



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**HCCC NO.166 OF 2015**

**NUCON SWITCHGEARS PYT LIMITED.....PLAINTIFF/RESPONDENT**

**VS**

**KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. Said to be brought under the provisions of Order 1 rules 10(2) and 14 of the Civil Procedure Rules 2010 and Sections 3A, 1A and 1B of the Civil Procedure Act is the Chamber Summons dated 28<sup>th</sup> June 2016 for the following two substantive prayers:-

**2. THAT this Honourable Court be pleased to strike out the suit herein for mis-joinder of causes of action.**

**3. THAT in the alternative, this Honorable Court be pleased to stay these proceedings pending negotiations between the parties as stipulated under the three contracts herein.**

2. In the main the dispute herein is founded on three Contracts for the supply of transformers by the Plaintiff to the Defendant. The first contract is dated 24<sup>th</sup> June, 2009 for the delivery of 1573 transformers. A second contract is dated 22<sup>nd</sup> September 2011 for the supply of 1659 transformers. There is a yet a third contract of 16<sup>th</sup> July 2011 for 5229 Transformers.

3. It is the Plaintiff's contention that the Defendant breached the terms of the Contracts as follows:-

a) Termination thereof without cause.

b) Declining to accept transformers that were fit and ready for delivery and under a warranty and which had been approved by the Defendant through its representatives.

4. On the part of the Defendant it is asserted that it was constrained to terminate the Contracts for, inter alia, the following reasons:-

a) Expiry of the Bank Performance Quarantee during pendency of the first contract.

b) Inordinate delay in supply of the Transformers.

c) Continued supply of non-performing Transformers which had failed and leading to customer

dissatisfaction and filing of claims against it.

5. In support of the Chamber Summons now before Court for determination, Imelda Bore swore an affidavit on 28<sup>th</sup> June 2016 in which she rehashes the grounds upon which the Summons is premised. The position of the Defendant is that the three Contracts which are the subject of this suit are 3 three distinct Contracts. So as to elaborate that argument it is asserted that the first Contract is a dispute arising after the Defendant rejected 3 Transformers now lying at the port of Mombasa and failing to pay for 16 Transformer delivered to its stores for good reason. The second dispute is in respect to the refusal by the Defendant to pay for 32 Transformers and to accept 108 Transformers currently at the Port of Mombasa and 648 at the Plaintiff's factory in India. Further on this Contract is the Plaintiff's claim for payment of 559 Transformers yet to be manufactured. The final discord would be on the last contract which arose after the Defendant declined to pay for 660 Transformers and declined to accept another 821 Transformers already manufactured. On this third Contract the Plaintiff also makes a claim for payment of sums that would be due for 3533 Transformers yet to be manufactured.

6. It is pointed out by the Defendant that the Plaint comprises 55 paragraphs which make up a total of 34 pages. In addition the Plaintiff has served the Defendant with two voluminous list and bundles of documents comprising 1400 pages. It is the belief of the Defendant that the pleadings are a manifest indication that:-

- a) Establishing the breaches alleged by the Plaintiff shall require separate sets of facts and documents.
- b) The Defences proffered by the Defendant are distinct and based on separate set of facts and reliance on separate witnesses.
- c) The facts surrounding each of the three Contracts are not common and do not arise out of the same act or transactions or a series of the same acts or transactions.

In a word the Defendant alleges misjoinder of causes of action.

7. The Defendant is apprehensive that the misjoinder is likely to crowd the vision of the Court during main trial and embarrass the Court. In addition, it has made it difficult for the Defendant to file its substantive Defence due to the highly technical nature of the suit and thousands of documents involved. The Defendant contends that there is likelihood that this will lead to a gross miscarriage of justice and prejudice its Defence.

8. The Plaintiff takes a contrary view that the disputes in respect to the three Contracts should be tried together. It is highlighted by Mr. Tarun Kumar who swore a Replying Affidavit on 16<sup>th</sup> September 2016, that all the three Contracts relate to the same item being specialized Transformers and that the Defendant addressed the Plaintiff on all the Contracts in the same set of correspondences. Further that representatives of the parties herein carried out joint inspections of the Transformers under all contracts. Lastly that the termination letter dated 16<sup>th</sup> April, 2015 issued by the Defendant was in respect to all the three Contracts. It is also deponed that the intended witnesses in respect to the disputes are the same.

