



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 147 OF 2015**

**HEALTH & WATER FOUNDATION.....PLAINTIFF**

**VERSUS**

**INTERVITA ONLUS (Now known as Weworld Onlus) .....DEFENDANT**

**RULING**

1. This is a Ruling on a Notice of Motion application of the Plaintiff dated 20/4/15. The application is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules. It seeks an interlocutory order of injunction to restrain the Defendant from taking over, continuing, implementing or changing the status of the project jointly financed and implemented by the Plaintiff pending the resolution of the dispute between the parties in a Milano court.
2. The grounds for the application were contained both in the body of the Motion and the Supporting and Further Affidavits of Evans Misati James sworn on 20/4/15 and 28/4/15, respectively. These were that; by a Co-operation Framework Agreement dated 30/8/13 (hereinafter “the Agreement”) the Plaintiff and the Defendant entered into certain obligations in the Defendant financing and the Plaintiff coordinating and undertaking certain projects in certain parts of Nyamira County. That agreement was for a period of three (3) years from 1<sup>st</sup> August, 2013; the project was to contribute to a correct development of children, young adults and the community in general. The Plaintiff contended that it had performed part of its obligations under the agreement and engaged staff to implement the project. That the parties had agreed on the mode of settlement of disputes under the agreement with the Milan Court having the exclusive jurisdiction to settle the same.
3. The Plaintiff contended that; a dispute had arisen on various issues which the Plaintiff intended be resolved within the framework of the agreement; that the Defendant had given a Notice of termination of the contract thereby jeopardizing the project; that the employment of the staff that had been engaged is in jeopardy of being terminated without due process; that the parties are yet to establish their respective rights, obligations and liabilities as a consequence of the termination. It was therefore necessary to maintain the status quo by way of injunction pending reference of the dispute in the court in Milan.
4. The Plaintiff further contended that the Defendant had commenced the exercise of recruiting other staff to replace those contracted by the Plaintiff; that the Plaintiff had engaged employees for 3 years to run with the agreement; that the employees will sue the Plaintiff for unlawful termination of employment and that as the Defendant had not released any funds, the Plaintiff’s officials had been distressed for rent.
5. Mr. Mogeni, Learned Counsel for the Plaintiff submitted that there was no dispute that the parties were in agreement that the forum for dispute resolution was Milan; that the Plaintiff had however placed sufficient material before court for there to be a departure from the general rule on exclusive jurisdiction. He submitted that the Plaintiff was in the middle of implementation of the

- second agreement with the Defendant on the basis of which the Plaintiff had entered into contracts with 3<sup>rd</sup> parties under the Kenyan law for specific period; that issues of the effect of the said employment contracts and the extent of liability between the Plaintiff and the Defendant at the time of termination of the agreement are issues that are to be adjudicated under the Kenyan Law and Constitution. That the sub-strum of the agreement needs to be safeguarded before the Milan Court makes a determination on the issues to be submitted to it.
6. Counsel further submitted that the Court in Milan cannot issue orders similar to those sought in this application; that both parties were in Kenya, the subject matter is in Kenya and the orders will be obeyed in Kenya. That the Defendant was attempting to take over the implementation of the agreement which was a preserve of the Plaintiff as the Defendant had advertised for the same positions occupied by the Plaintiff's employees. Counsel referred to the case of **United India Insurance Co. Ltd vs East African Underwriters (K) Ltd (1985) eKLR** for the proposition that where there are exceptional circumstances, a court can ignore the exclusive jurisdiction clause in a contract and assume limited jurisdiction. The case of **The Despina Pontikos (1975) EA 38** was also cited for the same proposition. Counsel urged that the application be allowed.
  7. The application was opposed vide a Replying Affidavit of Annarita Spagnuolo sworn on 29<sup>th</sup> April, 2015. The Defendant contended that the suit was incompetent as the court lacks territorial jurisdiction to adjudicate the matter; that the agreement between the parties subjected all disputes thereto to the court at Milan under Italian law. That the Defendant did not have any intention of taking over the project and what it had done was to stop financing the same; that the project activities stopped in November, 2013 and the Plaintiff has not made any financial report since then; that the Defendant had nothing to do with the employees engaged by the Plaintiff. In any event, the employees of the Plaintiff were not engaged on the Defendant's project as the project had stopped in December, 2014.
  8. The Defendant further contended that the agreement between the parties allowed the Defendant to work with other organizations with regard to projects related to those areas already involved in the project carried out by the Plaintiff; that the Plaintiff had withdrawn its support from the project due to mismanagement by the Plaintiff; that the grounds upon which the Defendant was withdrawing its support from the project had been explained to the Plaintiff and that there was therefore no need of any interim measure as the contract had already been terminated.
  9. Ms Onsare, Learned Counsel for the Defendant submitted that there exists no special circumstances to warrant departure from the general rule that parties are bound by the exclusive jurisdiction clauses in contracts; that the duty of the court is to give effect to the clauses contained in the Corporation Framework Agreement. That Clause 13 of the agreement had clearly set out the parties intentions as to jurisdiction. That the court with jurisdiction was the court in Milan and not this court.
  10. Counsel submitted that the agreement had already been terminated and the only issue to be addressed is damages, if any, payable as a result of the termination; that since there has been no reports on the implementation of the project since November, 2013, there can be no employees and that the Defendant was allowed under the contract to work with other organizations. Counsel urged that the application be dismissed.
  11. On 9/4/15, the Defendant filed a Preliminary Objection to the effect that this court had no jurisdiction to entertain the matters under dispute. This court ordered that the objection be argued as part of the Defendant's Ground of Opposition in order to save on time. This the parties did and addressed the court at length as is shown above. I will consider that issue first before considering the application on merit.
  12. The Defendant's contention was that under Clause 13, all disputes arising from the agreement between the parties was to be adjudicated by the Court of Milan under Italian Law. The Defendant contended that the parties were bound to the terms of the contract. The Plaintiff argued that there was a window whereby on the circumstances of this case, this court should exercise a slim jurisdiction to maintain the status quo pending the court in Milan assuming jurisdiction. It was the Plaintiff's contention that the Kenya Labour law and Constitution applied as far as the rights of the employees employed by the Plaintiff in the implementation of the project was concerned.
  13. I have considered the Affidavits on record and counsel's submissions. I have also considered the authorities relied on. In the case of **Owners of Motor Vessel "Lillian S" Vs Caltex Oil (K) Ltd**

