



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCOM NO. E155 OF 2020

MICHELE CASTEGNARO.....PLAINTIFF

VERSUS

TIMOTHY JASON.....1ST DEFENDANT

EASTGATE INTERNATIONAL LIMITED...2ND DEFENDANT

R U L I N G

1. By a Notice of Motion dated 16/5/2020, brought under *sections 1A, 1B, 3A & 63 (b) of the Civil Procedure Act, Order 39 Rules 1, 2 & 5 and Order 51 Rule 1 of the Civil Procedure Rules*, the plaintiff sought that the defendants do show cause why they should not furnish security of **US \$ 540,000/-** for their appearance. The plaintiff further sought an injunction to restrain the defendants from dealing with any shares or property and the freezing of their accounts.

2. The grounds for the application were contained in the body of the Motion and the supporting affidavit of the plaintiff sworn on 16/5/2020. These were that; in the period between 2018 and 2019, the defendants approached the plaintiff's clients with investment proposals to inject capital funding from the defendants' fund known as 1st Degree South.

3. That two clients of the plaintiff entered into an agreement for funding amounting to **US \$ 5,500,000**. That in that deal, the defendants fraudulently made a profit of **US \$ 50,000** and costed the plaintiff and other investees **US \$ 2,900,000**. That the defendants had failed to honour their part of the agreement for which the plaintiff was claiming **US \$ 540,000** from them. It was also alleged that the defendants were winding up their business in Kenya and relocate therefrom.

4. In support of his assertions, the plaintiff produced the Work Permit for the 1st defendant which was for a period of 2 years from 13/7/2018, a signed 1 South Exclusive Mandate Agreement dated 1/1/2017, an unsigned copy of Equity Investment Term Sheet dated 22/1/2019, an unsigned copy of Convertible Loan Note Term Sheet dated 17/1/2019, a copy of Consulting Agreement dated 19/3/2019 and other documents evidencing communication between the parties and funds transfer.

5. The application was opposed by the defendants vide the replying affidavit of **Timothy Jason Smyth** sworn on 3/7/2020. He contended that; the dealings between the parties were predicated upon the Convertible Loan Sheet and Equity Investment Term Sheet which provided that the governing law was that of Mauritius; that this Court did not therefore have jurisdiction to entertain any dispute arising therefrom. That the said documents required that in the event of a dispute, the parties first attempt arbitration.

6. That the 1st defendant was wrongly sued and that the plaintiff had no locus standi to sue. That the monies sought to be recovered was the 0.5% fees paid in respect of due diligence. That no agreement had been reached yet as the matter was still at the due diligence stage. That it was not mandatory that the initial due diligence was to lead to capital injection to the invitees. In his view, the plaintiff was out to extort money from the defendants.

7. Together with the replying affidavit, the defendants filed a Notice of Preliminary Objection dated 3/7/2020. They contended that; this Court has no jurisdiction to entertain the suit as the agreement between the parties provided that the applicable law was that of Mauritius; that one of the agreements required that any dispute first be referred to arbitration; that the 1st defendant was sued in his own capacity yet the corporate veil of the 2nd defendant had not been pierced; that the plaintiff had no locus standi to sue as he was not a party to the agreements between the defendants and the investees.

8. The Court has considered the record in its entirety, the depositions of the parties and the submissions. Once an issue of jurisdiction is

raised, it is incumbent upon the Court to resolve it before delving further on a matter before it.

9. A preliminary objection is in the nature of a demurrer which raises pure points of law. It is raised on the presumption that the facts as pleaded are agreed. It cannot be raised where there are disputed facts or issues are to be ascertained. See **Mukisa Biscuits Manufacturing Company Co. Ltd v. West End Distributors Ltd [1969] EA 696.**

10. The first point in the preliminary objection was that, the two instruments that set out the terms of engagement between the parties provided that the governing law will be that of Mauritius. That in the premises this Court did not have jurisdiction to entertain the matter.

