



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

COMMERCIAL CASE NO. 52 OF 2019

PYROTECHNICS COMPANY LIMITED.....PLAINTIFF

VERSUS

MAERSK KENYA LIMITED.....DEFENDANT

RULING

1. This ruling relates to the Defendant's **Preliminary Objection** dated and filed in court on 8/8/2019. The Defendant's Preliminary Objection was premised on the grounds that **the court lacked jurisdiction to hear and determine the matter** in light of clause 5.1 as read together with Article 4 (2) (c) and (d) of The Hague Rules, and Clause 26 of the Terms of Carriage governing the Bill of Lading No. 964675 104 dated 6/5/2018.
2. Before delving into the merits of the Preliminary Objection and to bring every issue on board, I believe it is important to give a brief outline of the historical background and facts of this matter.
3. Initially, the Plaintiff filed this suit initially against two Defendants on 15/7/2019 vide its Plaintiff of 12/7/2019. The 2nd Defendant was the Plaintiff's Insurer, M/s Jubilee Insurance Company Limited. On 22/8/2019, the Plaintiff filed an amended Plaintiff in which it dropped its claim against its Insurer, the 2nd Defendant.
4. In the amended Plaintiff, the Plaintiff contends that on 12/4/2018 it purchased one hundred and forty tones (140,000) of Ammonium Nitrate Porous Prills from Suez International Nitrate Company (SINCO), a company located in Ethiopia. SINCO then contracted the Defendant herein to transship the goods to the port of Mombasa. The goods were packed in Five Thousand Six Hundred (5,600) woven bags of 25Kgs each and loaded in seven (7) containers.
5. According to the Plaintiff, the goods were delivered to the Plaintiff on the 18/7/2018. However, only four containers had reached the port of Mombasa. It was pleaded that out of the four containers 300 bags (7,500kgs) were damaged and dripping with wet substance. The other three containers reached the port of Mombasa on 6.9.2018 and they too had 447 bags missing.
6. Upon inquiry on the non-delivery of the consignment, the Plaintiff was informed that the missing bags were damaged due to bad weather. The Plaintiff then took the liberty to inspect and salvage the purportedly damaged bags and incurred costs thereof. Therefore, the Plaintiff's claim against the Defendant is for the costs incurred in separating the spoilt Ammonium Nitrate which is estimated as Kshs. 219,371.00 and the cost of the 747 spoilt bags which have an estimated value of Kshs. 1,045,800.00.
7. On being served, the Defendant entered an appearance and filed a Notice of Preliminary Objection as well as a statement of Defence under protest on 8/8/2019. Both the statement of Defence and a Notice of Preliminary Objection challenged the jurisdiction of the court and prayed that the suit be struck out with costs. Nonetheless, the Defendant conceded that it was contracted by SINCO to transship the 7 containers containing 5,600 woven plastic bags of Ammonium Nitrate Porous Prills from the port of Egypt to the port of Mombasa. However, before the designated vessels could sail out of Oman, Egypt, a cyclone "*cyclone mekuu*" hit the port of salalah, Oman and severely affected the surrounding region. As a result, part of the consignment was damaged.
8. What the Defendant is saying is that the consignment was damaged as a result of natural peril and owing to the Hague Rules which had been adopted by the parties, it (the Defendant) cannot be held to blame. The second position maintained by the Defendant is that, vide clause 26 of the terms of carriage executed by the parties, parties chose their forum for dispute resolution to be the English High Court of Justice in London to the exclusion of the jurisdiction of court of any other country.
9. In arguing the matter both parties filed written submissions. The Plaintiff's submissions are dated 9/6/2020 and filed on 15/6/2020 whilst the Defendant filed two sets of submissions on 27/01/2020 and 10/7/2020 respectively.

Submissions by the Plaintiff

10. In its submission, the Plaintiff pointed out two issues for determination, which are, **the nature of a preliminary objection and the existence of strong and exceptional reasons**. On the nature of preliminary objection, this court was reminded of the principles in the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696*, that a preliminary objection should only be raised on a pure point of law which if argued may dispose of the suit. According to the Plaintiff, the instant Preliminary objection does not meet the criteria in *Mukisa Biscuit Manufacturing Co. Ltd* case. It is averred that Clause 5.1 in the Bill of lading does not oust the Jurisdiction of this court and as such this court assumes Jurisdiction by dint of Section 4 of the Judicature Act which provides that the High Court shall have jurisdiction in all matters arising on the high seas.

11. Although the Plaintiff acknowledges that the bill of lading has an exclusion clause abrogating jurisdiction to the High Court of England, it is submitted that the Preliminary Objection ignores Section 4 of the Judicature Act and further the Kenyan Courts embrace common law legal system which is no different from the English courts.

