REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL ADMIRALTY & TAX DIVISION

CIVIL SUIT NO. 73 OF 2018

GROHE DAWN WATERTECH FITTING DIVISION PTY LTD.....PLAINTIFF/RESPONDENT

-VERSUS-

IDEAL CERAMICS...DEFENDANT/APPLICANT

RULING

1. This ruling relates to a notice of motion application dated 27th November 2018, brought under the provisions of Section 1A, 3A and 5 of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. It is premised on the grounds on the face of it and an affidavit dated 27th November 2018, sworn by Anish Doshi, a director of the Defendant's company.

2. The Applicant is seeking for orders that the suit be and is hereby struck out and the costs of the application and of the main suit be paid for by the plaintiff. He avers that the Distribution Agreement dated 15th March 2011 (herein "the Distribution Agreement") relied upon by the Plaintiff to bring the suit and the entire documentation and pleadings filed clearly shows the following:

(i) That it was entered into between the Defendant and a Company called Cobra Watertech (PTY) Ltd;

(ii) That it clearly provides at the second last page thereof under the hearing "Governing Law and Jurisdiction" that it shall be governed by and constructed in accordance with South African Law and that each party thereto irrevocably submit to the jurisdiction of the South African Courts;

(iii) That at the fifth page thereof, under the heading "Assignment", the Distribution Agreement clearly prohibits the assigning, transfer, charging or dealing in any other manner with the Agreement or any of the parties rights or obligations under it without prior consent of the other party.

3. That based on the above facts the court has no jurisdiction to hear and determine this suit. Further, even if the jurisdiction of this court had not been expressly ousted, the Plaintiff was not a party to the Distribution Agreement and cannot lodge any claim based on the same. Further, although the Plaintiff aver that there was change of name from Cobra Watertech (PTY) Ltd (the party to the Distribution Agreement) to Cobra ISCA PTY LTD and finally to the Plaintiff; Grohe Dawn Watertech Fitting Division PTY Ltd which took over the rights that Cobra Watertech (PTY) Ltd had over the Distribution Agreement, the Plaintiff cannot find a cause of action on the Distribution Agreement because:

(i) The Distribution Agreement could not be assigned to the Plaintiff as no consent of the Defendant was sought and obtained as provided for in the said Agreement as highlighted in his paragraph 3(iii). In fact the Plaintiff was never notified and was not aware of the change until the reply to defence was filed

(ii) The Plaintiff claims that there was a change of name from Cobra Isca PTY Ltd to the plaintiff with effect from 14th October 2015 yet no single invoices were issued in the plaintiff's name. Instead, the alleged invoices were issued in the name of Cobra Isca PTY Ltd even after the alleged change of name and as late as August 2018 as can be seen in the invoices attached to the Plaintiff's replying affidavit filed in court on 5th September 2018;

4. It was argued that, where parties expressly agree in a contract to oust the jurisdiction of the Kenyan courts as in this case, the wishes of the parties must be respected and granted by the courts. The question of forum convenience does not arise because the parties deliberately submitted to the jurisdiction of the South African courts while executing the Distribution Agreement and knowing too well that the goods would be delivered in Kenya irrespective of where the breach took place (whether in Kenya, South African or elsewhere.

5. The Applicant stated that it is not true as alleged by the Plaintiff that the Distribution Agreement was signed in Nairobi and therefore should be subject to the Kenyan courts. The Agreement clearly shows that it was signed on behalf of Cobra Watertech (Pty) Ltd in

Krugersdorp, a city in Guateng Province in South Africa where the Plaintiff is based. Further the invoices filed by the Plaintiff show that the same were issued in Krugersdorp by one Monica Maponye, the Plaintiff's Export Administrator, a clear indication that the documents and witnesses in support of this case are easily available in South Africa.

6. More so, the Distribution Agreement expressly provides that the products the subject of the Agreement, is available in Johanesburg South Africa and the prices quoted were in South African Rands, which shows the intention of the parties was to have everything about the Agreement to be South African. Finally the Plaintiff is a company incorporated in South Africa and it will be easier and cheaper for the plaintiff if the dispute is determined in South Africa as agreed by the parties.

