



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**HIGH COURT CIVIL CASE NO. E092 OF 2018**

**JET INC .....PLAINTIFF**

**-VERSUS-**

**COLLABORATION ENGINEERING SOLUTIONS**

**AND PRODUCTS (CESP)..... 1<sup>ST</sup> DEFENDANT**

**CHRISTOPHER NGANGA GATHINI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**BACKGROUND OF THE APPLICATION**

The Defendants raised a **Preliminary Objection** to the Plaintiff's suit brought to court via the **Plaint dated 24<sup>th</sup> September, 2018**. The Defendants' Preliminary Objection was premised on the grounds that **the court lacked jurisdiction to hear and determine the matter**.

**THE PLAINTIFF'S CASE AS CANVASSED IN THE PLAINT**

The Plaintiff approached court by filing the **Plaint dated 24<sup>th</sup> September, 2018** seeking the following prayers:

- a. Judgment for unpaid dues amounting to USD 208,799.75.
- b. Interest on (a) at 18%, running from 10<sup>th</sup> July, 2018 till completion of payment.
- c. Costs of the Suit.

The Plaintiff's case was supported by the sworn affidavit of its director as an authorized agent of the Plaintiff Company. The Plaintiff stated that they had entered into a Master Distributor Agreement dated 17<sup>th</sup> February 2011, which was later modified by an addendum dated 30<sup>th</sup> April 2013 with the 1<sup>st</sup> Defendant Company as its non-exclusive Master distributor of systems, parts and accessories in Kenya.

Additionally, the Agreement was unconditionally guaranteed by the 2<sup>nd</sup> Defendant.

The agreement provided that the 1<sup>st</sup> Defendant;

- i. Would be the non executive Master distributor in Kenya for the Plaintiff's products.
- ii. Would furnish the Plaintiff with monthly statements of product sales not later than the 15<sup>th</sup> day of every month.
- iii. Would make full payments for systems before shipping. However, the Plaintiff had discretion to extend credit to the 1<sup>st</sup> Defendant.
- iv. Would make payments before the 15<sup>th</sup> day after shipment.

v. Would incur an interest rate of 18% per Annum on sums unpaid when due.

In his pleadings, the Plaintiff stated that the 1<sup>st</sup> Defendant ordered and was supplied with various goods on credit between 11<sup>th</sup> May 2016 and 30<sup>th</sup> June 2016 and the same was invoiced.

The Plaintiff further stated that the 1<sup>st</sup> Defendant breached the terms of the Agreement by failing and/or neglecting to pay the sum total of **USD 221,330.51** and interest of **18%** p.a thereon for the goods within the 15-day credit window allowed in the agreement.

The Plaintiff added that they issued a demand for the accrued amount to the Defendants who issued a reply to the demand with a letter acknowledging the debt owed. In the letter, the defendants proposed negotiations for payment in installments which was ratified by both parties.

The Plaintiff further stated that despite demand and notice of intention to sue, the Defendants had failed to make good their proposal to pay amount of USD 208,799.75 together with 18% interest p.a owed in installments.

#### **THE DEFENDANTS' CASE ( STATEMENT OF DEFENCE )**

The Defendants opposed the Plaintiff's case through the Defence filed on 6<sup>th</sup> November 2018 in which the Defendants admitted to there being an agreement between the parties but disputed the terms of the Agreement as canvassed in the Plaintiff's case.

Specifically, the 2<sup>nd</sup> Defendant denied guaranteeing the credit agreement by stating that he was merely enjoined in the transaction by dint of being a director of the 1<sup>st</sup> Defendant Company.

Additionally, the 1<sup>st</sup> Defendant Company disputed the computation of the amount owed to the Plaintiff by stating that they had serviced part of agreement and had subsequently entered into a settlement agreement with the Plaintiffs and averred that the agreement was still in place.

#### **NOTICE OF PRELIMINARY OBJECTION**

Subsequent to the Defence filed on 6<sup>th</sup> November 2018, the Defendants filed a Notice of Preliminary Objection on 6<sup>th</sup> February 2019 against the Plaintiff's case (as canvassed in the Plaintiff dated 24<sup>th</sup> September 2018).

The Grounds relied upon to bring the P.O were that the court lacked jurisdiction to hear and determine the dispute as canvassed in the Plaintiff (or at all) pursuant to **Clause 2.6.1.1 and 2.11.1 of the Master Distributor Agreement dated 17<sup>th</sup> February, 2011** which provide;

***“Jet at its sole discretion may choose to resolve any dispute with the Master Distributer by using the Ohio Uniform Mediation Act.***

***The Agreement shall be governed in all respects by the laws of the State of Ohio as such laws are applied to agreements entered into and to be performed entirely within Ohio between Ohio residents, notwithstanding conflicts of law principles. Any dispute arising out of this agreement or any action to enforce and provision thereof or to obtain remedy with respect thereto shall be brought exclusively in the Court of Common Pleas; Cuyahoga County, Ohio or United States District Court, Northern District of Ohio, Eastern Division and for this purpose Master Distributor and Jet expressly and irrevocably consent to the exclusive jurisdiction of the said Courts.”***

Relying on the Preliminary Objection, the Defendants submitted that the Plaintiff's case (as in the Plaintiff dated 24<sup>th</sup> September, 2019) be struck out with costs.

