



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 22 OF 2020

4MB MINING LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

1. MISNAK INTERNATIONAL (UK) LIMITED1ST DEFENDANT/APPLICANT

2. CJ ICM GROUP2ND DEFENDANT/APPLICANT

3. ROHLIG PROJECTS LIMITED..... 3RD DEFENDANT

RULING

1. The 1st and 2nd defendants (applicants) through an application by way of Notice of Motion dated 11th June, 2020 anchored on the provisions of Order 1 Rule 10, Order 2 Rule 15(1)(b)(c) and (d), Order 50 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 12, 15 and 27 of Civil Procedure Act and all the enabling provisions of the law, seek the following orders –

i. Spent;

ii. Spent;

iii. That this Honourable Court be pleased to strike out this suit on the basis that the entire dispute herein arises from the contract between the plaintiff and the 1st defendant which said contract (sic) reserved jurisdiction of any dispute exclusively for English Courts;

iv. That this Honourable Court be pleased to strike out the suit due to lack of jurisdiction as the parties to the contract and the subject matter of the suit are not resident and/or situate in Kenya;

v. That in the alternative, to prayers 3 and 4, the Honourable Court be pleased to strike out the suit against the 1st and 2nd defendants for being an abuse of process; and

vi. That the costs of this application and the suit be borne by the plaintiff.

2. The application is premised on the affidavits of Peter Ferdinand and Tugrul Titanoglu and the grounds on the face of the application. On 5th August, 2020, the plaintiff/respondent filed a replying affidavit sworn by Yoram Moussaieff on 17th July, 2020. The 1st and 2nd applicants filed a supplementary affidavit through Peter Ferdinand sworn on 14th September, 2020. The respondent filed a further affidavit sworn on 6th October, 2020.

3. In support of the 1st and 2nd applicants' application dated 11th June, 2020, the law firm of Mohamed Madhani & Company Advocates filed written submissions. Mr. Shah, learned Counsel for the applicants stated that sometime in June, 2017 the respondent through its director Yoram Moussaieff contacted the 1st applicant requesting for its services in carrying mining equipment from Thailand to Juba, South Sudan through Mombasa, Kenya. It was stated that the 1st applicant through an email dated 23rd June, 2017 responded to the request by providing an explanation of their services and their charges. That in the said email, the 1st applicant highlighted that all business is conducted under BIFA Standard Trading Conditions latest edition, a copy of which could be made available on request.

4. It was submitted that the respondent accepted the terms of service provided by the 1st applicant and invoiced it on 18th February, 2018. That payment was made and the goods left Thailand enroute to Juba, South Sudan. It was further submitted that when the goods arrived at

the Port of Mombasa on 4th March, 2018 a dispute arose as to the charges which were levied by the 1st applicant.

5. It was contended that due to the dispute, the 1st applicant proceeded to exercise its right of lien over the goods, by first refusing to transport them from the Transit Port to Juba until payment was made and it subsequently moved the goods to United Arab Emirates (UAE) in order to mitigate loss and expense. The applicants' claim is that the cause of action in the present suit is unknown in law as it is based on a claim for theft and/or illegal diversion of goods at the Transit Port of Mombasa. The applicants' Counsel submitted that the applicants seek to strike out the suit herein owing to a jurisdiction clause in the Standard Terms and Conditions which form part of the contract between the respondent and the 1st applicant. That the 2nd applicant has also claimed that it was an agent of the 1st applicant and not a proper party to the suit. Mr. Shah relied on the case of **The Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd** (1989) KLR, where the Court of Appeal held that without jurisdiction, a Court has no power to make one more step.

6. It was submitted for the applicants that the contract between the 1st applicant and the respondent was based on an exclusive jurisdiction clause providing that the conditions and any act or contract to which they applied shall be determined by English law and any dispute arising out of any contract to which the conditions applied shall be subject to the exclusive jurisdiction of English Courts. Mr. Shah submitted that the exclusive jurisdiction clause is found both in the 2005a BIFA Standard Terms and also in the 2017 BIFA Standard Terms. He stated that the latter Terms expand the clause and provide for arbitration as a means of hearing and determining a dispute. To expound on the importance of the parties herein adhering to the said exclusive jurisdiction clause, he relied on the case of **Raytheon Aircraft Credit Corporation and another v Air Al-Faraj Limited** [2005] eKLR. He also cited the case of **Areva T and D India Limited v Priority Electrical Engineers and another** [2012] eKLR, where the Court of Appeal stated that the rule that parties should be held to their bargain should only be departed from in a special and exceptional case.

7. The applicants' Counsel proceeded to elaborate on what comprises a contract and relied on Chitty on Contracts and Halsbury's Laws of England/Contract (Volume 9(1) (Reissue) at paragraph 606. He cited the case of **Ali Abdi Mohamed v Kenya Shell & Company Limited** [2017] eKLR in which the Court of Appeal reiterated its earlier decision and stated that in **Abdulkadir Shariff Abdirahim and another v Awo Shariff Mohamed t/a A. S. Mohamed Investments** [2014] eKLR, it was held that there is no general rule that all agreements must be in writing and that the numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum.

8. He indicated that in the said case, the Court of Appeal went on to state that Section 3(1) of the Law of Contract Act is one such provision and that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. Mr. Shah also relied on the case of **Timoney and King v King** 1920 AD 133 at 141 on the issue that a contract can be inferred from the conduct of the parties.

9. He contended that although in the amended plaint and the respondent's further affidavit it was admitted that there was a contractual relationship between the respondent and the 1st applicant, the respondent in its submissions had disputed the same. Mr. Shah asserted that there existed an agreement between the two parties even though it was not a formal contract. He further submitted that the said contract incorporated BIFA Terms through an email from the 1st applicant dated 23rd June, 2017, which expressly stated so. He cited the case of **M/s Ikuyu Enterprises Ltd v Ms Feba Radio** [2009] eKLR, where the Court held that the principle of incorporation by reference applies equally to contracts which are made orally or by conduct.

10. He also relied on the case of **Rohlig (UK) Ltd v Rock Unique Ltd** [2011] EWCA civ 18, where the UK Court of Appeal upheld the findings of the Mercantile Court on the incorporation of BIFA Terms in contracts. Counsel for the applicants also cited Halsbury's Laws of England/carriage and carriers Volume 7 (2008), 5th Edition at paragraph 72, where it states that parties to a contract for carriage of passengers or goods may, with certain exceptions, incorporate in it any terms and conditions upon which they may agree and that standard conditions may be incorporated either by express agreements, oral or written, in which case no problem arises or by implication, which will usually arise either where the contract is made by the issue of a ticket or other contractual document or from a course of dealing between the parties.

