

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**MISC. APPLICATION NO 41 OF 2016**

**ARISING FROM CIVIL SUIT NO 741 OF 2015**

**SANLAM GENERAL INSURANCE (U) LTD**

**FORMERLY NIKO INSURANCE (U) LTD}.....APPLICANT**

**VS**

**1. VICTORIA MOTORS LTD}**

**2. ABACUS INSURANCE BROKERS (U) LTD}.....RESPONDENTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant commenced this application under the provisions of Order 6 rule 19 and 31 of the Civil Procedure Rules and section 98 of the Civil Procedure Act for leave to amend its statement of claim in the Plaint inter alia from Uganda shillings 750,558,532.62 to Uganda shillings 375,558,532.62/=. Furthermore the Applicant seeks amendment of the figure of Uganda shillings 750,558,532.62/= in the original Plaint to Uganda shillings 1,057,629,460.32/=.

At the hearing of the application Counsel Robert Iumba represented the Applicant while Counsel Brian Kalule represented the Respondent.

The Respondent's Counsel objected to the application on the ground that there is an arbitration clause requiring the parties to submit the dispute for arbitration and consequently the court had no jurisdiction to entertain an application for amendment of the Plaint. Otherwise the Respondent's Counsel has no objection to the application for amendment of the Plaint if the court has jurisdiction in the matter.

The Respondent's Counsel submitted that the court should not handle the application because there is an arbitration clause agreed to by the parties for reference of the dispute to the decision of an arbitrator. He was of the view that the court has no jurisdiction to try the suit and therefore to hear and determine the application for amendment of the Plaintiff. The defence of jurisdiction was averred in paragraph 9 of the Written Statement of Defence as well as paragraphs 6, 7 and 8 where it is averred that the insurance policy requires that disputes are resolved by arbitration and the suit should not be in the court. In the premises the court ought not to hear the application for amendment. Counsel relied on clause 13 of General Conditions of the policy which provides that all differences as to amount payable arising out of the policy shall be referred to the decision of an arbitrator appointed in writing by the parties. He submitted that a dispute had arisen as to the amount payable. The Applicant claims 750,558,532.62/- Uganda shillings. In paragraph 6 (a) (b) and (c) it is averred that vehicles were insured at 1,057,629,460.32/= shillings of which the Defendant paid only Uganda shillings 307,069,923/= leaving the outstanding claim of 750 million. In 6 (c) and (d) the Plaintiff avers that sums were due but it demanded reconciliation. In the WSD the Defendant avers in Para 4 (i) that the figure was based on an erroneous computation which did not take into account or offset various figures. It is the contention of the Respondent that the computation was based on erroneous interpretation of the contract on how the amounts should be computed upon cancellation of policy. Counsel relied on the authorities of **British American Tobacco vs. Lira Tobacco Stores HCMA No 924 of 2013** and **Yan Jian Uganda Co Ltd vs. Siwa Builders and Engineers HCMA 1147 of 2014**. In both decisions this court held that where the contract provides for arbitration the court shall refer the parties for arbitration and the suit lapses. Furthermore Counsel relied on the case of **George Omondi and 210 Others vs. Pension Fund and Retirements Benefits Authority Kenyan Court of Appeal Civil Appeal No. 5 of 2014** where it was held that the question of jurisdiction ought to be raised at the earliest opportunity. He prayed that the suit is dismissed and dispute referred for arbitration.

The Applicant's Counsel opposed the preliminary objection on the ground that section 13 of the policy clause relied on by the Respondent's Counsel only applies where there are differences as to the amount to be paid. The Applicant in various correspondences attached to the application wrote to the Respondent on the claim. There is a demand in the correspondence for outstanding

monies of Uganda shillings 750,558,532.62/=. The second Respondent on 23<sup>rd</sup> of Oct 2015 wrote back in annexure B5 indicating that there was need to do reconciliation and agree on the amount payable. He submitted that in paragraph 6 (2) of the affidavit in rejoinder Messrs Tumusiime and Kabega Advocates wrote and suggested reconciliation of accounts for the 4<sup>th</sup> of November 2015 at 10.00 am to establish the outstanding premium. The first Respondent in rejoinder wrote to the Applicant on the 2<sup>nd</sup> of November 2016 acknowledging the letter. According to the correspondence the matter in contention is not reconciliation of accounts which requires an arbitrator under clause 13. The issue of interpretation of policy is not captured under clause 13 of the General Conditions relied on for the arbitration.

