



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 S. A.PLAINTIFF

AND

VERVE K. O. LIMITED DEFENDANT

RULING NO. 2

1. 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.

2. The Plaintiff has now filed a Notice of Motion dated 22nd May 2020 seeking the following orders:

- a. Summary judgment be entered against the Defendant in the sum of USD 373,10.01 together with interest thereon in default of a defence*
- b. In the alternative judgment on admission be entered against the Defendant in the sum of USD 373,100.01 together with interest thereon.*
- c. The Plaintiff be awarded costs of the claim and the application.*

3. The Plaintiff relies on the supporting and further affidavit sworn on 2nd June 2020 and 9th July 2020 respectively by Wambui Kihuha Mbesa, the Plaintiff's Chief Executive Officer. The application is opposed by Grounds of Opposition dated 26th June 2020, a replying affidavit sworn on 26th June 2020 by Karani Nyamu, a director of the Defendant and re-sworn on 15th July 2020.

4. Both parties filed written submissions in support of their respective positions which were highlighted by their Advocates, Mr Wachira for the Plaintiff and Mr Omulama for the Defendant. From the depositions and submissions, the following issues emerged for consideration:

- (a) Whether the application before court is competent in view of the law governing the contracts.
- (b) Whether the Defendant's Replying Affidavits are valid.
- (c) Whether the Statement of Defence dated 9th June 2020 and Amended on 26th June 2020 are properly on record.
- (d) Whether the Defendant has admitted the sum of USD 373,100.01 as claimed.

5. Without seeming to disrespect the valiant efforts by counsel to urge issues (b) and (c) and for reasons that will become apparent, I propose to deal with the substance of the application by reference to settled principles. As regards summary judgment, the general principle

is that court will not enter summary judgment if the defence raises a triable issue (see *Gupta v Continental Builders Ltd* [1976-80] 1 KLR 809, *Postal Corporation of Kenya vs. Inamdar & 2 Others* [2004] 1 KLR 359 and *Isaac Awuondo V Surgipharm Limited & Another* [2011] eKLR). In *Choitram v Nazari* [1984] KLR 327 the Court of Appeal held that a party must show that an admission is plain and obvious in order to result in a judgment.

6. Turning to the facts of this case, it is not disputed that the contracts between the parties had a choice of law and exclusive jurisdiction clause as follows:

16 Settlement of Disputes

16.1 This Contract shall be governed by and be construed and take effect in all respects in accordance with the Laws of Luxembourg without reference to conflict of laws provisions.

16.2 All disputes between the parties arising out of the existence, validity, construction, performance and termination of this Contract (or any terms thereof), if not amicable resolved, shall be finally settled by the competent courts of Luxembourg.

7. In respect of jurisdiction, the application is properly before the court since I resolved the question of exclusive jurisdiction by my ruling dated 25th February 2020. I held that in light of the Court of Appeal decision in *Evergreen Marine (Singapore) PTE Limited and Another v Petra Development Services Limited* MSA CA Civil Appeal No. 91 of 2015 [2016] eKLR, the Defendant had waived its right to object to jurisdiction by unconditionally filing its memorandum of appearance without objecting to jurisdiction.

8. However, the choice of law clause is still applicable and being a contractual term, it is prima facie binding on the parties. I say prima facie because the issue is yet to be addressed at the plenary hearing. Since the dispute under the contracts is to be governed by the law of Luxembourg, whether the Defence raises triable issues or whether the admission relied on by the Plaintiff amounts to an admission entitling it to judgment is to be determined by reference to and in accordance with the law of Luxembourg.

9. The meaning and application of foreign law is a question of fact. It is for this reason the court is entitled to call on the opinion of experts as provided for in **section 48** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which states:

48(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts. [Emphasis mine]

10. Without the resolving the issue of the applicable law and illumination of that law as it relates to the facts of the case, the application for summary judgment and judgment on admission cannot stand at this stage. Further, it does not matter whether or not the Defendant filed a replying affidavit or whether the defence was on record since the Plaintiff has not surmounted the hurdle of proving the law of Luxembourg as relates to its case.

11. The Notice of Motion dated 22nd May 2020 is dismissed with costs. I also direct that the matter be placed before Deputy Registrar for reference to mediation.

DATED and DELIVERED at NAIROBI this 30TH day of SEPTEMBER 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.