



**Great Rift Drilling Limited v Cluff Geothermal Limited (Commercial Case E394 of 2022)
[2023] KEHC 314 (KLR) (Commercial and Tax) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E394 OF 2022**

EC MWITA, J

JANUARY 20, 2023

BETWEEN

GREAT RIFT DRILLING LIMITED PLAINTIFF

AND

CLUFF GEOTHERMAL LIMITED DEFENDANT

RULING

1. The plaintiff, Great Rift Drilling Limited, (Great Rift), filed this suit against the defendant Cluff Geothermal Limited (Cluff), seeking USD 2,853,177,44 with interest at USD 463.23 per day from 3rd June 2019 until payment in full and costs in a number of suits. Simultaneous with the plaint, Great Rift filed a motion application seeking interim orders attaching Cluff's drilling equipment and also restraining Cluff from disposing of or removing the equipment from the jurisdiction of this court.
2. On being served, Cluff filed motion application dated 12th October 2022, seeking to have the suit struck out for want of jurisdiction. Cluff also filed a Notice of preliminary objection raising the same issue of jurisdiction. In particular, Cluff asserted that the suit and application by Great Rift offend section 5 of the *Civil Procedure Act* in that this court has no jurisdiction to adjudicate on the matter as parties had chosen the courts of England and Wales as the forum for adjudicating disputes arising from a Deed of Settlement dated 21st December 2016 (the Deed).
3. With concurrence of counsel for the parties, directions were issued that the application and preliminary objection dated 12th October 2022 be heard first since the jurisdiction of the court to hear and determine the suit was under challenge. Parties were also directed to file responses and brief submissions to the application and the preliminary objection, thus this ruling.
4. The objection to this court's jurisdiction was based on ground that Deed relating to control of claims and priority of payments was clear on Cluff's role in managing and funding arbitral proceedings and



- the order of priority of payment. Cluff asserted that clause 9 of the Deed was clear on the applicable laws in interpreting terms of the Deed were the Laws of England and Wales and also reserved jurisdiction of those court for determining any dispute relating to the Deed or its subject matter.
5. According to Cluff, the arbitration claim partially succeeded and the funds recovered were applied in strict compliance with the terms of that Deed. Cluff took the view that the suit as framed, is that Great Rift was dissatisfied in the manner the funds from the arbitral award were applied and, therefore, the courts with exclusive jurisdiction to deal with disputes arising from the terms of the Deed are the courts of England and Wales which parties had mutually and expressly chosen to subject themselves to. Cluff argued that a party cannot cherry pick the clause(s) he seeks to enforce as a contract is read and observed as a whole.
 6. Relying on *United India Insurance Company Limited v East African Underwriters (Kenya) Limited* [1985] KLR 898, Cluff urged that exclusive jurisdiction clauses ought to be respected and enforced. Cluff again relied on *Raytheon Aircraft Corporation & another v Air AlFaraj* [2005] eKLR for the position that where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the non contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum.
 7. In the view of Cluff, the matters raised in the suit should be litigated before the courts parties chose to submit themselves to and Great Rift had not demonstrated exceptional circumstances to justify deviation from the clear and unambiguous exclusive jurisdiction clause in the Deed.
 8. Cluff again cited the decision in *Gossamer Crossing Inc. v Simon & 4 others Commercial* (Civil Case No. E865 of 2021 [2022] KEHC 300 (KLR), where the court downed its tools because the contract contained an exclusive jurisdiction clause. Cluff further relied on *Grobe Watertech Fitting Division PTY Ltd v Ideal Ceramics* [2019] eKLR where a similar position was taken and the suit was struck. Reference was also made to *Pyrotechnics Company Limited v Maersk Kenya Limited* [2021] eKLR and *Endmor Steel Millers Limited v Tata International West Asia DMCC & another* [2021] eKLR.
 9. Cluff made the point that where contractual disputes are presented to court, the court's remit is to interpret and enforce the contract but not to rewrite the contract for the parties. Reliance was placed on *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another* [2001] eKLR.
 10. Cluff's case is that Great Rift deliberately failed to disclose to the court the existence of the Deed and its binding terms regarding jurisdiction of the courts to hear and determine disputes arising from the terms of the Deed. Cluff relied on *Abraham Lenauia Lenkeu v Charles Katekeyo Nkaru* [2016] eKLR and *Tiwi Beach Hotel Limited v Stamm* [1991] eKLR, KLR 658; [1991] KLR 658 and urged that the suit and application be struck out with costs.