If it is true that the amount due was in contest, then the Respondents would not have waited for the Applicant to file a case and thereafter make a deposit of almost half the money after service of summons. They paid Uganda shillings 375,000,000/=. In the premises the Applicant's Counsel submitted that the authorities cited are not applicable because disputes as to interpretation were not contemplated for reference to arbitration. It was only disputes as to amounts that are envisaged for settlement through arbitration. In the premises the cases cited are distinguishable. Without prejudice the Applicant's Counsel submitted that what is important is for justice to prevail and the court can hear the application. He submitted that under article 126 (2) (e) of the Constitution the Respondent's objection was a mere technicality and the court can deal with the substance of the dispute without regard to technicalities.

In rejoinder the Respondent's Counsel submitted that from the correspondence it is clear that there is a dispute as about how much should be paid. The fact that there is an issue of interpretation does not change anything. In paragraph 4 (i) (vi) of the Written Statement of Defence the Respondent averred that the computation was based on an erroneous application to the clause which led to use of a wrong rates that led to a wrong amount. Ultimately the dispute is caught by clause 13 which deals with disputes relating to the amount payable.

Counsel further submitted that according to the **Premium Nafta Products Ltd and others vs. Fili Shipping Co Ltd and others [2007] UKHL 40** it was held that in construction of an arbitration clause there is a presumption that the parties as rational businessmen intended any dispute to be referred to arbitration unless there is clear language that says that disputes of a

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

particular kind are subject to arbitration and others are not. Counsel submitted that in the absence of clear words that questions of interpretation are excluded from the dispute contemplated for reference, then the arbitrator has jurisdiction.

With reference to Article 126 (2) (e) of the Constitution, it does not require much comment. This is because reference is mandatory under section 5 of the Arbitration and Conciliation Act (a matter of substantive law). Finally on the question of interest of the parties, the duty of the court is to uphold the agreement of the parties.

### **Ruling**

I have considered the objection to the application for amendment on the sole ground that the dispute before the court is subject to an arbitration agreement and ought to be referred to arbitration under section 5 of the Arbitration and Conciliation Act. In other words the application for amendment of the Plaint though not opposed would be futile as the matter is for reference to arbitration in accordance with the mandatory provisions of section 5 of the Arbitration and Conciliation Act. Clause 13 of the General Conditions of the policy document provides that:

“All differences as to amount to be paid arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties indifference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing to do so by either of the parties or in cases the arbitrators before entering upon the reference. The umpire shall sit with the arbitrator and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability for any claim here under and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all the purpose be deemed to have been abandoned and shall not thereafter be recoverable hereunder.”

The clause clearly deals with all differences as to amount to be paid arising out of the policy. Where there is any difference as to the amount to be paid arising out of the policy, such a

difference shall be referred to the decision of an arbitrator. The provision to refer any difference as to amount arising out of the policy to an arbitrator is couched in mandatory language due to use of the phrase: "shall be referred to the decision of an arbitrator".

The basic question to be determined is whether there is any difference or dispute as to the amount to be paid arising out of the policy. The question as to whether a reference should be made under clause 13 quoted above arises from the affidavit in reply of Robert Sessanga, the internal auditor of the first Respondent. He deposed that the Applicant provided insurance cover for vehicles owned by the first Respondent for the period 2014 and 2015. The Applicant and the first Respondent executed an insurance policy. The parties have since cancelled the policy and a dispute arose as to how much is payable under the policy upon cancellation. He further deposes on the basis of information of his lawyers that the court has no jurisdiction to hear the application for amendment of pleadings due to the clause making it mandatory to refer the dispute to the decision of an arbitrator under clause 13 quoted above.

