not the challenge before the arbitral tribunal and is not one of the grounds raised in this application. There is also no argument that the dispute or matter submitted to arbitration does not fall within the scope of the arbitral agreement.

37. The gravamen of the application is that the dispute was not submitted to arbitration within the time required by clause 9. According to the applicant, although the claim was repudiated, arbitration

process was initiated outside the timelines without its consent. The respondent's position is that arbitral proceedings should have been initiated within 12 months which was not done, thus the arbitral tribunal does not have jurisdiction to determine the dispute on that account.

38. The applicant argued that the dispute arose on or about 7th October 2019 the date the letter declining to settle the claim was issued. However, the respondent did not start the arbitral process until 12th October 2021 when his advocate wrote a letter asking for appointment of arbitral tribunal.

39. The respondent's response was that parties were engaged in mediation and only came to arbitration after the applicant declined to settle the claim. According to the respondent, the time taken in negotiations, done in good faith, does not count when computing time within which to refer the dispute to arbitration.

40. I have perused the pleadings before the arbitral tribunal and the impugned arbitral award. I have also considered respective parties' arguments before this court.

41. The respondent took out a comprehensive insurance cover with the applicant for motor vehicle KCB 677U for the period 18th October 22018 to 17th October 2019. On 6th May 2019, the vehicle was involved in an accident and was extensively damaged on the front part. The respondent reported the accident to the applicant through his agent.

42. After investigations, the applicant repudiated the claim and informed the respondent's agent though letter dated 7th October 2019 that it would not process the claim. The agent communicated the applicant's decision to the respondent on 8th October 2019. The respondent lodged a complaint with the Insurance Regulatory Authority (IRA), which commenced negotiations between the parties to resolve the dispute.

43. Parties went into negotiations facilitated by IRA and even had a joint assessment of the vehicle to determine any damage that was not consistent with the accident. A report was then filed with IRA recommending partial settlement of the claim, excluding parts that were inconsistent with the accident.

44. The applicant however declined to make the recommended partial settlement of the claim through the email of June 2021 to IRA. Following this, the respondent also informed IRA that he would be seeking legal redress.

45. On 8th September 2021, the respondent wrote a letter to the applicant demanding payment which elicited no response. The respondent then served the applicant with a notice for arbitration dated 12th October 2021 suggesting two names of persons one of whom was to be appointed as the arbitrator. That letter was also not responded to. The respondent turned to the Chairperson of the Chartered Institute of Arbitrators (Kenya Branch) through letter dated 25th January 2022 to appoint an arbitrator.

46. Clause 9 of the policy (on disputes between the parties) provided;

> If any dispute arises between you and us on any matter relating to this policy such dispute will be referred to:
>
> a. A single mediator to be agreed between you and us within thirty (30) days of the dispute arising and the mediation process to be finalized within thirty (30) days thereafter or
>
> b. A single arbitrator agreed between us, to be appointed within thirty (30) days of the dispute arising. If we cannot agree, either party will refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) whose

> decision will be binding on you and us. The arbitral award will be final. If the dispute is not referred to the arbitrator within twelve (12) months we will assume that you have abandoned the claim.

47. The accident occurred on 6th May 2019 and the applicant was dully notified. Parties went into preliminary issues and on 7th October 2019, the applicant informed the respondent's agent that it was repudiating the claim. The agent communicated the applicant's decision to the respondent on 8th October 2019.

48. The issue was reported to IRA which facilitated negotiations between the parties but eventually on 3rd June 2021, the applicant declined to partially settle the claim as had been recommended by IRA. The respondent then informed IRA through email of 7th June 2021 that he would seek legal redress. It is noteworthy that none of the parties produced communications with IRA before this court but the assertions were not controverted by either party.

49. I have read the record and the impugned interim arbitral award No 1. The arbitral tribunal considered the challenge to jurisdiction and the argument that the dispute was time barred and held that parties had freely entered into negotiations and mediation which exceeded the time of 30 days provided for in clause 9 (a) of the policy. Parties had continued to co-operate even after expiry of the period of 30 days, culminating in the rejection of the proposal for partial settlement of the claim through an email of 3rd June 2021. The arbitral tribunal then ruled that it had jurisdiction and dismissed the challenge.

50. The arbitral tribunal further stated that section 6 of the Limitations of Actions Act provides that the life of a dispute arising out of a contract is 6 years from the date the cause of action accrued. The clause of twelve months in clause 9(b) of the policy would defeat the purpose of the matter and disenfranchise the respondent.

51. Arbitration is one of the mechanisms for resolving disputes. Parties may enter into an agreement with a clause on how they should resolve dispute(s) that arise from the terms of their contract, including referring such disputes to an arbitrator. In such a case, the parties opt to subject themselves to a dispute resolution mechanism other than the traditional court system. Ordinarily, where parties have freely chosen the forum through which to resolve their disputes, they are bound by the terms of the contract and forum they chose for resolving their disputes.