11. Mr. Shah indicated that since the 1st applicant is a carrier, the Standard Trade Association Terms such as BIFA conditions are commonly used, especially where a party has been made aware of the said Terms, as in this case. He emphasized the position that the BIFA Terms were fully incorporated into the contract between the respondent and the 1st applicant and they should be bound by the terms of their contract. He relied on the case of **National Bank of Kenya Ltd v Pipeplastic Sumkolit (K) Ltd and another** [2001] eKLR, to propound the said submission.

12. He indicated that in this case, the exclusive jurisdiction clause was binding upon the parties unless it showed that exceptional circumstances exist to avoid exclusive jurisdiction and that in such an instance, the burden of proof would befall the respondent herein. He relied on the case of **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd** [1985] eKLR, to bolster his submission in that regard.

13. He pointed out that all the applicants are foreign companies with no presence in Kenya. Further, that the dispute cannot be compartmentalized by having a part of the dispute heard in Kenya and another part of the dispute heard in another jurisdiction.

14. Mr. Shah proceeded to argue that the 1st applicant was entitled to charge bond fees under Cost Insurance and Freight value (CIF) as opposed to Bond in Force (BIF) value. He thus urged that the right forum for determination of the dispute was in English Courts, which are familiar with BIFA Terms that are applicable by British Freight Associations in standard contracts. He also urged that Kenyan Courts may not be best suited to fully apply English law to the contract between the respondent and the 1st applicant.

15. He submitted that the 1st applicant did not illegally divert the respondent's goods by trans-shipping them to UAE but it exercised its lien over the goods under the BIFA Terms.

16. On the issue of the jurisdiction in which the offence was committed, Mr. Shah submitted that under Section 26(1) of the East African Community and Customs Management Act, 2004, goods in a transit shed or port are legally not deemed to be within the jurisdiction of the country but are outside the jurisdiction of this Court in terms of risk and possession. He contended that any alleged tort of conversion committed over the goods took place on the vessel that brought the goods.

17. Mr. Shah also made reference to the delivery order which states that “*goods and container in transit to Republic of South Sudan at Shippers’ Risk and expense.*” It was stated that the registration details of the vessel which shipped the goods to the Port of Mombasa was Safmarine Ngami, which was flying the USA flag, thus the claim for diversion had no nexus to Kenya.

18. It was submitted that the 1st applicant through an email dated 27th March, 2018 informed the respondent that it had invoked the election of Arbitration by giving notice to the respondent and that it stood to suffer no prejudice if the dispute was heard in England. It was stated that the respondent from its list of witnesses showed that only its director would give evidence but it was not disclosed in the respondent’s affidavit that any witnesses would be called from Kenya to warrant this Court to consider that the expense of trial would be cheaper in Kenya.

19. Mr. Shah indicated that since the 1st applicant is incorporated in England, if the respondent was successful in English Courts, it would easily enforce Judgment against the 1st applicant. It was stated that the claim was not time barred in England and that the respondent had the option of filing suit in England or even commencing Arbitration if it sees it fit to do so.

20. He also stated that the applicants’ witnesses are based abroad and the goods that had allegedly been converted were not within the jurisdiction of this Court, and that the Court would not have the benefit of assessing the value of the goods, more so, because they are technical in nature.

21. On the issue of the claim for loss of earnings in South Sudan, the applicants’ Counsel submitted that the purported earnings arise from a project in South Sudan, thus the claim for loss of earnings has no nexus to Kenya but to South Sudan, and that this Honourable Court has no jurisdiction in the said country. He contended that there were no exceptional circumstances to warrant a trial in Kenya and the proper forum to hear the dispute herein would be England.

22. In regard to the 2nd applicant, Mr. Shah posited that it should not have been sued as it acted as an agent for the principal being the 1st applicant. He supported his submissions with the decision of the Court of Appeal in **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates and another** [2016] eKLR, where the Court stated that the principle of common law is that where the principal has been disclosed, the agent is not to be sued. The applicants’ Counsel made reference to the affidavit of Trigrul Titanoglu sworn on 11th June, 2020 which was filed together with the present application. It was pointed out that the averments by the said deponent were not contested by the respondent in its replying affidavit or further affidavit and therefore remained uncontroverted. Further, that the respondent’s pleadings did not identify any direct cause of action against the 2nd applicant. It was indicated that when the 1st applicant took steps to mitigate its loss, it kept the goods in storage with the 2nd applicant in the United Arab Emirates (UAE). It was thus stated that even if this Court was to assume jurisdiction over the dispute herein, the 2nd applicant is not a proper party in this suit as it is an agent for a disclosed principal. Mr. Shah prayed for the application to be allowed.

23. Ms G. Okumu, learned Counsel for the respondent through submissions filed on 1st December, 2020 explained that the respondent’s claim was for USD 43,468,604.02 being the value of 15 containers together with the loss of use. She further stated that the said containers arrived at the Port of Mombasa on 1st March, 2018 and they were cleared as transit cargo destined for Juba, South Sudan. She indicated that a dispute arose between the respondent and the 1st applicant in respect to the amount of bond fees to be paid by the respondent and that the 1st applicant purported to exercise its right of lien on the consignment. She stated that the respondent filed **HCCC No. 30 of 2018. 4MB Mining Limited v Freight Forwards (K) Limited and 3 others** praying for an injunction and release of its containers and that when the case was pending in the High Court, the 1st applicant re-exported the containers from the Port of Mombasa to the Port of Jebel Ali, Dubai. She stated that the 1st applicant was the shipper and the 2nd applicant was the consignee under bill of lading Nos. 577431922 and 577879624 of 14th August, 2018 and 24th August, 2018, respectively.

24. The respondent’s Counsel submitted that the suit herein is as a result of fraud, theft and/or conversion of the respondent’s containers leading to their re-export from the Port of Mombasa to the Port of Jebel Ali, Dubai, thus the cause of action arose in Mombasa. She indicated that the respondent did not at any time transfer ownership of the containers to the applicants.

25. Ms Okumu submitted that the respondent had not improperly joined any party to the suit herein, thus the provisions of Order 2 Rule 15(1)(b)(c) and (d) of the Civil Procedure Rules had been wrongly invoked as the applicants had failed to establish how the suit is scandalous, vexatious, frivolous or an abuse of the court process. She contended that the applicants had pleaded contested facts in their application against rival pleadings and by so doing, they were trying to evade a full hearing. It was submitted that there was no formal agreement between the respondent and the 1st applicant and that correspondence could not amount to a contract. It was further contended that the 1st applicant only issued a quotation in a forwarding email which did not incorporate the BIFA terms which came into effect on 1st October, 2017 after the said email communication.

