REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 292 OF 2015

GRECO INTERNATIONAL LIMITED...PLAINTIFF

-VERSUS-

RIFT VALLEY RAILWAYS LIMITED...DEFENDANT

JUDGMENT

1. ***Greco International Limited***, the plaintiff in this matter, is a limited liability company incorporated in ***United Kingdom*** and carrying on business in ***Kenya*** and elsewhere around the world.

2. ***Rift Valley Railways (Kenya) Limited***, the defendant herein is a limited liability company incorporated and carrying on business in Kenya.

3. The plaintiff brought this claim against the defendant seeking judgment for ***USD 1,043,784.97.*** The plaintiff's claim is that that amount is in respect to the amount due for the supply to the defendant of various spare parts.

4. In response to the plaintiff's claim, the defendant filed a defence and counter claim. By its defence, the defendant denied any indebtedness to the plaintiff. By its counter claim, the defendant pleaded that it undertook verification process to ascertain whether the spare parts delivered were in conformity with the contract. Further that thereafter, the parties engaged in reconciliation exercise which exercise revealed that the spare parts delivered by the plaintiff did not meet specifications in the contract and that not all the spare parts had been delivered by the plaintiff. It was also pleaded that the plaintiff contrary to the agreement failed to provide information, figures and documents to assist in reconciliation. The defendant prayed for liquidated damages of ***USD 284,936.84*** in respect to the plaintiff's failure to deliver to the defendant spare parts as pleaded.

5. This case was fully heard before ***F. Ochieng, J*** who due to his transfer to Kisumu High Court was unable to write this judgment. The responsibility of preparing this judgment fell on my shoulders.

6. It is important to state that whilst the plaintiff's case was supported by oral evidence of its witness, ***Viresh Patel***, the defendant's defence and counterclaim was not supported by any evidence because its witness did not attend the trial and the court marked its defence as closed without evidence being tendered.

7. It follows that the defence and counterclaim of the defendant were unsupported by evidence and therefore they remain allegations. This was the holding of ***R.E. Aburili J***, in the case of ***Mary Njeri Murigi v Peter Macharia & another [2016] eKLR*** when the learned judge was confronted with a situation where the defendant did not adduce evidence. This is what the learned judge stated in that case:

> *"I am in total agreement with the decision by my learned brother Judge G.V. Odunga J in* ***Linus Nganga Kiongo & 3 Others vs Town Council of Kikuyu [2012] eKLR*** *on the consequences of a party failing to call evidence wherein he stated:*
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> ***"……in the case of Motex Knitwear Mills Limited Milimani HCC 834/2002*** *Honourable Lessit J citing* ***Autar Singh Bahra & another Vs Raju Govindji HCC 548 of 1998*** *stated:*
>
> ***"Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail….." where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged…."***

46. I am in agreement with the above persuasive exposition that indeed, it is not sufficient for a party and more specifically the defendants in this case to have made strong statements of defence on paper blaming other people for the accident. Their defence remains mere allegations not proved by evidence as required under Sections 107 and 108 of the Evidence Act."

8. The defendant's learned advocate by his final written submissions attempted to adduce evidence in support of the defendant's case. Such an attempt or attempt to rely on cross examination of the plaintiff's witness, cannot be substitution for evidence required under Section 107 and 108 of the Evidence Act Cap 80. The defendant's defence and counterclaim were therefore unproven.

9. There are however, two issues raised by the defendant in its submissions which require consideration. These issues relate to clause 14.1 to 14.5 of the parties contract. This provides as follows:

"14.1 dispute or disagreement arising during the interpretation or execution of the contract shall be settled through amicable negotiation, firstly.

14.2 If the amicable negotiation fails, all the disputes shall be settled under the London Court of International Arbitration Rules by a panel comprising one (1) arbitrator appointed in accordance with the said rules.