11. The plaintiff objected to this point and relied on two decisions to show that this Court has jurisdiction. No doubt, the Supreme Court of Kenya has held that, a court of law cannot allocate itself jurisdiction unless specifically donated by the Constitution and statute. See **Samuel Kamau Macharia & Anor v. Kenya Commercial Bank Limited [2012] eKLR.**

12. I have considered the documents referred to. Both the **Convertible Loan Note Term Sheet** and the **Equity Investment Term Sheet** provide that:

“This agreement is governed by the laws of Mauritius, or other jurisdiction that the parties may agree to, and the Parties submits to the exclusive jurisdiction of the courts of that jurisdiction”.

13. From those provisions, it is clear that the parties chose the governing law as that of Mauritius and the exclusive jurisdiction of the courts of that country. As I understand it, in interpreting the execution and performance of the agreement, the law governing the same would be that of Mauritius. However, what is before this Court is not the execution or otherwise of that agreement. The plaintiff alleges that the defendants were out to defraud him and his clients which they did. There was no investment or funding at all. It was a fraud.

14. In **United India Insurance Co. Ltd & 2 Others v. East African Underwriters (Kenya) Ltd [1985] eKLR** the Court of Appeal held: -

“The courts in 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. 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.

...

(a) in exercising its discretion the court should take into account all the circumstances of the particular case;

(b) in particular, but without prejudice to (a) the following matters, where they arise ...

i) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the courts of the country and the courts of the foreign country;

ii) Whether the law of the foreign court applies, and if so, whether it differs with the law of the country in any material respects;

iii) With what country either party is connected, and how closely;

iv) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage;

v) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country”.

15. In the present case, the dealings between the parties was done here in Kenya. The negotiations and alleged fraud, if any, was in Kenya. The evidence of facts will be readily available in Kenya. The allegation that the defendants wanted to dispose off and/or remove their properties from the jurisdiction was not denied. In the circumstances, I exercise my discretion to assume jurisdiction and hold that the issue in dispute is determinable by the courts of this country. Ground 1 of the preliminary notice therefore fails.

16. The second ground was that the **Equity Investment Term Sheet** provided that independent arbitration would be the first stage of dispute resolution prior to court action. **Schedule 4** thereto provided the steps which are to be undertaken in case of a dispute. That arbitration has to be undertaken in the UK.

17. Upon being served with the statement of claim and application herein, the defendants not only entered appearance, but they also delivered a statement of defence. In so doing, they wilfully divested themselves the protection they would have had under **section 6 of the Arbitration Act**. They are deemed by their own actions to acquiesce to the jurisdiction of this Court. They cannot turn around and try to impeach it. That ground also fails.

18. The 3rd ground of objection was that the 2nd defendant is a body corporate which can sue and be sued in its own name. That the 1st

defendant was therefore wrongly enjoined in these proceedings as the corporate veil of the 2nd defendant had not been pierced. The short answer to that is that, the 1st defendant has been sued in his own capacity for actions he undertook personally which the plaintiff alleges were fraudulent and are actionable. It is not that which he did for and on behalf of the 2nd defendant. That ground also fails.

19. The 4th and 5th grounds were that the plaintiff has no locus standi to sue and that the application is defective, incompetent and an abuse of the court process.

20. The two grounds require ascertainment of evidence to be determined. That is against the principle enunciated in the case of **Mukisa Biscuits Manufacturing Company Co. Ltd v. West End Distributors Ltd [1969] EA 696**. It was not clear how the application was incurably defective.

21. The Court is alive to the fact that the plaintiff carelessly cited ***order 39*** as the provision under which the application was brought. The applicant also failed to cite the provision under which the prayer for security for appearance was being sought. That however, is a technical issue which is curable under ***Article 159 of the Constitution and Order 51 of the Civil Procedure Rules***. The defendants did not show the prejudice they had suffered as a result of the plaintiff's aforesaid malfeasance.

22. In view of the foregoing, I find the Notice of Preliminary Objection dated 3/7/2020 to be without merit and dismiss the same with costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 27th day of **January, 2021**.

A. MABEYA, FCIArb

JUDGE