



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

HIGH COURT CIVIL CASE NO. 180 OF 2017

GLOBAL GEOPHYSICAL SERVICES INC.....PLAINTIFF

-VERSUS-

RIFT VALLEY MOVERS INVESTMENT.....DEFENDANT

RULING

PRELIMINARY OBJECTION

BACKGROUND

The Plaintiff filed a Plaint on 27th April 2017, dated 25th April 2017. The Amended plaint was later filed on 4th June 2018. The statement of claim is that Plaintiff and the Defendant executed a sale agreement on 13th September 2015, for the sale of 32 (Thirty Two) double Cabs at Ksh 68,800,000/-

That the Defendant took possession of all Motor vehicles and that the Defendant has paid a total of Ksh 34,500,000 on various dates as follows;

2nd November 2015 – Ksh 20,000,000/-

30th November 2015 – Ksh 10,000,000/-

30th November 2015 - Ksh 4,500,000/-

TOTAL Ksh 34,500,000/-

That the amount due and owing to the Plaintiff from the Defendant is Ksh 34,300,000/- being the balance of Ksh 68,800,000/- of the Sale Agreement less Ksh 34,500,000 paid by the Defendant.

DEFENCE

The Defendant filed a defense dated 25th May 2017 on 29th May 2017, in response to the Plaint and admitted that a Sale Agreement was entered on 13th September 2015 between the parties for sale of Toyota Hilux Double Cab vehicles at a cost of Ksh 68,800,000/- . However, of this amount, there was a discount given on 6th July 2016 and one vehicle was not taken and as such total cost of the Double Cabs was Ksh 57,350,000/-

The Defendant admitted he had made payment on various dates but that the amount of Ksh 34,500,000/- stated in paragraph 3 of the Plaint is less than the actual amount paid.

The Defendant states that the payments made for the vehicles was a total sum of Ksh 89,560,000/- instead of the sum owed of Ksh 88,250,000/-. Thus there was an overpayment with a sum of Ksh1,310,000/-which is the subject of the counterclaim in the Defense.

CHAMBER SUMMONS DATED 27TH MAY 2019

By a chamber summons application dated 27th May 2019, pursuant to **Section 3A and Section 11 of the Civil Procedure Act, Order 2 rule 15 (d) and order 24 Rule 6 (2) of the Civil Procedure Rules and Section 991 and 992 of the Company Act**. The Applicant/Defendant sought orders that the suit be dismissed with costs to the Defendant.

The Application was based on grounds;

- a. That the Plaintiff which is a foreign Company registered in Kenya applied for Bankruptcy in 2016 in the United States Bankruptcy Court for the Southern District of Texas;
- b. That the Plaintiff Company which is in liquidation has no legal capacity and therefore has no *locus standi* to institute this suit;
- c. That the filing of this suit by the Plaintiff was an abuse of the court process;
- d. That the agreement between the parties dated 13th September 2015, excludes the jurisdiction of this Court.
- e. That it is in the interest of justice that the amended Plaintiff dated 17th May 2018 be dismissed with costs to the Defendant.

SUPPORTING AFFIDAVIT

The application was supported by an affidavit filed in court on 29th May 2019, sworn by Isaac Mburu Njogu, the Defendant/Applicant herein. He averred that on 14th May 2019 he obtained copies of the Court proceedings and an Order of the Texas Court on the liquidation of the Plaintiff Company.

That the proceedings were initiated on 3rd August 2016. The same is in the **US Bankruptcy Court for the Southern District of Texas Corpus Christi Division** in the matter of Global Geophysical Services, LLC, et al. The Debtors who applied for the liquidation included Global Geophysical Services, LLC ((7582); Global Geophysical Services, Inc(4280), Global Geophysical EAME, Inc (2130); GGS International Holdings, Inc. (2420); Global Ambient Seismic, Inc(2256); Autoseis, Inc.(5224); Autoseis Development Company (9066); and Global Geophysical (MCD), LLC(a disregarded entity for tax purposes).

That the Texas court issued a confirmation order for liquidation on 19th September 2016. The Company is in liquidation and has no legal capacity or *locus standi* to institute a suit.

REPLYING AFFIDAVIT

The application is opposed vide an affidavit dated 2nd October 2019, sworn by Monica Wambui Mukami, Manager of the Plaintiff Company. She stated that in reply to paragraph 3 of the Defendant/Applicant affidavit, the Plaintiff/Respondent applied for reorganization of the company under **Chapter 11** and not liquidation of the company under **Chapter 7**. The annexed copy of Chapter 11 is annexed as **MWM-1**

The Deponent stated that if the company made an application under **Chapter 7** the present application would succeed but with the application having been made under **Chapter 11** this application was moot and fit for dismissal.