26. It was submitted by the respondent’s Counsel that the respondent never ceded possession of its consignment because after issuance of the bill of lading No. 574843545, the possession and control was under the shipper who was the respondent. It was also submitted that once the goods arrived in Mombasa, the shipping line issued a delivery order to the respondent, thus the 1st applicant did not have possession, custody or control of the consignment at any given time.

27. Ms Okumu submitted that the respondent was not bound by BIFA Rules as it was not a Member of BIFA. It was stated that the shipment was done by Safmarine Limited under bill of lading No. 574843545 and not the applicant and that customs entries made in respect of the goods confirmed that the respondent was the owner of the goods as the delivery order issued by the carrier placed the goods under the firm

custody of the respondent and Kenya Revenue Authority, thus the 1st applicant could not stake a claim on the consignment.

28. It was stated that the respondent's claim is for acts of fraud, theft, and illegal diversion of the respondent's goods from the Port of Mombasa to the Port of Jebel Ali, Dubai and that the 1st applicant purported to be the owner of the consignment. It was indicated that the respondent was not a party to the arrangements made when the 15 containers left the Port of Mombasa.

29. Ms Okumu submitted that there was no oral agreement between the respondent and the 1st applicant setting out the terms of engagement. That the 1st applicant issued a quotation through email, but there was no response from the respondent although it made payment to the 1st applicant. She stated that the contractual relationship between the respondent and the 1st applicant was for the latter to source and transport mining equipment from Thailand to South Sudan. She relied on Black's Law Dictionary which defines a contract as an agreement between two or more parties creating obligations that are enforceable or recognizable at law or the writing that sets forth the agreement.

30. The respondent's Counsel cited the case of **Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 others** [2014] eKLR, to demonstrate that the applicant bears the initial legal burden of proof which it must discharge.

31. She also relied the case of **Universal Education Trust Fund v Monica Chopeta** [2012] eKLR, in which the Court cited Section 93(1) of the Evidence Act which states that contents of a document can only be proved by that very document and not otherwise. Ms Okumu also relied on the case of the **County Government of HomaBay v Oasis Group International and another** HCCC No. 13 of 2015, where the Court held that failure to produce the contract document or to adduce any other admissible evidence was fatal to the plaintiff's case therein.

32. The respondent's Counsel was of the view that without an express indication that specific terms had been agreed between the parties, any reference to the specific term in any correspondence is a mere offer. She cited the case of **Pius Kimaiyo Langat v The Cooperative Bank of Kenya Limited** [2017] eKLR, where the Court of Appeal held that the letter of offer did not constitute a contract between the parties.

33. She stated that in the instant case, there was no contract put before the Court for transportation of the consignment from the Port of Mombasa to the Port of Jebel Ali, Dubai.

34. The respondent's Counsel asserted that the BIFA Rules were not applicable in the present instance as the matter in dispute relates to bill of lading Nos. 574843545 and 5777343191 issued at Mombasa to facilitate the transportation of the consignment from the Port of Mombasa to the Port of Jebel Ali, Dubai without the authority and involvement of the respondent, who was said to be the undisputed owner of the goods.

35. Ms Okumu submitted that since the two bills of lading were issued fraudulently, they make no reference to the BIFA Rules and the respondent was not a party to them, as there was no privity of contract between the respondent and the applicants to justify the transportation of the consignment to Dubai. She submitted that the respondent was at liberty to challenge the legality of the two bills of lading in the jurisdiction where they were issued.

36. On the issue of exclusive jurisdiction, Ms Okumu submitted that the mere fact that there exists a clause in the agreement limiting the jurisdiction of the Courts did not *ipso facto* exclude other Courts from determining whether they have powers to hear and determine the matter or not. She relied on the case of **A.B.C. Laminart Pvt. Ltd & another vs A.P. Agencies Salem [1989] 2, SCC 163**, to assert the position that in the absence of the words "**only**", "**alone**" and "**exclusive**", where the clause specifies that one of the two Courts having jurisdiction without specifically excluding the jurisdiction of the other Court, it means that both Courts have jurisdiction.

37. She also relied on the decision in **Road Transport Organization of India v Barunai Powerloom Weavers Co-op Society Ltd** (1997) 11 OLR 106, where the Court held that the clause on exclusive jurisdiction must be of mutual assent and must come to the knowledge of the person to whom the agreement is made. Ms Okumu submitted that in the present case no evidence of such mutual assent has been provided.

38. To demonstrate the importance of the meeting of minds in the application of exclusive jurisdiction, the respondent's Counsel relied on the case of **United India Insurance Co. Ltd v Associated Transport Corporation Ltd** AIR (1988) Ker 36, where it was held that a clause signed by the carriers' employee and not by the consignor did not constitute the meeting of minds and the exclusive jurisdiction of only Bombay did not apply.

39. It was submitted by the respondent's Counsel that the 1st applicant was solely relying on the email dated 23rd June, 2017 which was no more than a mere recital on the document and that there was no express acceptance of the same by the respondent, thus the recital was vague and general.

40. Ms Okumu posited that the applicant was asking this Court to assist in drafting an agreement between the applicants and respondent to incorporate the BIFA Rules to enable the applicant to raise the issue of jurisdiction. She relied on the case of **National Bank of Kenya Ltd v Pipeplastic Samkohit (K) Ltd and another** (supra), where it was held that Courts of law cannot rewrite a contract between parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

41. She submitted that in the case relied on by Mr. Shah in **United India Insurance Company Ltd v East Africa Underwriters (Kenya) Ltd** (supra), the Court held that the Courts of this country have discretion to assume jurisdiction over an agreement which was made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country and that a contractual undertaking should be honored unless there is a strong reason for not keeping them bound by the agreement.

42. In submitting that the Kenyan Courts have jurisdiction to hear the dispute in this case, Ms Okumu relied on the provisions of Order 1 Rule 3 and Order 1 Rule 9 of the Civil Procedure Rules and Section 15 of the Civil Procedure Act. She stated that the performance obligation was to be in Kenya and that the alleged breach of contract happened in Kenya and the theft of goods took place in Kenya. She took the

position that the UK Court has no jurisdiction to handle contractual matters on issues arising in Kenya. She relied on the case of the **Owners of the Motor vessel "Lilian S" v Caltex (K) Limited** (supra) on the issue of jurisdiction.

