



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. E031 OF 2021

ENDMOR STEEL MILLERS LIMITED.....PLAINTIFF

VERSUS

1. TATA INTERNATIONAL WEST ASIA DMCC

2. SEAFORTH SHIPPING (K) LIMITED.....DEFENDANTS

RULING

1. Before this Court for determination are three Applications. Each of the three parties have filed applications as follows: -

i) Notice of Motion dated 20th March, 2021 by the Plaintiff seeking an injunction for the release of the consignment of 2,038.780 metric tonnes of Prime Hot Rolled Steel Square billets.

ii) Chamber Summons application dated 30th April, 2021 by the 1st Defendant seeking the proceedings herein be stayed and the dispute between the parties referred to arbitration.

iii) Notice of Motion application dated 13th May, 2021 by 2nd Defendant seeking that the Plaintiff and suit be struck out against them.

The Notice of Motion Application dated 20th March, 2021 by the Plaintiff

2. The Application dated 20th March, 2021 by the Plaintiff is brought under

Article 40 of the Constitution of Kenya; Section 3, 3A, and 63 (c) & (e) of the Civil Procedure Act and Order 36 Rule 1; Order 40 Rule 1, 2 & 8 and Order 51 Rule 1 & 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It seeks the following orders: -

1. Spent;

2. Spent;

3. Spent;

4. THAT pending the hearing and determination of this suit, this Honourable court be pleased to issue an order of injunction restraining the Defendants their agents, servants and or persons acting under their authority from proceeding with any sale, assignment, transfer, alienation, consignment or manifestation in favour to any other party other than the Plaintiff, and or disposal in any way of the Plaintiff's goods comprised in the consignment of 2,038. 780 metric tonnes of Prime Hot Rolled Steel Square billets now in the custody of Autoports Freight Terminal Limited, a custom bonded warehouse;

5. THAT pending the hearing and determination of this suit, this Honourable court be pleased to issue an order of injunction compelling the Defendants to unconditionally release, surrender, manifest in favour of the Plaintiff, clear and or allow the Plaintiff to take away, collect, pick and or take custody of its consignment of 2, 038. 780 tonnes of Prime Hot Rolled Steel Square billets after payment of any due Kenyan taxes;