9. The Court is asked to determine two issues:-

- a) Whether the suit ought to be dismissed for misjoinder of causes of action.
- b) Whether the Court ought to stay proceedings herein pending negotiations.

10. Both sides have proposed that in resolving the first issue, this Court be guided by the decision of Bennet J. in YOWANA KAHERE AND OTHERS V. LUNYO ESTATES LIMITED (1959) EA 319. Considering the provisions of Order 1 Rule 1 of the Civil Procedure Rules then existing in Uganda which were *pari materia* the provisions of the current Order 1 Rule 11 the Judge approved the interpretation given by Chitty J. of a corresponding English Rule in Stroud v. Lawson(3) [1982]2 Q.B 44 at p.52:-

**“It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule”**

11. The Defendant argues that the Plaintiff has sued under three distinct Contracts and the reasons for terminating the three Contracts are similarly distinct. For that reason the issues of facts and law arising herein would be inevitably diverse. It is also submitted that justice should mean that each party to a dispute has a fair opportunity to advance its case or Defence. It is contended that the Defendant would find it nearly impossible to adequately respond to the issues raised in the Plaint and to frame its Defence.

12. On the other hand, this Court understands the Plaintiff to be saying that whilst the dispute involves three contracts, over time the parties have treated them as though they were one transaction. For that reason it is convenient that they be tried together.

13. Order 1 Rules 1 and 3 of The Civil Procedure Rule is the Rule and yardstick on the circumstances when persons and causes of action can be joined in one suit. Those provisions are:-

**“1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.**

2. ....

**3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”.**

14. There is no difficulty interpreting those provisions. For causes of action to be properly joined they need to arise out of the same act or transaction or series of acts or transactions. The second condition, which should be fulfilled in addition to the first, is there should be a common question of fact or law. (see Yowanu Kahere (Supra)).

15. Whether or not these conditions are met must turn on the circumstances of each case. While there is no doubt that the cause of action presented by the Plaintiff is founded on three contracts entered between it and the Defendant, there would be need to examine whether the parties treated the three as being the same transaction or series of transactions. As well, the dispute arising out of these contracts must be probed to see whether they reveal a common question of law or fact.

16. In the nature in which humans conduct their affairs and business, transactions whose genesis can be traced to distinct contracts can over time merge and collapse into one transaction or series of transactions. It will all depend on how the parties have treated the Contracts and interacted with each other. I would also imagine that the converse is possible. Parties can dissect a single contract and over time treat various parts of it as distinct and separate. As such, an examination as to whether the conditions of Order 1 Rules 1 and 3 are fulfilled requires a common sense approach to the circumstances of each case.

17. Now, no doubt, the Plaintiff and Defendant entered into three different Contracts on different dates. Common about those Contracts is that they were for the Supply of Specialized Transformers by the Plaintiff to the Defendant. In the course of time, controversies existed as to whether the parties had kept their respective bargains under the terms of the Contract.

18. The evidence presented by the Plaintiff, which was not controverted by the Defendant, is that as the parties interacted they addressed issues arising out of the three different Contracts in common

correspondence and forum. A few examples suffice. The Order under the Contract of 24<sup>th</sup> June 2009 was designated order No.3000276090, that of 22<sup>nd</sup> September 2011, Order No. 3000306807 and that of 16<sup>th</sup> July 2012 Order No.3000360552. The letters of 16<sup>th</sup> January 2013, 25<sup>th</sup> March 2013 and 24<sup>th</sup> July 2013 from the Defendant to the Plaintiff were in respect to issues regarding the schedule for delivery of the first two orders ( ie. 3000276090 and 3000306807). Then there are letters of 10<sup>th</sup> February 2014, 9<sup>th</sup> April 2014, 19<sup>th</sup> May 2014 and 20<sup>th</sup> January 2015. The common thread in these last four letters is that issues in respect to all the three Contracts are taken up together.

