



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 4 OF 2018

TRADIVERSE KENYA LIMITED.....PLAINTIFF

VERSUS

GLENCORE GRAIN BV LTD.....DEFENDANT

RULING

Outline of facts and historical background

1. This suit was initiated by the plaintiff on the 15/2/2018 pursuant to a plaint date the same day together with the plaintiff filed a Notice of Motion of even date by which the plaintiff sought an interim temporary injunction, in the nature of *status quo*, to forestall arbitration proceedings pending the determination, of the application *inter-partes* and a temporary injunction pending determination of the suit.
2. The matter was placed before the court on the same day and upon consideration interim orders were granted to the plaintiff and a date fixed for *inter-partes* hearing. On being served, the Defendant entered an appearance under protest and as well as Notice of Preliminary Objection and a Notice of Motion. Both the application and Notice of Preliminary Objection challenge the jurisdiction of the court and prayed that the suit be struck out with costs. The basis of the two notices is that by an agreement between the parties, they chose their forum for dispute resolution together with the applicable law and that the agreement expressly excluded Kenyan judicial system and its laws.
3. The preliminary objection thus contends:-
 - i. **The contracts which are the subject of the arbitration proceedings provided that all disputes arising out of or in connection with the contracts would be finally settled by arbitration in accordance with Arbitration Rules No. 125, of the Grain and Feed Trade Association, in the edition current at the date of the contracts, such Rules forming part of the contracts and of which both parties thereto would be deemed to be cognizant. The seat of arbitration chosen by the parties is LONDON.**
 - ii. **The governing law of the contracts selected by the parties is English Law.**
 - iii. **Only the English Courts, being the courts of the seat of arbitration, have jurisdiction to hear and determine an application challenging the award issued by the Grain and Feed Trade Association.**
 - iv. **The issues as to the merits of the award in so far as the same relates to a finding on whether the claims are time barred can only be determined under English law, which is the governing law of the contract.**
 - v. **Consequently, this Honourable Court lacks jurisdiction to entertain not only the Plaintiff's application but also the entire suit.**
4. When the question of prioritizing the hearing of the plaintiff's application and that by the Defendant came up before the court, it was decided and directed, after the parties addressed the court, that the defendant's application and preliminary objection be heard together and prior to the application by the plaintiff. The reason was that it raised jurisdictional questions with the potential to dispose of the matter and had to take precedence.
5. Even though filed separately the preliminary objection should essentially be a component and ground of the Notice of Motion and I will treat it as such. The Defendant also filed a further Affidavit sworn by one SYLVIE KOSOG.
6. In opposition to the defendant's Notice of Motion and said Notice of preliminary objection, the plaintiff filed grounds of opposition dated

14/3/2018 in which the major contention made was that the court's jurisdiction has not been ousted because the contract allegedly ousting jurisdiction was never executed by all so as to bind all and incorporate the principle of privity of contract. There was an added ground that the defendant had not disclosed what prejudice it would suffer were this court to adjudicate upon the dispute.

7. In urging the matter both parties filed written submission. The Defendant/Applicant submission are dated 4/4/2018 and filed the same day while those by the plaintiff are dated and filed on 16/4/2018.

Submissions by the Defendant

8. In summary the defendant submits that jurisdiction is everything and without jurisdiction a court of law downs its tools and that parties have the autonomy to choose forum for the determination of their disputes and the court has no mandate to interfere with that autonomy. It was then added that the New York Convention, (**the convention on the (Recognition and Enforcement of Foreign Arbitral Awards)**) it was acceded to by Kenya on 10/2/1989 and thus part of the Kenyan Law and duly recognized by Section 36(2) & 5 of the Kenyan Arbitration Act.

9. It is then submitted that the jurisprudence by courts around the world interpreting the New York Convention is that the only court with jurisdiction to entertain a challenge towards setting aside of an arbitral award is the court of the state in which or under the Law of which, that arbitral award was made – only the courts of the seat arbitration are the only courts where the award can be challenged and that no provision exist in the New York Convention granting general jurisdiction to national courts to hear a recourse to set aside a foreign arbitral award.

