



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E231 OF 2019**

**BETWEEN**

**INTRASOFT INTERNATIONAL SA.....PLAINTIFF**

**AND**

**VERVE KO LIMITED.....DEFENDANT**

**RULING**

1. This is a suit between the plaintiff, a company incorporated under the laws of Luxembourg with its registered office in Luxembourg while the defendant is a limited liability company incorporated in Kenya under the *Companies Act (Chapter 486 of the Laws of Kenya)*.

2. The plaintiff's suit arises from a series of contracts in which the defendant sought and the plaintiff agreed to provide the defendant with specified information technology solutions, technical services and software products in connection with the implementation of the national government's HUDUMA project in the Republic of Kenya. The plaintiff's claim against the defendant is for breach of contract. It alleges that the defendant failed to make payments. It prays for judgment for USD 373,100.01, interest at the rate of average 12M EURIBOR per annum plus a spread of 4% from March 2015 until payment in full as stipulated under the contracts, general damages for breach of contract and costs of the suit.

3. Upon being served with the plaint and summons to enter appearance, the defendant filed a memorandum of appearance dated 3<sup>rd</sup> September 2019 on the same day. On 13<sup>th</sup> September 2019, it filed a Notice of Preliminary Objection raising points of law and stating that in accordance with the terms of the contract between the two parties, the parties had vested jurisdiction for the determination of any disputes arising between them exclusively to Luxembourg courts and that the suit be struck out and dismissed with costs to the defendant since the suit is defective and this court lacks jurisdiction.

4. Following my orders on 20<sup>th</sup> November 2019, the defendant filed a Notice of Motion dated 4<sup>th</sup> December 2019 supported by the affidavit of Karani Nyamu, a director of the plaintiff, seeking the following orders:

1. The Plaint dated 10<sup>th</sup> July 2019 be dismissed and struck out in its entirety.
2. That this Honourable Court lacks jurisdiction to adjudicate over the matter as well as any further applications arising from the main suit and
3. That the plaintiff to bear costs of the instant application.

5. The defendant reiterated the grounds set out in the notice of the preliminary objection in affidavit of Karani Nyamu that the contracts between the parties provided for settlement of disputes and in particular choice of law and jurisdiction in that the parties provided that the applicable law was the law of Luxemburg and the courts of Luxemburg would be vested with jurisdiction.

6. The defendant opposed the application through the replying affidavit of Wambui Kuhuha Mbesa, the plaintiff's Chief Executive Officer,

sworn on 27<sup>th</sup> January 2020. She deponed that a party seeking to challenge a court's jurisdiction can only do so if they had entered a conditional appearance or an appearance under protest indicating its disapproval of the Court's jurisdiction at the earliest opportunity something that the defendant had not done.

7. She further deponed that part of the contract was performed mainly in Kenya as the express intention of the parties and also remotely in Athens, Greece. That the contracts placed a tax obligation on the defendant under Kenya tax regime for software products and services rendered in Kenya. She also added that the evidence to be adduced by either party is more readily available in Kenya thus would be more convenient and less expensive to determine the issues between the parties in this court than in the courts of Luxembourg and the defendant had not established any strong reasons for avoiding the jurisdiction of this court and is only pursuing this line of argument so as to frustrate the plaintiff out of its dues.

8. Ms Wambui Mbesa also deponed that the dispute between the parties is not envisaged by the clause referred to by the defendant since the debt claimed by the plaintiff was actually acknowledged by the defendant thus the application filed by the defendant be dismissed for lack of merit as there were no disagreements between the parties that necessitated litigation before the courts of Luxembourg.

9. Both parties made oral submissions supported by authorities in support of their respective positions I have outlined above. Since the terms of the agreements between the parties are not disputed, the main issue for determination is whether the court should enforce the exclusive jurisdiction clause. However, before I deal with the substantive issue, I propose to resolve the procedural issue that is whether by filing a memorandum of appearance, the defendant waived its right to challenge jurisdiction.

10. The plaintiff relied on the general principle that once a party had filed an unconditional memorandum of appearance, it has unconditionally accepted the jurisdiction of the court. In response thereto the defendant took the position that the memorandum of appearance is only intended to place on record the address of service of the defendant and that in any event, its opposition to jurisdiction was manifested by filing a notice of preliminary objection and following the same with an application to strike out the suit for want of jurisdiction.

11. The issue whether the defendant has waived any challenge to jurisdiction by filing an unconditional memorandum of appearance is not novel. It was discussed heavily by the Court of Appeal in *Evergreen Marine (Singapore) PTE Limited and Another v Petra Development Services Limited* MSA CA Civil Appeal No. 91 of 2015 [2016] eKLR where the court reviewed several decisions and stated as follows:

Where parties have bound themselves on the jurisdiction and the law to govern the transaction, a party, by conduct may be presumed to have waived the term and submitted to the jurisdiction of the local courts. The well-known circumstances where a party is so presumed include where the party upon service of summons enters appearance without protesting jurisdiction like the appellants initially did. For the exclusive jurisdiction clause to have effect it must be clear to all that jurisdiction is protested at the earliest point of entering appearance. A defendant like in the case of **United India Insurance Co. Ltd (supra)** can enter appearance in protest and quickly follow it with an application for stay of all further proceedings or for the dismissal of the suit on account of lack of jurisdiction. A party may also file a notice of preliminary objection. See **Raytheon Aircraft Credit Corporation and another v Air Al-Faraj Limited Civil Appeal No. 29 of 1999** where the court stated that;

“There are no rules of the court prescribing the procedure for challenging the jurisdiction of the High Court by a foreign defendant who has been sued in this country in breach of contractual forum selection and the exclusive jurisdiction clause. The procedure suggested by the predecessor of the court in **Prabhadas (N) & Co. v Standard Bank (1968) EA 679** at page 684 paragraph C-E is to enter a conditional appearance and then move the court for setting aside the process.”

