



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL CASE NO. 7 OF 2004**

**UNIVERSAL PHARMACY (K) LIMITED.....PLAINTIFF**

**-versus-**

**PACIFIC INTERNATIONAL LINES (PTE) LIMITED.....1ST DEFENDANT**

**KENYA RAILWAYS CORPORATION ..... 2ND DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff filed this suit against the 1st Defendant on 27th October 2004 vide its Plaintiff of even date. On 1st January 2005, the Plaintiff filed an Amended Plaintiff in which it added the 2nd Defendant to this suit.
2. The 1st Defendant filed its Statement of Defence to the Amended Plaintiff on 6th January 2005 while the 2nd Defendant did so on 1st February 2005.
3. On 16th March 2012, the firm of Musinga & Company Advocates filed a Preliminary Objection to the suit dated the same day. Although the said Preliminary Objection on its face indicates that it is filed on behalf of both Defendants, the record shows that the 1st Defendant is represented by A.B Patel & Patel Advocates therefore it is clear to me that the Preliminary Objection was filed on behalf of the 2nd Defendant.
4. In deed that Preliminary Objection clearly shows that it is the 2nd Defendant that is objecting to the court's jurisdiction. The Preliminary Objection is couched in the following terms:

**“Take notice that the 2nd Defendant shall on the hearing of this suit, raise a preliminarily objection on the following grounds:**

1. **That this honourable court does not have jurisdiction to hear this matter since clause 30 of the Terms and Conditions of the Bill of Lading No. PSHEMBO354474 dated and issued on 18th December 2011 and being item no. 1 of the Plaintiff's list of documents dated 6th March clearly provides that:**

**“The contract evidenced thereby or contained therein shall be governed by Singapore law. Any claim or other dispute thereunder shall be solely determined by the Singapore Courts unless the carrier otherwise agrees in writing.”**

**2nd Defendant's Arguments and Submissions**

5. The 2nd Defendant objected to the entire suit on the basis of lack of jurisdiction by the court to hear and determine the case. It contended that the court lacks jurisdiction because of Clause 30 of

the Terms and Conditions of the Bill of Lading PSHEMBO3J4474 which forms the basis of the Plaintiff's claim.

6. The 2nd Defendant submitted that although a preliminary objection ought to be raised at the first instance, the fact that the matter is part-heard should not make the court impervious to the objection raised. The 2nd Defendant relied on the case of **HASSAN NYANJE CHARO v. KHATIB MWASHETANI & 3 OTHERS** where the Supreme Court held that:

*“While a party is at liberty to raise a preliminary objection at any time of the proceedings, in the interest of natural justice and constitutional principle of fair hearing, we agree with Counsel for the Applicant that notice should be given.”*

7. The 2nd Defendant also submitted that jurisdiction is the substratum of any cause of action and the court must decide on whether it has jurisdiction before proceeding with the matter. The 2nd Defendant relied on the renowned case of **OWNERS OF THE MOTOR VESSEL “LILIAN S” v CALTEX OIL (K) LIMITED [1989] KLR 1** where it was held that jurisdiction is everything without which the court has no power to make one more step.
8. It was the 2nd Defendant's submission that when the parties executed the subject Bill of Lading, they had the intention to enforce the contract *en masse* and it was within their knowledge that the dispute would be adjudicated in Singapore. The 2nd Defendant submitted that parties are bound by their contracts unless there is fraud, coercion or undue influence which must be specifically pleaded and proved. In that regard, the 2nd Defendant relied on the case of **NATIONAL BANK OF KENYA LTD v PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER [2001] KLR 112** where it was held that:

*“A court of law cannot re-write a contract between parties. The parties are bound by the term of their contract, unless coercion, fraud or undue influence are pleaded and proved.”*

9. While relying on the case of **UNITED INDIA INSURANCE CO. LTD v EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985] KLR 898**, the 2nd Defendant submitted that it was upon the Plaintiff to establish why the matter should be adjudicated in Kenya and not in Singapore. In that case Madan JA stated that:

*“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 upon the courts of some other country. The exclusive 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 parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is a strong reason for not keeping them bound by the agreement.”*

10. According to the 2nd Defendant, the Plaintiff does not raise any special issues that would warrant the ousting of the choice of law clause. The 2nd Defendant relied on the case of **AREVA T & D INDIA LIMITED v PRIORITY ELECTRICAL ENGINEERS & ANOTHER [2012] eKLR** where Koome, JA stated as follows:

*“I agree with the submissions by counsel for the appellants that when parties signed the sub-contract agreement, they were aware that the contract was to be performed in Kenya, the payment was to be made in Kenya and the witnesses were located in Kenya. In my judgment, I find no exceptional circumstances that would support the learned Judges findings that changed the terms of the sub-contract by changing the choice of law and jurisdiction. It is trite that a court cannot re-write a contract for the parties.”*