Response

11. Great Rift opposed the application and preliminary objection through a replying affidavit sworn by its director, Carl Badenhorst, and skeleton submissions dated 6th December 2022. Great Rift also filed an application dated 28th November 2022 seeking one principle order, that the Deed be struck out from the documents filed by Cluff on ground that it had been rescinded for reason of fraudulent misrepresentation.
12. Great Rift stated in the replying affidavit and submission, that indeed there was a drilling contract between Geothermal Drilling Corporation (GDC), Cluff and GRD Mauritius dated 15th February 2013. Cluff had interests in GRD Mauritius. GRD Mauritius then assigned the performance of obligations under the drilling contract to it (Great Rift). Great Rift did not deny existence of the Deed.



13. According to Great Rift, arbitral proceedings were begun in 2017 with the intention of recovering sums pertaining to the performance of the drilling contract. Great Rift admitted that prior to arbitration, parties held detailed preparatory discussions that centred on strategy to be employed, leader of the strategy, how to handle instructions and custody of claims, selection of counsel and funding of the litigation. Great Rift however argued that Cluff the law firms of Mukite Musangi & Company Advocates and Omnai Strategy (law firm representing Cluff) had made representation that they would also represent it (Great Rift) and Cluff in those arbitral proceedings
14. Great Rift contended that sometime in December 2016, Badenhorst met lawyers James Palmer and Sarah Steele who assured that Omnia Strategy LLP would represent it in the arbitral proceedings in London. It was upon this assurance, that Great Rift agreed to execute the Deed. However, on receiving the arbitral award, it became apparent that there was no representation on its behalf in the arbitral proceedings, a fact it had not known and, therefore, had no opportunity to appoint own counsel to represent it in those proceedings.
15. Great Rift asserted that failure to be represented, vitiated the consent it had given to Cluff when executing the Deed and any consent communicated by the execution of the control of claims was vitiated by the material misrepresentation by both Musangi & Company Advocates and Omnia Strategy LLP. Great Rift maintained that had it known that it would not be represented in the arbitral proceedings, it would not have agreed to execute the Deed, an action that lead it into being deprived of the proceeds of the invoices it had raised against GDC.
16. Great Rift argued, therefore, that it was set up to perform the contractual obligations assigned to it and was left poorer and unable to pay its Kenyan creditors due to non-payment by GDC. Due to this financial position, Great Rift was left with no alternative but to accept the assistance from Cluff in pursuing the claims against GDC in the arbitral proceedings. Great Rift asserted that in the absence of counsel representing its interests, it did not have the benefit of understanding the contents of the Deed and its impact.
17. Great Rift relied on *Areva T & D India Limited v Priority Electrical Engineers & another* [2012] eKLR to argue that where there is a strong reason to keep parties bound by the terms of an agreement, the court has discretion to assume jurisdiction over the matter. Great Rift urged that misrepresentation is a strong reason as it vitiated its will when entering into the Deed.
18. Great Rift again relied on *Redgrave v Hurd* [1881] 20 Ch. D. 1 (p. 12/13) for the argument that even where moral fraud is to be shown in order to set aside a contract, one has it when a man having obtained a beneficial contract by a statement which knows to be false, insists on keeping that contract.
19. Great Rift further posited that the Deed had been rescinded and relied on the decision in *Edgington v Fitzmaurice* (1885) 29. Ch. D 459(p. 20/21) to argue that it has shown that Cluff intended that the statements made be acted upon, that the statements were untrue and Cluff knew them to be untrue, or were made under circumstances that could be construed to have been careless, whether they were true or not.
20. Great Rift again relied on the decision in *Redgrave v Hurd (supra)* that a man should not be allowed to get a benefit from a statement which he now admits to be false, and should not be allowed to say, for purpose of jurisdiction, that when he made the statement, he did not know it was false. Great Rift urged that the preliminary objection and the application be dismissed with costs.