6. THAT the costs of this application be borne by the Defendants.

3. The application is premised on the grounds set out on the face of it and it's supported by the annexed affidavit sworn on **20th March, 2021** by Gabriel Kiama the Plaintiff herein.
4. **Mr. Kiama**, deponed that on or about March, 2020 before the Corona-Virus pandemic hit Kenya, the Plaintiff had scouted for billets to import into the country and settled for billets from Ukraine and the 1st Defendant was the nominated seller.
5. The Plaintiff averred that as at April, 2020 9,000 metric tonnes of Prime Hot Rolled Square billets has been ordered and on **24th April, 2020, 30th April, 2020 and 1st May, 2020** the 1st Defendant acknowledgement of the three orders as Order No. PCSDK01126 for 5, 000 metric tonnes; Order No. PCSDK01136 for 2,000 metric tonnes and PCSDK01137 for 2,000 metric tonnes respectively.
6. It was deponed that the Plaintiff duly signed and stamped the order acknowledgments and the same was sent back to the 1st Defendant and on or about **30th April, 2020**, the 1st Defendant sent back a corresponding proforma invoice of the three quantities ordered.
7. It was the Plaintiff's case that on or about 26th June, 2020 the 1st Defendant sent a commercial invoice, packing list and bill of lading for each of the three quantities which were distinct as 1, 977.180 metric tonnes; 5,151.67 metric tonnes and 2,038.780 metric tonnes, the entire cargo totaling 9, 167.43 tons of billets worth USD 3, 810, 775.74 before taxes which is said to have arrived in Mombasa on board MV SFL SPEY and was offloaded into the 2nd Defendant's custom bonded warehouse.
8. The Plaintiff averred that despite a slight delay caused by the Corona-Virus pandemic and bad industry regulations they managed to pay the last installment sometime in November, 2020 which was acknowledged by the 1st defendant and thus the Prime Hot Rolled Steel Square billets consignment of 1, 977.180 metric tonnes and 5,151.67 metric tonnes were released to the Plaintiff, but the Defendants have totally refused, ignored and neglected to release the consignment of 2, 038.780 metric tonnes.
9. The Plaintiff further averred that the said consignment of 2, 038.780 metric tonnes of Prime Hot Rolled Steel Square billets has accumulated losses to the tune of USD 856,287.60.
10. It is the Plaintiff's case that after they placed their order and locked the price, the international market price for Prime Hot Rolled Steel Square billets has drastically shot up and it is apprehensive that the defendants want to illegally and unlawfully detain the cargo and sell it off to another party and the said threat is evidenced in an email dated 3rd December, 2020 from the 1st Defendant.
11. The Plaintiff has stated that the 20th March, 2021 Autoparts Freight Terminal Limited confirmed that the consignment of 2, 038.780 metric tonnes of Prime Hot Rolled Steel Square billets is still in their custody and the Applicant is apprehensive that the Kenya Revenue Authority (hereinafter KRA) may at any time auction the consignment occasioning irreparable loss of over USD 1,000,000.
12. The Plaintiff stated that despite several demands to the 1st Defendant, they have refused and/or neglected to release the said goods and that unless this court comes to its aid, the defendants will sell off the goods or KRA auction the same.
13. In Response to the said Application the 1st Defendant filed a Replying Affidavit sworn on **30th April, 2021** by **Vishal Tank**, an employee of the 1st Defendant duly authorized by its board of directors to swear the Affidavit on its behalf.
14. He deponed that the 1st Defendant is a subsidiary of Tata International Singapore Pte Limited a company incorporated in Singapore trading in steel products.
15. It was deponed that the 1st Defendant entered into a contract with the Plaintiff for the purchase of 9,000 Prime Hot Rolled Steel Square billets sometime in April, 2020. The 1st Defendant was to ship the billets from Ukraine. Before shipment, the 1st Defendant issued the Plaintiff with order acknowledgment forms dated 24th April, 2020; 30th April, 2020 and 1st May, 2020 which contained **Standard Terms and Conditions of Sale (Tata International West Asia DMCC)** which were binding to the parties. That further, proforma invoices were issued in the aforementioned dates.
16. The 1st Defendant averred that under the order forms it was clear that the Plaintiff was to pay 20% of the purchase price in advance by telegraphic transfer to the 1st Defendant's account and the balance be paid within five (5) days from the date of the Plaintiff's receipt of the shipment documents.
17. It was the 1st Defendant's case that the consignment was shipped on 22nd June, 2020 and the shipment documents (commercial invoices, packing list and bill of lading) were sent to the Plaintiff on the 26th June, 2020. It was stated that the consignment arrived sometime in July, 2020 and the Plaintiff had not paid the balance of the purchase price as agreed, thus was in breach of the contractual terms.
18. The 1st Defendant averred that despite the Plaintiff being in breach it still released part of the consignment measuring 1,197.180 metric tonnes and 5, 151.67 metric tonnes to the Plaintiff but retained 2,038.780 metric tonnes despite the Plaintiff's periodic payments to try and fulfill its payment obligations.
19. It was stated that the 1st Defendant issued a number of warnings and tried to reach a consensus with the Plaintiff for it to regularize payment. A final warning issued to that effect on the **20th September, 2020**, that the outstanding sum be paid by the **22nd September, 2020**

failure to which the 1st Defendant will realize its right of resell, and that despite the warning the Plaintiff was not compliant but continued to pay and the last installment was paid on **20th December, 2020** and upon demand for the consignment, the 1st Defendant informed it that 1,000 metric tonnes had already been sold to a third party to mitigate losses it suffered.

