REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 738 OF 2012

BARAKAT EXPLORATION INC……..……..……..PLAINTIFF

VERSUS

TAIPAN RESOURCES INC…….……..……..……..….DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated and filed on 19th March 2013 was brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15(1) (d) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. Prayer No 1 is spent. It sought the following remaining orders:-

a. **Spent.**
b. **THAT the main suit be struck out for being an abuse of the court process; or in the alternative and without prejudice to the foregoing;**
c. **THAT this Honourable Court lacked the jurisdiction to adjudicate over the main suit herein as well as any further applications in and/or arising from the main suit herein.**
d. **THAT all further proceedings in and/or arising from the main suit herein be stayed.**
e. **THAT Plaintiff do bear the costs of the instant application.**

2. The Defendant relied on several grounds to support its application. The same can be summarised as follows:-

a. **THAT the Plaintiff and the Defendant had never entered into any agreement giving rise to the obligations as prayed for in the main suit or at all.**
b. **THAT the legally binding contractual agreement entered into by the Plaintiff and the Defendant on or about 20th August 2012 stipulated that the same was to be governed by and construed in accordance with the laws of British Columbia, Canada.**
c. **THAT by filing the suit herein, the Plaintiff sought to contravene well established and grounded principles of "Freedom of Contract" and "Privity of Contract".**

AFFIDAVIT EVIDENCE

3. The Defendant's application was supported by the Affidavit of Maxwell Derek Birley, its Chief Executive Officer. It was sworn on 19th March 2012.

4. In the said affidavit, the deponent explained that on or about June 2012, the Defendant sought to invest in oil exploration in Turkana County, Kenya. So as to assess the viability of the said investment, it sought to engage the consultancy services of the Plaintiff but that despite protracted negotiations, the parties were unable to enter into a mutual consultancy agreement. He said that this was borne by the fact that when the Defendant sent the Plaintiff a duly signed Consultancy Agreement dated 20th August 2012, the Plaintiff declined to execute the same but that instead sent the Defendant a counter- offer to the agreement on 6th October 2012. He annexed copies of several emails which he stated evidenced that as at 6th October 2012, there did not exist any agreement between the Plaintiff and the Defendant.
5. It was his contention that in view of the fact that there was no agreement in existence and that the suit was premised on an alleged breach of terms and conditions in the said agreement, the suit herein constituted an abuse of the court process.
6. In the alternative and without prejudice to the foregoing, the deponent further stated that on or about 20th August 2012, the Defendant engaged the consultancy services of the Plaintiff but that the agreement entered into between the Plaintiff and the Defendant did not have an express jurisdictional clause. It, however, but had an express and unequivocal governing clause. Clause 16 of the said agreement stipulated as follows:-

   "The Agreement shall be governed by and construed in accordance with the laws of British Columbia, Canada."

7. He averred that the Defendant was incorporated and based in Canada and the various payments were to be made in Canadian Dollars (CAD $) drawing a strong inference that the parties intended that any dispute that would arise under the said agreement would be referred to courts in British Columbia, Canada. He annexed a copy of an email to a person by the name of "Azim" and emphasised the following words:-

   "In the highly and unlikely event either party wishes to contemplate litigation surrounding an agreement of this nature, I would suggest that Canada would be the most effective jurisdiction..."

8. It was the Defendant's submission that if the case was allowed to proceed before the courts in Kenya as opposed to Canada, it would be deprived of an opportunity of producing witnesses, majority of who were based outside the jurisdiction of this court and thus greatly compromise its right to a fair hearing. In addition, it contended that it was in the interest of business efficacy and Kenya's general economy that the freedom of parties who had entered into binding contracts as per their own terms and conditions be upheld.
9. In response thereto, on 25th April 2013, the Plaintiff filed a Replying Affidavit sworn by Azim Nathoo, a director of the Plaintiff Company on 24th April 2013. He stated that in the month of May 2012, the Defendant requested the Plaintiff to oversee a merger between Lion Petroleum Limited and the Defendant. He said this was fulfilled leading to the Defendant wholly owning Lion Petroleum (K) Limited which was incorporated in Kenya under Company No C. 148597. He further stated that the Plaintiff was also to negotiate a license extension and manage a Product Sharing Contract with the Government of Kenya for a consideration of Canadian Dollars 500,000 payable by Lion Petroleum Limited.
10. He stated that the Plaintiff continued to provide the consultancy services culminating in the parties executing a formal Consultancy Agreement of 20th August 2012. He said that the Plaintiff sought to negotiate the Governing Clause with a view to using Kenyan laws but they had not reached a settlement on the same.
11. It was his averment that the Defendant had offices both in Kenya and Canada and that there was no specific clause limiting this court's jurisdiction. It was the Plaintiff's case that all its witnesses were based in Kenya and that having the suit filed outside the jurisdiction of this court would deny it a chance of pursuing justice as the expenses would go beyond its affordability. He added that the Plaintiff had every right to pursue the agreement compensation.
12. In a Supplementary Affidavit sworn by Maxwell Derek Birley on 20th May 2013 and filed on the