Determination

21. I have considered the application and arguments by parties in support and opposition thereto. I must point out at this early stage, that this ruling is on the application dated 12th October 2022 and the preliminary objection of even date. The application by Great Rift dated 28th November 2022 was filed after directions had been given that the application dated 12th October 2022 and preliminary objection be heard first. The application by Great Rift is not, therefore, up for consideration in this ruling.
22. The single issue raised for determination in the application and preliminary objection, is whether this court should assume jurisdiction and hear the suit. Cluff argued against jurisdiction while Great Rift took an affirmative view that his court should assume jurisdiction.
23. At the centre of this contest is the Deed that was signed between the parties and dated 21st December 2016 whose terms are not however, in dispute. Of particular importance in the Deed, is clause 9 on applicable laws in interpreting the Deed and which courts have jurisdiction to adjudicate on disputes arising for the terms of that Deed. Cluff argued that clause 9 identified the laws of England and Wales as the applicable laws and the Courts of those countries as the courts with jurisdiction to hear disputes arising from the terms of the Deed and, therefore, this court should not assume jurisdiction in the face of an express clause on jurisdiction parties had chosen to have their dispute adjudicated.
24. Great Rift, although not disputing the terms of clause 9, argued that there were strong circumstances that should persuade this court assume jurisdiction. According to Great Rift, Cluff's advocates fraudulently misrepresented that they would also represent it [Great Rift] in the arbitral proceedings in the London International Court of Arbitration which however did not happen. For that reason, having not been so represented, the Deed stood vitiated and, therefore, this court should assume jurisdiction and hear the suit.
25. Clause 9 of the Deed states:
 - 9.1. This Deed and any contractual and non contractual dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination, or enforceability shall be governed by and construed in accordance with the laws of England and Wales.
 - 9.2. The parties submit to the sole and exclusive jurisdiction of the courts of England and Wales in the event of any contractual or non contractual dispute arising out of or in connection with this Deed.
26. Under clause 9.1 any contractual and non contractual disputes arising either from or in connection with the Deed or its subject matter regarding implementation or enforceability or even validity and termination is to be construed in accordance with the laws of England and Wales. Under clause 9.2, parties submitted themselves to the jurisdiction of the courts of those countries.
27. It is obvious from the terms of the Deed, that parties opted for the jurisdiction of the courts of England and Wales for resolving disputes in relation to interpretation, enforcement, termination or even questions on validity of the Deed. The law as it stands, is that parties are bound by the terms of their contract and it is not the business of the court to rewrite the contract for the parties. When parties chose the forum where their dispute should be resolved, the court should ordinarily give effect that wish unless there are strong reasons for not doing so.
28. In *United India Insurance Company Limited v East African Underwriters (Kenya) Limited* [1985] KLR 898, parties had entered into an agreement that disputes would be determined by the Indian



courts. A dispute arose and a suit was filed before courts in Kenya. The High court declined to grant stay so that the dispute could be heard in India. On appeal, the Court of Appeal held that where there is an exclusive clause conferring jurisdiction to courts in some other country, the exclusive clause should normally be respected because parties themselves freely fixed the forums for the settlement of their disputes and, therefore, the court should carry out the intention of the parties.

29. The Court of Appeal referred to the decision in *The Fehmarn* [1957] 1 Lloyd's Law Reports 551 where it was stated that where there is an express agreement to a foreign tribunal, it clearly requires a strong case to satisfy the court that such agreement should be overridden and that proceedings in the local court should be allowed to continue.
30. In *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)* [1984] eKLR (Civil Appeal No. 16 of 1982, the Court of Appeal stated that strong reason is a pre-requisite to exercise jurisdiction not to give effect to the exclusive jurisdiction clause and heavy onus lies on the party seeking to avoid the exclusion clause.
31. In *Raytheon Aircraft Corporation & another v Air AlFaraj* [2005] eKLR, the Court of Appeal again reiterated the general rule, that where parties have bound themselves by an exclusive clause, effect should ordinarily be given to that obligation unless the party suing in the non contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum.
32. Similarly, in *Areva T & D India Limited vs Priority Electrical Engineers & Another* [2012] eKLR, the Court of Appeal again rendered itself thus:

Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, any departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule.