12. On the second issue, the Plaintiff submits that the facts of this case reflect special circumstances to the exception of the exclusive forum clause. In buttressing its assertion, the Plaintiff relied on a plethora of Judicial authorities but of more importance, the case of *Eleftheria (1969) 2 All ER 641*. Based on that case, the Plaintiff submits that it will not make no commercial or legal sense to adjudicate the dispute in England courts or the US Courts when both parties have offices in Kenya. The Plaintiff thus believes that the Defendant only seeks procedural advantage as opposed to having a genuine trial by seeking to oust this Court's jurisdiction.

13. The Plaintiff further submits that it will be deprived of its day in court even after having filed the instant case because pursuing trial in the contractual forum, that is, U.S.A and England, will be gravely difficult and inconvenient. The Plaintiff avers that it will be impractical to prosecute the case in the England court because the cost of litigation will outstrip the amount being claimed. In any event, the Plaintiff submits that the exclusive forum clause is contained in a contract of adhesions by the Defendant who has undue economic power, and although the Plaintiff did not participate in drafting the same, was compelled by economic circumstances to abide by it.

Submissions by the Defendant

14. As earlier indicated, the Defendant on respective dates filed two sets of submissions. In the first set filed on 27/1/2020, after giving a summary on the preview of the case, the Defendant submitted that it has challenged the jurisdiction of this court from the onset and maintained that pursuant to Clause 26 of the Terms of Carriage, parties had agreed that any dispute arising shall be determined by the English High Court of Justice in London. That the Plaintiff has not shown strong and special circumstances for suing in Kenyan Courts as opposed to the contractually agreed forum. As such, it is the Defendant's submission that this court has no Jurisdiction and the best it can do is to lower down its tools at the earliest opportunity in observance of the decision in the case of *Lilian "S" [1989] KLR 1*.

15. The second set of the Defendant's submissions are a reply to the Plaintiff's submissions and were filed on 10/7/2020. In those submissions, the Defendant Responds on four issues namely;

- a. Whether the Defendant's Preliminary objection meets the criterion applicable in law;**
- b. Whether Section 4 of the Judicature Act confers the court with jurisdiction to adjudicate over this matter;**
- c. Does Clause 5.1 of the Terms of Carriage oust the Jurisdiction of the court, and**
- d. Whether there exist strong and exceptional reasons to warrant the court to avoid the exclusive forum selection clause**

16. On the first issue, it is submitted that the preliminary Objection is anchored on a specific clause in the Bill of Lading and objects to this court's Jurisdiction. Since this is not a factual issue to be ascertained, the Defendant opines that the Preliminary Objection meets the criterion of the applicable law.

17. On the second issue, reliance is placed in the Court of Appeal decision in the case of *Raytheon Aircraft Credit Corporation & another – vs- Air Faraj Limited [2005] eKLR* to canvass the argument that Section 4 of the Judicature Act does not authorize this court to disregard Private International Law on the status of the choice of law so as to disregard the exclusive Jurisdiction clause agreed by the parties.

18. As for the third issue, it is argued that the court has no jurisdiction to delve into an issue that has been determined by way of contractual provision. Here, the contentions by the Defendant here are that the consignment being claimed was destroyed as a result of bad weather and according to Article 4 of The Hague Rules, which were agreed on by the parties, the carrier is exempted from liability when destruction is caused by natural disaster.

19. On whether there are special circumstances shown in this case, the court is referred to consider the case of *Areva T & D India Limited – vs- Priority Electrical Engineers & another [2012] eKLR* which had facts similar to the case herein. All in all, the Defendant opined that there were no strong and special reasons that have been advanced by the Plaintiff and if any special circumstances do exist then they cannot be argued at the submission stage, the Plaintiff ought to have sought leave of the court, after showing those circumstances, to be allowed to sue in Kenyan courts.

Analysis and Determination

20. After a scrupulous probe of the contenting parties' respective positions and having taken into account the submissions by both parties and the authorities cited therein, I am of the considered view that the substantive issue for the court's determination is whether this suit should be

struck out for lack of Jurisdiction because the terms of carriage between the parties conferred exclusive jurisdiction to the English High Court in London and matters thereunder should be determined by the England Courts to the exclusion of any other court.