10. On the Ground of opposition that the agreement providing for arbitration as the forum for dispute resolution was never signed by all the parties, the defendant made a submission that it is an afterthought as the plaintiff had participated in the two tier arbitration proceedings and that the plaintiff is bound to the contract and the arbitration clause by conduct noting fundamentally that the plaintiff did not exercise its rights under the English Law to challenge the validity of the contract at any stage of the arbitral proceedings. In addition the defendant contended that the plaintiff is bound by its pleadings at paragraph 2, 3 & 4 of the plaint which tacitly admit the existence of a contract. Based on such pleadings the defendant takes the view and position that the plaintiff in by law bound by its pleadings and cannot be permitted to depart therefrom.

11. For that submission the defendant cited to court a series of decisions underscoring the need that court proceedings must be conducted without ambush or surprise and in full compliance with the dictates of fair play. The decisions cited include **IEBC vs Stephen Mutinda Mule [2014] eKLR**, **Joshua Mungai Mulango vs Jeremia Kiarie Mukoma [2015] eKLR** and **Kenya Airports Authority vs MituBell Welfare Society [2016] eKLR**.

Submissions by the plaintiff

12. For the plaintiff the position was taken that the agreement said to ground the mandatory arbitration as the chosen forum for dispute resolution and jurisdictional exclusion was never signed by it. The plaintiff relied on the decision in **IP Enterprises Ltd vs Unieximp Ltd [1976] eKLR** in which the court held that an unexecuted agreement importing GAFTA terms could not form the basis of stay pending arbitration unless the same had been signed by all the parties. It was then stated that the defendant was estopped from relying on the arbitration clause as a law not executed by it. The decision in **CMC Holdings Ltd vs Jaguar Land Rover Export Ltd [2013] eKLR** was cited for the proposition of law that where a contract conferred jurisdiction upon the Kenyan courts it would be a travesty of justice to shut out an applicant out of the Kenyan courts. Resort was then made to Section 17(6) (7) & 8(8) of the Arbitration which, counsel submitted, clothes the Kenyan courts to rule on preliminary issue relating to jurisdiction and that such jurisdiction is exercised the seat of arbitration notwithstanding. It was then contended that the GAFNA tribunal has not determined the entire dispute, having only determined the preliminary issue of reference to arbitration hence the final determination is yet to be reached, and therefore the jurisdictional question is a preliminary issue for the Kenyan courts to determine.

13. Reference was further made to the decision in **Ukwala Supermarkets Ltd vs Paul Mburu Wainaina [2005] eKLR**, which I have had a chance to read but my reading of that decision reveals no relevance or any assistance the court can derive therefrom. Lastly, the plaintiff's counsel submitted, while relying in the decision in **Niazsons (K) Ltd Vs China Road And Bridge Corporation (K) [2001] 2 EA 485**, that a court faced with an application for stay of proceedings pending arbitration must consider whether there exist any impediments on the validity, operation or performance of the arbitration agreement and whether the suit concerns a matter to be referred and that such issues are not suited to be urged by way of a preliminary objection. To counsel the contracts were negotiated in Kenya, goods subject matter thereto were shipped to Kenya and all the trade related transaction effect in Kenyan land and therefore the Kenyan courts had the requisite jurisdiction to entertain the suit.

14. On the propriety of the point taken up as a preliminary objection, counsel cited to court the immortalized decision on the point, **Mukisa Biscuits Co. vs West End Distributors [1969] E.A. 696**, that a preliminary objection consist of pure points of law and not arguable matters of fact. In this matter the plaintiff contended that the matter of lack of execution taken by it has not been rebutted and therefore would require minute interrogation of the factual position of execution by the court hence it is unsuitable point to be considered as a preliminary objection.

