



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 45 OF 2014

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

M & E TRADING COMPANY LIMITED.....1ST DEFENDANT

ERIC NJIRI MURIGU.....2ND DEFENDANT

MANHEIM BOL MALEK.....3RD DEFENDANT

RULING

1. The Defendants' Notice of Motion application dated 1st October 2014 and filed on 6th October 2014 was brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. It sought the following prayers:-

1. **THAT the Plaintiff's suit be dismissed.**
2. **THAT the costs of the suit and this application be borne by the Plaintiff.**

THE DEFENDANTS' CASE

2. In support of the application herein, on 1st October 2010, the 2nd Defendant swore the Affidavit on his own behalf and that of the 1st and 3rd Defendants. Their Written Submissions were dated and filed on 6th February 2015.
3. The Defendants contended that the Plaintiff's cause of action arose out of a Contract and Facility Letter dated 7th July 2008 that it had entered into with KCB Sudan Limited. They averred that the said Facility Letter provided that the applicable law and remedies available were those under the law of Southern Sudan.
4. It was their averment that this court could not assume jurisdiction over the disputes that arose in Southern Sudan for the reason that KCB Sudan Limited had its Head Office in Southern Sudan while the 2nd Defendant, though a resident in Kenya, resided and carried on business in Juba, Southern Sudan. They said that the witnesses and documentary evidence were also in Southern Sudan making it expensive for them to defend the proceedings in Kenya. They were emphatic that

- the balance of convenience lay in the matter being heard and determined in Southern Sudan.
5. They averred that there was no justification to bring the proceedings to Kenya as the legal system in Southern Sudan had not collapsed and that the courts there had less work than those in Kenya. They therefore sought to have their application allowed as prayed.

THE PLAINTIFF'S CASE

6. In opposing the said application, on 22nd October 2014, Debra Ajwang, the Plaintiff's Legal Manager, swore a Replying Affidavit on behalf of the Plaintiff. The same was filed on even date. Its Written Submissions were dated 12th February 2015 and filed on 16th February 2015.
7. The Plaintiff stated that it advanced the 1st Defendant a Loan facility of SDG 63,000 which was secured by a Debenture of the 1st Defendant's assets together with a simple certificate deposit over L.R. No Nairobi/Block 134/1081 that was secured by Personal Guarantees and Indemnity issued by the 2nd and 3rd Defendants, jointly and severally, as the 1st Defendant's directors.
8. It was its averment that although the suit herein was instituted pursuant to Clause 11 of the said Letter of Offer, the same was governed by international law. It stated that the "Defendant" encashed inward bills remittance at the Plaintiff's Moi Avenue Advantage Branch, Nairobi and that the security was situated in Nairobi. It was its contention that the claim arose within the jurisdiction of this court and therefore urged the court to dismiss the Defendants' present application.

LEGAL ANALYSIS

9. The Defendants argued that the court in Kenya had no jurisdiction to hear the dispute herein as KCB Sudan Limited, a subsidiary of the Plaintiff, was a separate entity with capacity to sue and be sued. They placed reliance on the case of **Lillian "S" vs Caltex Oil (K) Limited [1986-1989] EA- 305** to buttress its argument that the court had no jurisdiction to hear this case.
10. On the other hand, the Plaintiff submitted that Article 165(3)(a) of the Constitution of Kenya, 2010 provided that the High Court of Kenya had unlimited original jurisdiction to hear and determine civil disputes in Kenya. It referred the court to the case of **Atta (Kenya) Ltd vs Nesfood Industries Ltd [2012] eKLR** in which Mutava J had the following to say:-

"... At the minimum, the applying party must demonstrate that the right of access to justice under Article 48 of the Constitution of Kenya is at threat..."

11. It was its further argument that the laws of Southern Sudan would only come into operation where there was no relevant legal provisions. It also pointed out that Section 12 of the Civil Procedure Rules, 2010 provided that a suit in respect of immovable property would be filed within the local limits of which the subject property was situated and that Section 15 of the Civil Procedure Rules, 2010 stipulated that a suit should be instituted in a court within whose local limit, a cause of action, wholly or partially arose. It referred the court to several cases in which the courts assumed jurisdiction in similar circumstances as this instant case- **See United India Insurance Co Ltd vs East Africa Underwriters (Kenya) Ltd (1985) KLR at pg 909.**

12. A perusal of Clause 11 of the said Offer Letter shows provided as follows:-

"In case of no relevant legal provisions or applicable law of proceed(sic), or of substantive law on the point, the court of Judge (sic) shall act in accordance with the provisions of section 6(1) and (2) of the New Sudan Civil Procedure Act, 2003.

In this respect, application of the principles of justice, equity, good conscience and judicial precedents of the English Common Law may further require the Court or Judge to apply the provisions of:-

- ii. (sic) **International treaties and Conventions; and**

iii. The general principles of other different legal systems, provided they are in conformity with the local values or conditions in Southern Sudan.”

