



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 65 OF 2014

PETRA DEVELOPMENT SERVICES LIMITED PLAINTIFF

V E R S U S

1. EVERGREEN MARINE (SINGAPORE) PTE LTD 1ST DEFENDANT

2. GULF BADAR GROUP (KENYA) LIMITED2ND DEFENDANT

RULING

1. Plaintiff filed its Complaint on 22nd May 2014. By that Complaint Plaintiff pleaded that it agreed to sell to Raj Kripal Lumbars Ltd India (**the Purchaser**) 250 Containers of Rough Square Wooden Beams for U.S Dollars 3,750,000. Six of those containers were shipped by Plaintiff through the Defendants by the Port of Mombasa destined to Port Mundra and Port Mangalore. Those containers were shipped by Defendants on board of Motor Vessel "**Hammonia Gallicum**" on 6th March 2014. Plaintiff's claim is that the Defendants have wrongfully and unjustifiably withheld and or detained the original Bills of Lading numbers: 321400001014 and 321400001341 thereby causing the Plaintiff to fail to fulfill its obligation with the purchaser. That the said refusal of the Defendants to release the Bill of Lading is based on the Defendant's wrongful demand of payment of their debt owed by a separate entity to the Plaintiff. The Plaintiff has prayed in its Complaint for damages and for orders of mandatory injunction to compel the Defendants to unconditionally release to the Plaintiff original signed Bill of Lading.
2. Plaintiff filed a Notice of Motion dated 12th May 2014 (**Plaintiff's Notice of Motion**) seeking interlocutory mandatory injunction to issue ordering Defendants to release the Bills of Lading and to deliver the cargo at the respective Ports; for the orders that Defendants be restrained from breaching their contract with Plaintiff; and an order that the Defendants be restrained from charging any demurrage or other charges or penalties in respect to the containers.
3. The Defendants were served with the Summons and Complaint on 28th May 2014 and with the Plaintiff's Notice of Motion on 27th May 2014.
4. When the matter came up on 3rd June 2014 for inter partes hearing of the Plaintiff's Notice of Motion although the Defendants had been served they did not attend. The matter proceeded in the absence of Defendants. The Court on that day granted the orders for mandatory injunction compelling the Defendants to unconditionally release to Plaintiff or the consignee the original signed Bills of Lading and to release the cargo at the Port Mundra and Mangalore to the Plaintiff

and or consignee in India. The Court also ordered the Defendants be restrained from breaching the contract of carriage.

5. The Defendants filed a Notice of Motion dated 25th June 2014 (Defendant's Notice of Motion) which is under consideration seeking an order to set aside the ex parte orders of 3rd June 2014.

DEFENDANT'S ARGUMENTS

6. Defendants relied on two affidavits dated 25th June 2014 and 8th July 2014 of Yasser El Tunsy, the East African Area Manager of the 2nd Defendant. Those affidavits have two broad issues. The first is that this Court lacks jurisdiction to entertain this cause and the second is that the Court should not have granted the orders of 3rd June 2014.

JURISDICTION

7. Defendants' Learned Counsel began by citing the case **OWNERS OF MOTOR VESSEL "LILIAN S" Vs CALTEX OIL KENYA LTD [1989]KLR 1** and quoted the now often quoted passage of that case viz-

“Jurisdiction is everything. Without it, a Court has no power to make one step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8. Defendants relied on the Clause in the Bill of Lading which was the parties contract of carriage. That Clause is in the following terms-

“1. Non-U.S. Trades: except as provided in subparagraph (2) below, all claims arising hereunder must be brought and heard solely in the High Court of London, England to the exclusion of any other forum. Except as provided elsewhere in this Bill, English Law shall apply to such claims.

2.

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

The carrier as far as the above Clause is concerned is the Defendants herein.