11. The 2nd Defendant further relied on the case of **RAYTHEON AIRCRAFT CREDIT CORPORATION & ANOTHER v AIR AL-FARAJ LIMITED [2005] 2 KLR 47** to

demonstrate that although Article 165 (1) (a) of the Constitution of Kenya grants the High Court unlimited civil jurisdiction, courts should uphold choice of law clauses unless under special circumstances. In that case, Githinji, JA stated as follows:

***“I do not with respect, agree with the construction given by the Superior Court to section 60 (1) of the Constitution (now repealed). That section does not authorize the High Court to disregard private international law on the status of the choice of law and exclusive jurisdiction clauses in international commercial agreements and assume jurisdiction over persons outside Kenya.”***

### **Response by the Plaintiff**

12. The Plaintiff opposed the Preliminary Objection by the 2nd Defendant. The Plaintiff also relied on the case **UNITED INDIA INSURANCE CO. LTD** (supra) to posit that Kenyan courts, despite the existence of an exclusive foreign jurisdiction clause in a contract, would assume jurisdiction when the case is filed in Kenya. That doing so is a matter of discretion and not jurisdiction. The Plaintiff reminded the court of the various factors laid down in the case **UNITED INDIA INSURANCE CO. LTD** (supra) to guide the court in deciding whether to assume jurisdiction or not. I will refer to those factors shortly in this legal opinion.
13. While conceding that the contract provided that any dispute between the parties would be resolved in Singapore under the Singaporean law, the Plaintiff submitted that the 2nd Defendant did not show how the law in Singapore would apply to this case differently nor had the 2nd Defendant expressed a desire to go as far away as Singapore to have the dispute resolved or to take its witnesses there.

### **The Issue for the Court's Determination**

14. The issue for the court's determination is whether this suit should be dismissed for lack of jurisdiction because the contract between the parties is governed by Singapore Law and any claim or dispute thereunder should be determined by the Singapore courts.

### **Analysis**

15. It is not in dispute that the contract between the parties at Clause 30 provided that the same was to be governed by Singapore Law and that any claim or other dispute arising therefrom was to be determined by the Singapore courts. That Clause provided as follows:

#### **“30. Law and Jurisdiction**

**The contract evidenced hereby or contained herein shall be governed by Singapore Law. Any claim or other dispute thereunder shall be solely determined by the Singapore Courts unless the Carrier otherwise agrees in writing.”**

16. The parties before court agree with the legal principle that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. They also agree that courts cannot re-write contracts between parties. However, the question that arises is whether it is always natural and automatic that whenever there exists an exclusive foreign jurisdiction clause in a contract then the Kenyan courts cannot preside over the dispute for want of jurisdiction.
17. The position adopted by the Court of Appeal in the case of **UNITED INDIA INSURANCE CO. LTD** (supra) and which I entirely agree with is that Kenyan courts, despite the existence of an exclusive foreign jurisdiction clause in a contract, would assume jurisdiction when the case is filed in Kenya. The said case laid down the circumstances and the factors that the court has to consider in order to determine whether it should assume jurisdiction or not. The court (Madan, JA) stated as follows:

***“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 upon the courts of some other country. The exclusive 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.”*

18. The learned Judge then went on to state that a strong reason is pre-requisite to the exercise of the court's discretion not to give effect to the exclusive jurisdiction clause and that the balance of convenience, although not necessarily a decisive factor, is an important factor that the court may consider. That in exercising its discretion, the court should take into account all the circumstances of the particular case and the following matters where they arise, may be considered:

- i. **In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the court of the country and the court of the foreign country.**
- ii. **Whether the law of the foreign court applies, and if so, whether it differs from the law of the country in any material respects.**
- iii. **With what country either party is connected, and how closely.**
- iv. **Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage.**
- v. **Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.**

19. In my view, this case is one that would warrant the court to assume jurisdiction over the dispute despite the existence of the exclusive foreign jurisdiction clause. I say so because of the following reasons.

20. To start with, this suit relates to goods that are alleged to have been lost or destroyed while being transported by the 2nd Defendant from Mombasa to Embakasi. The cause of action therefore accrued here in Kenya and it appears to me that the main evidence is to be found in Kenya and most witnesses would be available here. In the case of VALENTINE INVESTMENT COMPANY (MSA) LTD v FEDERAL REPUBLIC OF GERMANY [2006] eKLR, an application was made to have the suit stayed on the basis that the case could only be heard and determined by German courts. Khaminwa J. dismissed the application and stated that:

*“The ouster clause in contract giving exclusive jurisdiction to foreign court by Kenya Courts was extensively discussed in the Kenyan case of United India Insurance Co. Ltd. vs. E.A. Underwrites (Kenya) Ltd. [1985] KLR [898]. This authority is quoted by both parties and is Court of Appeal decision. In that case there was a clause in contract conferring exclusive jurisdiction on a foreign court. The application was made to stay the suit instituted in Kenya and the principles for consideration in such circumstances were set out clearly. The court held:*

