



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE. 287 OF 2015**

HAKKEN CONSULTING LTD.....1<sup>ST</sup> PLAINTIFF

HAKKEN S.A.....2<sup>ND</sup> PLAINTIFF

CARLOS OLIVEIRA.....3<sup>RD</sup> PLAINTIFF

VERSUS

SEVEN SEAS TECHNOLOGIES LTD.....1<sup>ST</sup> DEFENDANT

SEVEN SEAS TECHNOLOGIES NIGERIA LTD.....2<sup>ND</sup> DEFENDANT

**RULING**

**Introduction**

1. This is an opposed application by the Defendant involving the issue of jurisdiction. The Defendant seeks to strike out the plaint on the basis that this court lacks the requisite jurisdiction. The Plaintiffs are castigated for launching the suit without leave of the court and further not lawfully and properly serving the 2<sup>nd</sup> Defendant with the Summons.

**Issue**

2. Having regard to the affidavits and heads of arguments filed, the sole issue for determination is whether this court has the requisite jurisdiction to entertain the suit herein.

3. To determine this issue, it may be necessary to determine the origin of the dispute and which origin is in controversy, with the Defendants contending that the origin of the dispute is a letter of award executed in the Federal Republic of Nigeria on 25 November 2013 whilst the Plaintiffs contend that the origins may be traced further back to a Memorandum of Understanding dated 27 November 2012.

**Arguments**

4. Defendants application is premised largely on the ground that the 2<sup>nd</sup> Defendant is a foreign company incorporated and domiciled in the Federal Republic of Nigeria. This is common cause.

5. The Defendants contend that the contract upon which the suit is predicated was entered into in the

Federal Republic of Nigeria through a letter of award dated 25 November 2013 and that the contract was to be performed in Nigeria, if at all. Payment, in consideration was also to be made in Nigeria. Consequently, it is the Defendants' contention that the cause of action arose outside the jurisdiction of this court.

6. Urging the application, Ms. Mwangi instructed by the firm of Njoroge Regeru & Co. Advocates was firm that the basis of the action was the letter dated 25 November 2013 in which the Plaintiffs secured a contract award from the First Bank of Nigeria to offer a support HP Service Manager Technology at a cost of USD 326,497.50. Counsel asserted that the services were not only contracted in Nigeria (outside jurisdiction) but were also to be performed outside of this court's jurisdiction in terms of delivery and payment. Additionally counsel submitted that the 2<sup>nd</sup> Defendant was a non-resident corporate entity and service of summons as well as court process was restricted under Order 5 of the Civil Procedure Rules.

7. To advance her arguments further, counsel relied on the cases of **Roberta Macclendon Fonville v James Otis Kelly III & Others [2002] eKLR** and **Raytheon Aircraft Credit Corporation & Another v Air Al Faraj Ltd [2005]eKLR** for the proposition that Courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract unless the circumstances fall within the provisions of Order 5 Rule 21 of the Civil Procedure Rules. For completeness, counsel added that the court could only assume jurisdiction over persons outside Kenya upon application by a Plaintiff to effect service of summons or Notice of Summons outside the country as provided for under Order 5 Rules 21 & 22.

8. In a brief response, Mr. E.K. Mutua appearing for the Plaintiffs submitted that, the contract, the basis of the suit was the Memorandum of Understanding executed on 27 November 2012. According to Counsel all the consequent dealings and transactions as well as obligations involving the parties which the Plaintiffs now need to enforce originated from the Memorandum of Understanding. Counsel insisted that as the Defendants do not challenge the Memorandum of Understanding, the jurisdiction of the court could also not be subjected to a challenge. In the alternative, Mr. Mutua submitted that the court was entitled on the totality of the documents availed to determine, that the appropriate forum for determination of the dispute was Kenya, on the basis of the concept of *forum conveniens* – otherwise well conversely celebrated in alternative dispute resolution forums as the principle of *forum non conveniens*.

### **Determination**

9. I have reflected on the issue. I have also considered the respective arguments advanced by counsel. Additionally, I have perused the case law cited by counsel. I take the following view of this matter.

10. There is no controversy that the 2<sup>nd</sup> Defendant is a company incorporated in accordance with the laws of Nigeria. There is also no controversy that the 2<sup>nd</sup> Defendant is indeed domiciled and conducts its business in Nigeria. It is also apparent that the parties are in agreement that there was an association between and among the parties, it is the extent of such association and appurtenant obligations which may and will be the subject of the dispute. The Defendants however contend that in view of the fact that the 2<sup>nd</sup> Defendant is a "foreign entity" this court has no jurisdiction as the contract in question does not fall within the ambit of Order 5 Rule 21.

11. I agree with the Defendant's counsel that jurisdiction is everything: see **Owners of Motor Vessel "Lillian S" –v- Caltex Oil (K) Ltd 1989 KLR**. It must not be obtained through craft but only through an appropriate appreciation of the relevant provisions of the Constitution or law which confer it.