In the affidavit in rejoinder, the Credit Manager of the Applicant, Mr Robert Mazima, deposes that the Respondent tactfully, deliberately and negligently failed to execute insurance policies and took out several motor insurance covers from the Applicant through the second Respondent as an insurance broker. He denies that the matter before the court has to do with how much is payable but concerns recovery of the outstanding premiums which are well known to the Respondents. He refers to several correspondences to make this assertion and on the strength of advice of his lawyers and contends that the issue is not an issue of reconciliation of figures but that of interpreting the policy by the first Respondent in the quoted correspondences. In the correspondences annexure "A" the Applicant wrote to the first Respondent in a letter dated 27<sup>th</sup> of August 2015 indicating the outstanding amount as US\$ 438,659.32 according to an attached statement. In reply the second Respondent acting on behalf of the first Respondent requested for a further reconciliation. Among the issues raised is that amounts are paid in Uganda shillings and the rates should be synchronised with the date of risk initiation. On 31 August and Applicant wrote to the second Respondent and the Applicant indicated in a schedule the outstanding premiums with corresponding amounts in Uganda shillings. In the next reply dated 3<sup>rd</sup> of October 2015 the second Respondent acting on the behalf of the first Respondent raised an issue of full

premium being claimed for certain vehicles when the first Respondent had claimed for compensation in respect of these vehicle but the organisation has not availed discharge vouchers. On 13 October 2015 the Applicant indicated the outstanding amount and claimed to have resolved the entire Respondent's queries. Thereafter the lawyers of the Applicant Messrs Tumusiime, Irumba & Company Advocates and Solicitors in a letter dated 22<sup>nd</sup> of October 2015 demanded for the outstanding amount being a sum of Uganda shillings 750,558,532.62/= . On 23 October 2015 the second Respondent acting on behalf of the first Respondent wrote back and claimed that the outstanding amount required reconciliation and was still in dispute. In a further letter dated 2<sup>nd</sup> of November 2015 the first Respondent's director wrote that they were reluctant to attend a meeting called by the Applicant's lawyers and that the point of contention is a matter of interpreting the terms and conditions of the policy executed and issued to the first Respondent. Each vehicle was insured individually. They furnished details pertaining to each vehicle. When accidents occurred, claims in particular write-offs were being processed for the particular vehicle and not as a group.

I have carefully considered the controversy and my holding is that there is a question between the parties of how much the outstanding amount due to the Applicant is. The Respondent does not dispute its obligation to pay the outstanding premiums which may be due but contends particularly in the letter of the first respondent dated 2<sup>nd</sup> of November 2015 and in response to the demand of Messrs Tumusiime, Irumba and Co Advocates that the outstanding claim required interpretation by NIKO Insurance. Specifically they insured each vehicle individually. They furnished NIKO Insurance with details of each vehicle and when accidents occurred, claims in particular write offs were being processed for particular vehicles but not in a group. They are willing to pay premiums and clearly the issue is how much the outstanding amount is. The actual controversy for trial arises from the pleadings in the suit which I refer to later on.

The law for references to arbitration of a suit before court is section 5 of the Arbitration and Conciliation Act which provides as follows:

“5. Stay of legal proceedings.

(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she 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) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral proceedings may be commenced or continued and an arbitral award may be made.”

Section 5 (1) of the Arbitration and Conciliation Act clearly requires a judge or magistrate before whom proceedings have been brought in a matter which is the subject of an arbitration agreement to upon the application of a party and after hearing the parties, refer the matter back to arbitration. In other words a party may apply for reference to arbitration after filing a Written Statement of Defence. The filing of a Written Statement of Defence does not operate as a waiver of the right to apply for reference of the matter to arbitration. Secondly the wording of section 5 of the Arbitration and Conciliation Act is mandatory as far as referring the matter back to arbitration is concerned.

The powers of the court under section 5 (1) of the Arbitration and Conciliation Act is confined to determining whether the arbitration agreement is null and void, inoperative or incapable of being performed or whether there is not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration. The jurisdiction whether to refer the dispute for arbitration or not is considered under section 5 (1) of the Arbitration and Conciliation Act and is not a discretionary power.

The question before court is whether there is in fact a dispute contemplated by the parties for reference. In terms of clause 13 of the General Conditions of the policy, the issue is whether the

dispute relates to the amount payable. As noted above the respondent does not deny liability to pay premium that is due but raises an issue of what is due upon consideration of factors such as write offs due to accidents etc.

An arbitration agreement is defined by section 2 (1) of the Arbitration and Conciliation Act as:

"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.."