43. She cited the decision in **Barakat Exploration Inc v Taipan Resources Inc** [2014] eKLR, where the Court held that unless the jurisdiction of Courts in Kenya is ousted in any clause in an agreement between the parties, a Court will decide a case involving a foreign corporation as if it was purely a Kenyan domestic case. She also cited the case of **Raytheon Aircraft Corporation and another v Air Al-Farat** (supra), on the same issue.

44. In addressing the issue of whether the applicant had a lien over the subject consignment, it was submitted by the respondent's Counsel that the applicants had not demonstrated that they reserved possessory rights over the consignment or that they had control over the same. It was contended that clause 8A of the BIFA Rules did not apply in this case and that the applicants would have to prove that they reserved possession, custody and control of the consignment as a condition precedent to their right of lien.

45. It was further submitted that once the goods arrived at the Port of Mombasa, a delivery order was issued to the respondent by the carrier firmly placing the consignment in the custody and possession of the respondent. It was argued that in view of the above, the 1st applicant could not have had the right of lien and that such a right cannot confer legal title and that by generating new bills of lading in its name, the 1st applicant acted fraudulently. It was further argued that the claim of a right of lien by the applicant did not meet the threshold set by clause 8A of BIFA Rules.

46. The respondent's Counsel submitted that in the case of **Sachs v Micklos** [1948] 2 KB 23, a bailee who sold furniture entrusted to him for storage merely because the owner failed to collect it after numerous written requests was held liable for conversion.

47. The respondent's Counsel stated that there were 2 separate consignments which were distinct and initiated at different Ports with the first one being from Thailand to Mombasa under bill of lading No. 574843545, delivery order No. SAFM 5748435 and custom entry No. 2018MSA 6827408, with the consignee being the respondent herein. She stated that the other (2nd) transaction) took place on 14th August, 2018 and on 24th August, 2018, when the consignment was shipped from Mombasa to the Port of Jebel Ali, Dubai, under bills of lading No. 57743192 and 577879624, with the 1st applicant being the shipper and the 2nd applicant as the consignee. She asserted that the respondent's cause of action in this suit relates to the 2nd transaction.

48. In regard to the submission that had been made by the applicants' Counsel that since the 2nd applicant was an agent of the 1st applicant it should not have been sued, Ms Okumu refuted the said contention by submitting that there are exceptions to the general common law principle that a disclosed agent cannot be properly joined in a suit. She stated that the said exceptions apply where there is an allegation of fraud and where the principal is a foreign company. She cited the case of **National Social Security Fund Board of Trustees v Ankhan Holding Limited and others** [2006] eKLR, where the Court held that no one can escape liability for his fraud by stating that he committed fraud on behalf of someone else and that he is not personally liable.

49. Ms Okumu urged that the 1st applicant should be held liable on account of fraudulently transferring the respondent's consignment to a third party without the respondent's consent and also for preparation of the documentation that facilitated the illegal transportation of the respondent's goods from the Port of Mombasa, Kenya to the Port of Jebel Ali, Dubai.

50. The case of **Standard Chartered Bank v Pakistan National Shipping Corporation** [202] UKHL 43, was relied on to demonstrate that the rationale behind the Hedley Byrne rule is that where the skill or offence is used for the assistance of another person who relies on such skill, a duty of care will arise. It was thus submitted for the respondent that the 2nd applicant owed a duty of care to the respondent since the 1st and 3rd applicants were the Notify Party on the bill of lading hence the 2nd applicant was properly before the Court under the provisions of Order 1 Rule 10 of the Civil Procedure Rules.

51. Ms Okumu pointed out that the respondent sought leave through an application dated 17th March, 2020 to serve notice of writ of summons and the 1st and 2nd applicants submitted themselves to the jurisdiction of this Court by entering an unconditional memorandum of appearance. It was submitted that the applicants lack the *locus standi* to raise issues not expressly pleaded in a statement of defence. She relied on the Court of Appeal decision in **Stephen Onyango Acholla v Edward Hongo Sule and another** [2004] eKLR.

52. She submitted that the performance of the contract in issue was to be at the Port of Mombasa and the alleged breach of contract took place at the said Port, within the jurisdiction of this Court. It was contended that the BIFA Rules lack the force of law as both the parties did not expressly refer to them as being applicable to the contract and there was no express agreement between the parties reserving any dispute to be heard in London or through arbitration which would have ousted the jurisdiction of this Court.

ANALYSIS AND DETERMINATION

53. The issues that arise for determination are-

i. If the contract between the 1st applicant and the respondent reserved jurisdiction of any dispute between them exclusively for Courts in England;

ii. If this Court should strike out the suit against the 1st and 2nd applicants for being an abuse of the court process.

54. The 1st applicant's Managing Director, Peter Ferdinand, in his affidavit in support of the application deposed that the 1st applicant is a limited liability company duly incorporated in the United Kingdom with its registered office in London, England, with no registered office or

presence in Kenya. He averred that on or about June, 2017 the respondent and the 1st applicant entered into a contract for the latter to deliver mining equipment from Thailand to Juba, South Sudan on transit through Mombasa, Kenya.

55. He also deposed that through an email of 23rd June, 2017 the 1st applicant issued a quotation for the service. That the said email contained information which clearly indicated that BIFA Terms were incorporated into the contract. He stated that the quotation was accepted by the plaintiff by ceding possession and control of the mining equipment to the 1st applicant for onward delivery to Juba, South Sudan.

56. There is no dispute as to the fact that the respondent's cargo duly arrived at the Port of Mombasa on 4th of March, 2018 for onward transmission to Juba, South Sudan. It was at that point in time that a dispute arose with regard to the charges which were being levied by the 1st applicant, as it was claiming bond in transit fees based on Cost Insurance and Freight (CIF) which it claims was governed by the BIFA Terms. The respondent declined to pay the sum of USD 122,020.58 on the basis that the bond fees ought to have been pegged on Bond in Force (BIF) value.

57. The 1st applicant referred to previous occasions outlined in the letter dated 14th March, 2018, attached to its affidavit as exhibit PF1, where the respondent had paid the 1st applicant bond fees based on CIF value as there had been no previous discussions or agreement to charge bond fees on BIF value. Further in the said letter the 1st applicant informed the respondent's Advocate that it had elected to refer the dispute to arbitration in accordance with the BIFA Terms.

58. In emails dated 27th March, 2018 and 4th April, 2018, the 1st applicant informed the respondent of its intention to sell the equipment it was holding under lien to offset its costs, container storage costs and any other associated costs incurred at the Port of Mombasa. The 1st applicant also informed the respondent that it considered its contract with the respondent to have been repudiated due to non-payment of the amount it had demanded.