9. It was submitted on behalf of the Defendants that this case, in view of the above Clause should have been filed in the High Court of London, England. That since that was the choice of Law and jurisdiction of the parties in this case, this Court had no jurisdiction over this matter. Defendants relied on the case **FIVEFORTY AVIATION LIMITED –Vs- LONZIM AIR (BVI) LIMITED (2013)eKLR**. The parties in that case had, just like this case, a Clause in their contract, that the Courts and the Law of England were vested with the exclusive jurisdiction over the disputes between the parties. The Court proceeded to uphold that Clause. The Court in that Ruling referred to other decisions which I think will be useful to consider here. **AREVA T & D INDIA LTD –Vs- PRIORITY ELECTRICAL** where the Court of Appeal stated as follows-

“Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this Court that that agreement should be overridden and that should be allowed to continue.”

The Court in that case also stated-

“I fully agree that the rule that the parties should be held to their bargain should only be departed from in a special and exceptional case. Here, in the case before us, as I have pointed out, no such special and exceptional circumstances have been established to depart from the contract that the parties had freely and voluntarily agreed upon. The learned Judge’s conclusion that his court ‘would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other party where clearly there is no legal or logical justification’ is based on no evidence that we can discern from the record, and the Judge’s order that the arbitration be conducted by ‘a single arbitrator to determine the dispute between them within fourteen (14) of today’s date failing which the chairman of The Institution of Engineers of Kenya shall appoint a single arbitrator to determine the dispute’ is without jurisdiction.”

In the case UNITED INDIA INSURANCE COMPANY LTD –Vs- EAST AFRICAN UNDERWRITERS (KENYA) LTD 1985 KLR Madan J.A stated-

“The Courts of this country have 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. This exclusive jurisdiction clause however should normally be respected because the parties themselves 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 the agreement.”

Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. It must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure. (per Cairns LJ in “the Makefjell” (1976)2 Lloyd’s Reports 29.”

In the case “**The Makefjelly**” (1976)2 Lloyd’s Reports 29 Sir Gordon Willmer stated-

“Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, a departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule. In my judgment the learned Judge made no more than this, as is, I think, made clear by the concluding words of the penultimate paragraph of his judgment, when he stated his conclusion in the following words: ‘The Plaintiffs have failed to show sufficiently strong reason why they should not be held to contract’. In these circumstances, I can find no fault with the learned Judge’s formulation of the principles on which his discretion should be exercised.”

10. The Defendants Learned Counsel submitted that Plaintiff’s replying affidavit does not show any circumstances which would warrant the change of provisions of the contract of carriage. That accordingly the Court should hold the parties to their bargain.
11. It is worthy to state that the Defendants filed on 20th June 2014 prior to filing their Notice of Motion an unconditional “**Memorandum of Appearance.**” After their Notice of Motion was adjourned at their application, the Defendants filed a conditional “**Amended Memorandum of Appearance**” on 7th July 2014. That Amended Memorandum of Appearance was filed “under protest.” Defendants Learned Counsel with that in mind submitted that although an unconditional appearance had been filed, the Defendants had filed another which was amended. And that five days later after filing the unconditional appearance Defendants filed their present Notice of Motion seeking setting aside of the exparte orders on the main ground that this Court had no jurisdiction in this matter. That if the Court was to assume jurisdiction on the basis of the

unconditional appearance the Court would be applying a technicality contrary to the provisions of Article 159(2)(d) of The Constitution of Kenya, 2010 which provides-

“(2) In exercising judicial authority, the Courts and Tribunals shall be guided by the following principles-

- a. ...
- b. ...
- c. ...
- d. **Justice shall be administered without undue regard to procedural technicalities.”**

Defendants relied on the case INTERJOINT INVESTMENTS & 2 OTHERS –Vs- PARADISE MOMBASA LTD & 3 OTHERS [2012]eKLR where the Court had this to say-

“10. In the present case, the Defence at paragraphs 2 and 3 clearly assert that the Court has no jurisdiction in the matter. However, their Memorandum of Appearance dated 14th October, 2002, was unconditional as the Defendants had not indicated that there was any jurisdictional objection. Accordingly, by an application dated 5th April, 2004, they sought to amend their Memorandum of Appearance having taken instructions that “the Courts of Kenya have no jurisdiction over the parties in this action or competent to adjudicate on the issues arising between the parties.” The application was allowed by Honourable Lady Justice Khaminwa in a Ruling dated 18th May, 2006 so that, the current position is that appearance by the Defendants is conditional as “under protest.”