In the case of **Heyman and Another vs. Darwin's, Ltd [1942] 1 All ER 337** Viscount Simon LC held that "an arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made". Furthermore Lord Macmillan at page 347 held that where proceedings have been instituted by one party where the parties have an arbitration clause, the first thing to be ascertained is the precise nature of the dispute which has arisen and many cases are concerned with:

"... the interpretation of the scope of the terms of reference, for an arbitrator has jurisdiction only to determine such matters as, on a sound interpretation of the terms of reference, the parties have agreed to refer to him."

Clause 13 of the General Conditions of the policy which forms the basis of the objection of the Respondent's Counsel deals with "all differences as to amount to be paid arising out of the policy". It includes all and every dispute which has an effect or bearing on the amount to be paid. Whether the issue relates to interpretation of the terms of the contract or to reconciliation of accounts and provided it affects the amount to be paid it falls within the jurisdiction of an arbitrator appointed by the parties. In this suit the respondent does not deny liability to pay premium. The averments in the WSD paragraph 4 (g) and (h) allege that the calculations of the Plaintiff/Applicant are contrary to the terms of the policy generally and clause 6 particularly. Paragraph 4 (i) of the WSD gives the grounds for contesting the computation of the Applicant. In the reply to the WSD, the Applicant avers in paragraph 9 and 10 that the calculations were

proper. It further avers in paragraph 11 issues about VAT refunds which would affect the final obligation of the parties.

The court cannot at this stage decide the merits of the suit disclosed by the pleadings. Controversies arise in terms of Order 15 rule 1 of the Civil Procedure Rules where one party asserts a proposition of fact or law which is denied by the other party. As far as the suit and defence thereto are concerned the controversies affect the issue of amount to be paid and a dispute has arisen as to the amount payable within the meaning of clause 13 of the General Conditions.

The issue that remains is what order should be made. Section 5 (1) requires the court to refer the dispute back to arbitration. What happens to the suit? That issue was resolved in **Miscellaneous Application Number 310 of 2013 between Daniel Delestre and others versus Hits Telecom (U) Ltd.** I held that where the court orders the dispute embodied in the proceedings before court to be referred for arbitration, the pending suit lapses. Secondly the High Court retains appellate and supervisory powers as far as the arbitral proceedings are concerned. Under section 16 of the Arbitration and Conciliation Act, an arbitral tribunal upon ruling that it has jurisdiction in any matter, entitles the aggrieved party to apply to the court within 30 days of the ruling to decide the matter and the decision of the High Court shall be final. Under section 27, the arbitral tribunal or any of the parties with approval of the arbitral tribunal may request court assistance in taking evidence and the court may execute the request according to the rules for taking evidence. Lastly an aggrieved party apply under section 34 of the Arbitration and Conciliation Act to set aside the arbitral award after it is made or to have it enforced under section 36 thereof. There would be no need to stay proceedings as an award is a final award enforceable by the court. Moreover apart from enjoying appellate or supervisory control over the arbitral proceedings, section 9 of the Arbitration and Conciliation Act provides that that no court shall intervene in matters governed by the Arbitration and Conciliation Act. In other words arbitration proceedings do not need to be interlocutory but are independent of the court save for intervention by the court in the manner provided for under the Arbitration and Conciliation Act and save for reference made by the court to arbitration of particular issues when the suit remains pending. Where the parties need intervention of court specific rules of procedure have been provided under section 71 of the Act

and the first schedule thereto, prescribing the procedure for moving the court in any manner enabled by the Arbitration and Conciliation Act. The application is registered as an arbitration cause and not a civil suit.

In the premises the dispute is referred to arbitration under clause 13 of the General Conditions of Contract and the parties shall commence the arbitration process as agreed to therein. The application for amendment of the Plaint serves no useful purpose and the suit in this court abates and costs occasioned thus far by filing the suit and applications in this court are referred to the arbitral tribunal for resolution as well.

Ruling delivered on the 14<sup>th</sup> of March 2016 at 9.30 am

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Robert Iumba Counsel for the Applicant

Brian Kalule Counsel for the Respondents

Robert Sessanga Internal Auditor of first Respondent present

Edward Kitumba MD of second Respondent in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**14<sup>th</sup> March 2016**

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*