This procedure seems to have gained sufficient traction in law to the point that it is safe to say that the point is settled. In **Fonville v Kelly III and other (2002) 1 EA 71** it was reiterated that the entering of appearance or filing of a defence under protest, the filing of an application for stay of proceedings or for striking out the proceedings and the raising of a preliminary objection to the suit before trial are all legitimate means of challenging the jurisdiction of the court.

It is common factor that the appellants initially filed unconditional memorandum of appearance which was subsequently amended to send the message that it was filed under protest on account of the court's lack of jurisdiction. By the time the amended memorandum was filed the horse had bolted and the court assumed jurisdiction. In any case, as correctly stated in the case of **Kanti & Co. (supra)**, a memorandum of appearance is not a pleading capable of amendment within the meaning of section 2 of the Civil Procedure Act. The Court in that case explained that;

“..the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court, and it could not thereafter abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of the court releasing it from its admission and acceptance of the jurisdiction.”

On this aspect of the appeal and for the reasons we have given we come to the conclusion that the High Court had jurisdiction to entertain and determine the application as it did.

12. The net effect of the decisions of the Court of Appeal is that where a party disputes the jurisdiction of the court on the basis of an exclusive jurisdiction clause, it must indicate its disapproval at the time of entering appearance by filing a conditional appearance or an appearance under protest. It may then follow this up with a notice of preliminary objection, application to strike out or stay the proceedings or a defence under protest. Failure to file a memorandum of appearance under protest is deemed as a waiver of jurisdiction.

13. In **WK, MWK (Both suing as the Administrators of the Estate of Dr WK) and Another v British Airways Travel Insurance and Another NRB CA Civil Appeal No. 274 of 2015 [2017] eKLR**, the Court of Appeal held that filing of an unconditional appearance was not bar to raising an objection to jurisdiction in the future. It distinguished the case of **Kanti and Company Limited v South British Insurance**

**Company Limited [1981] KLR 1** where the court affirmed the position that a defendant who enters unconditional appearance to a summons submits to the jurisdiction of the court on the ground that in that case, the defendant had an office in Kenya and the summons were received in Kenya by someone who was authorised to receive service of process. In the case at hand, the 2<sup>nd</sup> respondent did not have an office in Kenya and denied knowledge of the 1<sup>st</sup> respondent through which the summons to enter appearance were served and it raised the issue of jurisdiction immediately it was served. I think, this case and the **Raytheon Case (Supra)** are authority for the proposition that where the defendant is served outside jurisdiction under **Order 5 rule 22** of the **Civil Procedure Rules**, it may challenge jurisdiction of the local court notwithstanding it has filed an unconditional memorandum of appearance.

14. An interesting situation arose in **Hassan Zubeidi v Active Partners Group Limited and 3 Others ML HCCC No. 476 of 2016 [2018] eKLR** where Tuiyott J., accepted that where an unconditional appearance is entered together with the application for stay of proceedings or the preliminary objection to jurisdiction, the jurisdiction is not deemed to have been waived. In an appeal from that decision, **Active Partners Group Limited & Another v Hassan Zubeidi, Dubai Bank Kenya Limited(II) and Another NRB CA Civil Appeal No. 395 of 2018 [2019] eKLR**, upheld that position and stated that:

In our view, the filing of an unconditional memorandum of appearance simultaneously with the motion challenging the jurisdiction of the court on 25th November, 2016 were sufficient to indicate that the issue of jurisdiction had to be dealt with before entry of judgment in default of defence.

15. There is the case of **Grohe Dawn Watertech Fitting Division PTY Limited v Ideal Ceramics ML HCCC No. 73 of 2018 [2019] eKLR** which appears to favour the defendant. In that case the applicant had filed an unconditional memorandum of appearance and a notice of motion to transfer the case to the High Court at Mombasa and therefore submitted to the court's jurisdiction. Nzioka J., held that, "*the filing of the memorandum of appearance and the statement of defence, cannot override the express provisions by the parties stated in the Distribution Agreement .....*". This finding and conclusion, in my view, flies in the face of binding decisions of the Court of Appeal as I have set out elsewhere.

16. In this case, the defendant, a company incorporated in Kenya was served with process in Kenya, filed an unconditional memorandum of appearance and protested the jurisdiction of the court by filing a notice of preliminary objection and a notice of motion to strike out the suit after it had entered unconditional appearance. In the words of the Court of Appeal in the **Evergreen Marine Case (Supra)**, once the unconditional memorandum of appearance was filed, without lodging the objection to jurisdiction simultaneously, the horse had already bolted and the court had assumed jurisdiction.

17. The memorandum of appearance was filed on 3<sup>rd</sup> September 2019 and the Notice of Preliminary Objection, thirteen days later, on 16<sup>th</sup> September 2019. The inevitable result is that on that basis, and the binding decisions of the Court of Appeal I have cited, the preliminary objection dated 13<sup>th</sup> September 2019 and the subsequent notice of motion dated 4<sup>th</sup> December 2019 must fail. They are dismissed with costs to the plaintiff.

**DATED and DELIVERED at NAIROBI this 25<sup>th</sup> day of FEBRUARY 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Wachira instructed by O & M Law LLP Advocates for the plaintiff.

Mr Omulama instructed by Mboya Wangong'u & Waiyaki Advocates for the defendant.