Consequently, in my view, the question of jurisdiction remains alive issue. And although the Plaintiffs sought to deal with the point of jurisdiction as part of their response to the grounds of opposition in this application, the focus of the application was summary judgment. That is what was argued at the hearing even though the Plaintiffs had supplied a list of authorities including several authorities or the question or jurisdiction. These will be relevant when the issue of jurisdiction is formally tried.”

COURT’S DISCRETION TO GRANT MANDATORY INJUNCTION

12. On this second issue Defendants submitted that the Court would only proceed if it found that it had jurisdiction.
13. On this issue Defendants submitted that Plaintiff had misled the Court in granting injunction by stating that the cargo, Teak Wood, was perishable. To show the Plaintiff misled the Court Defendants relied on down-load made from the internet which showed that Teak was durable. The other ground Defendants relied upon to show mandatory injunction should not have been granted was that the Plaintiff failed to disclose its relationship with other entities namely Lumberlogs International Trading registered in Jordan and other entities with the same name but registered in Dubai, Uganda amongst others. By the affidavit of Yasser El Tunsy it was deponed that the Plaintiff’s share holding was as follows: Rami Bassam Musa Fakhouri (**Rami**) 900 shares, and Samer Barchour 100 shares. It was further deponed-
 - **THAT in the course of the said business dealing, RAMI FAKHOURI has at all times represented himself as the principal director/controller/owner of the LUMBER LOGS INTERNATIONAL TRADING entities, and the Defendants herein together with the 1st Defendant’s agents located in Uganda, Egypt and Jordan, recognized and dealt with RAMI FAKHOURI while truly believing as a result of his representatives that he was principal director/controller/owner of the LUMBER LOGS INTERNATIONAL TRADING entities and that the said entities were his agents/vessels/conduits for purposes of trading.**