20. According to the 1st Defendant, the Plaintiff was aware that 1,000 metric tonnes had been sold to a third party as the same was communicated via an email dated the **3rd November, 2020**. The 1st Defendant, further stated that it communicated to the Plaintiff that it would refund payments made less the attendant costs of resale, demurrage charges from the 2nd Defendant and any other lawful charges from KRA.

21. The 1st Defendant urged the court not to grant the prayers as sought in the Plaintiff's application dated **20th March, 2021** as the Plaintiff has not demonstrated that it has a prima facie case capable of success; the irreparable damage it stands to suffer if the order are not granted and that the balance of convenience heavily tilts towards the 1st Defendant who will suffer loss if orders sought are granted as 1,000 metric tonnes have already been sold to mitigate losses caused by the Plaintiff's breach of contract.

22. In response to the 1st Defendant's reply, the Plaintiff filed a supplementary affidavit sworn on **4th May, 2021** by Gabriel Kiama. He deponed that it should be noted that the transaction between the parties was before the Corona-Virus pandemic hit Kenya and that despite the challenges after the virus hit, the Plaintiff managed to pay in full for the consignment, which last payment of **USD 23, 931** out of **3, 810, 775.80** was made on the **27th November, 2020** and the same was acknowledged by the 1st Defendant.

23. The Plaintiff averred that the 1st Defendant's Country representative was aware of the Plaintiff's unprecedented challenges to pay the installments on time and further the 1st Defendant was always fully apprised via emails, telephone conversations and physical meetings of the reasons for the delay to pay for the consignments on time which reason was due to the closure of the factory at the County Government of Machakos just before the cargo arrived in Kenya.

24. It is the Plaintiff's case that the agreement between it and the 1st Defendant did not provide for resale of any part of the consignment for reasons of late payment.

25. Lastly, the Plaintiff averred that it believes that the 1st Defendant has refused to release the remaining consignment due to the international increase of the price of billets from USD 420/ton in April, 2020 to USD 600/ton, which the Plaintiff claims the 1st Defendant intends to benefit from.

The Chamber Summons Application by the 1st Defendant dated 30th April, 2021

26. The Chamber Summons application dated **30th April, 2021** by the 1st Defendant is brought under **Article 159 (1) (c) of the Constitution of Kenya; Section 1A, 1B, & 3A of the Civil Procedure Act and Section 6 of the Arbitration Act, 1995** and all other enabling provisions of the law. It seeks the following orders THAT: -

1. Spent;

2. The proceedings herein be stayed and the dispute between the parties be referred to arbitration;

3. The costs of this Application be awarded to the 1st Defendant.

27. The application is premised on the grounds set out on the face of it and it's supported by the annexed affidavit sworn on **30th April, 2021** by **Vishal Tank**, an employee of the 1st Defendant duly authorized by its board of directors to swear the Affidavit on its behalf.

28. **Mr. Tank**, deponed that there is a dispute between it and the Plaintiff and that the same should be resolved through arbitration as provided under **Clause 25 of the Standard Terms and Conditions of Sale (Tata International West Asia DMCC)**, a contract that was binding to both the 1st Defendant and the Plaintiff. Further, the matter be stayed as provided under **Section 6 (2) of the Arbitration Act**.

29. It was the 1st Defendant's case that it had not taken any steps in the proceedings of the suit and that the obligation to enter appearance and file a defence be suspended until the hearing and determination of the application herein.

30. In response the Plaintiff filed a Replying Affidavit sworn on **5th May, 2021** by **Gabriel Kiama**, a director of the Plaintiff. He deponed that the dispute herein is not one for arbitration as the dispute does not involve the Plaintiff and the 1st Defendant only, but also involves interested parties such as the 2nd Defendant, Kenya Ports Authority, KRA and AutoPorts Freight Terminal Limited who have a stake on the consignment because of taxes, fees and other dues owing to them.

31. The Plaintiff has further averred that it has been amenable to discussions and mediation to enable them reach an amicable settlement, but it is still convinced the court is properly seized of the matter and should determine the same to its logical conclusion.

