



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.475 OF 2016

HASSAN ZUBEIDI.....PLAINTIFF

VERSUS

ACTIVE PARTNERS GROUP LTD.....1ST DEFENDANT

MOHAMED ABDULRAHMAN MOHAMED.....2ND DEFENDANT

MUNGU & CO. ADVOCATES.....INTERESTED PARTY

DUBAI BANK (KENYA) LIMITED (IL).....3RD DEFENDANT

RULING

1. Central to the Dispute herein are two agreements, both of which have similarly worded Exclusive Jurisdiction clauses fixing the choice of Law and Forum for Settlement of Disputes arising therefrom. Active Partners Group Limited and Mohamed Abdulrahman Mohamed Fagir (the 1st and 2nd Defendants herein) seek to enforce the provisions of that clause through a Notice of Motion dated 25th November 2016 in which they pray that:

“2. THAT the Plaintiff’s suit and all the applications made thereunder be dismissed with costs”.

2. The Plaintiff’s Claim against the Defendants jointly and severally is for a total sum of USD 11,070,000 which are said to arise out of two separate agreements both of 18th August 2010. The first is between the Plaintiff and the 1st Defendant and the second is between one Jalal Hussien Diab (hereinafter Jalal) and the 1st Defendant. The proceeds in this latter agreement were assigned to the Plaintiff through a Deed of Assignment. A common feature of the Agreements of 18th August 2010 are these two clauses:-

“(1) This Agreement shall be governed by and construed in accordance with the laws of Sudan.

(2) Both Parties agree that the Courts of the Sudan shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement, irrevocably submit to the jurisdiction and proper venue of such courts”.

3. A Dispute arose and the Plaintiff presented these proceedings on 24th November 2016. The Defendants Entered Appearance on 25th November 2016 through a Memorandum of Appearance of the same day and simultaneously filed the Motion which is the subject matter of this Decision. Three days later the Defendants filed an Amended Memorandum of Appearance under protest. It is dated 28th November 2016 and filed on 29th November 2016.

4. In the Notice of Motion the Defendants and Interested Party underscore that the Exclusive Jurisdiction clause vests exclusive Jurisdiction in the Court of Khartoum, Sudan and that this Court, a Kenyan Court, does not have Jurisdiction in the matter.

5. In a further Affidavit sworn on 13th December 2017 the 2nd Defendant had deponed that the 1st Defendant is registered in Sudan with offices and substantial assets in Khartoum Sudan and has no place of business, agents or employee in Kenya. As for the 2nd Defendant, he is said to be domiciled in Sudan and has no business or other connection to Kenya. On the other hand it is alleged that the Plaintiff has a home in Khartoum and owns properties in Sudan. Further that the Plaintiff and Jalal freely agreed to vest jurisdiction in the Courts of Sudan as they both are faithful Muslims subject to Sharia Law. In addition that all persons who are parties to this suit and every witness are Muslim and subject to Islamic Law.

6. It was also asserted that Jalal who is an essential party to this suit cannot be compelled by this Court to attend.

7. The Plaintiff's responses were in two Affidavits sworn on 28th November 2016 and 8th February 2018. It is the position of the Plaintiff that South Sudan gained its independence from the North and the Country by the name of "the Sudan" as referred to in the Agreement does not exist anymore. It is stated that the Agreement entered into between himself and the 1st Defendant was predicated upon the existence of a state known as "The Sudan" which comprised of both the Republic of Sudan and South Sudan. The Jurisdiction clauses are therefore wholly inoperable and incapable of being enforced by either party.

8. As to the applicability of Islamic Law, the Plaintiff takes the position that at no time did the parties contemplate invoking Islamic Law. And that if this was so then nothing would have been easier than to have that infused into the Agreements. In any case, he deposes, the Agreements were concluded in Juba which is in a Region that does not apply Islamic Law.

9. In respect to the allegation of having property in Sudan, the Plaintiff deposes that he is not aware that the Applicants have substantial assets in Sudan as no evidence had been availed and that in any event the same does not defeat his Claim before the Court.

