Skynet Communication Limited v Meteo France International (Commercial Case E113 of 2021) [2024] KEHC 15217 (KLR) (Commercial and Tax) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15217 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E113 OF 2021

MA OTIENO, J

NOVEMBER 28, 2024

BETWEEN

SKYNET COMMUNICATION LIMITED ..... APPELLANT

AND

METEO FRANCE INTERNATIONAL ..... RESPONDENT

(An appeal from the Judgment and Decree of Hon L.L Gicheha (CM)) delivered on 29th October 2021 in the Milimani CMCC No. 1040 of 2017)

JUDGMENT

Introduction

1. This is an appeal from the Judgment in the Milimani CMCC No. 1040 of 2021 delivered on 29th October 2021 in which the trial court allowed the Respondent's claim for 104,299 Euros against the Appellant.

2. The background of the matter is that the Respondent, was in 2011 sub-contracted by the Appellant to undertake the installation and commissioning of a Meteostat Second Generation (MSG) Satellite Reception System and Forecasting Workstation for Jomo Kenyatta International Airport Meteorological Office. The contract price was 194,299 Euros.

3. The Respondent pleaded in the lower court that upon completion of the works, it was only paid a sum of 90,000 Euros by the Respondent, leaving as unpaid, a balance of 104,299 Euros.

4. To enforce recovery of the unpaid balance, Respondent instituted proceedings in the lower court against the Appellant seeking the payment of a sum of 104,299 Euros.

5. On 19th October 2021, the lower court delivered its judgment on the matter and allowed the Respondent's claim against the Appellant. The court therefore ordered the Appellant to pay to the Respondent the sum of 104,299 Euros. Costs and interest were also awarded to the Respondent.

The Appeal

6. Aggrieved by the trial court's Judgment, the Appellant lodged this appeal vide its Memorandum of Appeal dated 24th November 2021 and raised ten (10) grounds of appeal that; -

    i. The learned Magistrate erred in law and in fact for finding that the trial Court has the jurisdiction to adjudicate on the dispute between the parties who had agreed that the applicable law under the contract was the law of France.

    ii. The learned Magistrate erred in law and in fact for applying the laws of Kenya where the parties under the contract had expressly agreed to be bound by the laws of France.

    iii. The learned Magistrate erred in law by failing to consider the legal principle that a Court of law cannot re-write a contract between the parties.

    iv. The learned Magistrate erred in law and in fact by finding that the Defendant bad wholly submitted itself to the jurisdiction of the Court.

    v. The learned Magistrate erred in law and in fact by failing to determine the issue of security for costs raised by the Defendant despite indicating that the same will be determined in the judgment.

    vi. The learned Magistrate erred in law by failing to determine all pending applications before pronouncing judgment on the matter.

    vii. The learned Magistrate erred in law by failing to accord the Defendant the right to a fair trial under Article 50 of *the Constitution* by denying the Defendant's counsel the opportunity to cross examine the Plaintiff's witness.

    viii. The learned Magistrate erred in law by failing to consider that the Defendant's right to a fair trial may not be limited under Article 25 of *the Constitution* and imposing a condition precedent to the cross-examination of the Plaintiff's witness.

    ix. The learned Magistrate erred in law and in fact by failing to accord the Defendant ample time to present documentary evidence in defence of the Plaintiff's claim.

    x. The learned Magistrate erred in law and in fact by entering judgment in favour of the Plaintiff.

7. The appeal was canvased by way of written submissions. The Appellant filed its submissions dated 11th October 2024 whilst that of the Respondent is dated 13th November 2024.

Appellant's submissions

8. The Appellant in its submissions argued the ten grounds in the memorandum of appeal under two headings as follows; -

    a. Whether the trial court was seized with the jurisdiction to hear and determine the matter before it?

    b. Whether the Appellant was accorded a fair trial?

9. On whether the trial court had jurisdiction to hear and determine the matter before it, the Appellant referred to Article 18.2 of the Agreement and submitted that the clause ousted the jurisdiction of the Kenyan courts. That the Clause provided that the agreement was to be governed by the French laws.

10. Citing the Court of Appeal decision in the case of Areva T & D India Limited versus Priority Electrical Engineers & Another [2012] eKLR, the Appellant asserted that where parties in an agreement have submitted to the exclusive jurisdiction of a foreign court as was the case herein, courts should not interfere with such an agreement since doing so would be an infringement on the parties' contractual rights and obligations.

11. The Appellant therefore submitted that the action by the trial court of assuming jurisdiction over disputes emanating from the agreement was an infringement of the legal principle under contract law, and amounted to the court re-writing a contract between the parties, which is against the established principles in law.