14.3 The language to be used in the proceedings shall be English.

14.4 The venue of arbitration shall be in London.

14.5 The contract and the arbitration shall be governed and construed according to the laws of England."

10. There are two issues for consideration from the above clauses which both relate to whether or not this court has jurisdiction to determine this matter. Firstly is whether this court lacks jurisdiction because parties, by their contract, agreed that the contract would be governed according to the laws of ***England.*** Secondly, is whether this court lacks jurisdiction because of the existence of an arbitration clause under clause 14.2 reproduced above.

11. The defendant relied on the case of ***Skoda Export ltd vs Tamoil East Africa Ltd [2008] eKLR***. In that case, the court entertained a preliminary objection by the defendant on the ground that the contract had an arbitration clause, that the applicable law of the contract was that of ***Czech Republic***; and that the place of arbitration was ***London, England***. The court in that case upheld the objection.

12. The defendant also relied on the case of ***Anami Silverse Vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR.*** This case started before the High Court where the election of the National Assembly Members for Shinyalu Constituency conducted on ***4th March 2013***, was challenged. The High Court upheld the election but the Court of Appeal set aside the decision of the High Court by declaring the election void. That finding by the Court of Appeal was challenged before the Supreme Court. The Supreme Court found that the High Court had no jurisdiction to entertain the petition because that petition had been filed outside the 28 days provided under Article 87 (2) of the Constitution and under Section 76 (1) (a) of the Election Act.

13. The defendant in this case has submitted that the issue of jurisdiction just as in the case of ***Anami*** (*supra*) can be raised any time, even at appeal stage.

14. In my view, the defendant erred in raising the issue on jurisdiction on account of existence of arbitration clause and the parties' choice of applicable law. I so find because, the defendant on being served with the summons and the plaint, filed a Memorandum of Appearance on ***8th July 2015*** and also filed a defence and counterclaim on ***29th July 2015*** which were all filed within the prescribed legal period. The defendant then filed an application dated ***17th March 2016***, seeking that the plaintiff be ordered to provide security for costs. The defendant's main ground for seeking security for costs was that the plaintiff was a company incorporated in the United Kingdom.

15. This court by its ruling of ***29th September 2016***, dismissed with costs, the defendant's application for security for costs.

16. Thereafter parties undertook Case Management Conference (CMC) which was adjourned from time to time and finally on ***14th March 2017*** the court certified that both parties had complied with CMC, that is, they had filed witness statements, bundle of documents and issues for determination during trial.

17. The case was fixed for trial on ***2nd October 2017*** when the plaintiff's witness testified in chief and was cross examined by the defendant's learned advocate.

18. It will be clear from the above that from ***June 2015***, when this case was filed, the defendant fully participated in the matter and further filed an interlocutory application for security for costs. The defendant in all that time and until it filed its final written submissions raised no objection to the jurisdiction of this court. The defendant did not as provided under Section 6 of the Arbitration Act Cap 49 seek to stay this proceedings pending arbitration.

19. In my view, the defendant in failing to seek stay of these proceedings and by actively participating in this case for three years must be taken to have submitted itself to the jurisdiction of this court. This was the holding in the case of ***Kisumuwalla Oil Industries Limited vs Pan Asiatic Commodities PTE Limited & another [1997] eKLR*** as follows:

"according to s.6(1)(b) of the Arbitration Act in order to take advantage of the arbitration clause, the party applying has to satisfy

the court that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. There was nothing in the corporate case to indicate that the appellant either at the time the legal proceedings were commenced or at any time thereafter indicated that it wished to take the advantage of the arbitration clause and desired the matter to be referred to arbitration. The arbitration provision does provide a remedy of specific performance. However, one cannot ask for specific performance of an agreement by the other side unless he has been and still is ready to perform his part of the agreement. There was nothing even in the defence of the corporate to show that it had ever been ready and willing to refer the matter to arbitration. On the other hand corporate had in fact waived the right to refer the matter to arbitration and have the legal proceedings stayed in the meantime by filing a defence."

…….The parties can of course expressly agree to ignore or disregard the clause. They may also do so by conduct. Once the parties have submitted to the jurisdiction of the court they cannot blow hot and cold and subsequently without consent of each other rely upon the condition precedent in the arbitration clause."