- **THAT over a period of approximately twelve (12) months, the 1st Defendant had been contracted by LLI Jordan through RAMI FAKHOURI to ship and deliver over three hundred (300) containers of TEAK WOOD LOGS through its aforesaid various agents located in Kenya (the 2nd Defendant), Uganda (Gulf Badr Group (Uganda) Limited) and in Jordan (Ammon Shipping and Transport).**
- **THAT in the course of the mercantile dealings between the said RAMI FAKHOURI and the 1st Defendant, RAMI FAKHOURI negotiated and secured on behalf of LLI (Jordan) and/or the LLI entities in general, a credit arrangement that allowed the shipment and delivery of cargo by the 1st Defendant on deferred payment through its various agents to various Ports in India to the order or notification of RAJ KIRPAL LUMBERS LIMITED of 7 ARJUN NAGAR, KOTLA MUBARAKPUR, NEW DELHI, INDIA (hereinafter RAJ KIRPAL) and/or KESHAV GLOBAL PRIVATE LIMITED of 371, BEACH ROAD, KEY POINT SINGAPORE (hereinafter KESHAV GLOBAL).**
- **THAT the credit arrangement was utilized by LLI Jordan and/or the LLI entities in general and as at the date hereof a sum of US\$ 202,110.67 remains due and owing to the 1st Defendant in outstanding freight and related charges. Annexed hereto and marked as Exhibit GBG-2(b) is a copy of a comprehensive statement of account showing the amount outstanding.**
- **THAT from the emails annexed hereto as exhibit GBG-1(a), the said RAMI FAKHOURI has on various occasions promised payment of outstanding sums due to the 1st Defendant from the LUMBER LOGS INTERNATIONAL TRADING entities and has in past occasions directed LLI Uganda to settle the said outstanding amounts despite the fact that the amounts were owed by LLI Jordan, in which RAMI FAKHOURI is and/or has represented himself to be a Managing Partner.**
- **THAT it is therefore not correct as stated in the supporting affidavit as well as the plaint filed herein that the outstanding amounts are owed by LLI Uganda in which the said RAMI FAKHOURI is not a shareholder or a director, the correct position being that the outstanding freight is owed by LLI Jordan in which RAMI FAKHOURI is a Managing Partner and who now happens to be a majority shareholder of the Plaintiff.**
- **THAT I verily believe that the only way LLI Uganda (which was initially represented by RAMI FAKHOURI to the 1st Defendant as a branch office of LLI Jordan and is now claimed in this suit to be an entirely separate outfit in which RAMI FAKHOURI has no interest) would be able to settle amounts owed to LLI Jordan is if LLI Uganda was an agent of RAMI FAKHOURI and or LLI Jordan.**
- **THAT I verily believe that similarly, the Plaintiff in this suit is a corporate outfit that is in fact an agent/vessel/conduit of the real Merchant in the transactions from which this suit arose and that Merchant is RAMI FAKHOURI.**
- **THAT from the email correspondence annexed as exhibit GBG-1(a) and the Bills of Lading annexed as exhibit GBG-2(a) above, it is clear that RAMI FAKHOURI was the real Merchant in the course of the transactions involving the shipment of TEAK WOOD LOGS from the Port of Mombasa to various Ports in India to RAJ KIRPAL LUMBERS and/or to the notification of KESHAV GLOBAL.**
- **THAT while it may be that the said RAMI FAKHOURI had no shares in LUMBER LOGS INTERNATIONAL TRADING LIMITED (Uganda), he had actual control over its shareholders and/or employees and finances including but not limited to directing them to effect payment to the 1st Defendant of sums of money owed by LLI Jordan and I verily believe that the LUMBER LOGS INTERNATIONAL TRADING entities just like the**

Plaintiff herein, are merely agents/vessels/conduits of RAMI FAKHOURI who is the real Merchant in the transactions involving the export of TEAK WOOD LOGS to the consignee known as RAJ KIRPAL.

What in essence I understand Defendants to say by the above deposition is that they are justified to refuse to release the Bills of Lading to the Plaintiff because they are owed money by Lumber Logs International Trading. Indeed they seem to be owed US Dollars 21,390.00, and because Rami is a major shareholder of Lumber Logs and a shareholder of the Plaintiff's Company, the Defendants claim to be entitled to a lien over the Plaintiff's Bills of Lading. Defendants provided an excerpt of Halsbury's Laws of England Forth Edition as follows-

“A general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the chattel are satisfied. It can only exist (1) as a common law right arising from general usage, or (2) by express agreement.”

PLAINTIFF'S ARGUMENT

14. Plaintiff's Learned Counsel began his submissions by dissuading the Court that the Order of 3rd June 2014 was exparte. He submitted that the Defendants as per affidavit of service were served for that day on 27th May 2014 but they failed or neglected to attend the inter partes hearing of Plaintiff's Notice of Motion. Further that the extracted order of 3rd June 2014 was served upon Defendants on 5th June 2014. In that regard, I can confirm there is an affidavit of service in the Court file, of Isaac Muriuki Kinyua who deponed that the Court order of 3rd June 2014 was served upon Defendants on 4th June 2014. Although Learned Counsel for the Defendant stated that those affidavits of service had not been served upon him I wish to state that the fact he did not know about those affidavits of service is just evidence of lack of diligence on his part because they are on Court record. There is no obligation that is known in Law requiring the party served with Court document to also be served with the affidavit of service, confirming such service. To require such service would result in absurdity.

