

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. E077 OF 2024

BIDCO AFRICA LTD
APPELLANT

VERSUS

RICHARD KAMIRI MACHARIA t/a
BRIGHTWAVES GENERAL SUPPLIES
RESPONDENT

***(Being an appeal from the ruling of Hon. Abdulgadir
Lorot - CM - dated 13th June 2024 in Naivasha Civil Case
No. E250 of 2023)***

JUDGMENT

1. The appellant herein filed Naivasha Civil Case No. E250/2023 against the respondent. It sought for special damages amounting to Kshs.1,543,316/= being the sum paid to it by M/s Kenindia Assurance Company Ltd under policy certificate No. P/110/06/0662/2015/02/100005. This was compensation for its goods which were damaged/destroyed/stolen as a result of an accident involving the respondent's truck KCL 918S which was transporting the goods to Naivas and Gilanis Supermarkets in Nakuru town.

2. After being served with the pleadings the respondent on 19th June 2023 filed the following documents all dated 13th June 2023:
 - Memorandum of appearance.
 - Statement of defence
 - Defendant's list of witnesses
 - Notice of preliminary objection
3. The preliminary objection was challenging the court's jurisdiction to hear the matter, as the issues raised go against the provisions of Section 10 of the Arbitration Act No. 4 of 1995. The respondent also referred to mediation and arbitration as per clause 17 of the Local Transport Agreement dated 19th November 2018.
4. The preliminary objection was heard by way of written submissions. Thereafter a ruling was delivered on 13th June 2024, whereby the preliminary objection was allowed and the suit was stayed in its entirety.

5. The appellant was aggrieved and filed this appeal dated 11th July 2024 on the following grounds:

- (i) That the Learned Trial Magistrate misapprehended and misguided himself on the interpretation of Section 6(1) of the Arbitration Act, No. 4 of 1995 in finding that the responded did not acquiesce himself to the jurisdiction of the Trial Court despite filing a statement of defence.***
- (ii) That the Learned Trial Magistrate erred in both law and fact in failing to consider that the suit at the Trial Court was brought under the Insurance Doctrine of Subrogation.***
- (iii) That the Learned Trial Magistrate erred in both law and fact in failing to consider the Appellant's submissions thereby reaching a wrong conclusion.***

6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. These were filed by Christine Oraro and co-advocates and are dated 13th January 2025. Counsel gave a background of the facts. She referred to clause 17 of the Local Transport Agreement dated 19th November 2018 which was relied on by the respondent. She submitted on the court's duty to re-hear the case and make its own conclusion. Reference was made to the **Machakos High Court case of Moiz Motor Limited & another V Muthoka & 2 others (Civil Appeal No. E079 of 2022 [2023] KEHC 26428** which cited the case of **Coghlan V Cumberland [1898] 1 Ch 704**.
8. On the grounds of appeal counsel first referred to Section 6(1) of the Arbitration Act and submitted that the parties had entered into a contractual agreement and were thus bound by clause 17 therein. Further that it was open to the respondent to apply "for stay of proceedings not later than entering appearance but before filing any pleadings." In defining what a pleading is counsel referred to the definition in Section 2 of the Civil Procedure Act Cap 21. Considering the said definition she contended that a statement of

defence is a pleading. Hence by filing it the respondent voluntarily subjected himself to the jurisdiction of the court and cannot run away from it.

9. She cited the **Court of Appeal case No. 75 of 2017 - Adrec Limited V Nation Media Group Ltd [2017] eKLR** and referred further to the case of **Corporate Insurance V Wachira (1995 - 1998) I EA 20** as was cited with approval in the case of **Adrec Ltd (Supra)** where it was held that the arbitral clause in the contract in question was in the nature of a Scott V. Avery clause which provided that disputes shall be referred to arbitration. That the court went on to hold that:

“In the present case, if the appellant wished to take the benefit of the arbitration clause, it was obliged to apply for a stay after entering appearance and before delivering any pleadings. By filing a defence the appellant lost its right to rely on the clause.”