Analysis of facts

15. It is common ground and an undisputed fact that parties engaged in the trade of commodities on set-out-terms upon which delivery was, in fact, effected but the written agreement was never signed by the plaintiff in this suit. One of the terms of the unsigned agreement was that disputes would be resolved in accordance with Rules No. 25, of the Grains and Feed Trade Association (**GAFTA**) which Rules were made part of the contract. The arbitration was seated in London and the applicable law chosen to be the English Law. Pursuant to that relationship it is agreed that a dispute was filed at GAFTA over three contracts and an objection was taken to the effect that the claims were statute barred but a preliminary award was made with holding the objection on one contract and rejecting the same on the other two contracts. It is that

award that the plaintiff now seeks to upset by these proceedings it being contended that the dispute should not be handled by the chosen forum for being time barred and that the status quo be maintained by way of an order for injunction. That is the plaintiff's dispute and cause of action in the reigning plaint.

16. When served with the notice of preliminary objection and the Application to strike out, the plaintiff filed a Replying Affidavit and exhibited the intended contract between the parties and asserted that it did not sign the same contract made to premise the arbitral proceedings and being the arbitral agreement.

17. That assertion is not controverted by the defendant who was given leave to file a supplementary affidavit and filed one called further affidavit sworn by SILVIE KOSOROG. In that Affidavit there was no denial of non-execution of the agreement by the plaintiff. Instead an assertion was made to the effect that the plaintiff did not before the arbitral proceedings challenge the validity of the contract in accordance with the English Arbitration Act 1996.

18. As matters of evidence stand now, the plaintiff assertion that the agreement should not be enforced against it due to non-execution remains unchallenged. Being unchallenged, the principle of the law of contract is that a written contract to be enforced against a party to it must be signed by that party^[1]. In this matter it is contended by the plaintiff and not controverted by the defendant that the agreement incorporating the arbitration clause was never signed to bind the plaintiff to go to arbitration. That being the position of facts; can the defendant's objection be said to be a demurer raising a pure point of law that the jurisdiction of this court has been ousted? I do not think so. I think whether or not the arbitration clause is the unsigned contract is enforceable is an arguable fact which can only be subjected to rigorous and full blown arguments supported by evidence. Where evidence or elaborate arguments are required to dispose a point, the point ceases to be a preliminary objection on a pure point of law only^[2].

19. I opt not to venture into minute and detailed examination of facts not fully before me in deciding the preliminary point and find that on the material availed the point was improperly taken as a preliminary objection.

20. The second reason I am not able to find for the Defendant is its prayer that the suit be struck out on account of this court's jurisdiction having been ousted by agreement of the parties exercising party autonomy on choice of forum.

21. While it is true that on arbitration clause could even be oral the terms of the same ought to be proved. Such proof in my view must be left to the trial process. Such cannot be resolved and settled by the summary and guillotine procedure of striking out a suit upon the preliminary objection grounded on a disputed agreement. The existence of the arbitration agreement must not be confused with the agreement for sale and delivery of the commodity. The two are distinct even though if there had been a conclusively signed agreement incorporating the arbitration then such clause would be part of the contract for sale

22. In coming to this determination, I have not lost sight and knowledge that parties have a right to make choices including the choice on forum for dispute resolution but those choices need be clear to the court and the clarity is best attained by way of parties availing to court all the material available. I have not reached the level of determining whether the agreement is enforceable or not but for now, I determine that the preliminary objection was improperly taken and I do dismiss it to enable the matter be determined on its merits.

Dated and signed at **Mombasa** this **28th** day of **June 2019**.

P.J.O. OTIENO

JUDGE

Dated and delivered at **Mombasa** this **28th** day of **June 2019**.

LADY JUSTICE D. CHEPKWONY

JUDGE

^[1] See **Agricultural Finance Corporation vs Lengetia Limited [1985] eKLR** as well as **National Rule of Kenya vs Pipedcast Sacco (K) Ltd [2002] 2 EA 502**

^[2] **Mukisa Biscuits Co. vs West End Distributors [1969] E.A. 696,**