7. However the application was opposed vide a Replying affidavit dated 30th January 2019 sworn by Gerald Lunjala, the Regional Accounts Manager of the Plaintiff's company. He deposed that sometimes in 2014 and 2015, the Plaintiff Company amended its memorandum of incorporation subject to and in adherence to the provisions of the Companies Act 2008 of South Africa. The changes were necessitated by various internal branding and marketing strategies aimed at furthering the Plaintiff's commercial interests and effectively changed the name of the Plaintiff Company's name from Cobra Watertech to Cobra Isca (PTY) Limited and to Grohe Dawn Watertech Fitting Division (PTY) Ltd. The changes were effected and recognized by the relevant authorizing bodies, and an amended Registration Certificate issued to the Plaintiff's Company bearing the new name authorizing it to conduct business under such.

8. That nothing in the above stated averments constituted the assignment, transfer, charging or dealing by the plaintiff that would require the consent of the Defendant as per the fifth page of the Agreement under the heading "Assignment." The change of name did not vary the obligations and/or duties the company owed to its contractors.

9. The Respondent however conceded to the fact that, the Distribution Agreement between the parties has a 'governing law and jurisdiction' clause which provides it shall be governed by and constructed in accordance with the South African Law and that each party thereto irrevocably submits to the jurisdiction of the South African Courts. That the mandate of court to hear and determine a matter arises from the jurisdiction that is conferred upon it either by the parties through a valid and binding contract between them, statute or the Constitution. But, however maintained that, nothing in the Distribution Agreement ousts the jurisdiction of the Honourable court in Kenya to hear and determine this dispute.

10. It was argued that the jurisdiction of a court can only be exclusively conferred or reserved for the courts of a particular country to the exclusion of all other jurisdictions by a clear and unequivocal statement in a contract and that the applicable clause herein was intended to further a clearer interpretation of the clauses of the Agreement for the convenience of the parties at the time.

11. The Respondent argued that in determining the governing law applicable herein the importance of the *lex loci contractus* cannot be ignored in a case where there is no exclusive clause ousting the jurisdiction of the Kenyan High Court. The Honourable court has discretion to decide the applicable law in favour of the party that proves that the Kenyan High Court is forum convenience. The Court was invited to consider that:-

(a) The Defendant is a legal person that is Kenyan and situated in Kenya;

(b) The contract or part of contract was performed in Kenya;

(c) Nothing prejudices the Defendant in the suit being heard and determined in Kenya whose laws and public policy is supposed to adhere to.

12. The Plaintiff/Respondent argued that the Defendant is simply grasping at straws in a bid to frustrate the Plaintiff's company through ill-timed frivolous applications made to the court in order to continue to hold its debt. The Plaintiff has borne the brunt of a previous application before the Honourable Court which has since been dismissed.

13. However the Applicant filed a further affidavit dated 27th February 2019, sworn by Anish Doshi, who reiterated that the contract needed not to provide expressly that the jurisdiction of Kenyan courts is ousted. By vesting jurisdiction on the South African courts, the Distribution Agreement effectively ousted the jurisdiction of courts of other countries, Kenya included. Further it is not a realistic approach because a contract cannot realistically list all countries whose courts the jurisdiction are ousted because it is an impossible task to list all countries in the world. It is sufficient for a contract to only provide the country whose courts have jurisdiction and not the countries whose jurisdictions are ousted.

14. That the principle of *lex loci contractus* is not applicable in this case since there is no conflict of laws and the Distribution Agreement is clear on what law is applicable and which court has jurisdiction. Further the Distribution Agreement does not provide that the place of performance is Kenya.

15. The parties disposed of the Application by filing submission wherein the Applicant averred that the application is based on two main grounds; whether the court has no jurisdiction to hear this matter and whether the Plaintiff has locus standi to bring this suit because it was not a party to the Distribution Agreement. That indeed the Distribution Agreement contains a clause entitled "Governing Law and Jurisdiction" which provides as follows:

"*This Agreement shall be governed by and constructed in accordance with South African law and each party irrevocably submits to the jurisdiction of the South African Courts*"

16. In that regard, the Black's Law Dictionary, 8th Edition defines the word "irrevocable" as "unalterable, committed beyond recall". That implies that once the parties to the Distribution Agreement committed to submit to the jurisdiction of South African courts, that commitment

could not be altered or recalled by any party.