59. The 1st applicant further informed the respondent that it had exercised its contractual right of lien over the equipment pursuant to clause 8A of the BIFA Terms and that under clause 28 of the said Terms, the 1st applicant had elected to have the dispute determined by either arbitration in the United Kingdom or litigation in a Court in England.

60. The 1st applicant deposed that through an email dated 5th April, 2018 the respondent, through its lawyers Antonia Jackson of Ince and Co. LLP affirmed knowledge of a debt owed to it for bond in transit fees for various consignments amongst which the respondent had made payment of USD 24,435.31 and that on 27th April, 2018 the 1st applicant was surprised to learn that a suit had been instituted. That the said suit was **MSA HCCC No. 30 of 2018 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan v Misnak International (UK) Limited**, which sought to challenge the actions by the 1st applicant in respect of the charges levied under the contractual lien.

61. The applicant averred that in its understanding, the said case went up to the Court of Appeal and was determined by the said Court in **Civil Appeal No. 118 of 2018, Misnak International (UK) Limited v 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan**, in which the Court of Appeal held that the High Court lacked jurisdiction to entertain the suit.

62. The 1st applicant deposed that it had been advised by its Advocate that despite the determination by the Court of Appeal, the respondent had instituted the present suit to re-litigate the issue relating to the performance of the contract by the 1st applicant and its contractual right of lien.

63. The 1st applicant proceeded to aver that the delay and failure by the respondent to remedy its breach under the contract compounded by the fact that the equipment was incurring excessive port and storage fees in Mombasa led it to re-export the equipment to the United Arab Emirates which is 2.5 KM from the sea to mitigate costs and observe best practice in preserving the equipment from deterioration.

64. The 1st applicant deposed that the respondent had specifically chosen to draft its pleadings in a manner which would shroud the true cause of action and nature of claim between the parties to circumvent the application of clause 28 of the BIFA Terms. Additionally, that the suit as pleaded discloses no clear and/or reasonable cause of action against it, which was deliberate and therefore an abuse (of the court process).

65. The present application is also supported by the affidavit of Tugrul Titanoglu, the Chief Operating Officer of the 2nd applicant, CJ ICM Group, who deposed that the 2nd applicant is a limited liability company duly incorporated in the United Arab Emirates and maintaining an office in Dubai, with no registered office and/or presence in Kenya. The 2nd applicant agreed with the contents of the depositions made by the 1st applicant. It averred that the dispute between the 1st applicant and the respondent is a contractual one and that the 2nd applicant has no relationship with the respondent, as it is the disclosed agent of the 1st applicant. The 2nd applicant averred that on or around August, 2018 the 1st applicant contracted it for purposes of storing its equipment under a contractual lien at its storage space in Dubai.

66. It further deposed that the 1st applicant duly informed it that the goods were on transit in Mombasa, Kenya but it was incurring excessive port and storage fees and therefore had the intention to move the same to Dubai where storage and port charges are substantially reduced. That the 2nd applicant confirmed to the 1st applicant that the same was in order and as a result, the mining equipment was taken to Dubai and it was being held at the 2nd applicant's premises, as an agent of the 1st applicant. The 2nd applicant deposed that it was not a necessary party to the suit herein as it is a disclosed agent thus no reasonable cause of action was disclosed against it and the suit against it was an abuse (of the court process).

67. In a replying affidavit sworn by Yoram Moussaieff, the respondent's director, he deposed that nobody had been wrongly joined as a defendant. He also deposed that the applicants had not demonstrated how the respondent's plaint was scandalous, frivolous or vexatious and how it would prejudice, embarrass or delay the fair trial of the action or how it is an abuse of the court process.

68. The respondent deposed that the applicants were asking the Court to determine the merits of issues arising out of rival proceedings and contested facts through this application.

69. The respondent averred that there was no formal contract between it and the 1st applicant and the said averment was premised on several correspondences between the respondent and the 1st applicant in the month of June, 2017. It further averred that the 1st applicant issued a quotation but it was not true that the quotation or the forwarding email incorporated the terms of the British International Freight Association (BIFA) Standard Trading Conditions, 2017 as alleged or at all. It was deposed that although the email communication was dated 23rd June, 2017 the BIFA Terms of 2017 came into effect on 1st October, 2017.

70. The respondent averred that the shipment of the consignment to Mombasa was by the carrier Safmarine Limited in terms of bill of lading No. 574843545 and not by the 1st applicant as implied and that the respondent was named as the consignee. That since the 1st applicant was not referred to in the bill of lading, it had no possession, custody and control of the goods as implied. It was deposed that after the goods arrived at Mombasa, they were released to the respondent by the issuance of a delivery order by the carrier and that the 1st applicant was not in the picture at all. The membership of the 1st applicant to the BIFA was contested and it was contended that it was not bound by its Standard Trading Conditions of 2017 as there was no evidence to support the claim

71. It was deposed that the delivery order issued by the carrier Safmarine Ltd effectively placed the possession and custody of the goods with the respondent and the Kenya Revenue Authority through licensed Customs Agents, Freight Forwarders (K) Limited, who kept the goods in a bonded warehouse, thus the 1st applicant could not stake a claim on the goods on the bill of lading No. 574843545.

72. The respondent averred that BIFA Terms do not apply in respect of its case against the 1st applicant which is based on re-exportation of the consignment from the Port of Mombasa to the Port of Jebel Ali, Dubai. It was stated that the East African Community Customs Management Act, 2004 and the regulations thereunder override BIFA conditions 2017, since bond in transit fees are payable in Kenya Shillings as they relate to Kenyan customs bonds. It was deposed by the respondent that the consignment was not rerouted to the Port of Jebel Ali, Dubai but it was shipped as a fresh export distinct from the 1st one from Thailand and as such, in the 2nd shipment, legal title was transferred to the 1st applicant.

73. In a supplementary affidavit filed on 26th September, 2020, the 1st applicant reiterated its position that BIFA Terms applied to the contract between it and the respondent and that all correspondence and documentation from it contain the BIFA mark. It was stated that provision of services took place from February, 2018 as evidenced by the invoice dated 14th February, 2018, hence the reference to 2017 BIFA Terms. The 1st applicant exhibited its BIFA Membership Certificate.

74. It was deposed by the 1st applicant that the mining equipment was at the transit Port of Mombasa when a dispute arose with regard to the charges levied by the 1st applicant under the contract, which were pre-agreed contractual rates. It was also averred that the goods were never released to the respondent and remained in the transit Port pending resolution of the dispute. It was stated that the dispute which arose first in time requires to be determined first, before consideration of the other claims made by the respondent.