21. It is not in dispute that Clause 26 of the Terms of carriage between the parties provided that the same was to be governed by the U.S.A law and the law of England. And that any claim or other disputes therefrom was to be determined by either United States Federal Court of Southern District of New York or the English High Court of Justice in London as the case may be. That clause provides as follows:

“26. Law and Jurisdiction

For shipments to or from the U.S any dispute relating to this bill of lading shall be governed by U.S law and the United States Federal Court of the Southern District New York to have exclusive jurisdiction to hear all disputes in respect thereof. In all other cases, this bill of lading shall be governed by and construed in accordance with the English law and all disputes arising hereunder shall be determined by the English High Court of Justice in London to the Exclusion of the Jurisdiction of the court of another country. Alternatively and at the carrier’s sole option, the carrier may commence proceedings against the merchant at a competent court of a place of business of the Merchant.”

22. I must hasten to state that it is a rudimentary principle in law that a court cannot re-write contracts between parties. Parties are therefore bound by the terms of their contract, unless **coercion, fraud** or **undue influence** are **pleaded and proven**. However, the question that begs consideration is whether it is always natural and automatic that whenever there exist an exclusive foreign jurisdiction clause in a contract then the Kenyan courts cannot preside over the dispute for want of jurisdiction.

23. In my mind, and which is also the path the Plaintiff has endeavored to walk along, this court as well as all other courts within our jurisdiction have a discretion to assume jurisdiction notwithstanding a clause in the contract conferring jurisdiction upon the courts of some other country. However, the underlying position is that the exclusive jurisdiction clause 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 a strong reason for not keeping them bound by their agreement. The foregoing of course answers the Plaintiff’s concerns that this court should assume jurisdiction under Section 4 of the Judicature Act.

24. In the instant case, the Plaintiff avers that it was forced by commercial circumstances to accede to the exclusive Jurisdiction clause which is (sic) oppressive and unilaterally drawn given that the Defendant has more financial powers than itself (the Plaintiff). However, as a matter of evidence as it stands, there is no sufficient material evidence that has been placed before this court to help in ascertaining that indeed the terms as agreed by the parties were oppressive to the Plaintiff. This issue would have been considered in depth if the Plaintiff had sworn affidavit evidence to show the full circumstances under which the agreement was made. The Plaintiff therefore did not discharge its burden of proof on a balance of probabilities as regards this issue.

25. The Plaintiff further submitted that there are strong and convincing reasons as to why the exclusive Jurisdiction should be overlooked. More specifically, the Plaintiff submitted that if this case is to be prosecuted before the English courts, the cost of litigation will outstrip the amount being claimed by the Plaintiff. Essentially, the Plaintiff’s argument is that litigating the claim in the English court is so expensive so as to justify the departure from the exclusive Jurisdiction clause. Again, the Plaintiff has not tendered any material evidence to show the estimated cost it would incur in litigating the matter at the forum of selection. In as much as the Plaintiff avers that the flight tickets would be so high, there is no estimated figure that has been presented before the court to prove the assertion that the expenses would outstrip the amount being claimed herein. It is not upon the court to speculate on the extent of expenses that the Plaintiff would incur in prosecuting the case at the forum of selection, but it is upon the Plaintiff to prove the same on a balance of probabilities.

26. A strong reason is pre-requisite to the exercise of the court's discretion not to give effect to the exclusive jurisdiction clause. In my humble view, the Plaintiff in this case has not shown and proved sufficient grounds to depart from the contract between the parties and allow the case to continue. I do associate myself with the finding of the court of appeal in the case of **Areva T & D India Limited –vs- Priority Electrical Engineers & another** where the court in adopting the words of Cairns LJ stated thus;

“While no absolute rule can be laid down to this effect, the court should be very slow to refuse a stay if the claim is just the sort of claim to be rejected. When a clause of this kind is introduced into a contract it must be supposed that the parties considered that, in general, trial in the place mentioned in the clause is more convenient than trial elsewhere. It does not lie in the mouth of one party to say when a claim arises; “although this claim differs in no way from the generality of claims that might be made by me under the bill of lading, I say that the specified place of trial is inconvenient”

27. In conclusion, I find that this court has no jurisdiction to entertain this matter. By dint of Clause 26 of the Terms of carriage, the parties submitted disputes out of the bill of lading to English High Court of Justice in London. This, in turn ousted the jurisdiction of this Court which must down its tools.

28. It therefore follows that the issue as to whether the Defendant is liable for damages caused by a natural peril vis-à-vis The Hague Rules will be heard in the court that will hear and determine the matter.

29. In that regard, I find that the Preliminary Objection has merit and is hereby upheld. It is thus ordered that the suit herein be and is hereby struck out for want of jurisdiction.

Disposition

1) This Court lacks Jurisdiction to hear and determine the dispute as canvassed in the Plaintiff’s case in the Plaintiff dated

12th July, 2019 and amended on 21st August, 2019.

2) The matter is hereby struck out with costs to the Defendant.

It is hereby so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 25th day of January, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY

JUDGE