15. Plaintiff through the affidavit of its Director Samer Bachour (**Samer**) stated that after the extracted Order of 3rd June 2014 was served upon the Defendants, the Defendants began to coerce Plaintiff to withdraw this case as a condition of them releasing the Bills of Lading. Samer referred to email written by 1st Defendant's employee, after the Defendants obtained temporary exparte stay of the Order of 3rd June 2014. Those emails are attached to Samer's affidavit where that employee stated-

“Good day Mr. Rami. We got Court order to stay aside the old order. This legal issue will take a very long time. We are ready to deliver U (sic) the OB/L after U (sic) close this legal case totally and we can sign on that at our lawyers office. Otherwise we are continue the legal case. Now I'm at Mombasa. M Lotfy.”

16. On jurisdiction Plaintiff responded by raising two issues. First Plaintiff argued that the Defendants were statutorily obligated to release the Bills of Lading and that the Defendants had breached the provisions of Section 2, 4 and Clause 3 and 4 of the Schedule of Carriage of Goods By Sea Act Cap 392. Clause 3 and 4 provides-

“3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things-

a. **the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or**

- coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;
- b. either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
 - c. the apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with subparagraphs (a), (b) and (c) of paragraph 3 of this Article.”

17. The above are the obligations the Defendants it was alleged had failed to fulfil and the Plaintiff submitted that the Defendants erred to say that the Court was called upon to determine contractual relationship of the parties. Rather the Plaintiff submitted that the Court was to consider whether the Defendants have breached Cap 392. In response to the case **FIVEFORTY AVIATION** (supra) Plaintiff’s Learned Counsel argued that it was recognized by the Court in that case that the Court has discretion even where parties contract on the jurisdiction to determine disputes.

18. The second ground Plaintiff relied on in response to Defendant’s submission on jurisdiction was that Defendants filed an unconditional Memorandum of Appearance. Plaintiff in support to its submission that Defendants had submitted to the jurisdiction of this Court referred to the case **BARAKAT EXPLORATION INC. –Vs- TAIWAN RESOURCES INC. [2014]eKLR**. In that case the Court relied on a Court of Appeal decision **CIVIL APPEAL No. 39 OF 1980 KANTI & CO LIMITED –Vs- SOUTH BRITISH INSURANCE COMPANY LIMITED** where it was held-

“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.”

On the issue of Appearance Plaintiff further relied on the case **BILLY GRAHAM OWUOR –Vs- DAUDI SABIN BAHIRA & ANOTHER [2012]eKLR**. The Court had this to say-

“From the foregoing provisions, it was clearly incumbent on the Applicant herein, to immediately upon or simultaneously with the filing of appearance in the lower Court, to also file an application for stay or the proceedings, and to exhibit the arbitral agreement to the Court. Instead, the Applicant filed an appearance and went to sleep, leaving provisions of the Civil Procedure Act to apply unabated, and the appearance to act as a submission to the court’s jurisdiction. In my view, the court’s jurisdiction became thereupon wholly crystallized and irreversible upon the entry of judgment in default.”

19. Plaintiff further argued that Defendants had forfeited their plea on jurisdiction because they had not sought stay of these proceedings. Plaintiff relied on the case **KISUMUWALLA OIL INDUSTRIES LTD –Vs- PAN ASIATIC COMMODITIES PTE LTD & ANOTHER (2) EALR [1995-1998]**. In that case the Defendant sought the dismissal of a civil case on the ground that the contract between the parties had an Arbitration Clause. The Court of Appeal in part held-

“The Appellant’s application to strike out the plaint and dismiss the suit was a step in the proceedings and by not filing an application for stay of the legal proceedings the appellant had forfeited its right to rely on the arbitration clause.”

In this case Plaintiff submitted that since the Defendants had sought orders to set aside the Order of 3rd June 2014 and had not sought to stay the proceedings they had submitted to this Court's jurisdiction.

20. Plaintiff further submitted that an Appearance was not a pleading as defined under Section 2 of the Civil Procedure Act Cap 21 and could not therefore be amended, as Defendants had done.