> **The Applicant referred to the case of; *Fonville V. Kelly III & Others [2002] 1 EA 71*, where Githinji, J. (as he then was) held that an agreement which provided that the applicable law was the law of State of Florida, USA ousted the jurisdiction of the Kenyan court regarding any disputes arising from the Agreement. The learned Judge stated as follows:**
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> > ***"The position in law is that where parties have expressly stipulated that a contract is to be governed by a particular law, that law is the proper law of contract.***
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> > ***In this case, the intention of the parties regarding proceedings relating to the Stock Purchase Agreement was that the proper law of contract was the law of State of Florida, USA and that any proceedings should be instituted in the Ornage County, Florida. Clause 12 of the Stock Purchase Agreement therefore settles the matter. It ousts the jurisdiction of the Kenya court regarding any disputes arising from the Agreement."***

17. The Applicant further submitted that it is now well settled as a general rule that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain. The case of;

> (a) *Raytheon Aircraft Credit Corporation & Another V Air Al-Faraj Limited [2005] eKLR,* was cited where the Court of Appeal stated as follows:
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> > *"The general rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non-contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum (see Donohue –vs- Armo Inc. [2002] 4 LRC 478, H.L.; The Elieptheria [1969] 2 All ER 641, United India Insurance Co. Ltd –vs- East African Underwriters (Kenya) Ltd [1985] KLR 898."*
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> (b) *East Africa Capital Partners Management LP vs Wananchi Nominees Limited & 2 Others [2018] eKLR* and the case of; *United India Insurance Co. Ltd vs East Africa Underwriters (Kenya) Ltd [1985] KLR 898*, where the court also stated that it had discretion to assume jurisdiction where there is exclusive jurisdiction then observed that:
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> > *"the exclusive jurisdiction clause however, should normally be respected because the parties themselves freely fits the forum for the settlement of their dispute; the courts should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual under taking should be honoured unless there is strong reason for keeping them bound by their agreement."*
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> (c) *Areva T & D India Limited vs Priority Electrical Engineers & Another [2012]eKLR* where the court of appeal stated:
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> > *"Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, any departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule."*
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> ***(d) United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd V. East African Underwriters (Kenya) Ltd [1985] eKLR*** **Madan, JA stated that:**
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> > ***"The courts of this country have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction. 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 honoured unless there is a strong reason for not keeping them bound by their agreement.***

18. The Applicant submitted that, the doctrines of *forum conveniens* and *lex loci contractus* do not apply in this case. The Encyclopaedic Law Dictionary, 3rd Edition, 2008 defines *lex loci contractus* as "the law of the place where the contract was made"while Jowitt's Dictionary of English Law, 2nd Edition by John Burke defines *lex loci contractus* as follows:

> ***"the law of the place of the contract. Generally speaking, the validity of a contract is decided by the law of the place where it was made."***

19. It was argued that, the above definitions show that if this Honourable court were to apply *lex loci contractus*, then the court will have to go with the law of the place where the contract was made. That this then leads to the question, where was the Distribution Agreement made? The Distribution Agreement was executed by the Plaintiff in Klugersdorp, South Africa on 21st March 2011. On the other hand, it was executed by the Defendant in Nairobi, Kenya on 15th March 2011. Clearly, it cannot be told with certainty where exactly the Agreement was made. It was submitted that this *lex loci contractus* does not apply in this case because it is not clear where the Distribution Agreement was made. *Lex loci contractus* only applies where it is not clear the law of which country is applicable.

20. The Applicant distinguished the cases relied upon by the Respondent and argued that, the case of; *Kanti & Co. Ltd vs South British Insurance Co Ltd [1981] eKLR* was based on different circumstances as there was no ouster/exclusive jurisdiction clause. In fact there was

no contract, just an insurance policy and the certificate of insurance which was the subject of the case and provided as follows: "the Policy referred to in this certificate has been duly stamped in compliance with the British revenue laws. Claims payable at UK subject to company's regulations. The abbreviation "UK" is typed on the printed forms."

21. That the Defendant had not filed statement of defence in Kent & Co. Ltd Case. In the instant case, the Defendant filed Defence in which it is pleaded¸ *inter alia*, that it would at the opportune moment make an application to strike out this suit for want of locus standi on the part of the Plaintiff and for want of jurisdiction of the Honourable court. The Defendant cannot therefore be said to have submitted to the court's jurisdiction.