52. This positon was articulated in Kenya Shell Ltd v Kobil Petroleum Limited (supra), where the Court of Appeal observed that:

> Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts in this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligations in which event the *Arbitration Act*, Act no. 4 of 1995 (the "Act") would apply and the courts take a back seat.

53. In this application, the applicant's contention is that the dispute arose on 7th October 2019 and should have been referred to arbitration within 30 days from that date. The applicant does not deny that parties went into negotiations facilitated by IRA. While negotiating, parties did not insist on observing the timelines set under clause 9 of the policy. They took as much time as was necessary, including subjecting the vehicle to joint assessment.

54. It was not until June 2021 that the applicant informed IRA that it would not settle the claim as proposed. This was a clear demonstration that parties had waived the requirement of compliance with strict timelines in clause 9 of the contract. Had the applicant not willingly participated in IRA

mandated process [and without minding timelines], it would have been right for it to argue that the arbitration process was not commenced within the timelines.

55. However, the applicant having participated in the process, the dispute cannot be said to have arisen when the claim was repudiated in October 22019 because after that dated, parties opted to freely negotiate with a view to resolving the matter. That was why there was a recommendation that the applicant partially settle the claim, which the applicant declined in the email of June 2021 to IRA.

56. The respondent then served a formal demand dated 8th September 2021 for payment which did nor elicit a response. That, in my view, was the point when the dispute should be taken to have arisen after the respondent formally demanded settlement but the applicant declined to settle the claim.

57. This view finds support in Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, (1988) 2 SCC 338; where the Supreme Court of India observed that the existence of a dispute is essential for appointment of an arbitrator. The Court opined that a dispute arises when a claim is asserted by one party and denied by the other. The term 'dispute' entails a positive element and mere inaction to pay does not lead to the inference that dispute exists. Where the respondent had failed to finalise the bills due to the applicant, the Court held that cause of action would be treated as arising not from the date on which the payment became due, but on the date when the applicant first wrote to the respondent requesting finalisation of the bills.

58. Regarding clause 9 of the policy, it offers two possible dispute resolution mechanisms; mediation or arbitration. On mediation, parties are supposed to agree on the mediator within 3o days and the mediator is to resolve the dispute within 30 days. The applicant did not argue that the process before the IRA was a mediation under clause 9. Even if that was the case, as already alluded to, parties did not stick to the timelines of thirty (30) days that mediation should have taken. That means parties waived timelines under the contract given that none of them complained on the prolonged periodof negotiation.

59. Secondly, the applicant communicated to IRA in June 2021 that it would not settle the claim as recommended, a clear indication that the applicant was consciously participating in the process with a hope of amicably resolving the dispute. For that reason, the applicant could not turn around and assert that the dispute arose on 7th October 2019 and should have been resolved as was anticipated by clause 9.

60. A reading of clause 9 further reveals that it is not unequivocal on the mode of dispute resolution and the time lines within which the dispute should be resolved. Under clause 9(a) for instance, the mediator should be agreed on within (30) days after the dispute arises. Thereafter, the dispute should be resolved within thirty (30) days following the mediator's appointment.

61. There is however no clarity on what should happen if parties fail to agree on the mediator within 30 days, or the dispute is not resolved by the mediator within that 30 days of appointment. The clause does not also state whether or not the decision of the mediator is final and binding on the parties or what should happen next.

62. On the other hand, clause 9(b) provides that a single arbitrator is to be agreed between parties and appointed within thirty (30) days of the dispute arising. If parties do not agree, either party may refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) whose decision will be binding on the parties. The arbitral award is also final. If the dispute is not referred to the arbitrator within twelve (12) months it would be assumed that the respondent's claim would have been abandoned.

63. The emphasis in clause 9(b) is that a dispute should be referred to arbitration within twelve months after arising. I take the view, that since clause 9(a) is not conclusive on the dispute being resolved

through mediation, that leaves room for the dispute being taken to arbitration within twelve months of the dispute arising. This must be read to mean twelve months from the time the respondent asserted his claim following the failed amicable settlement of the dispute.

64. Clause 9(b) cannot however be read and understood to mean that the claim would be deemed to have been abandoned after twelve months as that would mean introducing a time bar which would be contrary to statute.

65. The view this court takes, therefore, is that patties having clearly decided to proceed with dispute resolution without strict compliance with time lines in the policy, the dispute was declared when the respondent wrote to the applicant in September 2021 demanding payment.

66. It would be inconceivable, therefore, that the applicant should now seek to rely on strict interpretation of clause 9 when it did not stick to the timeliness itself. I do not find fault with the arbitral tribunal's holding that it had jurisdiction thereby dismissing the challenge.

67. In the end, having considered the application, the response and arguments by parties, the conclusion I come to is that there is no merit in the application. It is declined and dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2023

E C MWITA

JUDGE