12. It is no doubt true that this court has an unlimited jurisdiction over civil and criminal matters: see Article 165(3) (a) of the Constitution but not on all subjects. With regard to foreign Defendants, the Court of Appeal in the case of **Karachi Gas Co Ltd v Issaq [1965] EA 42** , (per Newbold Ag VP at 53) stated as follows

*“ the two main issues which arise in this appeal are first, whether the supreme court had jurisdiction and secondly, whether the contract was frustrated. As regards the first of these issues, the defendant was out of the jurisdiction and was neither domiciled nor ordinarily*

***resident in Kenya. In such a case, the courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract unless the circumstances fall within the provisions of Order V Rule 21 of the Civil Procedure Rules 1948. This rule details the circumstances in which service of the summons or a notice of summons may be allowed out of the jurisdiction in order to give effect to a jurisdiction, inter alia, if contract is made in Kenya or if the proper law of contract is Kenya or if a breach is committed within Kenya” [emphasis mine]***

13. The principle stated in case of **Karachi Gas Co Ltd v Issaq** (supra) was applied in the case **Raytheon Aircraft Credit Corporation & Another v Air Al-Faraj Ltd [2005] eKLR** and also in the case of **Fonville v Kelly III Others [2002]1 EA 71**. These two cases were also copiously referred to by the Defendants’ counsel.

14. It is clear that jurisdiction of the High Court hinges on the provisions of Order 5 Rule 21 of the Civil Procedure Rules in so far as foreign defendants are concerned. Where any one of the indexed instances is met then jurisdiction may not be denied. What is of import is that the one of the reasons to allow service to be effected out of jurisdiction is actually shown to exist.

15. Order 5 Rule 21 stipulates as follows:

***21. Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever-***

***a. The whole subject matter of the suit is immovable property situate in Kenya (with or without rents and profits);***

***b. Any act, deed, will, contract, obligation or liability affecting immovable property situate in Kenya is sought to be construed, rectified, set aside, or enforced in the suit;***

***c. Any relief is sought against any person domiciled or ordinarily resident in Kenya;***

***d. The suit is for the administration of the personal estate of a deceased person who at the time of his death was domiciled in Kenya, or for the execution (as to property situate in Kenya) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Kenya;***

***e. The suit is one brought to enforce, rectify, rescind, dissolve, annul, or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract-***

***i. Made in Kenya; or***

***ii. Made by or through an agent trading or residing in Kenya on behalf of a principal trading or residing out of Kenya; or***

***iii. By its terms or by its legislation to be governed by the Laws of Kenya ; or***

***iv. Which contains a provision to the effect that any Kenya court has jurisdiction to hear and determine that suit in respect of that contract,***

***Or is brought in respect of a breach committed in Kenya, of a contract, wherever made, even though such a breach was preceded or accompanied by a breach out of Kenya which rendered impossible the performance of the part of the contract which ought to have been performed in Kenya; or***

***f. The suit is founded on a tort committed in Kenya;***

***g. Any injunction is sought as to anything to be done in Kenya, or any nuisance in Kenya is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or***

***h. Any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya.***

16. It is admitted that the 2<sup>nd</sup> Defendant is a foreign entity. It is contested that the contract the basis of the suit was executed in Nigeria. It is however not disputed that all the parties enjoined to these proceedings are relevant parties and indeed interested in the proceedings. They are not busy-bodies.

17. The 2<sup>nd</sup> Defendant may be a person out of Kenya but is a necessary party or proper party pursuant to Order 5 Rule 21(h). I take note too of the fact that there are two Defendants to this cause. The 1<sup>st</sup> Defendant is domiciled locally and there may be possibly no jurisdictional challenge to the suit. The suit against the 1<sup>st</sup> Defendant has been properly brought. The 2<sup>nd</sup> Defendant is however a “foreign entity”. Service ought only to have been effected with the leave of the court.

18. It is unclear how service was effected and how the 2<sup>nd</sup> Defendant entered appearance. What however clear is that the 1<sup>st</sup> Defendant was sued on the basis of the Memorandum of Understanding. It is for this reason that the Defendants sought to have the dispute referred to arbitration. Even the 2<sup>nd</sup> Defendant seems to have ascribed to this view that the parties were bound by the terms of the Memorandum of Understanding and that the court needed to refer the dispute to arbitration.

19. It has also not been alleged that service was effected outside jurisdiction. The defence statement though was filed pursuant to the leave and orders of this court issued on 18 May 2016 (Farah J). It is the court which allowed the 2<sup>nd</sup> Defendant to file its defence. I take the view that this was a pre-emptory action taken by the court with the consent of the Defendants and with the full knowledge of the status of the 2<sup>nd</sup> Defendant. It robbed the Plaintiffs of the opportunity, if at all, to seek the courts leave to serve the summons outside jurisdiction. The Plaintiff may in the circumstances not be condemned for action precipitated by the Defendants.

20. With regard to the issue as to whether the contract was executed in Kenya or Nigeria, my view is that having found that Order of Rule 21(h) of the Civil Procedure Rules is applicable and thus jurisdiction was assumed by the Court, I need not venture into that issue. It is better left to the merit of the dispute rather than the jurisdictional angle. I find that the court has the jurisdiction to entertain the Plaintiffs’ claim.

## **Disposal**

21. In the result, I decline the application by the Defendants dated 31 October 2016. It is dismissed with costs to the Plaintiffs.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of July, 2017.**

***J.L.ONGUTO***

**JUDGE**