REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E316 OF 2020

SAIMON NTASIKOI NOONKANAS.....APPELLANT

-VERSUS-

RESOLUTION INSURANCE LIMITED..... RESPONDENT

(Being an appeal from the ruling of Mmasi, SPM delivered on 23rd October, 2020 in

Nairobi CMCC No. 749 of 2020)

JUDGMENT

1. **Saimon Ntasikoi Noonkanas**, (hereafter the Appellant) had sued **Resolution Insurance Limited** (hereafter the Respondent) in the lower court , seeking payment of the sum of Kshs. 6,970,000/- and damages for breach, arising from the **Private Motor Vehicle Policy No. P/130/0701/2017/4721** (hereafter the Policy) issued by the Respondent Company in respect of the Appellant's motor vehicle registration number **KCM 411M.** The said vehicle was allegedly written off following damage sustained in an accident on or about the 24th September, 2017. The Appellant averred that subsequent to lodging his claim, the Respondent sent him an offer letter accompanied by a discharge voucher, by which the Respondent proposed to pay him an all-inclusive sum of Kshs. 6,970,000/- as compensation for the motor vehicle, subject to certain conditions and terms in the offer letter; that the Appellant accepted the offer and complied with the terms and conditions therein including the execution of the discharge voucher, but that notwithstanding the Respondent had failed, refused and or neglected to pay the amount owed or agreed, occasioning the Appellant loss and damage.

2. The Respondent having entered appearance in the suit proceeded to file a chamber summons dated 17th March 2020, under Section 6 (1) and (2) of the Arbitration Act, seeking an order to stay the proceedings and referral of the dispute to arbitration in accordance with clause 8 (b) of the Policy. The motion was anchored on the key grounds that the Appellant had instituted the suit against the Respondent seeking to enforce his alleged rights arising from the Policy and that pursuant to Clause 8 (b) of the Policy, any dispute arising between the parties under the Policy was subject to arbitration. The motion was supported by the affidavit sworn by **Elizabeth Wachira,** the claims manager with the Respondent in amplifying the grounds on the face of the motion.

3. The Appellant opposed the chamber summons through his replying affidavit. By the ruling delivered on 23rd October 2020, the lower court allowed the chamber summons. That ruling provoked the instant appeal which is based on the following grounds:

"1. The Hon. Magistrate erred in both law and fact in staying the proceedings and directing that the dispute herein be referred to arbitration even though there was no arbitration agreement in the discharge voucher being enforced by the plaintiff.

2.The Hon. Magistrate erred in both law and fact in making a decision where there is no existing dispute warranting arbitration as the Defendant having made a settlement offer and the Plaintiff having accepted the offer.

3.The Hon. Magistrate erred in both law and fact in failing to consider that the suit was for enforcement of the discharge voucher made between the Plaintiff and the Defendant.

4.The Hon. Magistrate erred in both law and fact in failing to acknowledge the Defendant's mischief alleging unsubstantiated claims of fraud and instigating investigations after it had concluded and approved the settlement of the claim with the Plaintiff.

5.The Hon. Magistrate erred in both law and fact in failing to note that the Defendant does not want to pay the Plaintiff the claimed amount to the extent that they created and or fabricated allegations of fraud 2 years after they agreed to settle the insurance claim.

6. The Hon. Magistrate erred in both law and fact and misdirected herself in failing to acknowledge that the letter of offer and Discharge Voucher in the present suit have not been nullified and or set aside and constituted a valid contract for enforcement.

7. The Hon. Magistrate erred in both law and fact in failing to consider that the Defendant's Application dated 17th March, 2020 was an afterthought and filed to avoid paying out a settlement in fulfilment of a valid contract.

8. The Hon. Magistrate erred in both law and fact in failing to consider the Plaintiff's averments in the Replying Affidavit dated 11th August, 2020 and submissions filed in Court on 29th September, 2020 and instead rendered a ruling that did not include the Plaintiff's representations before the court clearly showing bias and that the court had made predetermined position to exclude the Plaintiff.

9. The Hon. Magistrate erred in both law and fact in failing to acknowledge and appreciate the numerous authorities cited by the plaintiff from the Court of Appeal which clearly contradict the position taken by the learned Magistrate in her Ruling subject of this appeal."