22. The Applicant relied on the case of; *Universal Pharmacy (K) Limited* vs *Pacific International Lines (PTE) Limited & Another [2015] eKLR* where the court stated as follows:

> "*25. The Defendants herein did not just enter unconditional appearance but also filled (sic) a defence. They also did not object to this court's jurisdiction based on the exclusive foreign jurisdiction clause in their respective Statements of Defence. By entering appearance unconditionally and failing to object to the court's jurisdiction in their Defences, the Defendants waived the jurisdiction of the Singapore courts and wholly submitted to this court's jurisdiction*. (underlining ours)

23. It was further argued that, there is no place in law for entering "conditional appearance". There is no law requiring a Defendant who objects to the court's jurisdiction to enter conditional appearance. That "conditional appearance' is a strange animal unknown in law. That the memorandum of appearance filed by the Defendant herein complied with Order 6 of the Civil Procedure Rules, 2010, and was in conformity with Form 12 of Appendix A. The Defendant could not plead that this court has no jurisdiction in the memorandum of appearance which is a statutory form. The issue of jurisdiction could only be pleaded in the statement of defence which is a pleading as the memorandum of appearance is not a pleading. It is therefore not true that the Defendant submitted to this court's jurisdiction.

24. Further, filing of unconditional appearance is not a bar to raising objection to jurisdiction in future. Reliance was placed on the case of; *W. K. M, W. K. (Both Suing as the Administrators of the Estate of Dr. W. K.) & Another vs British Airways Travel Insurance & Another [2017] eKLR* where the Court of Appeal clearly distinguished and departed from the case of Kanti & Co. Ltd (supra) by holding that the Defendant who had entered unconditional appearance was still entitled to challenge jurisdiction. That the Court of Appeal held as follows:

> "*26. The 2nd respondent raised the issue of jurisdiction immediately after entering appearance. In Raytheon Aircraft Credit Corporation & Another vs Air Al-Farah Limited (surpa), this Court held that even if the High Court assumes jurisdiction over a foreign defendant by granting leave to serve summons or notice of summons outside Kenya, the foreign defendant is still entitled to challenge the jurisdiction of the High Court...*
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> *28. We therefore find that the 2nd respondent was not estopped from challenging the High Court's jurisdiction to hear the matter."*

25. The Applicant further distinguished the case of; *Dorcas Kemunto Wainaina v. Ipas [2018] eKLR* and argued that the case dealt with an employment contract which is not the case here. Secondly, and most importantly, the contract between the parties in the said case did not expressly provide for the court with jurisdiction.

26. Finally, the Applicant distinguished the case of *P. M. vs M. [2018] eKLR* submitting that the Country in issue in that case was the Republic of Slovakia which is not a commonwealth country. In the instant case, we are dealing with the Republic of South Africa which is a commonwealth country. The provisions of Foreign Judgments (Reciprocal Enforcement) Act are therefore applicable should the Plaintiff obtain judgment in South Africa. The Plaintiff will not face any difficulty in enforcing a judgment of South African court in Kenya. Finally that the issues raised by the Plaintiff that it will have challenges in enforcing the judgment from South Africa is baseless and cannot be a reason to overlook the express exclusive jurisdiction clause agreed upon by the parties in the contract.

27. However, the Respondent submitted that the subject clause does not expressly exclude the jurisdiction of the Kenyan Courts and relied on the case of; *Kanti & Co Ltd v South British Insurance Co Ltd [supra]* eKLR where the Court held:

> "*It must be clearly and unequivocally stated in the contract that jurisdiction to entertain legal proceedings in connection with or arising out of it is exclusively conferred or reserved for the courts of a particular country to the exclusion of all other jurisdictions"*. The case further held that*;*
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> > "*When there is concurrent jurisdiction in more than one country the Court will be guided by the principles of the balance of convenience between the parties"*

28. That the landmark case in establishing Forum *Non Conveniens* (a foreign court is the more appropriate forum for the trial of the proceedings or rather that the local court is not the appropriate forum) which is what must be proved for a court to grant a stay of proceedings and issue and order that the matter be dealt with by a court of a different nation is the UK case of; *Spiliada Maritime Corp v. Cansulex Ltd [1987] AC 460.* In that case, the court stated:

> "*Where a Defendant had been served within England, so that jurisdiction had been founded as of right, he could apply to The court to exercise its discretion to stay the proceedings on the ground known as forum non-conveniens. If he did, the burden was on him to satisfy the Court that there was another forum having jurisdiction which was the "appropriate forum" for the action because in it the case could be tried more suitably for the interests of all the parties and for the ends of justice. In discharging this burden, he had to satisfy the Court not merely that England was not the natural or appropriate forum, but that another forum was actually more appropriate. In this context, The Court had to look for connecting factors pointing to another forum. Those factors would include*

not only matters of convenience, eg availability of witnesses, but also matters like the law governing the transaction or the parties' places of residence or business. If the Court concluded that there was no forum more appropriate for trial of the action, it would normally refuse a stay. If it concluded that there was, it would normally grant a stay, unless the Plaintiff showed that there were special circumstances by reason of which justice required that a stay should nevertheless not be granted."