33. The theme running through these decisions is that courts should give effect to the exclusive clause on jurisdiction unless there is strong reason or exceptional circumstances for not doing so, the heavy burden, being on the party seeking to turn away from that clause to persuade the court to depart from the general rule.
34. In the present application, Great Rift admitted existence of the Deed with had an exclusion clause which not only provided that the applicable laws when interpreting or applying the terms of the Deed were the Laws of England and Wales but also placed jurisdiction in the courts of those countries. to determine any disputes arising from the terms of the Deed. Great Rift having decided to file this suit in a non-contractual forum, bore the burden to demonstrate strong reason(s) for not going to the forum parties had opted to subject themselves to.
35. Great Rift did not mention this Deed in the plaint. that notwithstanding, Great Rift did not deny existence of the Deed or its terms. According to Great Rift, GRD Mauritius signed a drilling contract with Cluff and GDC for drilling. GRD Mauritius then assigned the performance of obligations under the drilling contract to it [Great Rift]. Later Great Rift signed the Deed, the subject of this application, with Cluff whose terms are not in dispute.
36. Great Rift urged the court to dismiss the application arguing that it accepted the Deed due to fraudulent misrepresentation made to it that it would have legal representation in the arbitral proceedings. However, Great Rift argued, that because it was not represented, the misrepresentation vitiated the Deed, thus the Deed stood rescinded. In fact, Great Rift filed the application dated 28th



- November 2022 asking to court to strike out the Deed from the documents for reason that it was rescinded.
37. If I understood Great Rift's argument, the only reason why the application and preliminary object should be disallowed, because of misrepresentation that it would have had legal representation in the arbitration proceedings in London which did not happen, and therefore, the Deed was rescinded. This, according to Great Rift, is the strong reason why the suit should be allowed to proceed before Kenyan courts and not the contractual forum in the Courts of England and Wales.
 38. Rescission of the Deed, as I see it, is an issue Great Rift wants this court to presume. This is so because Great Rift did not demonstrate when it took steps to rescind that Deed except the application dated 28th November 2022 filed after jurisdiction of this court had been challenged. Similarly, the argument by Great Rift that misrepresentation vitiated the Deed is a matter that is raised before this court and in my view, is not the strong reason referred in the decisions cited to above.
 39. Whether or not the Deed was obtained through fraudulent misrepresentation, deceit and or was rescinded, is a matter that should be determined in the contractual forum parties chose to subject themselves to. This emerges clearly from the reading of clause 9.1 and 9.2 that disputes or claims arising out of or in connection with the Deed regarding its existence, validity, termination, or enforceability were to be governed by and construed in accordance with the laws of England and Wales and jurisdiction of courts in those countries was preferred. In that regard, parties submitted themselves to the sole and exclusive jurisdiction of the courts of England and Wales and not this court.
 40. It is clear to this court, parties chose the forum in which their disputes arising from the Deed would be resolved. That was a contractual election through the will of the parties and this court has a duty to give effect to that wish, unless strong reason has been shown why that should not be the case. Parties had their own reason for choosing the Courts of England and Wales as the forum before which to adjudicate their disputes. Great Rift recognizes that when parties enter into a contract on their own free will, they freely subject themselves to the clauses in that contract. To turn away from the forum parties chose, and Great Rift appreciated this too, could only be possible if strong reason was shown, which Great Rift, I am afraid, did not do.

Conclusion

41. Having considered the application and the preliminary objection as well as arguments by parties, the conclusion I come to is that the application has merit and should succeed. Clause 9.1 and 9.2 identified the laws applicable when interpreting the terms of the Deed and the courts of England and Wales as the courts where disputes arising from the Deed would be adjudicated.
42. In coming to this conclusion, I note that the gist of the complaint in the plaint is on the proceeds received from the arbitral award issued in the arbitration proceedings before the Landon International Court of Arbitration and the fact that Cluff failed to remit those proceeds to Great Rift. On the other hand, Cluff holds the position that the proceeds were utilized and applied strictly in accordance with the terms of the Deed. This places the dispute within the jurisdiction of the forum parties chose for themselves.
43. Great Rift has not demonstrated that there is strong reason for this court depart from the general rule not to give effect to the exclusion clause in the Deed. This court declines to assume jurisdiction in this matter.



Disposition

44. The application dated 12th October 2022 succeeds and is allowed. The suit and application dated 7th October 2022 are hereby struck out with costs. The order issued on 13th October restraining the Atlas Rig from leaving the jurisdiction of this court is hereby discharged.
45. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

E C MWITA

JUDGE