12. On the question of whether the Appellant was accorded a fair hearing, the Appellant submitted that the trial court infringed on the Appellant's rights to a fair hearing under Article 50 of *the Constitution* of Kenya by failing to allow the Appellant's application for adjournment. That this unlawfully prevented the Appellant from presenting its documentary evidence in the matter.

13. It was further the Appellant's submission that the trial court erred declined the Appellant's application for adjournment, and proceeded with the Defendant's case in the absence of the Appellant's director who was then unwell and out of the country, thereby denying the Appellant ample opportunity to cross-examine the Respondent's witness.

14. Finally, it was the Appellant's position that the trial court erred in failing to determine all interlocutory applications before the main hearing, In particular, the Appellant submitted that the trial court erred in law and in fact by failing to first dispose of its Notice of Motion Application dated 14th April 2021, which sought inter alia, orders for security for costs against the Respondent on the basis that the Respondent is a foreign company with no known assets within the jurisdiction of the court.

15. The Appellant therefore urged this court to allow the appeal with costs and set aside the lower court's judgment and decree.

Respondent's Submissions

16. On his part, the Respondent supported the judgment by the trial court and urged this court to uphold the same. According to the Respondent, the trial court was right in its conclusion that it had jurisdiction over the dispute.

17. The Respondent submitted that contrary to the Appellant's submissions, Article 18.2 of the agreement did not oust the jurisdiction of the Kenyan courts to deal with any dispute under the agreement. The Respondent asserted that the Article merely provided that the applicable law for the contract would be French Law, and nothing more.

18. It was further the Respondent's submissions that the issue of jurisdiction was not taken up by the Appellant in its pleadings and could not therefore be raised and sustained at the hearing.

19. Regarding the Appellant's argument that it was not given adequate opportunity to present its case at trial, the Respondent submitted the Appellant was given sufficient opportunity to present its case at trial. It was further the Respondent's submissions that this ground of appeal amounts to the Appellant appealing the ruling of the trial court refusing adjournment without requisite leave of the court, which is contrary to Order 43 of the Civil Procedure Rules, 2010.

20. The Respondent therefore urged this court to dismiss the appeal with costs to the Respondent.

Analysis and determination

21. This being a first appeal, this court must reevaluate and reassess the evidence tendered at trial with a view of reaching its own conclusion, keeping in mind that, unlike the trial court, it did not have the advantage of observing the demeanor of the witness and hearing their evidence first hand. See the Court of Appeal decision in Peters vs Sunday Post Limited [1958] EA where the court stated that; -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.....the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. The court is equally aware that an appeal to this court is by way of retrial and this court is not bound by the findings of the trial court merely because it did not have the advantage of hearing the witnesses testify and seeing their demeanor as was held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that: -

> " ...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial court .....is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

23. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that: -

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

24. I have carefully reviewed and considered the Appellant's memorandum of appeal dated 24th November 2021, the record of appeal as well as the submissions by the parties in support of their respective positions. I note from the proceedings that there are only two issues for determination in this appeal. The first is to determine whether Article 18.2 of the agreement ousted the jurisdiction of the Kenyan courts in favour of the French courts. The second is a determination of whether the trial court failed to accord the Appellant sufficient opportunity to defend its case thereat.

Whether the Court had jurisdiction

25. From the record of appeal, I note that on or about 4th April 2011, the Respondent was contracted by the Appellant to undertake installation and commissioning of Meteostat Second Generation (MSG) Satellite Reception System and Forecasting Workstation for Jomo Kenyatta International Airport Meteorological Office. The contract price was 194,299 Euros.

26. From the text of the agreement, Article 18.2 thereof as follows; -

> " 18.2 Applicable Law

> "The Contract and associated orders are governed by French laws. This shall comprise rules governing both substance and form"

27. The Appellant's director, Suryakant Patel who testified before the trial court on 24th May 2021 admitted that the sum of 104,299 Euros was still owing under the agreement. However, he told the trial court that the Respondent's claim was premature since the Respondent knew that the payment could only be made upon receipt of monies from government/client ministry. That the ministry was yet to pay the contractual sum hence the delay on the part of the Appellant to fully satisfy the debt. On cross-examination, the witness however admitted that there was no such clause in the agreement between the parties.

28. Additionally, the witness insisted that the agreement was governed by the French laws and therefore the trial court did not have jurisdiction over the same. It is this aspect of the Appellant's case that has made its way to this appeal.