10. On another front, the Plaintiff was aware that on 22nd October 2016, the 1st Defendant and Government of South Sudan consented to the release of Khs.177,000,000 from the accounts held by the Government of South Sudan to be paid to the 1st Defendant in a Bank situated and based in Kenya. That it was directed that the monies be paid to the Interested Party herein, Mungu & Company Advocates, who practice and carry out business in Kenya. The argument of the Plaintiff being that this Court has Jurisdiction to hear and determine the suit as the amount payable is either expressly or impliedly within the Jurisdiction of this Honourable Court.

11. The Plaintiff further argue that the Defendants Memorandum of Appearance dated 25th November 2016 was unconditional and the Defendants had thus submitted to the jurisdiction of the Honourable Court.

12. On their part the Defendants explain that the Consent Order for payment by the Government of South Sudan was as a result of Arbitration proceedings between the Government and the 1st Defendant. The Arbitration proceedings were held in Nairobi by agreement of the parties and a finding was made in favour of the 1st Defendant and Damages awarded to it. Subsequently the 1st Defendant filed Execution proceedings in the High Court in Nairobi in Miscellaneous Application No.531 of 2015. It is however deposed that the Execution proceedings were frustrated when the Government of South Sudan directed its banking business to other Banks overseas following the issue of an injunction by this Court as the injunction was considered to be a challenge to the sovereign dignity and immunity of that Government. As a result, there are no assets in Kenya to satisfy the Plaintiffs Claim if found to be justly due.

13. In respect to the status of Sudan, the Defendants assert that Southern Sudan was created as an autonomous region of Sudan and became independent of Sudan in a subsequent Referendum. It was then deposed,

“40. That the establishment of GoSS was a necessary antecedent to the independence of Southern Sudan and the parties to the two agreements the subject of this suit made the agreements in anticipation of the independence of Southern Sudan and elected to vest jurisdiction in the Courts and laws of Sudan in preference to that of GoSS/the Republic of Sudan.

45. The independence and creation of the Republic of Southern Sudan did not affect the status of the Republic of Sudan with Khartoum as its Capital which continues to be a member of the United Nations Assembly.

14. Flowing from the issues raised and submission made by Counsel, this Court is invited to restate two propositions of the Law.

15. The Plaintiff on the one part and the 1st Defendant on the other were happy to choose the Law that governed their relationship and the forum for settlement of any dispute that would have arisen. The general rule is that such a Jurisdiction Clause must be obeyed as parties have freely submitted to it. A departure from it will not be permitted unless there are exceptional reasons to justify it and the onus is on the party seeking out to demonstrate the existence of extraordinary reasons. In United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd, Madan JJA said as follows on exclusive jurisdiction clauses:-

*“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 honoured unless there is **strong reason for not keeping them bound by their agreement**”.*

16. Secondly, and this is a General Proposition, where a party disputes the jurisdiction of the Court on the basis of an Exclusive jurisdiction clause, the party must indicate its disapproval at the time of Entering Appearance. Typically a party who disagrees with jurisdiction ought to enter a conditional Appearance or an Appearance under protest. As the premise for resisting Jurisdiction is the agreed choice of Law and/or Forum, it is imperative that a party signals the disapproval at the earliest opportunity otherwise it is taken to have waived its Right to the clause and as a repercussion to have submitted to the Jurisdiction of the Local Courts. It is for this reason that Jurisdiction cannot be protested by an Amendment to an Entry of Appearance that was originally unconditional. See the Court of Appeal Decision in Kanti & Co. Ltd vs. South British Insurance Co. Ltd [1981] eKLR cited to this Court by the Plaintiff's Counsel which has the following holding:-

“I am of the opinion that the Defendant by entering an unconditional appearance submitted to the jurisdiction of the High court, and it could not thereafter abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of the court releasing it from its admission and acceptance of the jurisdiction. 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”.

See also Evergreen Marine (Singapore) PTE Ltd & Gulf Badar Group (Kenya) Ltd vs. Petra Development Services Limited [2016]eKLR.