That the Plaintiff/Respondent Company was not in Liquidation. That it was in good standing and had a legal capacity to institute this suit. Annexed and marked **MWM2** is a copy of status of good standing of the Plaintiff Company from State of Delaware.

That in reply to paragraph 8 of the Defendant/Applicant application she was advised by her advocates on record;

- a. That Defendant/Applicant entered an unconditional appearance hence submitted himself to the Jurisdiction of this court.
- b. That the agreement was executed, performed, payments made and breach happened in Kenya which is under the Jurisdiction of this Court.
- c. That most of the evidence and witnesses are found in Kenya.
- d. That the law of contract in USA and Kenya are not different and there will be no party will suffer prejudice if the matter handled in Kenya.
- e. That both parties conduct their business in Kenya.
- f. That if the Plaintiff/Respondent conducts the trial in USA the Plaintiff will be prejudiced and if successful and has to enforce the Judgment in Kenya.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

The Respondent in its submissions relied on the case of *Kanti & Co. Ltd -vs- South British Insurance Co. Ltd [1981] eKLR*, where the Court of Appeal espoused;

“I am of the opinion that the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court.... Once a defendant submits to the jurisdiction of the court, the Plaintiff acquires a vested interest which the defendant cannot deprive him of at his whim by entering a conditional appearance or an appearance under protest. As long as the unconditional appearance stood, as it stands even today, the court was seized of jurisdiction to try the suit.”

The Plaintiff submitted on a balance of convenience as another factor to be taken into consideration;

“The contract was also to be performed in Kenya. The goals were consigned to the plaintiff at Nairobi via Mombasa where the Plaintiff has its registered office and place of business. If necessary the loss or damage to the goods could be proved equally effectively at Nairobi. Must the Plaintiff spend thousands of shillings to travel to the United Kingdom to pursue its legal remedy there, also probably pay a much larger legal fee and possibly be called upon to provide security for costs when the defendant has a place of business and has also itself appointed a person resident in Kenya authorized to accept on its behalf service of process? The balance of convenience is clear in this matter; the suit should be heard and determined in Kenya.”

In *United India Insurance Co. Ltd -vs- East African Underwriters (Kenya) Ltd [1985]eKLR*, the Court of Appeal was quoted as follows;

"In exercising its discretion, the court should take into account all the circumstances of the particular case;

a. In particular, but without prejudice to (a), the following matters, where they arise, may properly be regarded:-

- i. In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the court of the country and the court of the foreign country.**
- ii. Whether the law of the foreign court applies, and if so, whether *it differs from the law of the country in any material respects.***
- iii. With what country either party is connected, and how closely**
- iv. Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage**
- v. Whether the Plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.**

If successful the Plaintiff should not be put to the hazard of having to transfer the decree for execution against the defendant, facing a *challenge that it may not be executed bringing another long wrangle.*”

DEFENDANT/APPLICANT SUBMISSIONS

The Defendant invoked **Section 991 (5) of Companies Act (KY) 2015** that provides where a registered foreign company is placed in liquidation for notification to the Registrar of Companies of the liquidation and appointment of Liquidator within 1 month.

The Defendant outlined **Clause 17 of the Sale Agreement;**

“The Agreement shall be governed by and construed in accordance with the provisions of US law and the parties herein submit to the exclusive jurisdiction of the US Courts.”

The Defendant relied on the following case-law;

HCCC No7 of 2004 Mombasa Universal Pharmacy Ltd vs Pacific International Lines (PTE) & Anor Kasango J citing United India Insurance Co ltd vs East Africa Underwriters KLR 892 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 themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and *enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honored unless there is strong reason for not keeping them bound by their agreement.*”

DETERMINATION

The application filed by the Defendant of 27th May 2019 amounts to a Preliminary Objection of the Court's jurisdiction in hearing and determination of the matter due to exclusive jurisdiction clause in **clause 17 of the Sale Agreement of 13th September 2015**.

Order 2 Rule 9 CPR 2010 prescribes that a party may by his pleading raise any point of law.

Mukhisa Biscuit Manufacturing Co ltd vs West End Distributors Ltd 1969 E.A. 696 the renowned case of preliminary objection defines it as;

“...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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In **Valentine Investment Company (MSA)Ltd vs Federal Republic of Germany [2006] e KLR** ; the suit related to goods that were alleged to have been lost/destroyed by 2nd Defendant from Mombasa to Embakasi.