29. First, it is critical to point out that from the Appellant's statement of defence dated 16th May 2017, which was later amended on 5th December 2017, the Appellant did not plead as its defence that the trial court lacked jurisdiction on account of the agreement being governed by the French laws. The Appellant only raised the issue of pecuniary jurisdiction, which again for some unstated reason was not taken up by the Appellant in its submissions before the trial court.

30. This court is however well aware that the question of Jurisdiction is a fundamental issue that it can be raised at any time including on appeal. This principle was stated by the Court of Appeal in Kenya Ports Authority vs Modern Holding [EA] Limited [2017] eKLR as follows: -

> " We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard."

31. From the foregoing, it is evident that the issue of jurisdiction as raised by the appellant on appeal is procedurally permissible. However, having reviewed the agreement in question, particularly Article 18.2 thereof, I agree with the Respondent's submissions that the Article was not meant to oust the jurisdiction of the Kenyan Courts to adjudicate over any dispute arising from the agreement. The Article simply provided that the contract, in terms of its form and procedure, was to be governed by the French laws. On dispute resolution, the agreement at Article 18.3 thereof provided for among others, arbitration with the seat of arbitration being specified to be Geneva, and the language being English.

32. From the above, it is clear that dispute resolution under the agreement was not restricted to the French courts as was submitted by the Appellant.

33. In the instant case, it appears from the proceedings that there was no dispute in the contract that could be referred for arbitration and that obviously explains why none of the parties suggested that route.

34. In any event, it is a settled principle of law that even in instances where parties have agreed to the exclusive jurisdiction of a foreign court, the local court may under exceptional circumstances still assume jurisdiction. In the case of United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd [1985] KLR 898 Madan, JA (as he then was) observed as follows: -

> " The Courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring

> jurisdiction upon the Courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the Court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement."

35. From the facts of this case, it was expressly admitted by the Appellant, both in its statement of defence and in its testimony before the trial court that a sum of 104,299 Euros was still owing under the contract. The only 'defence' raised by the Appellant is that the suit was premature since payment to the Respondent under the contract was dependent on the Appellant receiving monies in respect thereof from the client ministry.

36. Given the facts of this case and taking into account that the contract was performed wholly in Kenya and that all the documents and witnesses are in Kenya, this clearly a case where the trial court was right in assuming jurisdiction, assuming there was one.

37. Further, the argument that the Appellant was only to pay the Respondent upon receiving monies from the client ministry was not part of the contract between the parties herein as was confirmed by the Appellant's director in his testimony before the trial court.

Whether the Appellant was accorded a fair trial

38. The Appellant submitted that the trial court infringed on its right as to fair hearing under Article 50 of *the Constitution* of Kenya by failing to allow its application for adjournment to enable the Appellant present its documentary evidence in the matter at trial. That further, the trial court erred in proceeding with the Respondent's case in the absence of the Appellant's director who was then unwell and out of the country. According to the Appellant, this denied it the requisite opportunity to cross-examine the Respondent's witness.

39. I have carefully reviewed the proceedings before the lower court and do not find the argument by the Appellant to be the correct account of what happened before the trial court. In particular, in relation to the proceedings of 8th April 2021 when the trial court delivered its Ruling dismissing the Appellant's application for adjournment. The court on that date directed parties to proceed with the plaintiff's (Respondent's) case, with the defence (Appellant's) case adjourned to another date.

40. I note that on 24th April 2021, the matter proceeded with the hearing of the Appellant's case with the Appellant's director, one Suryakant Patel testifying in chief. He was duly cross-examined by the Respondent's Counsel and re-examined by the Appellant's counsel.

41. In the premises I find that the allegation by the Appellant that its right to fair hearing was infringed by the trial court not tenable.

42. The same applies with the Appellant's allegation that the trial court failed to hear and dispose its interlocutory application dated 14th April 2021 requiring the Respondent to furnish security. It is trite law that courts have authority and discretion to deal with disputes before the court in a manner that is expeditious, proportionate and affordable as required under Section 1A, 1B and 3A of the *Civil Procedure Act*.

43. A perusal of the record clearly indicates that the dispute was instituted way back in 2017. Justice demands that disputes, particularly those that are of commercial in nature, are resolved with expediency to allow parties certainty in their business relationships and decisions.

44. For the reasons set out above, the appeal herein fails and the same is hereby dismissed with costs to the Respondent.

45. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF NOVEMBER 2024

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ADO MOSES

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JUDGE

In the presence of:

Moses – Court Assistant

.....for the Appellant.

..... for the Respondent.