17. Now, it is common ground that when the Defendants and Interested Party Entered Appearance on 25th November 2016, the Memorandum of Appearance was neither conditional nor under protest. It is also true that three days later, on 28th November, 2016 the Trio purported to amend the Memorandum of Appearance by filing the following document:-

AMENDED MEMORANDUM OF APPEARANCE UNDER PROTEST

PLEASE ENTER CONDITIONAL APPEARANCE UNDER PROTEST for ACTIVE PARTNERS GROUP LIMITED the 1st Defendant, MOHAMED ABDULRAHMAN MOHAMED FAGIR the 2nd Defendant and MUNGU & COMPANY ADVOCATES whose address of service for the purpose of this suit is care of Mungu & Co. Advocates, Podium 2, Reinsurance Plaza, Taifa Road, P.O Box 19414-00100 Nairobi.

Amended at NAIROBI this 28th Day of November 2016.

Mungu & Company

Advocate for the Defendants

18. If that was all to the matter then an inevitable outcome to be reached is that as a consequence of the unconditional Entry of Appearance by the Defendant and Interested Party both had waived their Right to insist on the Exclusive jurisdiction clause and had submitted to the jurisdiction of this Court. The filing of the subsequent Amended Memorandum of Appearance under protest could not reverse the events or turn back the clock or to borrow the words of the Court of Appeal in Evergreen Marine (Singapore) (Supra), “*by the time the Amended Memorandum was filed the horse had bolted and the Court assumed jurisdiction*”.

19. But simultaneously with filing the Original Memorandum of Appearance, the Defendants filed this Application in which they invoke the Exclusive Jurisdiction Clause and challenge the Jurisdiction of this Court. If the objective of Entering Appearance under Protest is to challenge Jurisdiction at earliest point a Defendant comes into a matter, then I have to find that filing an Application that protests Jurisdiction simultaneously or concurrently with a Memorandum of Appearance (which though, may be unconditional) serves the same purpose. In the circumstances of this case the filing of the Entry of Appearance on 25th November 2016 was not a submission to the jurisdiction of this Court as the Defendant had concurrently protested it by way of substantive application. This situation is akin to the situation under the Arbitration Act in which Section 6(1) of the Act requires a party who wishes to protest the jurisdiction of the Court in a matter which is the subject of an Arbitration Agreement to apply for Stay of the Court proceedings not later than the time when the party Enters Appearance or otherwise acknowledges the Claim.

20. However, the events that came after the filing of the Notice of Motion may have turned tables on this question of waiver. In A Notice of Motion dated 29th December 2016, Dubai Bank Kenya Limited (IL) sought to be enjoined in this suit as a 3rd Defendant on the basis that the facilities advanced under the terms of the two Agreements were done on its behalf and that the subject matter herein being the sum of USD 11,070,000/= is due and payable to it.

21. In allowing the Application for joinder this Court observed as follows:-

21. To be observed for now is that Dubai Bank (k) Ltd was not privy to the controversial agreement and would ordinarily not be allowed to enter into the dispute between the contracting parties. But there may be something unconventional about the arrangement entered between Zubeidi and Active Partners!

22. The agreement declares,

‘.....the ‘second party’ in his capacity as the owner and the Chairman of the ‘Bank’ is willing to offer his services to the ‘first party’ to secure their requirements from the ‘Bank’ as mentioned hereunder’.

23. A question could arise whether this was not a bold statement that Zubeidi was to use his dominant position as owner (perhaps majority shareholder) and Chairman of the Bank to bid and lobby for the facilities from the Bank on behalf of Active Partners. And if so, whether he could lawfully and without breaching the provisions of the Banking Act, exert that leverage and in particular for a personal benefit of fees. As a corollary, and as argued by Counsel for Dubai Bank IL, whether if, there was such an arrangement, a benefit accruing should be to the Bank and not Zubeidi.