The Notice of Motion Application dated 13th May, 2021 by the 2nd Defendant

32. The Application dated **13th May, 2021** by the 2nd Defendant is brought under **Order 2 Rule 15 of the Civil Procedure Rule**. It seeks

the following orders: -

1. Spent;

2. THAT the Plaint and this suit as against the Second Defendant be struck out and the costs of this Application, the Plaintiff's Application and of this suit be awarded to the Second Defendant.

33. The application is premised on the grounds set out on the face of it and it's supported by the annexed affidavit sworn on **13th May, 2021** by **Robert Minnis**, the 2nd Defendant's Operations Manager duly authorized to swear the Affidavit herein

34. He deponed that the relief sought by the Plaintiff seek to restrain both Defendants from selling, transferring, assigning, manifesting or alienating cargo which the 2nd Defendant has no interest in, be it proprietary or otherwise nor does it have the cargo in its control or possession and any orders made against it would be made in vain.

35. The 2nd Defendant averred that it is not and has not at any time acted as a local agent for the owners of Motor Vessel 'SFL SPEY' which is said to have carried the subject cargo to Mombasa.

36. It was the 2nd Defendant's case that it is clear that the dispute between the Plaintiff and the 1st Defendant relates to the sale of the cargo and whether or not the terms and conditions of sale were breached.

37. The 2nd Defendant contends that it has been mentioned generally with no specific averment or allegations have been made against it other than a mention of a letter dated 26th October, 2020 to which the 2nd Defendant claim it did not respond as it was not the agent for the Vessel nor did it have authority to manifest the cargo on behalf of the ship owners or Master.

38. According to the 2nd Defendant, the Plaintiff is aware that they are not involved with suit herein and a letter was written to the Plaintiff's Advocate on the **19th April, 2021** to communicate the said sentiments. The 2nd Defendant has maintained that it has no proprietary interest and thus it cannot be alleged that it has held or refused to release the subject cargo or that together with the 1st Defendant they want to illegally and unlawfully detain the cargo and sell it.

39. The 2nd Defendant lastly, averred that there is an arbitration agreement between the Plaintiff and the 1st Defendant, that it is not a party to and thus cannot be enjoined in the matter in any event.

40. In response the Plaintiff filed a Replying Affidavit sworn on **19th May, 2021** by **Gabriel Kiama**, a director of the Plaintiff. He deponed that the Plaintiff received information from the 1st Defendant's Mr. Irshad Ahmad that the 2nd Defendant was the party that held the manifest for the ship that had docked with the cargo of billets on the 26th July, 2021.

41. It was the Plaintiff's averment that on the 26th October, 2020 it wrote a letter to the 2nd Defendant demanding that the manifest be changed from the itself to the 1st Defendant's local subsidiary **TATA HOLDINGS AFRICA (KENYA) LIMITED** to enable the Plaintiff clear the cargo. That the said letter was never responded to despite the several calls to the 2nd Defendant's offices and that they have since never given any contrary information that they were not the party that held the manifest as far as the subject cargo is concerned.

42. The Plaintiff's case is that at all time the 1st Defendant has appreciated and acknowledged the 2nd Defendant as its agents for purposes of manifesting the subject cargo and that the 2nd Defendant is necessary to the case as it is mentioned in the 1st Defendant's Replying Affidavit sworn on 30th April, 2021

by **Vishal Tank** where he stated that the 1st Defendant is awaiting demurrage charges from the 2nd Defendant before the cargo can be released to the Plaintiff.

43. The parties took directions on submissions. The Plaintiff filed two sets of submissions in support of its application dated 20th March, 2021 and in opposition of the 1st Defendant's Application dated the 30th April, 2020. The submissions are dated the 5th May, 2021 and 7th May, 2021 respectively. The 1st Defendant did not file any submissions, while the 2nd Defendant's submissions are dated the 13th May, 2021 and filed on 17th May, 2021.

