



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E072 OF 2020

AQUVA AGENCIES LIMITED.....PLAINTIFF

VERSUS

TUMAZ AND TUMAZ ENTERPRISES LTD.....DEFENDANT

PRELIMINARY OBJECTION

RULING

PLAINTIFF'S CASE

1. The Plaintiff filed a plaint on 9th March 2020 dated **6th March 2020**. The statement of claim is that on diverse dates between 6th June 2017 and 16th August 2017 vide various LPOs the defendant requested the Plaintiff to supply the Defendant an assortment of construction equipment and furniture valued at a total sum of **Kshs.143,000,000**.
2. That sometimes between 8th September 2017 and 13th November 2018 the defendant tendered to the plaintiff diverse cheques amounting to **USD 1,130,000**. The plaintiff contends that the said Cheques were dishonoured on account of insufficient funds and bank account closure.
3. By reason of the said dishonour the Plaintiff issued the Defendant with a Notice of Dishonour on 2nd May 2019. Pursuant to an agreement to settle debt by instalments entered into on 23rd August 2018 between the parties, the Defendant admitted its indebtedness. The Defendant in the blatant breach of the aforesaid agreement has since refused to pay the sum of **Kshs.143,000,000**.

DEFENCE

4. The Defendant denies the allegations by the Plaintiff and states that the Plaintiff did not discharge its contractual obligation by delivering the goods to the Defendant. Further that it was not an agreed term of the contract that upon delivery of the goods the Defendant would examine the same and intimate its acceptance of the goods.
5. The Defendant states that it has never admitted its indebtedness to the plaintiff to a sum of Kshs.143,000,000 neither has it ever bound itself to liquidate the debt by monthly instalments.
6. The Defendant does not admit the jurisdiction of the court and has raised a Preliminary Objection on the same.

PRELIMINARY OBJECTION

7. The Respondent raised a preliminary objection dated 19th March 2020 as follows;
 - a) The Court lacks jurisdiction to entertain the suit to the extent that the same is premature in view of the dispute at hand.
 - b) The suit is an abuse of the court process owing to the correspondences between parties submitting themselves to arbitration.
 - c) It is the interest of justice that the suit herein be stayed pending the outcome of the mechanism contemplated under clause 17.1 of all the LPOs.

DETERMINATION

8. The Defendant raised a Preliminary Objection citing that the court lacks jurisdiction to entertain the suit herein. **Order 2 Rule 9 Civil Procedure Rules 2010** prescribes that; -

A party may by his pleading raise any point of law.

9. **The issue for determination is whether this court has jurisdiction to deal with the dispute in question.**

The issue of jurisdiction is well settled in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1*, where Nyarangi J. of the Court of Appeal held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. The power of a court to stay proceedings and refer matters to arbitration is provided for under **Section 6 of the Arbitration Act Cap 4 of 1995**. It provides that:

"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."

11. The Defendant denies its indebtedness to the Plaintiff to a sum of **Kshs.143,000,000**. Further, the Defendant in its pleadings avers that the postdated cheques issued to the Plaintiff were to aid the Plaintiff in fulfilment of the LPOs of which LPOs were not subsequently fulfilled.

12. In the instant case; the Arbitration clause is under **Clause 17 of the Purchase Order** which provides;

"In the event of any dispute, controversy, or claim arising out of or relating to this LPO, the complaining party shall notify the other party in writing thereof. Within 60 days of such notice, both parties shall meet at an agreed location to attempt to resolve in good faith. Shall the dispute not be resolved within 60 days after such meeting, the complaining party shall seek remedies exclusively through arbitration administered under the arbitration act of Kenya 1995. The number of arbitrators shall be one. The place of arbitration shall be in Nairobi, Kenya. Kenyan law shall apply. The prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorney's fees incurred in enforcing this agreement."

13. Further to the foregoing, the parties entered into an agreement to settle debt by installments on 23rd August 2018. Paragraph 6 of the said agreement provides; -

"It is hereby agreed that if the debtor shall default in remitting any installment on or before the due date and in the sum agreed then the creditor shall be entitled to refer the matter to arbitration administered under the arbitration act of Kenya 1995 upon a 15 days' notice. The number of arbitrators shall be one. The place of arbitration shall be in Nairobi, Kenya. Kenyan law shall apply. The prevailing party shall have the right to collect from the other party its reasonable costs and necessary disbursements and attorneys' fees incurred in enforcing this agreement."

14. The import of the **Clause 17** is that all disputes relating to the **Purchase Orders** shall be arbitrated. **Clause 17** of the Purchase Orders was/is not challenged as invalid and outlines in detail the parties' choice of forum for dispute resolution. There is a dispute relating to the LPOs and in light of the above I find that this Court lacks jurisdiction to hear and determine the dispute.

15. The Defence filed at paragraph 11, the jurisdiction of the Court is not admitted.

16. **The proceedings herein are stayed and the dispute is referred to arbitration forthwith.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST MAY 2021 (VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MARUJA FOR THE DEFENDANT

MR. GICHOMO FOR THE PLAINTIFF

COURT ASSISTANT - TUPET