Also see – **Fairline Supermarket Limited V Barclays Bank Limited NAI HCCC No. 102 of 2011.**

10. Counsel thus submitted that the filing of the defence dated 13th June 2024 was a fundamental error which cannot be remedied by invoking Act 159 of the Constitution.
11. Referring to paragraph 7 of the appellant's plaint dated 8th May 2023 counsel referred to its Insurance cover with Kenidia Assurance Company Limited under which it was compensated for the loss suffered while they were entitled to recover from the respondent. Thus on the doctrine of subrogation reliance was placed on the case of **Leli Chaka Noro Vs Maree Ahmed & S.M. Lardhib [2017] eKLR** and **Independent and Electoral Boundaries Commission & another V Stephen Mutinda Mule & 3 others [2014] eKLR** which cited with approval the decision of the **Supreme Court of Nigeria in Adetown Oladeji (NIG) Vs Nigeria Breweries PLC SC 91/2002.** Counsel urged the court to hold that the suit was correctly filed under

the insurance doctrine of subrogation, the appellant's insurer having fully compensated them for their loss.

Respondent's submissions

12. The same were filed by Bedan Njeri & Co. Advocates and are dated 14th January 2025. Counsel gave a background of the facts while also referring to clause 17 of the agreement between the appellant and respondent. He referred to the accident involving their motor vehicle registration No. KCL 918S which overturned while carrying the appellant's goods.
13. Counsel submitted that they expected the appellant to invite them to try and resolve the dispute. To their surprise a suit was filed by the appellant, forcing them to file a preliminary objection, and defence alongside the memorandum of appearance. The preliminary objection was heard and a ruling was delivered hence the appeal.

14. Counsel referred to Section 6(1) of the Arbitration Act No. 4 of 1995 and referred to a number of cases in support of his position that the step he took was correct. The cases are:

- Charles Njogu Lofty V Bedonin Enterprises Limited Civil Appeal No. 253 of 2003.
- Lavington Security Guards Limited V Kenya Electricity Generating Company (Civil Suit No. 750 of 2008).
- Niazsons (K) Limited V China Road & Bridge Corporation (Kenya) Civil Appeal No. 1 of 2000.
- Eunice Soko Mlagui V Suresh Parmar & 4 others [2017] eKLR.
- Mt. Kenya University V Step Holding (K) Ltd [2018] eKLR.

15. Counsel submitted that since the preliminary objection was filed contemporaneously with the defence, the preliminary objection had to be heard first as it was on a point of law. That the preliminary objection had no specific prayer, but since it was allowed it should be construed as an application for stay of proceedings. He argued that the preliminary objection contested the

court's jurisdiction due to the presence of an arbitration clause in the agreement.

16. He urged the court to find that: filing a defence does not automatically waive the right to file an application for stay of proceedings; the only requirement is to file the application for stay promptly at 1st instance; having filed the 3 documents together it followed that the preliminary objection was deemed to have been filed earlier; since the preliminary objection did not require the court to discuss the suit, it should be deemed as an application for stay; further Section 10 of the Arbitration Act bars this court from intervening in this matter.
17. On the doctrine of subrogation counsel submitted that this was never brought up in the lower court though mentioned in the lower court's ruling. To him the issue is whether there was a dispute capable of being referred to arbitration by dint of Section 6(1) of the Arbitration Act. Reliance on this was placed on **Patel V**

Nthiga (Civil Appeal E431 of 2021) [2023] KEHC 20549 KLR. Counsel argues that the parties' intention was to oust the court's jurisdiction and have preference to have the dispute settled through arbitration. He urged the court to find the appeal unmerited and uphold the ruling of the lower court.

Analysis and Determination

18. This being a first appeal it is this court's duty under Section 78 of the Civil Procedure Act to re-evaluate and assess the evidence tendered before the trial court and come to its own independent conclusion. See **Moize Motor Limited & another (Supra), Selle & another V Association Motor Boat Co. Ltd & others [1968] E.A 123; Peters V Sunday post (1958) E.A 424.**
19. Upon careful consideration of the record of appeal, grounds of appeal, submissions by both parties, cited authorities, the issue I find falling for determination is whether the preliminary objection dated 13th June 2023 amounted to an application for stay of proceedings.