4. The appeal was canvassed by way of written submissions. Anchoring his submissions on the provisions of Section 6(1) (b) & (3) of the Arbitration Act and placing reliance on the decision in **UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR,** counsel for the Appellant submitted that there was not in fact any dispute between the parties concerning the matters agreed to be referred to arbitration under the Policy, as the settlement proposed in the Respondent's offer letter of 19th March 2018 had been accepted by the Appellant by executing the discharge voucher on 20th March 2018 and complying with the terms in the offer letter and that the suit in the lower court was seeking to enforce the settlement.

5. Further citing the decisions in **Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd (1986) eKLR** and **Margret Gakenia Mwaniki v Kenya Orient Insurance Limited [2020] eKLR** counsel argued that once the Respondent offered to compromise the claim which offer was subsequently accepted by the Appellant, a valid contract was sealed; that such contract was good unless and until set aside for fraud, which in this instance was not pleaded and demonstrated to the requisite standard; and that the said contract compromised the Appellant's initial claim and superseded the arbitration clause in the Policy. Thus, the Respondent could not invoke the arbitration clause to avoid the settlement.

6. Concerning the question of the admissibility of the evidence of the offer that was made by the Respondent on a *"without prejudice" basis,* counsel argued that this instant is an exception to the general rule in section 23(1) of the Evidence Act, because a legally binding contract was formed when the Appellant received the offer letter and accepted it by executing the discharge voucher. Counsel cited several authorities for the proposition, including **Halsbury's Law of England Vol 17** at paragraph 213, where it is stated that the contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it, which he said is the case herein ; **Mumias Sugar Co. Ltd & Another v Beatrice Akinyi Omondi [2016] eKLR** and **Trinity Prime Investments Limited v Lion of Kenya Insurance Company Limited [2015] eKLR** where **Ringera J** (as he then was) found that a discharge voucher executed pursuant to an offer "*constituted a contract couched in clear and unambiguous terms*". The court was urged to allow the appeal.

7. The Respondent defended the decision of the lower court. Firstly, referring to Section 6(1) & (2) of the Arbitration Act counsel contended that the dispute between the parties herein was governed by the Policy and that clause 8(b) of the said Policy provided for arbitration in the event of a dispute on any matter relating to the Policy, which in his view included the matter before the lower court. That the arbitration clause could only be defeated if it was caught up by the provisions of Sub-section 1 (a) or (b) of section 6 of the Arbitration Act as to being null and void, inoperative or incapable of being performed or where there was not in fact any dispute between the parties, concerning matters agreed to be referred for arbitration.

8. He asserted that the validity of the arbitration clause was not challenged and that there existed a dispute between the parties as the Appellant seeks compensation for alleged breach of the Policy of insurance. He sought to distinguish the facts of this case from the case of **UAP Provincial Insurance Company vs Michael John Becket's** where the settlement had been preceded by lengthy negotiations, unlike in this case where he asserted that no agreement had been concluded between the parties . As regards **Lochab's** case, he asserted that repudiation was done several months after the offer letter and part payment had been done and that the suit was brought to enforce a contract under a discharge voucher, unlike in this case which is not exclusively brought for such purpose.

9. Regarding the application of the "*without prejudice rule*", counsel argued that in the case of **Mumias Company Ltd V Beatrice Akinyi Omondi** unlike in this case, the offer to settle had not been repudiated and no fraud had been discovered. Thus, he took the position that the discharge voucher in this case is unenforceable on account of fraud by the Appellant in violation of the principle of *uberrimae fidei* applicable in insurance contracts, and that therefore the said voucher cannot be treated as constituting a separate contract outside of the Policy, as indeed clause 7 thereof permitted repudiation of claims for fraud.

10. He contended that the suit in the lower court was not brought to enforce a settlement but for alleged breach of the insurance Policy, which claim could not succeed on account of alleged serious acts of fraud on the part of the Appellant. The Court was urged to uphold the decision of the lower Court. Finally, counsel took issue with the relief in the memorandum of appeal seeking that default judgment be entered against the Respondent. According to counsel, the prayer was misplaced as no application for such judgment had been sought in the lower court, the matter having proceeded upon the Respondent's motion for stay of proceedings under section 6 of the Arbitration Act. The court was urged to dismiss the appeal.