same date, the Defendant denied the Plaintiff's assertions regarding the issue of Lion Petroleum Limited. He reiterated that there was no signed agreement because as late as 31st October 2012, the Plaintiff's advocates were still calling for a duly executed Agreement and that the Consultancy Agreement marked as "AN 2" attached to the Plaintiff's Replying Affidavit had been executed by the Plaintiff in a blatant attempt to mislead this court.

13. He pointed out that by an email dated 6th October 2012, the Plaintiff forwarded a counter-offer to the contract executed on 20th August 2012 which the Plaintiff averred was signed on 20th August 2012. He was categorical that the Defendant was not opposed to the matter being adjudicated upon but that the same should be adjudicated upon before the proper forum.
14. On 27th May 2013, the Plaintiff filed a Further Affidavit sworn by Minaz Devji on 24th May 2013. The deponent described himself as a Director of the Defendant Company and confirmed the Plaintiff's assertions. He averred that the contract between the Plaintiff and the Defendant was duly executed and that the latter was still doing business in Kenya by virtue of the oil exploration contract with the Government of Kenya.
15. In a Further Affidavit sworn on 24th May 2013 and filed on 27th May 2013, Azim Nathoo he contended that he executed the edited copy of the Consultancy Agreement and that the requests by the Plaintiff's lawyers for a contract was for execution of another contract and not that of 20th August 2012. He also stated that after execution of the said contract, the Plaintiff sought a revised contract specifically to address the issue of the Governing Clause. He denied having admitted in his witness statement that he did not execute the said agreement as had been alleged in the Defendant's Supplementary Affidavit. He was categorical that he executed the re-edited contract and that the Defendant was adopting all means to avoid its obligations therein.

LEGAL SUBMISSIONS BY THE DEFENDANT

16. In its written submissions dated 7th June 2013 and filed on 10th June 2013, the Defendant denied the existence of any contract between it and the Plaintiff and contended that there could therefore not have been any breach of its terms. Its argument was based on the ground that the Plaintiff did not agree to the terms of the contract of 20th August 2012 that it sent the Plaintiff but that instead the Plaintiff had sent it a counter-offer on 6th October 2012 which it did not accede to as at the time the suit herein was filed on 27th November 2012.
17. The Defendant thus argued that the counter-offer amounted to a rejection of the original offer. In this regard, it referred the court to the case of **Hyde vs Wrench (1840) 49 ER 132** in which it was stated that:-

"A counter-offer amounts to a rejection of the offer, and so operates to bring it to an end."

18. It was the Defendant's contention that the non-existence of a contract was borne by the fact that the Plaintiff had admitted the same in its Witness Statement, the averments contained in the Plaint and the various demand letters by the Plaintiff's advocates demanding that the Defendant sign a contract that the Plaintiff had forwarded to it. The Defendant submitted that the Plaintiff had only recently executed the contract to mislead the court that the same was executed on 20th August 2012.
19. It was the Defendant's further argument that the two (2) alleged contracts differed in that one showed that the contract was yet to be performed and the governing law as being that of British Columbia while the second alleged contract suggested that the contract had already been performed and the governing law would be that of Kenya.
20. Hence, the Defendant submitted that the suit herein was unfounded and an abuse of the court process and liable to be struck out *in limine*. It relied on several cases to persuade this court to strike out the suit herein on the ground that the suit herein was an abuse of the court process.
21. In addition thereto, the Defendant argued that if the court were to hold that there was a binding contract between itself and the Plaintiff, it should nonetheless strike out the suit herein on the ground that this court lacked jurisdiction to determine the matter herein. This was premised on the grounds that:-

a. **The Defendant, being a foreign company was not served with summons as envisaged in Order 5 of the Civil Procedure Rules, 2010; and**
b. **The alleged contract had an express Governing Law Clause which ousted the jurisdiction of this court.**