75. In a further affidavit filed on 8th October, 2020 the respondent deposed that BIFA Terms cannot apply to diversion of the consignment as the respondent was not a party to the removal of the consignment from the Port of Mombasa to the Port of Jebel Ali, Dubai. The respondent deposed that all the averments by the applicant were of no effect as long as they had not filed a statement of defence.

76. It was further averred by the respondent that the Courts in England would not have competent jurisdiction to deal with the issues raised herein since the cause of action arose in Mombasa, Kenya, after delivery of the consignment to the Port of Mombasa from Thailand.

If the contract between the 1st applicant and the respondent reserved jurisdiction of any suit between them exclusively for Courts in England.

77. The above issue must be considered in the context of the suit before this Court. The respondent's claim against the applicants is as per the amended plaint filed on 5th August, 2020. Paragraphs 6 to 10 of the said plaint defines the relationship between the 1st applicant and the respondent herein as being that the 1st applicant was contracted by the respondent to source for the purchase and transportation of machinery from Thailand to Juba, South Sudan, which goods were duly purchased and the sum of USD 8,769,698.02 paid to the 1st applicant as per invoices raised for the cost of containers, freight and transport to Juba. That the 1st applicant sub-contracted the inland haulage of the consignment from Mombasa to South Sudan to the 3rd defendant and that the cargo arrived at the Port of Mombasa on 1st March, 2018 and was cleared as transit cargo and moved to a custom bonded facility at Allied Wharfage Limited, awaiting transportation to Juba, South Sudan.

78. It is further claimed in the plaint that in collusion with 1st and 2nd applicants through their agents in Mombasa and without the knowledge of the respondent, the 1st and 2nd applicants on diverse dates in the month of August, 2018 removed the subject containers from the Port of Mombasa and illegally and/or unprocedurally re-exported them to the Port of Jebel Ali, Dubai in the United Arab Emirates.

79. The amended plaint outlines particulars of unlawful re-exportation and fraud on the part of the applicants. The respondent in the suit seeks the following orders –

- a. A declaration to the effect that the 1st, 2nd and 3rd Defendants facilitated the illegal and unprocedural re-exportation of the

Plaintiff's consignment consisting of fifteen (15) containers from the Port of Mombasa, Kenya to the Port of Jebel, Dubai, United Arab Emirates;

- b. A declaration that bills of lading Nos. 577743192 and 577879624 were null and void and have no legal effect;
- c. Payment of the entire value of the subject consignment valued at USD 8,769,698.02;
- d. Special damages being loss of income at USD 34,698,906.00 from April, 2018 to December, 2019;
- e. Interest on (a), (b) and (c) at commercial rates from 17/3/2018;
- f. Costs of the suit; and
- g. Any other/further relief the Court may deem fit and just to award.

80. It is not disputed that the goods in issue arrived at the Port of Mombasa. They were then discharged and taken for storage at a bonded warehouse. The respondent, 4MB Mining Limited, was the consignee of the goods as per the bill of lading No. 574843545.

81. The Court in **Barber v Meyerstein** (1870) LR 4HL 317 held that the bill of lading remains a "living testament" only so long as the carrier's obligation remains unfulfilled. That obligation would be current until delivery of the cargo was made against the bill of lading.

82. In the case of **Barclays Bank Ltd vs Commissioner of Customs and Excise** [1963] 1 Lloyd's Report 81, it was held that the bill of lading may remain a living instrument even if the goods have been deposited in the warehouse by the carrier, for in such a case the carrier retains constructive possession of the cargo and that if the warehouse issues a delivery warrant, which the carrier will instruct it not to do until the freight has been paid, the bill of lading will then become exhausted.

83. In this matter, as per the exhibit marked "YM-2" attached to the respondent's replying affidavit, a delivery order was issued by Safmarine Limited under bill of lading No. SAFM 574843545. The delivery order was issued on 6th March, 2018 by the business unit of Safmarine Kenya, Mombasa. The delivery order was for the release of various equipment to Freight Forwarders Limited. The Notify Party was Freight Forwarders (K) Ltd of P. O Box 90682 Mombasa, Kenya. The consignee was 4MB Mining Ltd c/o Ministry of Mining, Juba, Republic of South Sudan.

84. The annexure marked "YM5" shows that the containers in issue were shipped out of the Port of Mombasa using non-negotiable waybills. The shipper was Misnak International (UK) Limited (1st applicant) and the consignee was the 2nd applicant herein. They were shipped to the Port of Jebel Ali, Dubai aboard MV Safmarine Ngami and MV Chinook using waybill Nos. 577743191 and 577879624. The said waybills were issued on 30th August, 2018 in London.

85. The International Sale of Goods Law and Practice 2nd Edition by Michael Bridge at paragraph 9.17, p. 389 states as follows about a sea waybill –

"A sea waybill is defined in negative terms as not a bill of lading. It must be both a receipt for the goods and evidence of a contract of carriage by sea. Furthermore, it must identify the person to whom the carrier is to make delivery."

86. It was by the use of sea waybills that the 1st applicant shipped the consignment in issue out of the Port of Mombasa to the Port of Jebel Ali, Dubai. The 1st applicant claimed that by so doing it exercised its right of lien over the goods because of unpaid bond in transit fees. Halsbury's Laws of England 4th Edition at paragraphs 721 and 722 states as follows on the issue of liens-

"A legal lien is in general an entitlement to a person in possession against the owner of the chattel to retain them until all claims or accounts of the person in possession against the owner of the chattel are satisfied. In addition, the holder of a lien, being voluntarily in possession of the chattel which belongs to another is a bailee of the chattel and owes the normal duty of care owed by the bailee towards the owner."

87. A legal lien can only arise when possession has been obtained by the person claiming the lien. Further, the possession necessary to sustain a lien must be lawful and there must be continuity in possession. The 1st applicant in its supplementary affidavit stated that it was contracted by the respondent to provide freight forwarding services of goods from Thailand to Juba, South Sudan. The said averment was not controverted by the respondent. It thus follows that even after the goods were offloaded from the ship at the Port of Mombasa, the applicant still had the responsibility to ensure that the goods reached Juba, South Sudan. It is the non-payment of the bond in transit fees which led to the goods being trans-shipped to Dubai.