1. *Kenya Courts have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign court. The discretion should be exercised by granting a stay of proceedings in local courts unless a **strong reason for not doing so is shown.***
2. *The onus of establishing a strong reason for avoiding the jurisdiction of Kenya courts is on the party who seeks to avoid that jurisdiction and that burden is a heavy one.*
3. *In exercising its discretion, the court should take into account all the circumstances of the particular case.*

*In the present case the facts show that the evidence of drivers and authorities under the traffic and licensing laws are here in Kenya and such evidence would be more readily*

***available in Kenya and it would be convenient and less expensive in Kenya courts (and) the law of foreign courts would not be applicable.”***

21. The 1st Defendant which is the foreign based company, incorporated in Singapore, has not challenged the court's jurisdiction. In its Statement of Defence, the 1st Defendant did not raise any objection to this court's jurisdiction based on the exclusive foreign jurisdiction clause, only on pecuniary jurisdiction. Instead, it is the 2nd Defendant which is a local state corporation based in Kenya that seeks to have the trial done in a foreign country. It will be more cumbersome for the Plaintiff to prosecute and the 2nd Defendant to defend the claim in Singapore by ferrying their witnesses and evidence to that country.
22. Further, this court takes judicial notice of the fact that the 2nd Defendant is a public body, and therefore should make best use of resources placed at its disposal by the tax payer. Having this case tried in Singapore will definitely not serve that public interest bestowed on the 2nd Defendant.
23. The Plaintiff and the 2nd Defendant are both more connected with the local courts than the courts in Singapore because they are both based in Kenya. The 2nd Defendant has not genuinely demonstrated why it desires this case to be tried in Singapore rather than in Kenya or shown what prejudice it is likely to suffer should this case proceed in this court. It is my view that the 2nd Defendant is taking procedural advantage in order to defeat the Plaintiff's claim. It is therefore clear to me that on the relative convenience and expense of trial as between this court and the court in Singapore, it is proper and in order for this court to overlook the exclusive foreign jurisdiction clause in the subject contract and assume jurisdiction over this claim.
24. Another important reason why the application must fail is because the Defendants entered unconditional appearance. This court dealt with the issue of jurisdiction where the Defendant entered an unconditional appearance in the case of **PETRA DEVELOPMENT SERVICES LIMITED V EVERGREEN MARINE (SINGAPORE) PTE LTD & ANOTHER [2014] eKLR**. This court stated as follows:

*“The summons in this case required Defendants to enter an appearance within 15 days. The appearance was due on or before 12th June 2014. Defendants filed an Appearance on 20th June 2014. That Appearance was in the following terms-*

***“MEMORANDUM OF APPEARANCE***

***Please enter appearance for EVERGREEN MARINE (SINGAPORE) PTE LIMITED and GULF BADAR GROUP (KENYA) LIMITED, the Defendants herein whose physical address for service is S.K.A. House, Dedan Kimathi Avenue, and whose postal address is P.O. Box 83156-80100, Mombasa.***

***DATED at MOMBASA this 20th day of June, 2014.***

***ANJARWALLA & KHANNA***

***ADVOCATES FOR THE DEFENDANTS.”***

*As it will be seen that was an unconditional Appearance. The Court of Appeal in the case **KANTI & CO. LIMITED** (supra) held that once such an Appearance is filed a party has then submitted itself to the jurisdiction of the Court. Black's Law Dictionary defines Appearance as-*

***“A Defendant's act of taking part in a Law suit, whether formally participating in it or by answering, demurrer, or motion ...”***

*In that definition the dictionary in attempting to give further explanation of Appearance stated –*

***“... appearance, which is not mere presence in court, but some act by which a person who is sued submits himself to the authority and jurisdiction of the Court.”***

*It therefore follows that as at 20th June 2014 Defendants submit themselves to the authority of this Court. That means the Defendants as at that date submit to this Court to have authority over the Plaintiff's claim for the release of Bills of Lading and for damages incurred. It is important to remember that the Jurisdiction Clause reproduced above provided the carrier who is the Defendants had the option to unilaterally waive the jurisdiction of England. For our remembrance of the Clause it stated-*

***“This Law and Jurisdiction Clause is intended solely for the Carrier's (Defendants) benefit and may be unilaterally waived by the carrier, in whole or in part before or after proceedings are commenced.”***

*It follows that by filing an unconditional Memorandum of Appearance on 20th June 2014 the Carrier (**the Defendants**) waived that jurisdiction of England and wholly submitted to this jurisdiction.”*

25. The Defendants herein did not just enter unconditional appearance but also filled a defence. They also did not object to this court's jurisdiction based on the exclusive foreign jurisdiction clause in their respective Statements of Defence. By entering appearance unconditionally and failing to object to the court's jurisdiction in their Defences, the Defendants waived the jurisdiction of the Singapore courts and wholly submitted to this court's jurisdiction.

### **Conclusion**

26. For the foregoing reasons, the Preliminary Objection by the 2nd Defendant fails and is hereby dismissed with costs to the Plaintiff.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of July, 2015.**

**MARY KASANGO**

**JUDGE**

30.7.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For 1st Defendant:

For 2nd Defendant:

**Court**

The Ruling delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**