22. Regarding the first issue, the Defendant relied on the case of **Raytheon Aircraft Credit Corporation & Another vs Air Al- Faraj Limited [2005] 2 KLR 47** in which the Court of Appeal stated as follows:-

"The first appellant Raytheon is a foreign corporation incorporated under the laws of Kansas, USA… the High Court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in Order V Rule 21 (e) of the Civil Procedure Rules, that is, inter alia, the contract is made in Kenya or if it is governed by the laws of Kenya or if a breach of contract is committed in Kenya. The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under Order V Rules 23 and after such summons are served in accordance with the machinery stipulated therein… The record does not show nor is it contended that the respondent moved the High Court for leave to serve the first appellant outside the jurisdiction and that such lave was given…Thus, there cannot be any question that Raytheon was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone."

23. The Defendant also relied on the case of **Fonville vs Kelly III & Others [2002] 1 EA 71** where the court made a similar finding on the issue of jurisdiction of the High court in Kenya.
24. As regards the second issue, the Defendant submitted that this court should take into account the place where the contract was made and the currency in which it was to be made in finding that it did not have jurisdiction to determine this matter. It argued that the alleged contract had a governing law clause, the Defendant was based in Canada, the payments were to be made in Canadian Dollars and it was not evident where the contract was made or breach of contract occurred.
25. It also submitted that the Defendant would be greatly prejudiced if the matter was heard in Kenya as all its witnesses were based in Canada and that it would incur astronomical costs in both Kenya and Canada in defending the suit herein.
26. It referred this court to the case of **Karachi Gas Company Limited vs Issaq [1965] EA 42** where the court held that the proper law ought to be that which the transaction had the closest and most real connection.
27. The Defendant urged this court to respect the will of the contracting parties and referred the court to the case of **Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Limited** (Supra) where the court observed 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 discharges the burden case on him showing strong reasons for suing in that forum."

LEGAL SUBMISSIONS OF THE PLAINTIFF

28. In response to the Defendant's written submissions, the Plaintiff filed its written submissions dated 19th June 2013 on the same date. It submitted that the Defendant's Supporting Affidavit was incompetent and defective as it offended the mandatory provisions of Order 9 Rule 2 (c) of the Civil Procedure Rules, 2010 as Maxwell Derek Birley had not disclosed that he had authority to swear the said Affidavit. It relied on the cases of **Microsoft Corporation vs Mitsumi Computer Garage Limited & Another [2001] KLR 470** and **Elite Earthmovers Limited vs Krishna Behal & Sons [2005] KLR 379** to buttress its point.
29. On the issue of jurisdiction, the Plaintiff submitted that Article 165 (3) of the Constitution of

Kenya, 2010 conferred on the High Court unlimited jurisdiction to adjudicate any dispute that was placed before it for determination. It was categorical that it sought and obtained leave to serve the Summons to Enter Appearance upon the Defendant on 4th December 2012 and that the Defendant submitted itself to the jurisdiction of this court when it entered an unconditional Memorandum of Appearance in the matter.

30. It relied on the case of **Civil Appeal No 39 of 1980 Kanti & Co Limited vs South British Insurance Company Limited** (unreported) where the Court of Appeal held as follows:-

"A Defendant, by entering an unconditional appearance to a Summons to enter appearance, submits to the jurisdiction of the court and as long as the unconditional appearance stands, the Court is seized of jurisdiction to try that suit."

31. Further, the Plaintiff submitted that copies of the Contract dated 20th August 2012 annexed in its Replying Affidavit and to the Defendant's Supporting Affidavit were clear that there was no clause that ousted the jurisdiction of this Honourable Court and only dealt with the governing law clause as shown in paragraph 6 hereinabove.

32. It relied on the case of **Kanti & Co Limited vs South British Insurance Co Limited** (Supra) where the court held as follows:-

" Jurisdiction can only be exclusively conferred or reserved for the Courts of a particular country to the exclusion of all other jurisdictions by a clear and unequivocal statement in the contract."