(1989) KLR 1, it was held:-

*“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a format way for its decision. The limited of this authority are imposed by the statute, Charter or commission under which the court is constituted and may be extended by the lime means. ....”*

*Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”*

14. In the Case of **The Mekefjel (1976) 2 Lloyds Law Reports, Part 1, 29 at page 34**, the Court held:-

*“Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure.” (Emphasis added).*

15. In the case of **United India Insurance Company Ltd & 2 others Vs East African Underwriters (Kenya) Ltd (1985) e KLR**, the Court of Appeal held:-

*“The courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction. Jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement.”*

And

*“In order to cut down an unnecessary and long argument, we refer to the indication recently given by this court in Carl Running Vs Societe Navel Chargeurs Delams Vieljeaux and The Swedel line C.A No. 16 of 1982 that strong reason is a prerequisite to the exercise of the court’s discretion not to give effect to the exclusive jurisdiction Clause, the onus of proving strong reason being upon those who seek to avoid it. In my view, the burden is a heavy one.”*

In that case, the Court of Appeal held that the delay in the hearing of disputes in the courts of Bombay was an exceptional reason for the Kenyan court to assume jurisdiction.

16. From various decided cases, the general rule would seem to be that courts would vigorously bind parties to their bargains in contractual transactions including where exclusive jurisdiction clauses apply except where there is strong reason not to. See **Maneklal Purshottam Vs Kehsvlal Talackchand (London) Ltd (1954) 21(1) EACA 111, the Despina Pontikos (1975) EA 38, Raytheon Aircraft Credit Corporation & Anor Vs Air Al Faraj Ltd NBI CA No. 29 of 1999 (UR).**

17. In Clause 24 of the Co-operation Framework Agreement, the subject of this suit the parties provided, inter alia, that:-

*“24. .... Any controversy between the parties with regard to this contract, its interpretation and implementation will be subject to the Italian Law. The parties acknowledge the Italian Jurisdiction and agree that the competent forum for any controversy that might arise be the Court of Milan.”*

18. It is clear from that clause that the parties had chosen their forum of dispute resolution. The Plaintiff contends that the status quo should be maintained pending the reference of the dispute to the Milan Court and that the welfare of the employees of the Plaintiff who were hired for the implementation of the project should in the meantime be safeguarded. Can these be said to be

exceptional circumstances? Firstly, it is not clear when the Milan Court will be moved to determine the dispute between the parties; Secondly, there is evidence that the Agreement has already been terminated and the Defendant has withheld funding on the basis that the project activities were suspended for more than a year now; Thirdly, the contracts exhibited in respect of the Plaintiffs employees do not specifically tie those employees to the project the subject of the suit. They seem to have had the employees generally hired by the Plaintiff. It was not the Plaintiff's case that its employees were only hired for the particular project.

19. In my view, looking at the totality of the whole case, I am not satisfied that the Plaintiff has presented any strong circumstances to warrant the court to depart from the general rule that parties are bound by their agreements. I am afraid that courts would strenuously enforce bargains freely entered into by parties, however onerous those bargains may appear. Courts are for enforcement of bargains entered into voluntarily by parties and not to re-write them. Accordingly, this court has no jurisdiction to entertain the matter before it. The Preliminary Objection is upheld and the application and suit are hereby struck out with costs.

DATED and DELIVERED at Nairobi this 12<sup>th</sup> day of June, 2015.

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**A. MABEYA**

**JUDGE**