11. The court has perused the record of the lower court, considered the grounds of appeal, and the parties' submissions in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11** and **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278.**

12. The Court of Appeal stated in **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** that:

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case *of Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2EA 212* wherein the Court of Appeal held, *inter alia*, that: -

"On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

13. This appeal emanates from a ruling delivered on 23rd October, 2020 allowing the Respondent's chamber summons dated 17th March, 2020 seeking to stay the proceedings in the lower court pending arbitration. The chamber summons was expressed to be brought under Section 6 (1) and (2) of the Arbitration Act. There is no dispute that the Respondent had insured the Appellant's motor vehicle registration number **KCM 411M** under a Policy No. P/130/0701/2017/4721 (the Policy) prior to the alleged accident involving the vehicle, and the Appellant had lodged his claim seeking to be indemnified by the Respondent. Further, it is undisputed

that clause 8 (b) of the Policy document provided for referral of any disputes related to the Policy to arbitration. The Respondent had invoked the said clause in the chamber summons.

14. The said Clause 8 of the Policy Agreement is titled **"Dispute between You and Us"** and provided that:-

"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 not later than thirty (30) days thereafter.**

(b) **A single arbitrator, under the rules of Arbitration Act 1995 of Kenya, agreed between us, to be appointed thirty (30) days of the dispute arising, if we cannot agree, either party can apply to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) to appoint an arbitrator whose decision will be binding on you and us. The arbitral award be final. If the dispute is not referred to the arbitration process within twelve (12) months, we will assume you have abandoned the claim.**

(c) **The Costs of arbitration (including fees and expenses of the arbitrators) shall be shared equally between the parties UNLESS the award expressly provides otherwise."**

15. The Respondent's application in the lower court was premised on the provisions of Section 6 (1) and (2) of the Arbitration Act which provide that:

"(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 otherwise acknowledges the claim against which the stay of proceedings is sought, 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.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

16. On this appeal, as in the lower court, the dispute has centered upon the legal impediment in section 6 (1) (b) above. The question whether the summons in the lower court was brought in compliance with the statutory requirements of Section 6(1) of the Arbitration Act raised for the first time on this appeal by the Appellant cannot be entertained as no such issue was raised before the trial court. Similarly, the prayer in the memorandum of appeal seeking entry of default judgment is unsuited for the appeal as the proceedings giving rise to this appeal did not deal with such a matter. Besides, pursuant to the provisions of section 6 (1) of the Arbitration Act, a chamber summons under the section could only be brought before the filing of a defence statement by the Respondent, and once the application was allowed, the effect was to stay proceedings in the suit. No step could be taken in the lower court suit during the subsistence of the stay order. The prayer for default judgment is therefore misconceived.

17. The Court of Appeal in **Kenneth K. Mwangi v City County of Nairobi & 2 others [2017] eKLR** while address a similar situation cited with approval the decision in **George Owen Nandi V Ruth Watiri Kibe, CA No 39 of 2015** stating that:

"We are in agreement with the 2nd respondent's submissions that these issues are being raised for the first time in this appeal. They are not among the grounds of appeal filed in court. Nor has the appellant sought and obtained leave from this court to argue them. We have no justification at all to entertain the issues so late in the day. In the case of George Owen Nandi V Ruth Watiri Kibe, CA No 39 of 2015 this Court observed as follows regarding new issues that are raised before it

for the first time:

"In general, a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point, which has not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See Nyangau V Nyakwara [1986] KLR 712)".

Similarly in the case of North Staffordshire Railway Company V Edge [1920] A. C. 254, Lord Birkenhead justified why an appellate court is reluctant to entertain new issues on appeal in these terms:

"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...

The efficiency and the authority of a court of appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake a decision which may be of the highest importance without having received any assistance at all from the judges in the court's below."

We entirely agree with and endorse these observations and accordingly decline to entertain the new grounds urged before us by the appellant for the first time" (Emphasis added).

18. Thus, in my considered view, this appeal turns on the sole question whether there was not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration as envisaged in sub-section 6 (1) (b) of the Arbitration Act. That question is closely connected to the question whether the undisputed offer letter and discharge voucher constituted a complete and independent contract that superseded the Policy that could be enforced as such, as held in the **Lochab** case. The Appellant's position is in the negative, while the Respondent asserts that indeed there was a dispute relating to matters agreed to be referred to arbitration under the Policy.