44. The submissions were orally highlighted before me on the 19th May, 2021.

The Plaintiff's submissions

45. The Plaintiff filed two sets of submissions, one in favour of its application for injunction dated **20th March, 2020** and in opposition of the 1st Defendant's application dated **30th April, 2020** on jurisdiction of the court.

46. The Plaintiff relied on the case of **Giella vs Cassman Brown & Co. Ltd, [1973] E.A** and stated that they have demonstrated a prima facie case with a probability of success. The Plaintiff stated that the 2, 038.780 metric tonnes of billets has been taken away by the 1st Defendant's greed because the price of the billets has drastically shot up and the Plaintiff is deserving of the court's protection.

47. On irreparable loss, the Plaintiff stated that they are suffering immense damage and loss as it relies on the raw material imported to manufacture steel and they are incurring loss due to the deficiency of the said billets.

48. The Plaintiff stated that the said loss cannot be compensated by an award of damages as the 1st Defendant's company is based in Dubai and the same would be extremely difficult to enforce. The Plaintiff relied on the case **JOSEPH SIRO MOSIOMA v HOUSING FINANCE COMPANY OF KENYA & 3 others [2008] eKLR** where Warsame J, as he was then stated that damages cannot be an automatic remedy when deciding whether or not to grant an injunction and cannot substitute for loss occasioned by a clear breach of law.

49. On balance of convenience, the Plaintiff stated the same tilts in its favour as it is seeking for the preservation of the 2, 038.780 metric tonnes and release of the consignment whose value will be depleted by taxes and demurrage charges and other apparent costs.

50. The Plaintiff stated that it paid the 1st Defendant who accepted payments diligently and at no point did they communicate that the billets were sold to another party clearly a breach of contract.

51. On whether the matter can be transferred for arbitration, the plaintiff submitted that the suit cannot be referred to arbitration as the claim is against two parties and the 2nd Defendant is not a party to the arbitration agreement and relied on the case of **Standard Group PLC v Wesley Kiptoo Yegon & another [2019] eKLR** where it was held that parties could not proceed with arbitration as the 2nd Defendant in the case was not part of the arbitral agreement.

52. The Plaintiff submitted that the nature of the dispute herein cannot be referred to arbitration due to the interests of third parties involved. Further, that the goods are already present in Kenya and thus will be unfair to arbitrate in Dubai the country indicated in the Conditions of sale.

53. It has been submitted that the dispute cannot be referred for arbitration in Dubai as the dispute does not involve the entire 9,000 metric tonnes but the remaining 2, 038.780 tonnes of billets.

54. The Plaintiff submitted that the 1st Defendant cannot ask the court to refer the suit herein for arbitration when there has been no attempt to amicably resolve the dispute they would wish to be referred to arbitration as was the requirement in the case of **County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR**.

55. It has been submitted that the 1st Defendant is in breach and cannot seek refuge in arbitration to defeat justice. The Plaintiff has claimed that the 1st Defendant received the full purchase price and has not refunded the same after acknowledging that they have sold part of the consignment thus benefiting unfairly.

56. The Plaintiff has further stated that the contract does not give the 1st Defendant the right to unilaterally change consignees and that the 2nd Defendant's refusal to manifest the goods in favour of the Plaintiff is a material breach that cannot be helped by arbitration.

The 1st Defendant's submissions

57. The 1st Defendant submitted that there is an arbitral clause (25) in the **Standard Terms and Conditions of Sale (Tata International West Asia DMCC)** that accompanied the proforma invoices issued on **24th April, 2020, 30th April, 2020 and 1st May, 2020**. The 1st Defendant urged the court to give effect to the parties' agreement or contractual intention to have their dispute resolved under the said clause.

58. The 1st Defendant has acknowledged that there is a dispute between the parties and stated its contention is that the Plaintiff had been late to meet payments and 1st Defendant was not obligated to deliver the said consignment.

59. It has been submitted that the 1st Defendant is ready and willing to refund the amounts that have been received because the consignment was already sold to a third party.

60. According to the 1st Defendant the involvement of third parties cannot override the obligation upon which court can stay the proceedings and refer the said matter for arbitration. It has been stated that the Plaintiff cannot evade the agreement.