24. When looked at from the Provisions of Section 11(1)(h) of the Banking Act, then the matters raised above may require further consideration of the Court. These provisions are that:-

11.1) An Institution shall not in Kenya;

(h) grant any advance or credit facility or give guarantee or incur any liability or enter into any contract or transaction or conduct its

business or part thereof in a fraudulent or reckless manner or otherwise than in compliance with the provisions of this Act.

Under the provisions of Section 11 (1A) "reckless" is defined to include misuse of position or facilities of the Institution for personal gain.

25. It is my view Dubai Bank IL has made out a case that it should be enjoined herein for purposes of determining, if only in respect to the first agreement and if found due and owing, whether the sum of USD 6,000,000 should be paid to the Plaintiff as a personal commission or to the Bank.

26. What is of interest is the stance taken by the Defendants and Interested Party to Dubai's plea for joinder. On 3rd January 2017, Mr. Mungu appeared for the three in Court and on that occasion informed Hon. Sewe J. that,

"I support the Application".

This was reiterated by Mr. Munga to me on 7th February 2017 when the application was heard. An affirmation that the settled position of the three was to support the joinder.

27. The joinder of Dubai Bank into these proceedings was a significant event herein and not like other steps, such as seeking of preservative orders, as it allowed into the proceedings a third party with a substantive Claim to the subject matter. Yet the Defendants and the Interested Party who had protested the jurisdiction were happy to support the joinder. When Dubai was seeking joinder, it must have acknowledged jurisdiction of this Court to hear and determine its stake herein. In fact in paragraph 9 of its Defence Dubai expressly admits the jurisdiction of this Court. Further the claim by Dubai calls for a discussion some provisions of a Kenyan Statute, The Banking Act, and its possible application to the Claim. In view of these two reasons, this Court holds that by unconditionally supporting the joinder of Dubai, the Defendants and Interested Party had waived their Right to rely on the Exclusive jurisdiction clause and were happy to submit to the jurisdiction of this Court.

28. Being of that persuasion it would be needless for this Court to consider the other issues raised but I will make some short observations on one matter.

29. The Kenyan Courts (See for example **United India Insurance Co Ltd (supra)** have embraced the principles formulated (with necessary modification) in **The Eleftheria** [1969]2 All ER 641 as providing the indices upon which to consider the effect of a Jurisdiction Clause. Madan JA stated,

"Two of the principles established by the authorities mentioned by Brandon, J in the Eleftheria [1970]p.94 at p 100 are (a) in exercising its discretion the court should take into account all the circumstances of the particular case (b) 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 they would be deprived of security for their claim, be unable to enforce any judgement obtained, be faced with a time bar not applicable in their country".

30. If I were to apply those tests to the matter at hand I would find, as between the Plaintiffs on the one hand and the Defendants and Interested Parties on the other ;

- a) It is not disputed by the Plaintiffs that the evidence on the issues or dispute is more readily available in Sudan than in Kenya.
- b) The parties agreed to Sudanese Law which may differ from the Laws of this Court.
- c) The Plaintiffs do not assert or state that they are unable to enforce any judgement obtained in Sudan.
- d) The Plaintiffs do not state that a Trial in Sudan would deprive that of security for the claim.
- e) The Plaintiffs do not raise any apprehension that they are unlikely to get fair trial in Sudan.

These factors tilt the scales in favour of upholding the jurisdiction clause.

31. However, the entry of Dubai Bank (IL) into the fray, which it needs to be repeated was supported by the Defendants and the Interested Party, disturbs the scales. Some aspects of the dispute, which may now involve this third party, may involve a discussion of The Banking Act of Kenya. The support of the entry by this third party may be construed as an acknowledgement by the Defendants and the Interested Party that this Court can properly and ably adjudicate the entire dispute.

32. But for reasons earlier stated the Notice of Motion dated 25th November 2016 is hereby dismissed with Costs.

Dated, Signed and Delivered in Court at Nairobi this 29th day of May, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Rebelo & Mungu for Defendants

Mungu for Interested party

Hannan for Plaintiff

N/A for 3rd Defendant

Nixon - Court Assistant