19. Annexed to the Affidavit of Kumar are minutes of a meeting of a Factory Acceptance Test carried out on 25<sup>th</sup> to 28<sup>th</sup> August 2014. The minutes reveal that there was a joint inspection of Transformers under Orders 3000360552 and 3000306807. There was also joint inspection of Transformers under these two orders on 22<sup>nd</sup> March 2015 to 3<sup>rd</sup> April 2015.

20. When eventually the Defendant was displeased by the manner in which the Plaintiff was servicing the Contracts it issued the following termination letter:-

**16<sup>th</sup> April 2015**

**M/s Nucon Switchgears PVT Ltd**

**D-47, Phase – V, focal Point**

**Ludhiana 141010(Pb)**

**INDIA**

**Dear Sirs,**

**Re: CONTRACTS FOR SUPPLY OF VARIOUS TYPES OF DISTRIBUTION TRANSFORMERS.**

**Reference is made to the above matter.**

**We hereby notify you that KPLC has, effectively from the date of this letter terminated for breach the following contracts for supply of the following transformers:-**

- 1. TX 200KVA 3PHASE 11/433V**
- 2. TX 100KVA 3/PHASE 33/433V**
- 3. TX 50KVA 3/PHASE 11/433V**
- 4. TX 100KVA 3/PHASE 11/433V**
- 5. TX 315KVA 3/PHASE 33/433V**
- 6. TX 200KVA 3/PHASE 33/433KV**

**Please be advised that KPLC shall not accept any further deliveries of transformers in respect of these contracts. Further, KPLC reserves the right to take any and all measures under the applicable laws as a result of the said breach.**

**Yours faithfully,**

**Mrs. Beatrice Meso**

## General Manager, Corporate Affairs & Company Secretary

While the letter talks of Termination of “ContractS” without specifying them, the Defendant has not denied that they are indeed in respect to the three which are the subject of these proceedings.

21. Another aspect of commonality alluded to by the Plaintiff was that the witnesses intended to be called are the same. While the Plaintiff is short in detail as to who these are, the Defendant does not expressly take on this assertion.

22. What then is the conclusion to be drawn from these circumstances? There can be no argument that the three Contracts were at their execution distinct and separate. Over time, and perhaps because they were in respect to the same type of products (ie. Transformers), and that the terms of the Contract were not dissimilar, the parties addressed issues in respect to the Contracts in common correspondence and forum. Tests and Inspections of the Transformers under the orders were carried out jointly. Ultimately, the termination of the said Contracts was in one letter.

23. The Court is no doubt alive to the Defendants argument that the termination of the three Contracts was for distinct reasons given as follows:-

- (i) Expiry of the Bank performance Guarantee during the pendency of the first contract.
- (ii) Inordinate delay in supply.
- (iii) Continued supply of non-conforming transformers.

From the evidence presented to Court, it is unclear whether the second and third Contracts were also affected by Expiry of Bank Performance Guarantee. What is more clear however is that the issue of inordinate delay and non-conformity was raised by the Defendant in respect to all the three Contracts (letters of 10<sup>th</sup> February 2014, 9<sup>th</sup> April 2014, 10<sup>th</sup> May 2015, 20<sup>th</sup> January 2015).

24. The impression one gets is that there is substantial commonality of issues of law and fact that arise from the dispute in regard to the three Contracts and the Controversy between the parties may be more efficiently and expeditiously disposed of if tried and determined together. (Section 1A and 1B of The Civil Procedure Act)

25. There is need, however, to address the Defendants’ concern that it has been unable to substantially respond to the suit as framed. The observation this Court makes on this concern is that the Defendant has filed a 23 paragraph Amended Defence of 27<sup>th</sup> June 2016. While the task of drawing the Defence had to be tedious because it was a response to a 55 paragraph Plaintiff, the Defence would seem to have comprehensively responded to each and every issue raised in the lengthy Plaintiff. The inability to adequately frame a Defence complained of by the Defendant is therefore not apparent.