33. It was also its submission that there were strong reasons why this court should invoke its discretion to hear and determine the matter herein irrespective of the governing clause and referred the court to the cases of **United India Insurance Company Limited vs East African Underwriters (Kenya) Limited [1985] KLR** and **Valentine Investment Company Limited (MSA) Limited vs Federal Republic of Kenya [2006] eKLR** in this regard.

34. It stated that there were strong reasons why the court herein should hear and determine the case herein as it had demonstrated that the contract of 20th August 2012 was partly executed in Kenya, it was to be performed in Kenya, payments were to be made in Kenya and breach was in Kenya. It pointed out the following facts which were borne by the affidavit evidence and documents annexed thereto:-

a. **exhibit marked "AN 4" in its Replying Affidavit clearly showed that the Defendant had presence both in Kenya and Canada bringing the Defendant within the jurisdiction of this Honourable Court;**
b. **the services were to be provided in Kenya and East Africa;**
c. **the payment was to be made in Nairobi, Kenya;**
d. **the Defendant required it to adhere to the local customs and laws;**
e. **its witnesses would come from Nairobi, Wajir, Ministry of Energy in Kenya and other services providers in Kenya.**

35. Additionally, it was the Plaintiff's argument that the contract of 20th August 2012 was valid under the Law of Contract Cap 23 (laws of Kenya) and that the intentions of the parties could be discerned therefrom, a fact that was upheld in the case of **Musundi & Others vs Small Enterprises Finance Company Limited [2007] 1 EA 219** relied on by the Defendant.

36. It was emphatic that the terms of a written contract could not be amended by an implied stipulation unless it was demonstrated to have been mutually intended as had been observed by the Court of Appeal in the case of **Kenya Breweries Limited vs Kiambu General Transport Agency Limited (2002) 2 EA**.

37. It prayed for dismissal of the Defendant's application and asked to be given an opportunity to fully present its case in court showing the process of events leading to the execution of the contract of 20th August 2012 and that there had been no *consensus ad idem* in respect of the governing clause which prompted it to seek an amendment to the same.

LEGAL ANALYSIS

38. A careful analysis of the pleadings, affidavit evidence and oral and written submissions shows that there are essentially three (3) issues for determination by this court, that is:-

a. **Whether there was a valid contract between the Plaintiff and the Defendant herein;**
b. **Whether this court has jurisdiction to hear the dispute between the Plaintiff and the Defendant;**
c. **If the answer to (b) hereinabove is in the negative, whether the Plaintiff's suit herein should be struck out for being an abuse of the court process and/or the court should order a stay of proceedings herein.**

THE CONTRACT

39. A copy of the Consultancy Agreement dated 20th August 2012 marked as Exhibit "MDB 2" annexed to the Defendant's Supporting Affidavit was only signed by the Plaintiff. This is what the Defendant contended the Plaintiff forwarded to it on 6th October 2012. Page 16 thereof provided that :-

"This Agreement shall be governed by and construed in accordance with the laws of Kenya."

40. Copies of the Consultancy Agreement dated 20th August 2012 marked as Exhibit "MDB 1" and "MDD 4" also annexed to the Defendant's Supporting Affidavit were both executed by the Plaintiff and the Defendant. Page 7 of both documents provided that :-

"This Agreement shall be governed by and construed in accordance with the Laws of British Columbia, Canada."

41. It is because of the Consultancy Agreement that was sent to the Defendant by the Plaintiff on 6th October 2012 that the Defendant averred that there was no contract between the Plaintiff and the Defendant as the Plaintiff was not agreeable to the applicable law to govern the said agreement as was proposed by the Defendant.
42. In its submissions, the Plaintiff admitted that both parties executed the Contract of 20th August 2012 but that they were not agreed to the issue of the governing clause. It stated that this was evidenced by the fact that it sent the Defendant a revised contract changing the governing clause.
43. The court has noted the Plaintiff's submissions that the said contract was valid and that the terms of the contract have to be construed as they are unless expressly changed and agreed by both the parties. The Defendant has also not denied that it executed "MDB 1" and "MDB 4".
44. From the documentation before herein, there is no doubt in the mind of this court that both the Plaintiff and the Defendant executed the Contract of 20th August 2012 and there now existed a valid and binding contract between them. This essentially means that, in the absence demonstration of any vitiating factors by either of the parties, both the Plaintiff and the Defendant were bound by **all** (emphasis court) the terms and conditions of the said contract.
45. Neither party herein can invoke the parole evidence rule to adduce oral evidence so as to deny the validity or existence of the said contract or evade certain terms when it suits them for the reason that the contract herein was evidenced in writing.
46. Any amendments to the terms of the contract can only be effected in writing showing in clear and unequivocal terms, that the new contract supersedes the original contract. The fact that a party executes an agreement and thereafter disagrees with certain terms cannot negate the validity and binding nature of the terms it has executed by arguing that the parties therein were not *ad idem*. For all purposes and intent, the contract of 20th August 2012 remains the only valid and binding contract between the parties herein.
47. It is for that reason that this court rejects the Plaintiff's submissions that although there was a valid and binding contract between it and the Defendant, it could escape the clause on the