#### **DETERMINATION**

From the pleadings filed by both parties and submissions, the following are the issues to be determined by the Court: -

##### ***1. Whether this court has Jurisdiction to hear and determine the dispute as formulated.***

First, the issue of Preliminary Objections is as codified in the locus classicus case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696**, where it was held that;

***“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”***

Secondly, it was well settled in **Samuel Kamau Macharia v. Kenya Commercial Bank Ltd & 2 others (2012) eKLR** that a court's Jurisdiction flows from either the Constitution, Legislation or both. Effectively, this means that a court can only exercise jurisdiction as conferred upon it by the Constitution or Subsidiary Legislations flowing from it. Thus, a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law.

The Plaintiff submitted with reference to the case of **Ganuni Construction Ltd vs County Government of Garrissa & Anor [2019]**;

***“The Defendant herein did not pursue the alternative methods of resolving the instant dispute including arbitration as provided in their Contract. After entering Appearance; they went ahead and filed their defence admitting the jurisdiction of the Court, and as if that is not enough they participated in the Plaintiff’s case and after the close of Plaintiff’s case they seemed to have woken from slumber and remembered that there existed an Arbitration warranting some action.”***

In ***Barakat Exploration Inc vs Taipan Resources Inc [2014]*** it held;

***“It was incumbent upon the Defendant to challenge the jurisdiction of this Court at the time it entered its Memorandum to Enter Appearance on 17<sup>th</sup> January 2013 by filing conditional Memorandum of Appearance so as not to submit itself to the jurisdiction of this Court.***

***By filing an unconditional Memorandum of Appearance the Defendant submitted itself to the jurisdiction of this Court and cannot therefore seek a stay of proceedings on the ground that this Court has no jurisdiction to hear and determine the dispute between it and the Plaintiff herein.”***

The Court distinguishes the 2 cited cases on the following grounds;

- a) Jurisdiction is everything; where the Court acts outside its jurisdiction as stipulated by law, the proceedings and outcome shall be *void abinitio*.
- b) The matter herein has not commenced hearing, however, although it is conceded that the unconditional Memorandum of Appearance was filed on 19<sup>th</sup> October 2018 and the Defence filed on 9<sup>th</sup> November 2018 and finally Preliminary Objection on 7<sup>th</sup> February 2019, the Defendant surrendered to the jurisdiction of this Court; the Dispute resolution Clause outlined above at clause 2:6:1 & 2:11:1 of Distributor Agreement gave the Plaintiff sole discretion to determine forum and conduct of dispute resolution.

The Plaintiff in mandatory terms prescribed a Choice of Law clause; that is **US Law** specifically the **Ohio Uniform Mediation Act** would apply and the Choice of Forum Clause was/is Court of Common Pleas, Ohio state.

The Agreement is executed by Plaintiff and 2<sup>nd</sup> Defendant Director of 1<sup>st</sup> Defendant.

So, even if this Court was/is to proceed with the matter the Applicable Law ought to be US law which inapplicable in this Court.

Therefore, the issue of considering whether the Defendant submitted to the jurisdiction by filing unconditional documents and whether the High Court of Kenya is the forum of convenience of the parties cannot arise as the applicable law contracted by the parties is not applicable in this Court.

In this case, the **Ohio Uniform Mediation Act** was the choice of law settled upon by the parties to settle disputes arising out of the Agreement. In the Agreement parties also settled on a specific forum which rendered this Court as lacking jurisdiction to hear and determine the matter.

## ***2. Whether the Plaintiff dated 24<sup>th</sup> September, 2018 should be struck out.***

In ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1***, Nyarangi J. of the Court of Appeal held that:

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

By dint of ratifying and endorsing the Master Agreement, the parties submitted disputes arising out of the agreement to Ohio Laws as well as the stipulated forum court of common pleas; Ohio state. This in turn ousted the jurisdiction of this Court which must down its tools. Therefore, the suit is dismissed for lack of Court’s jurisdiction to hear and determine the matter. The Plaintiff is struck out as the suit cannot be heard in this court.

## **DISPOSITION**

- 1. This Court lacks Jurisdiction to hear and determine the dispute as canvassed in the Plaintiff’s case in the Plaintiff dated 24<sup>th</sup> September 2019.**
- 2. The matter is dismissed with costs to the Defendant.**

**DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 13<sup>th</sup> DAY OF MARCH 2020.**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. SEBASTIAN H/B FOR WAMBUGU FOR THE PLAINTIFF**

**MR. AMBALA FOR THE 1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS**

**COURT ASSISTANT – MR. TUPET**