20. First and foremost it is not disputed that there is a contractual agreement between the appellant and respondent; Clause 17 of the agreement provides thus:

“In the event of a dispute between the Company and the Transporter, the parties shall attempt to resolve the dispute in good faith. Failing resolution by such mechanism, the issue shall be submitted to a mutually agreeable mediation service. Failing resolution as the consequence of mediation, the matter shall be referred to Arbitration by a single arbitrator to be agreed in writing by both parties, failing which the Arbitrator shall be appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya). Such shall be conducted in Nairobi in accordance with the Rules of Arbitration of the said institute and subject to and in accordance with the provisions of the Arbitration Act 1995 and Arbitration (Amendment) Act of 2009 of Kenya. The decision and or award of the Arbitrator shall be final and binding on the parties.”

21. A reading of clause 17 confirms that the two parties have agreed to refer any dispute between them to arbitration.
22. The next question is whether the parties are governed by the Arbitration Act. The answer is in the affirmative since parties cannot be left to do things the way they want.
23. Section 6(1) of the Arbitration Act provides as follows:

“6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it 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.”

24. Section 6 (1) above gives direction on the procedure to be followed when proceedings which are the subject of arbitration are filed before the court. That is what is before the lower court and now here.
25. The position clearly sets out the application of Section 6 (1) Arbitration Act in the case of **Adrec Limited V Nation Media Group Limited (Supra)** by stating thus:

“The suit brought in the High Court by the appellant relates to a matter which is the subject of an arbitration agreement vide clause 16 of the Distritorship Agreement. Consequently with Section 6 (1) of the Arbitration Act, it was open to the respondent to apply “not later than the time when the respondent entered appearance or otherwise acknowledged the claim against which the stay of the suit was sought. The record shows clearly that the respondent merely filed a notice of appointment of advocates and proceeded

to apply for stay of the suit. Once a defendant in a suit founded on a contract containing an arbitral clause, enters appearance or causes a notice of appointment or intervene of appearance files an application for stay of proceedings, the court is statutorily obligated to stay the proceedings and refer the parties to arbitration as provided in the arbitral clause in the Agreement unless the court makes such findings as are referred to in (a) and (b) of Section 6 (1) of the Arbitration Act. It should be emphasized that the right to seek and obtain stay of proceedings under Section 6 (1) of the Arbitration Act is lost the moment a defence is filed in the proceedings. By dint of the defence the party filing it subject itself to jurisdiction of the court and cannot therefore resile from that position.”

Also see **Fairlane Supermarket Limited (Supra)**.

26. In the present case the respondent filed a memorandum of appearance, defence and preliminary objection on the same day. Nobody forced him to file

the defence. From the provisions of Section 6 (1) of the Arbitration Act and the holding by the Court of Appeal in the above case of **Adrec Limited** (supra) the respondent ought to have filed an application for stay of proceedings and reference of the matter to arbitration upon filing of the memorandum of appearance. What stopped that? What made him think that a preliminary objection is deemed to act as an application for stay of execution as he claims? Even if it did the moment he filed his statement of defence the door for applying for stay of execution was shut, under Section 6 (1) of the Arbitration Act. This has nothing to do with Section 10 of the said Act since the directions under Section 6 (1) of the Act must be complied with.

27. The above being the position, I find that the respondent having filed the defence dated 13th June 2023 before filing an application for stay of proceedings and a reference to arbitration locked himself out of the arbitral clause, and the court has jurisdiction to hear

the matter. However if the parties are willing they could agree to have the suit stayed and they go for arbitration.

28. The ruling delivered by the learned trial magistrate on 13th June 2024 is hereby set aside. The file is hereby sent back to the lower court for hearing. Costs shall be in the cause.

29. Orders accordingly.

Delivered virtually, dated and signed this 6th day of August, 2025 in open court at Nakuru.

**H. I. ONG'UDI
JUDGE**