governing law because both parties were still negotiating the same. Its reliance on the case of **Hyde vs Wrench** (Supra) does not therefore find favour with this court as the same is clearly distinguishable from the facts of this case as it dealt with an offer and counter-offer.

48. In the same breathe, this court hereby rejects the Defendant's submissions that there was no valid and binding contract between it and the Plaintiff because the latter had made it a counter-offer on the clause of the governing clause which it had not acceded to as the time it filed the application herein.
49. The court finds and holds that in the absence of any other written and duly executed contract negating the terms of the contract of 20th August 2012, the terms therein were binding on both the Plaintiff and the Defendant in their entirety.

JURISDICTION OF THE COURT

50. Having found that there was a valid and binding contract between the Plaintiff and the Defendant, this court will now address the jurisdiction issue as this goes to the root of this case. The mandate of a court to hear and determine a matter arises from the jurisdiction that is conferred upon it either by the parties through a valid and binding contract between them, statute or the Constitution.
51. A careful perusal of the pleadings, written and oral submissions and case law submitted in this matter leads this court to come to the conclusion that it had jurisdiction to hear and determine this matter for the reasons shown hereunder.
52. It is correct as the Plaintiff submitted, that Article 165 (3) of the Constitution of Kenya, 2010 confers the High Court unlimited original jurisdiction to hear and determine matters that are placed before it. Indeed, Article 50 of the Constitution of Kenya also provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. However, the court has to look at the law to ensure and be satisfied that all the provisions of the law have been strictly adhered to.
53. To assume jurisdiction over foreign corporations, as was held in the case of **Raytheon Aircraft Credit Corporation & Another vs Air Al; Faraj Limited** (Supra), the court has to grant leave to serve a party with Summons to enter Appearance, outside its jurisdiction. This leave is premised in the provisions of Order 5 Rule 21 of the Civil Procedure Rules, 2010. At the time of application, the Plaintiff was required to show that he had a *prima facie* case that the dispute between it and the Defendant fell under the said Order and that the High Court in Kenya was *forum conveniens* in the interests of the parties and to meet the ends of justice.
54. It is evident from the facts of this case that upon hearing the Plaintiff's application under the relevant provisions of the Civil Procedure Rules, 2010, to effect service out of the jurisdiction of the Kenya court upon the Defendant herein, Mutava J, granted leave to the Plaintiff to serve the said Summons to Enter Appearance on 4th December 2012.
55. It is not expected that the Defendant would have been able to object to the said application to serve the Summons to Enter Appearance out of the jurisdiction of this court at that time as such an application is ordinarily made *ex parte.* However, it was incumbent upon the Defendant to challenge the jurisdiction of this court at the time it entered its Memorandum to Enter Appearance on 17th January 2013 by filing a conditional Memorandum of Appearance so as not to submit itself to the jurisdiction of this court.
56. By filing an unconditional Memorandum of Appearance, the Defendant submitted itself to the jurisdiction of this court and cannot therefore seek a stay of proceedings on the ground that this court has no jurisdiction to hear and determine the dispute between it and the Plaintiff herein.
57. Further, having entered appearance in the proceedings herein, challenging the mode of service of the said Summons to Enter Appearance upon it would at this stage be a procedural technicality which would not avail it any relief by virtue of Article 159 (2)(d) of the Constitution of Kenya which mandates this court to determine matters before it without having undue regard to procedural technicalities.
58. Regarding the Defendant's argument that the governing law ought to have been that of British Columbia, Canada as the same was expressly stated in the Contract of 20th August 2012, it is evident from the documentation placed before this court that the Defendant was the first to execute the contract of 20th August 2012. The court has noted the Defendant's submissions that suggest

that the Plaintiff executed the said contract on another date other than 20th August 2012 and that because the Plaintiff forwarded to it another contract on 6th October 2012, it was not clear where the contract was made. However, it is evident to this court that the said contract was executed by the Plaintiff in Kenya as the Defendant forwarded an executed agreement to it thus creating a binding and valid agreement between them.