29. The Plaintiff submitted that the Defendant's allegation that it lacks locus standi by virtue of not being privy to the contract they entered into with Cobra Watertech (PTY) Ltd and not Grohe Dawn Watertech Fitting Division Pty Limited, is unfounded in law as evidence has been produced to show that it is one and the same company that underwent a change of name. Change of name which was valid in law both in South Africa and Kenya. That the position of the law on the effect of a change of name of a company, with regard to its rights and obligations, is very clear and expressly stated under Section 66(2) &(3)of the Companies Act of Kenya as follows:

"*The change does not affect any rights or obligations of the company or invalidate any legal proceedings by or against it.*

Any legal proceedings that might have been continued or commenced against it by its former name may be continued or started against it by its new name."

30. The Respondent stated that this position is also recognized in the Companies Act of South Africa, Section 19(7) where it provides:

"*After a company has changed its name, any legal proceedings that might have been commenced or continued by or against the company under its former name may be commenced or continued by or against it under its new name."*

31. Similarly, this position is supported by the case of; *John Kahiato Bari & 3 others vs New Kenya Cooperative Creameries Limited & another [2017] eKLR where* The court stated:

"*The Claimants have submitted that since the (old) KCC was never wound up, what happened was a mere change of name as envisaged under Section 20(4) of the Companies Act (supra). This change of name in my view did not therefore affect the business entity… The relationship between the Old KCC and New KCC is perceived from the documents filed herein – see communication from New KCC (Appendix 9) page 126 of Claimants' documents showing payments to NSSF for one Dedan Maera Ngali who was an employee of the Old KCC. This shows that the New KCC retained all documents in relation to the old employees of the Old KCC because the entity remained one."*

32. Finally, reference was made to the case of; *Kenya Scientific Research International Technical and Allied Institutions Workers Union vs Flame Tree Brands Limited & 2 others (2013) eKLR,* where the court held that "Change in business name does not mean the business has ceased to exist. The Respondent therefore argued that it is clear from the above legal authorities that the Defendant by making such allegations of change of name is only trying to delay the process of the trial herein and abusing the process of the court as such matters are well established in law.

33. That on the basis of balance of convenience and relative hardship, if the court grants the orders sought by the Defendant, it would in effect be frustrating the Plaintiff's efforts to get expeditious justice. This is because, even if the court ordered that the suit be dealt with in South Africa, an order granted in favour of the Plaintiff would be very difficult to enforce in Kenya as South Africa is not a Reciprocal Country under the Foreign Judgments (Reciprocal Enforcement) Act.

34. A country that does not have a reciprocal enforcement arrangement can only enforce a foreign judgment in Kenya as a claim in common law. A party would have to file a plaint at the High Court providing a concise statement of the nature of the claim, the amount of the judgment debt accompanied by a verifying affidavit, a list of witnesses and a bundle of documents, key among them a certified foreign judgment. This is in fact the process that has already been commenced before this Honourable court and granting the orders would just delay justice for the Plaintiff by forcing them to go through an unnecessary process. That justice delayed is justice denied.

35. The Respondent relied on the case of; *P M vs V M [2018] eKLR* where the court stated that;

"*There is no doubt that the republic of Slovakia is not a common wealth country so as to have an automatic recognition and entry of its foreign judgments. The fact that Slovakia is a member of European Union as contended by the applicant does not make Slovakia a common wealth country. In the absence of extension authority by the minister, judgments from Slovakia will not qualify for recognition and registration in the Kenyan Superior courts under the foreign judgments (Reciprocal Enforcement) Act."*

36. That it is clear that this application is a desperate effort by the Defendant to delay the trial and frustrate the Plaintiff's efforts to access justice. They have previously attempted to unsuccessfully frustrate the commencement of this trial by refusing to accept service of documents of which the court had to issue an order for substituted service. They have also applied to the court for the case to be transferred to Mombasa of which the court found no merit in their application and struck it out. The court cannot allow anymore delay in the commencement of this suit as this would amount to an injustice upon the Plaintiff.