An application was filed to have the suit stayed and be heard by German Courts. The High Court Khaminwa J relied on the following case on jurisdiction and stated as follows;

- 1. Kenya courts have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign court. The discretion should be exercised by granting a stay of proceedings in local courts unless a strong reason for not doing so is shown.**
- 2. The onus of establishing a strong reason for avoiding the jurisdiction of Kenya courts is on the party who seeks to avoid that jurisdiction and that burden is a heavy one.**
- 3. In exercising its discretion, the court should take into account all the circumstances of the particular case.**

The Court of Appeal Madan J in **United India Insurance Co ltd vs East Africa Underwriters KLR 892 supra** considered despite exclusive jurisdiction clause, the forum with the balance of convenience as follows;

- i. In what country the evidence on the issues of fact is situated, or more readily available, the effect of that on relative convenience and expense of trial as between the Court of the country and Court of Foreign country.
- ii. Whether, the law of the foreign court applies and if so whether it differs from law of country in any material respects
- iii. With what country either party is connected and how closely
- iv. Whether the Defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage.
- v. Whether the Plaintiffs would be prejudiced by having to sue in the foreign Court because they would be deprived of security of their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.

This Court finds that the Plaintiff Company is resident/has presence in Kenya by virtue of registration; annexed to the plaint is certificate of compliance of 24th April 2013 signed /from Registrar of Companies.

Valentine Investment Company (MSA)Ltd vs Federal Republic of Germany [2006] e KLR ; United India Insurance Co ltd vs East Africa Underwriters KLR 892 standards confirm that the exclusive jurisdiction clause is also subjected to the test of '**forum non conveniens**' considerations.

The test involves identifying the most appropriate forum, in the absence of counter veiling circumstances, priority is given to the most decisive connecting factors to confirm the forum to hear the substantive dispute.

Although the Plaintiff Company is incorporated in the US, it is resident in Kenya by virtue of the Certificate of Compliance and has an office in Kenya with Manager in office; the deponent of the Plaintiff's affidavit in this matter. The agreement constitutes an international business transaction drawn in US but performed in Kenya. Whereas the Agreement is governed and construed in accordance with US law, the dispute is not in relation to the terms of the agreement but is with regard to performance of a valid contract; motor vehicles were delivered to Kenya by the Plaintiff to the Defendant and the Defendant received the motor vehicles but only made part payment. Despite demand the Defendant has failed to settle full purchase price and is alleged to retain and benefit from use and/or sale of motor vehicles and which continue to depreciate and deprive the Seller /Plaintiff of full payment of the agreed value of the motor vehicles.

On the other hand, the dispute involves a Counterclaim by the Defendant against the Plaintiff for non-delivery of logbooks for the motor vehicles, non-delivery of some vehicles and overpayment of the value of the purchased vehicles.

The dispute arose in Kenya, the delivery of motor vehicles and of purchase price part payment was in Kenya where the Plaintiff is resident. The vehicles are in Kenya. Both Plaintiff and Defendant are in Kenya and none of the parties shall be prejudiced if the dispute in

performance of valid contract is heard and determined in Kenya.

Since the parties are in Kenya and dispute arose in Kenya, Kenya has the closest connection. The evidence regarding the dispute is readily available in Kenya, more particularly; the delivered motor vehicles are in Kenya.

It would cost the parties; particularly the Defendant to travel and stay in order to access the US Court. If judgment is obtained in the US, it shall be executed in Kenya where the dispute arose and it would inconvenience the parties to have matter heard in US Courts then executed in Kenya.

There is no evidence on record to confirm that the Defendant intends to contest or institute proceedings in US Courts.

The Agreement is not contested by the parties and therefore the exclusive jurisdiction **Clause No. 17 of the Agreement** does not apply.

With regard to liquidation of the plaintiff Company, the Documents availed by the Defendant do not disclose liquidation as there is no Court order liquidating the company and/or appointing liquidator. **Section 991(5) Companies Act** is premature at this stage.

DISPOSITION

- 1. The Application of 29th May 2019 of Preliminary Objection as to the Court's jurisdiction is dismissed with Costs to the plaintiff.**
- 2. The matter shall be processed in the normal manner under CMC with DR Commercial Division within 90 days in light of ongoing Corvid 19 pandemic lockdown**
- 3. Thereafter parties to take a hearing date of the substantive dispute.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 22ND MAY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR PLAINTIFF

N/A

FOR

DEFENDANT