61. On the Plaintiff's application for temporary injunction, the 1st Defendant submitted that the said orders cannot issue as the 1st Defendant has already been exercised, but emphasized they are ready to refund the Plaintiff under the proper forum which is DIFC Dubai as stipulated in the contractual agreement between the parties.

The 2nd Defendant's submissions

62. The 2nd Defendant's submissions were filed in support of its application dated **13th May, 2021** and in opposition of the Plaintiff's application dated

20th March, 2021.

63. It has been submitted that the Plaintiff's Application as well as the Plaintiff disclose no cause of action against the 2nd Defendant. It has been stated that the 2nd Defendant has no proprietary or any interest at all in the cargo which is the subject of this suit nor was it the shipping

agents nor authorized by the master to file any manifest and thus there can be no authority whether apparent or otherwise that the 1st Defendant can grant to the 2nd Defendant for loading of the manifest with the appropriate authorities.

Analysis and determination

64. This court will first endeavor to determine whether it has jurisdiction to entertain the suit herein and whether the matter should be referred to arbitration as stipulated in the **Standard Terms and Conditions of Sale (Tata International West Asia DMCC)** as requested by the 1st Defendants.

65. It is noteworthy that the 1st Defendant and Plaintiff have acknowledged that there exists a dispute between them. It is the Plaintiff's contention that they paid for the consignment in full and the 1st Defendant should be compelled to release the remaining 2, 038.780 tonnes of billets. The 1st Defendant's contention is that the Plaintiff was late to fulfill payments as agreed and they exercised their right of resale and part of the consignment has been sold to a

third party, but they maintain they are ready and willing to refund the Plaintiff the amounts paid less demurrage charges and taxes applicable. The 1st Defendant thus sought that the dispute be referred to arbitration.

66. In determining whether a matter can be referred to arbitration, **Section 6(1) of the Arbitration Act No. 4 of 1995** is key. It provides: -

“(1) 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 files any pleadings or takes any other step in the proceedings, 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.”

67. The application of **Section 6** above as read in line with **Article 159 (2) (c) of the Constitution of Kenya** is mandatory with a limitation if there is proof that the arbitration agreement is null and void, incapable of being performed and where there is no dispute between the parties with regard to matters agreed to be referred to arbitration.

68. The Arbitration Clause in the **Standard Terms and Conditions of Sale (Tata International West Asia DMCC)** reads as follows: -

Governing Law, Jurisdiction and Arbitration

25

a) The provisions of the U.N Convention on Contracts for the International Sale of Goods are hereby expressly excluded from application to the contract or any transaction between parties hereunder.

b) The contract will be governed by and construed in accordance with the Laws of England and Wales.

c) All disputes, contraventions or differences arising out of or in connection with the contract including any questions regarding the existence, validity and termination shall be settled amicably between the parties, after a party has given notice of the occurrence of the dispute. In the event the parties are unable to arrive at an amicable resolution, the parties concerned subject to sub rule (d) below, to refer the dispute to arbitration. The arbitration shall take place in Dubai at the Dubai International Financial Centre (DIFC) in accordance with rules of DIFC – LCIA Centre (DIFC-LCIA Rules) or Any amendment thereof, which Rules are deemed to be incorporated by reference into this clause. The arbitration shall be conducted by a sole arbitrator to be appointed in accordance with the said Rules. The Laws of arbitration shall be DIFC Dubai and the language of the arbitration shall be English.

d) Notwithstanding anything contained in sub rule (c) above, the seller may of its sole option institute proceedings with regard to the disputes in any court by way of suits, actions or proceedings which has competent jurisdiction and the buyer submits to such jurisdiction and irrevocably revokes any right that it may have to claim that the action has been brought in an inconvenient forum.