88. The respondent in his further affidavit admitted in paragraph 4 that paragraphs 5, 6, 7, 8, 9, 10 and 11 of the contents of 1st applicant's supplementary affidavit were true. In essence, the respondent admitted the averment in paragraph 7 of the 1st applicant's supplementary affidavit which states—

"That from the onset when the 1st defendant made the offer in June, 2017 to the plaintiffs (sic) to provide services sought by the plaintiff, the 1st defendant expressly stated through my email the following –

“All business is conducted under BIFA Standard Trading Conditions latest edition, a copy which can be made available upon request.”

89. By virtue of paragraph 4 of the respondent’s further affidavit, it admitted that 2017 BIFA Terms were applicable and that all correspondence and documentation by the 1st applicant contain the BIFA mark.

90. The respondent claimed that since no written contract was executed by the 1st applicant, there was no meeting of minds. Chitty on Contracts at paragraph 13004 states thus on the intention of parties to a contract-

“In many cases, however, one or the other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into an inference that the parties must have intended the stipulation in question. An implication of this nature, may be made in two situations –

First where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both however depend on the presumed intention of the parties.” (emphasis added).

91. In the case of **RTS Flexible Systems Ltd v Moikerei Alois Miller GMBH & Co. KG UK (production)** 2010 3 ALL ER 1, Lord Clarke stated that the test on whether parties intended to create a legally binding contractual relationship is as follows –

“Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them, or conduct whether that leads, objectively to a conclusion that they intend to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economics or other significance to the parties have not been finalized, an objective appraisal of their words lead to the conclusion, that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement. The essential terms of an agreement must at all times be present and must be clear and unequivocal. The court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability.” (emphasis added).

92. Having analyzed the depositions in the affidavits and annexures filed by the parties in this application, this Court has no hesitation in arriving at the conclusion that there was a meeting of minds between the 1st applicant and the respondent on what the terms and conditions of the contract entailed.

93. As per the email dated 23rd June, 2017 in regard to the segment of transportation costs from Mombasa to Free on Truck (FOT) Juba/South Sudan, the 1st applicant was clear that ***the bond in transit fee was to be advised to the respondent once value information had been provided.*** It is noteworthy that the information was to be availed by the customs authority as bond had to be executed for the respondent’s goods which were on transit from Mombasa to Juba, South Sudan. At the time the dispute arose as to the amount payable, the respondent’s consignment was in Kenya and the disagreement was in regard to the transit bond required under Kenyan laws.

94. Sections 106 and 107 of the East African Community Customs Management Act (EACCMA) provides as follows-

“106. The Commissioner may require any person to give security for the due compliance by that person with this Act and generally for the protection of the customs revenue; and, pending the giving of such security in relation to any goods subject to customs control, the Commissioner may refuse to permit delivery or exportation of such goods or to pass any entry in relation thereto;

107(1) Where any Security is required to be given under this Act, then that security may be given to the satisfaction of the Commissioner either –

- a. by bond, in such sum and subject to such conditions and with such sureties as the Commissioner may reasonably require; or**
- b. by cash deposit; or**
- c. partly by bond and partly by cash deposit; or**
- d. Any other form of security that the commissioner may allow.”**

(emphasis added).

95. Mr. Shah was of the view that since the goods were in a transit shed as per the provisions of Section 26(1) of the East African Community and Customs Management Act, 2004 (EACCMA), they were deemed not to have been within the jurisdiction of Kenya in terms of risk and possession. The provisions of Section 26(1) and (2) of the EACCMA state as follows-

“(1) Goods which have been unloaded and landed into a transit shed or a Customs area shall be deemed to be still in the importing aircraft or vessel until they are delivered from such transit shed or Customs area; and so long as they remain in the transit shed or the Customs area the owners or agents of the aircraft or vessel shall continue to be responsible for the goods as if such goods had not been removed from such aircraft or vessel.

(2) Where the goods are handed over to an owner of a transit shed who is not an agent of the importing aircraft or vessel the owner of the transit shed shall be responsible and accountable for the goods.” (emphasis added).

96. The dispute as to whether the transit bond fees was payable based on Cost Insurance and Freight or Bond in Force was the genesis of the action which was taken by the 1st applicant to trans-ship the respondent’s goods to Dubai.

97. Another issue that arose was the 1st applicant’s contention that it had a contractual lien over the respondent’s goods under clause 8(A) of the BIFA Terms. The said provisions state as follows-

“Subject to sub-clause B below, the company:

i. Has a general lien on all goods and documents relating to goods in its possession, custody or control for all sums due at any time to the company from the customer and/or owner on any account whatsoever, whether relating to goods belonging to, or services provided by or on behalf of the company to the customer or owner, storage charges shall continue to accrue on any goods detained under lien.....”

98. Black’s Law Dictionary Tenth Edition defines a general lien as –

“A possessory lien by which the lien-holder may retain any of the debtor’s goods in the lien-holder’s possession until any debt due from the debtor, whether in connection with the retained goods or otherwise has been paid.”

99. The said Dictionary further defines a general lien as -

“1. A lien granted by the common law, rather than by statute, equity, or agreement by parties.

2. A right of one person to retain possession of property belonging to another until certain demands of the possessing party are met. This type of lien unlike an equitable lien, cannot exist without possession”

100. The submission by Ms Okumu was that the 1st applicant could not exercise its right of lien over the goods after they had been offloaded from the ship and delivery order issued in the respondent’s name, as the 1st applicant had ceded possession, custody and control of the goods. In this Court’s view the issue raised by the respondent’s Counsel calls for determination by the Courts in Kenya. As Ms Okumu correctly submitted, a delivery order had been issued to the respondent and the only outstanding issue was the deposit of the security bond with the Kenyan Customs before the goods could be transported by road to Juba South Sudan. It calls for a Court in Kenya to interpret if goods in a transit shed but for which a delivery order has been issued can still be deemed to be in a ship or the means of conveyance that transported it to the Port of Mombasa, or if the 1st segment of the contract between the 1st applicant and the respondent terminated when a delivery order was issued to the respondent awaiting the performance of the 2nd segment of the contract.

101. In opposing the suit herein being heard in Kenya, Mr. Shah relied on clause 28A of the BIFA Terms and stated that any dispute between the 1st applicant and respondent shall be governed by English law. the said provisions state thus –

“(a) These conditions and any act or contract to which they apply shall be governed by English law.

(b) Any dispute arising out of any act or contract to which these Conditions apply shall, save as provided in (c) below, be subject to the exclusive jurisdiction of the English courts.

(c) Notwithstanding (b) above, the Company is entitled to require any dispute to be determined by arbitration.

(d) The Company may exercise its rights under (c) above either by itself commencing arbitration in respect of a dispute or by giving written notice to the Customer requiring a dispute to be determined by arbitration.”