59. It is for that reason that in determining the governing law applicable herein therefore, the importance the *lex loci contractus* cannot also be ignored in a case where there is no exclusive clause ousting the jurisdiction of the Kenyan High court. The court has discretion, on being satisfied of strong grounds, to decide the applicable law in favour of the party that proves that the Kenyan High Court is *forum conveniens*.

60. Indeed, Order 5 Rule 21 (e) of the Civil Procedure Rules, 2010 stipulates as follows:-

"Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever-

the suit is one brought to enforce, rectify, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for in respect of the breach of contract

i. **made in Kenya…"**

61. The court finds that the Plaintiff was able to demonstrate the following:-

a. **THAT the Defendant had presence both in Kenya and Canada bringing the Defendant within the jurisdiction of this Honourable Court;**
b. **THAT the services were to be provided in Kenya and East Africa; and**
c. **THAT the payment was to be made in Nairobi, Kenya;**

62. Other factors that this court has considered are the Plaintiff's assertions as regards the adherence to local laws, customs and place of payment. The fact that the contract showed that the Plaintiff was required to adhere to the local customs and laws and its witnesses would come from the jurisdiction of the High Court in Kenya indicate a strong connection to Kenya and inference that the *forum conveniens* ought to be Kenya.

63. The place of payment of the contract monies to the Plaintiff by the Defendant also strongly suggests Kenya as the *forum conveniens*. Clause 3.3. in Appendix B in all copies of the contracts annexed in the Defendant's Supporting Affidavit provided that the payment was to be made at:-

Diamond Trust Bank of Kenya, Nation Centre

P.O. Box 27556- 00506

Nairobi, Kenya

Account # 0112333001

Swift: DTKEKENA

Correspondent Bank Standard Charter Bank PLC

For Credit to Barakat Exploration Inc

64. The filing of the suit herein by the Plaintiff against the Defendant is premised on an alleged breach of contract. It is the view of this court that if there was breach of contract, then the same occurred in Kenya. This would also bring the dispute herein squarely within the jurisdiction of this court.

65. Indeed, Order 5 Rule 21 (e) of the Civil Procedure Rules, 2010 stipulates as follows:-

"Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever-

… the suit…is brought in respect of a breach committed in Kenya, of a contract wherever made, even though such a breach was preceded or accompanied by a breach out of Kenya which rendered impossible the performance of the part of the contract which ought to have been performed in Kenya."

66. Unless the jurisdiction of a court in Kenya is expressly ousted in any clause in an agreement between parties, the court will decide a case involving a foreign corporation as if it was a purely Kenyan domestic case. This court is therefore of the view that the Defendant did not discharge the burden of asserting that the applicable law was that of British Columbia, Canada.
67. For the foregoing reasons, while the underlying principle is that parties are bound by their agreed choice of jurisdiction, the court finds that the Defendant did not demonstrate that the Kenyan High Court was *forum non conveniens*. Its argument that British Columbia was instead *forum conveniens* because its witnesses would come from Canada and that it would incur legal costs both in Canada and Kenya were not reasons that were as strong and compelling as those that were advanced by the Plaintiff.
68. In a nutshell, having considered all the parties' affidavits, written and oral submissions and the case law in support thereof, this court has come to the Defendant has not succeeded in persuading this court to find that the Plaintiff's suit was an abuse of the court process and that the same should be struck out or that this court should stay the proceedings herein to give the parties an opportunity to have this dispute heard and determined in British Columbia, Canada.
69. Bearing in mind that the Defendant's application was not successful, the court does not find it necessary to address the question of the competence or defectiveness or otherwise of the affidavit sworn by Maxwell Derek Birley in support of the application herein.

DISPOSITION

70. Accordingly, the upshot of this court's ruling is that the Defendant's Notice of Motion application dated and filed on 19th March 2013 is not merited and it is hereby dismissed with costs to the Plaintiff.
71. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 21st day of May, 2014.

J. KAMAU

JUDGE