20. This was also the finding in the case ***Universal Pharmacy (K) Limited vs Pacific International Lines (PTE) Limited & another*** ***[2015] eKLR*** where the court held:

"The defendants herein did not just enter unconditional appearance but also filed 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."

21. It will be clear from the above discussion that the objection raised by the defendant in its final written submissions is misconceived and is for rejection. It is no answer to that finding that the Supreme Court in the ***Anami case*** *(supra)* that the Supreme Court found that that High Court had no jurisdiction to entertain an election for having been filed out of time. The Supreme Court for the first time in making that finding was upholding a constitutional provision. It is on that ground that that case is distinguishable from the case at bar.

22. It is therefore the finding of this court that this court has jurisdiction to hear and determine this case because the defendant waived the English Jurisdiction by wholly submitting to this court's jurisdiction and more importantly because the defendant by its defence admitted that this court has jurisdiction to determine this matter.

23. The plaintiff's evidence as stated before was adduced by ***Viresh Patel*** a director of the plaintiff's company. His evidence was uncontradicted by the defendant.

24. The plaintiff's witness stated that the plaintiff for the last 20 years has been in the business of supplying railway equipment and spare parts to railway organizations. In this regard, the plaintiff had been in business with the defendant for several years. The defendant would raise purchase orders against which the plaintiff would supply the parts that were ordered. Those purchase orders had a list which set out the technical description of each spare part and also included price per unit of each item. The defendant on the whole, although with some delay, did settle the amount due for the parts supplied.

25. The defendant as proof of delivery was issued with delivery notes, arrival advices, invoices and shipment confirmation in respect to spare parts supplied to it by the plaintiff. The defendant acknowledged receipt of the confirmations by stamping and signing the respective documents.

26. The plaintiff witness stated that 2 years prior to the filing of this case he had engaged in numerous meetings, phone calls and emails in respect of the amount owed by the defendant whereby the defendant always promised to settle the accounts. An example of such commitment is an email by an employee of the defendant to the plaintiff's witness which I reproduce hereunder:

"From: Munene Gatere [mailto:munene.gatere@rvr.co.ke]

Sent: 14 June 2013 17:29

To: Viresh Patel

CC: Kamini; 'Hassan Popat'

Subject: RE: Payment Due

Hello Viresh,

Yes, a commitment was made to work to get your payments out this week. That has not borne fruit this time unlike the previous commitments.

We spoke earlier this afternoon, so kindly understand that I remain committed to getting Greco paid.

However, to better navigate whatever challenges that may have arisen, kindly avail the various documented agreements you have made with RVR regarding payments to Greco.

I trust that you appreciate, that RVR does value its relationships with its suppliers. They must remain mutually beneficial.

You mentioned that you have further locomotive parts consignments to deliver to RVR.

Kindly give me an indication, of the value, indicative lead-times & if you have the supporting documents for this, do email them to me.

Revised invoices for approx. US$ 600k were re-submitted. I reviewed them and passed them on for processing to pay."

27. According to the plaintiff's witness the defendant by ***March 2015*** was indebted to the plaintiff to the tune of ***USD 1,071,090.37***. Following the plaintiff's advocate's demand for that amount, the defendant paid ***USD 27,305.40*** which left the amount of ***USD 1,043,784.97*** now claimed in this matter.

28. The plaintiff has proved on a balance of probability that the defendant was indebted to it for the amount claimed in this matter. That evidence was not controverted since the defendant failed to give evidence. Accordingly the ***plaintiff succeeds in its claim***.

29. In the end the judgment of the court is that ***there shall be judgment for the plaintiff for USD 1,043,784.97*** with ***interest at court rate*** from the date of filing suits until payment in full. The ***plaintiff is awarded costs*** of this suit.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **30th** day of **October,** 2018.

MARY KASANGO

JUDGE

<u>Judgment read and delivered in open court in the presence of:</u>

Court Assistant....................Sophie

.... for the Plaintiff

.... for the Defendant

MARY KASANGO

JUDGE