



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 369 OF 2015

DHAHIR ADOW ISMAIL 1ST PLAINTIFF

KALA MAALIM YUSSUF..... 2ND PLAINTIFF

VERSUS

KENFREIGHT (EA) LIMITED 1ST DEFENDANT

TASLIM TRANSPORT LIMITED 2ND DEFENDANT

RULING

INTRODUCTION

1. Before the Court is the 1st and 2nd Defendant's Preliminary Objection dated 11th February 2016 and filed on 15th February, 2016. The Defendants have raised a Preliminary Objection to the Plaintiffs' suit contending that this Court lacks the requisite jurisdiction to hear and entertain the suit.
2. The Preliminary Objection was prosecuted by way of written submissions. The Defendants filed their submissions dated 25th February, 2016 on 26th February, 2016 while the Plaintiffs filed their submissions dated 4th March, 2016 on 7th, March 2016.

ANALYSIS

3. I have considered the Preliminary Objection as well as the written submissions by Counsel in support and in opposition to the same. Having done so, I take the following view of the matter.
4. The Law on Preliminary Objections is well settled as was held by JA and Sir Charles Newbold P. in *Mukisa biscuits manufacturing co ltd vs West end distributors (1969) EA 696*. At page 700, Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

5. The preliminary objection raised by the Defendants consists of a point of law as it touches on the jurisdiction of this Court. As was held in the case of *The owners of the motor vessel "lillian s" vs caltex oil (Kenya) ltd (1989) Klr*, Jurisdiction is everything and without it a Court cannot make a step.
6. The Plaintiffs instituted this suit seeking for a number of reliefs, among them, special damages. Their claim is that the Defendants had hired them to transport goods from Juba to Bentiu in South Sudan. However, according to the Plaintiffs, the Defendants misrepresented the goods to be transported leading to the arrest of the 2nd Plaintiff and the impounding of their motor vehicle registration number KBS 169 B Mercedes Benz Actrios and Trailer registration Number ZC 3094.
7. The Defendants' contention with regard to this suit is that the Plaintiffs have not shown or adduced any proof as to the existence of the alleged contract between the parties. The Plaintiffs in claiming that there was misrepresentation of goods to be transported referred to a 'hiring agreement'. It was the Plaintiffs' submission that the contract between the parties could be implied from the correspondences between the parties as well as a delivery note dated 28th February, 2014.
8. The issue of whether or not there was an agreement or contract between the parties herein is a matter of fact and can only be determined conclusively once evidence is adduced. The Defendants further submitted that in the event that there was a contract then the same was entered into with a separate entity incorporated under the Laws of the Republic of South Sudan separate from the 2nd Defendant. In that case it is their position that this Court is *forum non conveniens* to determine the instant matter. Again, this is a matter of fact and not law. The Defendants' concern is more of a speculation as there is no evidence before the Court showing that the contract was made between the Plaintiffs and a company in South Sudan.
9. The above notwithstanding, this Court has jurisdiction to determine the matter subject to **section 15** of the **Civil Procedure Act**. The provisions of the said section is as follows:-

"...every suit shall be instituted in a court within the local limits of whose jurisdiction—

- a. *the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or*
- b. *any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or*
- c. *the cause of action, wholly or in part, arises.*

10. It is not disputed that the Defendants herein are companies incorporated under the **Companies Act, Cap 486 Laws of Kenya (now repealed)**. It therefore follows that the Defendants carry on business within the jurisdiction of this Court and the Plaintiffs are thus entitled to institute the present suit against them in this Court.

DISPOSITION

11. The upshot of this Ruling is that the 1st and 2nd Defendants' Preliminary Objection is dismissed with costs.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 29th DAY OF APRIL 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Ndege for Plaintiffs

Mr. Busaidi for Defendant

Teresia – Court Clerk