The buyer submits to the exclusive jurisdiction of the Courts of the Dubai International Financial Centre (DIFC)

69. The reading of **clause 25 (c)** above is very clear that the intention of the parties was to oust the jurisdiction of the court and have preference to resolve the dispute amicably first by issuance of a notice that dispute has occurred and secondly if they have not settled the dispute amicably, it be referred to arbitration at the **Dubai International Financial Centre (DIFC) in accordance with rules of DIFC – LCIA Centre (DIFC-LCIA Rules)**.

70. Further, the Application of **clause 25 (c)** of the Conditions of Sale has a limitation as it is indicated that it applies subject to **clause 25 (d)** which in my understanding states that it is only the seller (the 1st Defendant) who is allowed to institute proceedings in any court of law with competent jurisdiction subject to the buyer (the Plaintiff) submitting itself to the said jurisdiction. The said provisions do not extend to the buyer (the Plaintiff) to institute a suit or any proceedings in a court of law that it deems fit. The **Standard Terms and Conditions of Sale**

(Tata International West Asia DMCC) are clear that “the buyer submits to the exclusive jurisdiction of the Courts of the Dubai International Financial Centre (DIFC).”

71. The Court of Appeal in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR** held: -

“...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...”

72. Therefore, it is sufficient for this court to conclude that under **clause 25 (c) and (d) of Standard Terms and Conditions of Sale (Tata International West Asia DMCC)** the Plaintiff is not entitled to commence a suit in the law courts of Kenya. The jurisdiction to hear a suit or proceedings as commenced by the buyer (the Plaintiff) is vested “*exclusively*” in the **Courts of the Dubai International Financial Centre (DIFC)**.

73. It is trite law that jurisdiction is the cornerstone of any litigation and without it, a court has no legal authority to entertain a suit that is not properly before it. See **Owners of the Motor vessel “Lillian S” V Caltex Oil Kenya Ltd (1989) e KLR** where Nyarangi, J held that *jurisdiction is everything and without it a court cannot move a step further hence should down its tools.*

74. Similar position was held in the Court of Appeal case of **George C. Gichuru v Senior Private Kioko & another [2013] eKLR** where the court has this to say on jurisdiction: -

“...It is settled law that parties cannot, even by their consent on a matter, confer jurisdiction on a court where no such jurisdiction exists. And a court would act in vain, nay, perform a nullity, if it were to exercise a jurisdiction it does not have - see Volume 3:1-N WORDS AND PHRASES LEGALLY DEFINED at pg 113...”

A question of jurisdiction may be raised by a party or by the court suo moto (emphasis provided) during the proceedings – see section 18 Civil Procedure Act - and once raised, that question must be determined without further ado...”

75. The parties herein have not disputed being bound by the **Standard Terms and Conditions of Sale (Tata International West Asia DMCC)** contained in the order acknowledgment and proforma invoices dated the **24th April, 2020, 30th April, 2020 and 1st May, 2020**, that only give **Dubai International Financial Centre (DIFC) and Courts of the Dubai International Financial Centre (DIFC)** jurisdiction to hear dispute between the parties that are commenced by the Plaintiff.

76. In the circumstance, this suit being commenced by the Plaintiff contrary to the provisions of **Clause 25(c) and (d) of the Standard Terms and Conditions of Sale (Tata International West Asia DMCC)**, this court lacks the jurisdiction to determine the applications as brought forth by the parties herein.

77. For the above reasons, I find that this court lacks jurisdiction to hear the suit herein and I make the following orders: -

i) That the Plaintiff’s application dated 20th March, 2021 is hereby dismissed with costs to the 1st and 2nd Defendants.

ii) The Plaintiff’s suit dated 20th March, 2021 is struck out with costs to the 2nd Defendant.

iii) The 1st Defendant’s application dated 30th April, 2021 is hereby dismissed with no orders as to costs.

iv) The 2nd Defendant’s Application dated 13th May, 2021 is dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OCTOBER, 2021

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kirimi for the Plaintiff/Applicant

Mr. Deya counsel holding brief for 1st Defendant

Mr. Ondego counsel for 2nd Defendant/Respondent

Gitonga - Court Assistant