37. Reliance was placed on the case of; *Telkom Kenya Limited v Rapid Communications Limited [2015] eKLR,* where the court stated that:

"*Section 6 of the Arbitration Act is couched in a manner that it abhors any dilatory or deliberate behaviour that runs counter to the overriding objective. In such case as this, I would only state that the request for stay of proceedings and referral of the subject of the suit to arbitration is a comedy of extravagant humour and an attempt to delay this case. This case is such that The Court should straight away hear and finalize it. Accordingly, I dismiss the application for stay of proceedings and referral of the subject of the suit to arbitration. I also direct that the Motion Application dated 14.5.2014 be listed for hearing as one way of fast tracking this*

case in accordance with the overriding objective of the law to dispose of cases in proportionate, just, fair and expeditious manner."

38. I have considered the application, the grounds and supporting affidavit and the objection raised by the Respondent and I find that the application rests on the following issues:-

(a) Whether the court has the jurisdiction to entertain this matter;

(b) Whether the Plaintiff as the locus standi to institute the suit;

(c) Whether the Defendant has submitted to the jurisdiction of the court.

39. In relation to the first issue, I find that the subject Distribution Agreement annexed to the affidavit in support of the application and marked as "AD1", clearly states under the clause on "Governing law and jurisdiction" that;-

"the Agreement shall be governed by and construed in accordance with South African law and each party hereby irrevocably submit to the jurisdiction of the South African Courts." (Emphasis added).

40. From the content of this clause, two key words arise being; "shall" and "irrevocably". These words connotes that the parties did not intend to have an option on the law that would govern the dispute arising from the Distribution Agreement and the relevant law applicable is the South African law. Similarly, by use of the work "irrevocable" it is clear that the parties submitted fully to the jurisdiction of the South African Courts.

41. That the law is settled, that jurisdiction is everything, without it the court has no power to make one more step, as held in the case of; *Owners of Motor Vehicle Lillian ("S") vs Caltex Oil (K) Limited (1989) 1 KLR*. Indeed where a court has no jurisdiction, any proceedings taken would be null and void. Therefore, the court must determine the issue of jurisdiction at the outset.

42. In determining the same, I have taken into account among other issues, that the Plaintiff is a company incorporated under the South African law while the Defendant is a company incorporated under the Kenyan law. Further, the Distribution Agreement was signed by the parties in their respective jurisdictions. Similarly the dated 3rd May 2017, under the heading "payment terms and notice" , from the Plaintiff to the Defendant indicates that the currency that the parties transacted in for payments is the South African Rands

43. However, the most notable issue is that, a party who is resisting the Application is the Plaintiff's company which is actually domiciled in South Africa. The question that arises is what prejudice will the Plaintiff suffer if this case is heard and determined in South Africa? It suffices to note that the identity of the Plaintiff and its locus standi to file this suit is in issue. The Plaintiff in response argues that, it changed its name, under the South African law. Therefore, which court is more appropriate in ascertaining the same? In my considered opinion, if there will be any party that will suffer prejudice, it will be the Defendant that will have to travel to South Africa for the hearing of the matter.

44. It is noteworthy that the role of the court is to enforce the terms and conditions of the contract between the parties and not to re-write the contract between them. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved as held in the case of; *National Bank of Kenya Limited vs Pipe Plastics Sumkolit (K) Ltd & Another (2001) KLR 112.* Therefore the court should not import into the agreement clauses that were not intended by the parties themselves. Where the parties have agreed on a forum, the court should respect that decision.

45. However, the Respondent argues that, by the Applicant entering an unconditional memorandum of appearance and filing a notice of motion to transfer the case to Mombasa High Court, they submitted to the jurisdiction of the court, but I note that the Applicant had clearly denied the jurisdiction of the court in its pleadings as stated under paragraph (15) of the statement of defence.

46. Be that as it were, the filing of the memorandum of appearance and the statement of defence, cannot override the express provisions by the parties as stated in the Distribution Agreement. Indeed, the Respondent concedes that the law applicable is the South African law.

47. In conclusion, I therefore find that the court has no jurisdiction to entertain this matter. It therefore follows that, the issue as to whether the Plaintiff has locus standi or not cannot to institute the claim herein will be heard in the court that will hear and determine the matter. In that regard, I find that the application has merit and allow it. I order that the suit herein be struck out for want of jurisdiction. In the view of the fact that the Applicant's did not raise this issue, at the earliest, I make no orders as to costs.

48. Those are the orders of the court.

Dated, delivered and signed in an open court this 29th day of August 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Muyuri for the Plaintiff/Respondent

Ms. Ogutu for Mr. Oluga for the Defendant/Applicant

Dennis ----------------------Court Assistant