19. In this regard, this court has looked at the offer letter and discharge voucher. Without a doubt, the two documents comprise a definite offer by the Respondent and acceptance thereof by the Appellant. All that remained was the payment of agreed sums. On the face of the documents, there was *ex facie* a binding contract between the parties. Evidence of lengthy negotiations and or part payment may go to confirm the making of a contract, but these are not necessary ingredients to the making of a contract. The essence of the dicta in **Michael John Beckett's** case is not any less applicable to this case because there were lengthy negotiations preceding the compromise therein unlike in this case. Ditto for **Lochab's** case: it is no less applicable in this case because repudiation herein was done in two months unlike in **Lochab's** case where repudiation was made several months after the settlement and part payment pursuant thereto. Indeed, in that case, as herein, the Respondent had attempted to repudiate the settlement on the basis of investigations instituted *after* the compromise had been reached, on the basis of mistake. It was to no avail, as the court affirmed the compromise.

20. In the **Mumias** case, the Court stated that in order to determine whether parties had reached an agreement it must inquire whether there has been a definite offer by one party and acceptance of that offer by the other. The Court then restated the objective test laid out in **Lochab's** case, where several grounds, including mistake had been raised by the defendant in a bid to avoid a compromise. In the latter case the court expressed itself as follows:

"In order for the defendants to avoid payment of the claim on this last ground it must show that its mistake rendered the contract a nullity one naturally turns to the decision of the House of Lords in Bell vs Lever Brothers. I feel that the best and briefest statement of what that case decided is Lord Denning (then Denning L J) in Solle vs Butcher [1950] 1 TLR at p 458, which reads: "Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell vs. Lever Bros. Limited (48 The Times L R 133; (1932) A C 161). The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good, unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake."

In this case a contract to settle the plaintiff's claim under the policy was clearly made. The sending of a completed discharge voucher to the plaintiff was plainly an offer. His signing and returning the same was clearly an acceptance. The parties had to all outward appearances settled the claim. The contract is good unless and until it is set aside for failure of some condition which the existence of the contract depends or for fraud or on some equitable ground. (Emphasis added).

21. In the case of **Abdul Aziz Suleiman v South British Insurance Co. Ltd (1965) EA 66**, cited by **Mutungi J** (as he then was) in his decision in **UAP Provincial Insurance Co. Ltd. v Michael John Beckett**, it was held that where parties had reached a compromise, there was nothing to be referred to arbitration. This court is persuaded that a compromise had been reached in this matter prior to the filing of the suit. Thus, the *"without prejudice rule"* does not apply to the communication between the parties .This court readily agrees with the dicta of **Shields J**, in **Lochab Transport Ltd** to the effect that**:**

"If an offer is made 'without prejudice', evidence cannot be given of this offer. However, if this offer is accepted, a contract is concluded, and one can give evidence of the contract and give evidence of the terms of the 'without prejudice' in the letter offer."

22. **Halsbury's Law of England Vol 17** at paragraph 213 states:

"The contents of a communication made on a "Without Prejudice" basis are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible....."

23. The next question therefore becomes whether the suit in the lower court was one for the enforcement of the compromise or of the Policy. The Respondent does agree that the suit was seeking the former, but in addition to the latter. The Court has studied the plaint in some detail. The drafting could have been more precise, but the averments at paragraphs 5,6, and 7 appear to relate to the necessary background of the claim including the taking out of the Policy, payment of premiums, the accident and claim. Key averments to the claim are found at paragraphs 3,8-13, 15 and part of paragraph 14 and relate to the alleged settlement. The fact that paragraph 4 and part of paragraph 14 refer to breach of the insurance policy and contain a claim for general damages does not transform the suit primarily brought to enforce the settlement into one to enforce the Policy. Indeed, the key prayers are for the payment of the sum in the offer letter and damages.

24. It is difficult at this stage to categorize and sever the Appellant's claims in the plaint without appearing to make presumptions. Unless, amendments are made to bring clarity, the court must wait for clarification when evidence is adduced at the trial. Suffice to say that any claim pursued under the policy, which the Appellant himself has strongly disavowed, would fall under the arbitration clause. Subject to this caveat, the court is satisfied that the claim in the lower court was primarily brought to enforce the compromise in respect of Shs.6, 970,000/- in settlement of the Appellant's claim. The Respondent's invocation of the arbitration clause in the case therefore appears tenuous and it could not be said that the dispute arising from the settlement was a matter agreed to be referred to arbitration under the Policy.