102. This Court has held that central in the suit filed herein will be the interpretation and applicability of some of the provisions of the EACCMA. The preamble of the said Act states that it is an Act of the Community to make provisions for the management and administration of Customs and for related matters. The Community means the East African Community, of which Kenya is a Party to. In the said circumstances, Kenyan Courts are inclined not to cede jurisdiction to Courts in England in an instance where it is properly seized of jurisdiction to interpret and apply EACCMA. It is also noted that the substance of Common law will also come into play.

103. Having gone through the amended plaint, it is claimed that the cause of action arose in Mombasa within the jurisdiction of this Court. The 1st applicant did not file a defence to claim that the cause of action arose outside the jurisdiction of the Kenyan Courts and that the applicable law is the law in England, thus Kenyan Courts have no jurisdiction to hear the case filed by the respondent.

104. In *United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd* (1985) KLR 898 Madan JA stated as follows:

“The Courts of 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 upon the Courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties freely fixed the forums for the settlement of their disputes; the court should carry out the intention of 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 the agreement.” (emphasis added).

105. I agree with Ms Okumu’s submissions that the 2nd segment of the contract between the 1st applicant and the respondent was a distinct one as the respondent’s cargo was to be loaded on trucks sourced to transport the goods from Mombasa enroute to Juba, South Sudan. Mombasa was the transit Port where the goods in issue had to be offloaded and stored before being transported by road to Juba. On the instructions of the 1st applicant, the goods were trans-shipped to Dubai by the 2nd applicant when the respondent failed to pay bond in transit fees pegged on CIF as requested by the 1st applicant. The claim by the 1st applicant that the respondent had in all previous occasions paid bond in transit fees based on CIF value is not relevant as each contract must be looked at in its own circumstances. From the email correspondence between the two parties it is clear that the 1st applicant was to advise the respondent on the bond in transit fees applicable but the respondent disputed the terms upon which the amount was being charged.

106. As earlier stated, the critical issue is if goods that were in the transit shed awaiting transport after a delivery order was issued to the respondent could be regarded as still being aboard the vessel which conveyed the goods to the Port of Mombasa so that the 1st applicant could exercise a right of lien over the goods.

107. The 1st applicant relied on the **British International Freight Association (BIFA) Standard Trading conditions** 2017 Edition. Clause 2 states thus-

“2(A) Subject to sub-paragraph (B), below, all and any activities of the company in the course of business whether gratuitous or not are undertaken subject to these conditions.

(B) If any legislation, to include regulations and directives, is compulsorily applicable to any business undertaken these conditions shall, as regards such business, be read as subject to such legislation, and nothing in these conditions shall be construed as a surrender by the company of any of its rights or immunities or as an increase of any, of its responsibilities or liabilities under such legislation, and if any part of these conditions be repugnant to such legislation to any extent, such part shall as regards such business be overtaken to that extent and no further.”

108. At the hearing of the case filed by the respondent, reference will most likely be made to EACCMA and Common law. That being the position, the 1st applicant has failed to discharge the onus of proving why the suit filed by the respondent should be heard by Courts in England. It is my finding that due to the special circumstances in this case, the BIFA exclusive jurisdiction provisions do not apply.

109. Although the 1st applicant in its affidavit alluded to having informed the respondent of the provision for arbitration in the BIFA Terms, it is however apparent that it took no action to commence arbitral proceedings in England. If it did so, that information was not availed to this Court. Failure to commence arbitral proceedings in England left the respondent with the option to pursue its claim as per the suit filed in this Court. Although the respondent as well as the 1st and 2nd applicants are not resident in Kenya, the respondent’s allegation is that its goods were unlawfully re-exported from the Port of Mombasa to Dubai and that the said action was done fraudulently. I hold that Courts in Kenya have jurisdiction to hear the dispute herein and I decline to strike out the suit.

If this Court should strike out the suit against the 1st and 2nd applicants for being an abuse of the Court process.

110. On the issue of striking out of the 2nd applicant from this suit as it is a disclosed agent of the 1st applicant, the pleadings allege that the 1st and 2nd applicants jointly and severally illegally and/or unlawfully and/or procedurally re-exported the subject consignment leading to loss of income/loss of user. The decision cited by the respondent’s Counsel in **Standard Chartered Bank v Pakistan National Shipping Corporation** (supra) is applicable and the 2nd applicant is liable to explain its actions. I therefore decline to strike the 2nd applicant from these proceedings.

111. One last thing that this Court would like to make clear is that the 1st applicant misapprehended the decision of the **Court of Appeal in Civil Appeal No. 118 of 2018 at Mombasa**. In its Judgment, the Court of Appeal did not say that Courts in Kenya did not have the jurisdiction to hear the dispute between the 1st applicant and the respondent. The Court of Appeal held that at the time the preliminary objection in the High Court was heard and a decision rendered, the High Court had not assumed jurisdiction over the appellant, thus it was not amenable to the jurisdiction of the High Court and the preliminary objection should have been allowed on that ground alone.

112. It cannot therefore be argued by the 1st applicant that the respondent is re-litigating the same matter. It is apparent that the other suit which was the subject of the appeal was rendered null and void by the decision of the Court of Appeal as no leave to serve summons out of jurisdiction had been sought and granted by the High Court. This suit is therefore not *res judicata* as was suggested by the 1st applicant.

113. Section 7 of the Civil Procedure Act provides as follows on the doctrine of *res judicata*-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.” (emphasis added).

114. In **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others [1996] eKLR**, the Court summarized the ingredients of the principle of *res judicata* as follows-

“In order to rely on the defence of *res judicata* there must be:

- i. a previous suit in which the matter was in issue;**
- ii. the parties were the same or litigating under the same title.**
- iii. a competent court heard the matter in issue;**
- iv. the issue has been raised once again in a fresh suit.”**

115. It is apparent that in *res judicata*, the Court looks at the subject matter of the respective suits. This Court has had the opportunity to look at the previous suit filed against the 1st applicant and finds that the subject matter in the previous suit is distinct from the subject matter in this suit. It is evident that subject of the previous suit was not determined with finality. The issue of the suit herein being *res judicata* does not arise.

116. It is my finding that the application dated 11th June, 2020 is devoid of merit. It is hereby dismissed with costs to the plaintiff (respondent).

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF NOVEMBER, 2021. 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 the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Wameyo for the plaintiff/respondent

Mr. Shah for the 1st & 2nd defendants /1st & 2nd applicants

No appearance for the 3rd defendant

Mr. Oliver Musundi – Court Assistant.