13. As was rightly pointed out by the Plaintiff, Article 48 of the Constitution of Kenya, 2010 guarantees every person a right to access justice while Article 50 thereof accords every party a right to have any dispute that can be resolved by application of law decided in a fair hearing before a court.
14. Appreciably, Sections 12 and 15 of the Civil Procedure Rules are applicable herein. As the security was situated in Kenya, this court was clothed with jurisdiction to hear and determine the dispute herein, a position that was properly articulated by the Plaintiff.
15. It is also clear from Explanation (1) of Section 15 of the Civil Procedure Rules that where a person has a permanent residence at one place and a temporary residence in another place as did the 2nd Defendant herein, he shall be deemed to reside in both places in respect of a cause of action arising at any place where he has such temporary residence.
16. Suit against the 2nd Defendant could either be filed in Southern Sudan or in Kenya. Where a cause of action against several defendants cannot be separated, it would create an absurdity for a suit to be filed in a particular jurisdiction and for another suit relating the same cause of action to be filed in a different jurisdiction merely because other defendants in that matter reside in a different jurisdiction.
17. The Defendants' argument that KCB Southern Sudan Limited was the only one that could sue did not elucidate the correct position of the law as Explanation (2) of the said Section 15 of the Civil Procedure Rules, it is clear that a corporation shall be deemed to carry on business at its sole or principal offices or in respect of any cause of action arising at any place where it has a subordinate office. The Plaintiff was the principal office while KCB Southern Sudan was its subsidiary, any of which could sue and/or be sued.
18. Going further, encashing of the bills by the Defendants at the Plaintiff's branch at Moi Avenue was evident that monies were paid within the jurisdiction of this court. Explanation (3)(iii) of Section 15 of the Civil Procedure Rules provides the cause of action is said to arise at the place where in performance of the contract any money to which the suit was expressly made or impliedly payable.
19. Unless there is an exclusive jurisdiction clause, a plaintiff would be perfectly in order to elect the jurisdiction in which it wishes to file suit against such defendants. The Plaintiff was therefore in order when it elected to sue the Defendants herein in this court's jurisdiction.
20. Notably, there was no exclusive jurisdiction clause in Clause 11 of the Offer Letter that expressly ousted the jurisdiction of this court from hearing and determining the dispute between the Plaintiff and the Defendants herein. The effect of exclusive jurisdiction clause was adequately addressed in the case of **Raytheon Aircraft Credit Corporation vs Air Al- Faraj Limited [2005] eKLR** in the Court of Appeal stated as follows:-

“... The general rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non-contractual forum discharged the burden cast on him showing strong reasons for suing in that forum...”

21. Indeed, parties who wish to exclude the jurisdiction of any court must state their intention in plain and unequivocal language and not leave interpretation of such intention to speculation.
22. Having said so, the court was of the firm view that there was no provision of the law that would empower this court to dismiss a suit as was suggested by the Defendants unless of course it was pursuant to the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules, 2010 which reads as follows:-

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

23. The aforementioned sub-rule (3) is read together with sub-rule (1) of Rule 2 in which it is stipulated as follows:-

“In any suit in which no application has been made or step taken by either party for one year, (emphasis court) the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

24. Appreciably, none of the conditions under Order 17 of the Civil Procedure Rules, 2010 obtained in the circumstances of this case. A Preliminary Notice which would have had the effect of disposing of the suit before it proceeded for trial appeared to have been a more appropriate procedure.
25. Accordingly, having considered the pleadings, the affidavit evidence, written submissions and the case law that was relied upon by the parties, the court came to the conclusion that the provisions of the Civil Procedure Rules, 2010 regarding the place of suing and the issues raised in the Plaintiff's Complaint were within the relevant legal provisions or applicable law in the Kenyan jurisdiction that were envisaged in Clause 11 of the said Offer Letter.
26. As the Plaintiff successfully demonstrated compelling reasons why this court should assume jurisdiction to hear the dispute between it and the Defendants herein, the burden of establishing a strong and compelling reason to avoid this court's jurisdiction thus lay with the Defendants herein. However, they failed to discharge the burden of demonstrating that the suit herein ought to be dismissed on the ground that this court did not have jurisdiction to determine the dispute between them and the Plaintiff.
27. Indeed, the Defendants' arguments regarding incurring of huge expenses to defend the case or the purported backlogs in the Kenyan courts had no legal basis and were not sufficient to dissuade this court from assuming jurisdiction to hear and determine the matter herein.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's ruling was that the Defendants' Notice of Motion application dated 1st October 2014 and filed on 6th October 2014 was not merited and the same is hereby dismissed with costs to the Plaintiff.
29. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of May, 2015

J. KAMAU

JUDGE