25. In **Lochab's** case the court stated that:

"The defendant seeks to avoid payment of the sum due under the settlement by setting up a number of defences but I am satisfied that all these defences are based on a radically mistaken conception of the law. When a claim is compromised, the cause of action becomes merged and is supersedent (sic) **by the compromise and a defence to the original cause of action is not a defence to an action brought to enforce the compromise. Thus is the present case, the defendant cannot rely as it has sought to do on the arbitration clause in the policy of insurance to stay the action founded on the compromise. On this point see Green vs. Reson [1955] 1 W L R 741 and in particular the observations of Slade J. at p. 746 and Conlon vs Conlas Ltd. 1952 2 TLR 343."**

26. Is the settlement unenforceable on account of fraud" The respondent company in **Lochab's** case had sought to avoid the compromise through repudiation, on allegations of breach against the appellant company and pleaded mistake on their part in a bid to avoid the compromise. The Court nevertheless upheld the compromise stating that it was good until set aside "*for failure of some condition which the existence of the contract depends or for fraud or on some equitable ground."* Similarly, the Respondent herein made vigorous claims that the Appellant was in breach of the principle of utmost good faith as there were serious discrepancies in

the Appellant's claim, the most significant ones touching on the Appellant's alleged ownership of the accident vehicle and the identity of the vehicle itself. The Respondent asserted to have repudiated the claim upon discovery of these matters.

27. The Appellant's response was that fraud must be particularized and proved and that the investigations purportedly carried out after the offer letter were in bad faith and calculated to deny him payment. The Respondent was content at the lower court to rely on bare depositions and a note from the police suggesting tampering with the chassis number of the accident vehicle, but they did not exhibit a copy of the investigation report or other evidence discovered, to shore up the allegations of fraud. At this stage therefore it is not possible to determine the veracity of the Respondent's claims based on the material proffered. Nonetheless, but the assertions concerning fraud, if proved could well render the compromise null and void. That however is a matter for the trial court to determine upon tangible evidence.

28. The Court of Appeal stated in **Trinity Prime Investment Limited V Lion of Kenya Insurance Company Limited [2015]** eKLR, in anticipating the grounds upon which such a compromise would fail stated:

"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."

29. These then are the matters that the lower court had been called upon to consider in determining the Respondent's chamber summons. The thrust of the ruling of the court was as follows:

"Section 5 of the Civil Procedure Act Mandates Courts to hear all suits unless such hearing is expressly or impliedly barred.

The act that bars the hearing of a matter before a court where the same has an arbitration clause. Section 6 (1)(a) of the Arbitration Act which bars any further action other that the filing of a memorandum of appearance, for a party seeking to rely on the existence of an arbitration clause and as such, the defendant seeks to rely on the existence of an arbitration clause on section 8 b of the policy document.……Similarly, the court held in Kenya Oil Company Limited & Another v Kenya Pipeline Co. Ltd [2014] e KLR held that as long as it does not offend the structures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts.

This court is aware of the binding decision in National bank v Pipe Plastic Samkolit Ltd & Another [2001] eKLR and shall not purport to re-write the contracts of the parties herein. When the parties contracted herein as per the policy document, they chose to have any future disputes determined through reference arbitration.

In the Court of Appeal in its decision in the case of TSJ v SHSR - Nairobi Civil Appeal 119 of 2017,…, the court therein held that an alternative dispute resolution body in the form of an Arbitration Board to which parties had submitted to by dint of their religious edits under the religious organization's Constitution, was the correct body to adjudicate a dispute amongst two members of religious edict.

The gist of my finding is that upon filing of the instant application by the Defendant for referral of the dispute herein to arbitration has been successful the same is allowed, the proceedings herein are stayed, pending the reference of this matter to an arbitrator…" (sic)

30. From the foregoing, it is evident that the lower court glossed over the pertinent issues placed before it for determination and embarked on a bare discussion on the arbitration clause in the Policy and the rights of parties to settle disputes through arbitration. The court misdirected itself by failing to engage with the pertinent issues raised in the application, and especially the question whether the application surmounted the legal hurdle in section 6(1)(b) of the Arbitration Act.

31. I find it useful to quote *in extenso* the discussion on the court's obligation under this section, in **Michael John Beckett'**s case, where the Court of Appeal delivered itself as follows:

"<u>It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1)(b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with</u>

regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.

The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the Arbitration Act, to undertake an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings and the question whether there was a dispute for reference to arbitration, Mutungi J. was therefore within the ambit of section 6(1)(b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a Section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute.