26. I move to the second limb of the Application. In urging the Court to give parties an opportunity to engage in negotiations, Counsel for the Defendant submitted,

**“Clause 7.25.1 of the General Conditions which formed part of the contracts entered into between Nucon Switchgears PVT Limited and Kenya Power and Lighting Company provides that, *“the procuring entity and the supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the contract”***

27. This Court has looked at the three Contracts. Under clause 2 of the Contract of 24<sup>th</sup> June, 2009, the General conditions of Contract of the Defendant are deemed to form and be read as part of the said Contract of 24<sup>th</sup> June 2003. There are similar clauses in the 2<sup>nd</sup> and 3<sup>rd</sup> Contracts but with a rider that,

**“In the event of any ambiguity or conflict between the Contract Documents listed above, the order of precedence shall be the order in which the Contract Documents are listed in 5 above except where otherwise mutually agreed in writing”.**

28. The General conditions of Contract are found in the Plaintiffs Bundle of Documents (pages 121FF-121VV and 399-413). And it is true as submitted by Counsel for the Defendant that in the Dispute Resolution clauses, the parties are required to make every effort to resolve amicably, by direct informal negotiations, any disagreement or dispute arising between them under or in connection with the Contract. This clause forms part of the Contracts as the General condition of Contract are deemed to be one of the documents that constitute the Contracts between the Plaintiff and Defendant. And nothing has been shown to this Court that the clause on Dispute Resolution ought be excluded as being in conflict within the Contracts Agreement themselves.

29. In the Contracts, the parties committed themselves to actively attempt amicable resolutions of disagreement or disputes arising between them under or in connection with the Contracts before turning to other forms of dispute resolution mechanism. The Defendant bespeaks an opportunity to negotiate this matter first and for a stay whilst the proposed negotiations would be ongoing.

30. One would have to think that the proposal put forward by the Defendant should meet no difficulty because Courts themselves are enjoined to promote alternative forms of dispute resolution. Article 152(2) (c) of The Constitution is an edict to Courts and Tribunals to promote alternative forms of dispute resolution. The language of Article 159(2) is the following mandatory and explicit terms:-

**“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(a) justice shall be done to all, irrespective of status;**

**(b) justice shall not be delayed;**

**(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**

**(d) justice shall be administered without undue regard to procedural technicalities; and**

**(e) the purpose and principles of this Constitution shall be protected and promoted”. (my emphasis)**

31. In Civil litigation, Section 59C of The Civil Procedure Act (which was introduced post the Constitution 2010) provides the legislative framework that enables the Civil Court to obey and effect the command of Section 159(2) (c) of The Constitution. Section 59C reads:-

**“(1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.**

**(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.**

**(3) Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.**

**(4) No appeal shall lie in respect of any judgment entered Under this section”.**

32. The provisions of Section 59C permits the Court to refer a suit to other methods of Dispute Resolution where the Court considers the case suitable for such referral even where the parties had not contemplated

it by way of agreement. Yet here, the parties had contemplated negotiations as the first port of call in the event of disagreement or dispute. The inclusion of this in the Contracts cannot be idle and this Court will have no difficulty effectuating it not in the least because it is also commanded by the Constitution to promote alternative forms of Dispute Resolution.

33. The Plaintiff itself does not have a difficulty submitting to negotiations but is not agreeable to staying the proceedings in the meantime. Counsel had argued that proceedings do not have to be stayed for negotiations to be undertaken.

34. This Court takes a different view. Once parties submit themselves to alternative methods of dispute resolution then their submission should be real and not cynical. It must not be the intention of parties to simply submit for purpose of compliance. The parties ought to give the alternative methods a real chance of resolving their differences. To pursue the Court process in parallel can poison an otherwise conducive atmosphere under which negotiation ought to be carried out. It would be inimical to the negotiations. This Court will order a short ‘truce’ from litigation for the parties to attempt negotiations.

35. These now are the final Orders of the Court:-

**35.1 Prayer 2 of the Chamber Summons of 28<sup>th</sup> June 2016 is hereby disallowed.**

**35.2 Prayer 3 thereof is allowed. There shall be stay of proceedings for 90 days from the date of this Ruling.**

**35.3 As each party has partially succeeded and by the same token failed, each shall bear its own costs of the Application.**

**Dated, Signed and Delivered in Court at Nairobi this 13<sup>th</sup> day of October, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Ongonyo h/b Kemboy for Plaintiff

Nyamolo h/b Otieno for Defendant

Alex - Court clerk