The provisions in Section 6(1)(b) of the Arbitration Act are similar to the provisions of Section 1(1) of the Arbitration Act, 1975 of England before its amendment by the Arbitration Act, 1996. Section 1(1) of the English Arbitration Act of 1975 provided:

"If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperable or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings." [Emphasis]

In interpreting that provision which, as we have said is somewhat similar to the provision in our statute, English courts have held that the court need not stay proceedings in cases where there was no "real dispute". Lord Swinton Thomas LJ captured the significance of the words "there is not in fact any dispute between the parties" as used in the 1975 English Arbitration Act, and which appear in our section 6(1)(b), in the English case of Halki Shipping Corpn v Sopex Oils Ltd [1998] 1 W L R 726 which presents striking similarity with the circumstances in the present appeal. We bear in mind that that case was decided under the 1996 Arbitration Act of England.

In Halki Shipping Corpn v Sopex Oils Ltd, shipowners applied for summary judgment against charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties and the charterers applied to stay those proceedings pending reference to arbitration. The issue in that case was whether there was a dispute within the meaning of the arbitration clause. Lord Swinton Thomas LJ stated at page 755 that:

"The words used in clause 9 of the charterparty in relation to a referral to arbitration were "any dispute." The words in section 1 (1) of the Act of 1975 are: "there is not in fact any dispute between the parties." To the layman it might appear that there is little if any difference between those words. However, the legislature saw fit to draft section 1 using the phrase "not in fact any dispute." The legislature did not use the words "there is no dispute" and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrase "any dispute" and "not in fact any dispute" is of central importance in understanding what underlies the cases that preceded the Act of 1996. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of Order 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words "not in fact any dispute" as opposed to "no dispute" have from time to time been interpreted by the courts as meaning "no genuine dispute," "no real dispute," "a case to which there is no defence," "there is no arguable defence", and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed "is indisputably due." The approach of the courts has on occasions been similar to that adopted by them in Order 14 proceedings in cases where there is no arbitration clause.

In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C., Ord. 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable

defence."

In the English case of Ellis Mechanical Services Ltd v Wates Construction Ltd (Note) [1978] 1 Lloyd's Rep 33 which was determined on the basis of the1975 English Arbitration Act, Lord Denning, M. R at page 35 had this to say:

"There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or dispute about it. If the court sees that there is a sum which is indisputably due then the court can give judgment for that sum and let the rest go to arbitration, as indeed the master did here."

Bridge L.J in the same case at page 37 captured the same principle as follows:

"To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the court that at least £X is presently due from the defendant to the plaintiff" If it is, then judgment should be given to the plaintiff for that sum, whatever X may be, and in a case where, as here, there is an arbitration clause the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £X is indeed because there is no issue or difference, referable to arbitration in respect of that amount."

We identify fully with those pronouncements by English courts. The words "that there is not in fact any dispute between the parties" appearing in Section 6(1)(b) of the Arbitration Act are in our view not superfluous and require the court to consider whether there is in fact a genuine dispute when considering an application for stay proceedings. As we have held, under Section 6(1)(b) of the Arbitration Act, 1995, the issue whether the dispute or differences between the parties had any merit was a matter properly before Mutungi J.

In our view, the learned judge was right in finding that the suit before him was for enforcement of the settlement agreement under which Beckett was pursuing his right to payment and that having regard to the settlement agreement there was no dispute between parties capable of being referred to arbitration."

32. Had the lower court addressed its mind to the issues arising from the material canvassed by the parties, it would have come to the conclusion that the chamber summons could not succeed in the circumstances of the case. Considering all the foregoing, this court finds that the appeal has merit will therefore allow it by setting aside the ruling of the lower court dated 23.10.2020 and substituting therefor an order dismissing the chamber summons dated 17.3.2020 with costs. The costs of the appeal are awarded to the Appellant.

33. However, for the avoidance of doubt, prayer 3 in the memorandum of appeal cannot be granted for reasons given earlier in this judgment. With the setting aside of the stay of proceedings order of 23.10.2020 by this judgment, the time provided for the Respondent to file a defence statement in the lower court suit could only start running today, assuming that service of the plaint had been duly effected upon the Respondent. In view of the history of this matter, possible administrative delays in remitting the lower court file back to the subordinate court, and in the interest of justice, this court will allow a period of 21 days from today's date for the filing of the defence statement by the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 15Th DAY OF DECEMBER 2021.

C. MEOLI

JUDGE

In the presence of:

Mr. Murage for the Appellant

For the Respondent: N/A

C/A: carol