21. Plaintiff drew Court's attention to the amount allegedly owed to the Defendants and stated if it was owed it indeed was owed by another entity other than Plaintiff. Samer by his affidavit on this issue stated-

"12. THAT with reference to the contents of paragraphs 6 to 32 of the said Affidavit in which the said Yasser El Tunsy has gone to great length to attempt to draw a connection between various entities, I state as follows-

- a. **Each of the entities referred to in the said affidavit is a separate legal entity, each with its own corporate legal personality quite distinct from its shareholders;**
- b. **Any amounts due and owing by any of the entities (which are incidentally not admitted) are the debts of the individual company and not its shareholders – and the repayment obligation does not fall upon the shareholders;**
- c. **Whilst the said Yasser El Tunsy alludes to "... a corporate entity being used for fraudulent purposes ...", no evidence or explanation has been proffered as to the fraud that is alleged and certainly no evidence of this has been proffered;**
- d. **All the Bills of Lading annexed to the said Affidavit are endorsed as "Freight PrePaid" and constitute a receipt for the freight allegedly outstanding and both the Defendants, and particularly the Second Defendant, is now estopped from alleging otherwise; and**
- e. **Each of the entities mentioned in paragraph 7 of the said Affidavit is a separate legal entity incorporated in the respective country mentioned with each one having a different shareholding.**

ANALYSIS

22. The parties relationship is one of a carrier and a shipper. The Plaintiff, that is the shipper contracted with the Defendants to carry the goods contained in the two containers. Their Bill of Lading are Nos. 32140001014 and 32140001341. The Defendants' refusal to release signed and original Bills of Lading is not because the Plaintiff is indebted to the Defendant. There is indeed no debt between the Plaintiff and the Defendant. If a debt exists it seems to be between Defendants and other entities. Plaintiff is a Corporation registered in Uganda on 10th December 2013. One of the Plaintiff's Directors is Rami Fakhour. The Defendants justify their retention or refusal to release the original signed Bills of Lading on the ground that Rami Fakhour is a Director of Lumber Logs International Trading Limited and therefore according to the Defendants Rami is the real Merchant and that he should not be allowed to defraud the Defendants through technicalities. Although the Defendants through their Area Manager stated that such wide definition of Merchant has been used in the industry to ensure that freight is recovered by the carrier, they failed to give instances that have indeed occurred in the industry. I make this analysis as an opening statement but I believe the issues identified by the Defendants are the issues that will assist the Court to determine the application.

JURISDICTION

23. The Defendants were served with the Summons and Plaint on 28th May 2014. Order 6 Rule 1 of the Civil Procedure Rules provides that-

“Where a defendant has been served with summons to appear, he shall unless some order be made by the Court, file his appearance within the time prescribed in the summons.”

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.

24. The Defendants, however, without the leave of the Court filed an Amended Memorandum of Appearance on 7th July 2014. It is clear that in the case **INTERJOINT INVESTMENTS** (supra) the Defendant approached the Court to grant it leave to amend its Memorandum of Appearance to reflect that its Appearance was under protest. Defendant did not seek such leave. Defendants argued that the Civil Procedure Rules permit the amendment of pleadings at any time. That is

indeed a misrepresentation of those Rules. Order 8 Rule1(1) provides that a party can amend its pleadings without leave of the Court before close of pleadings. But the more important question is whether a Memorandum of Appearance is a pleading. Section 2 of The Civil Procedure Act defines pleadings as-

“Pleading’ includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

Further the Black’s Law Dictionary defines pleadings as-

“A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials or defenses.”

It is clear from those definitions that an Appearance is not a pleading. It follows its amendment can only be through the leave of Court. In my view once documents are filed in a Court file they cease to belong to the party and such a party can only deal with those documents in the Court file as provided in the Rules. In this case an Appearance not being a pleading the Defendants ought to have invoked the Court’s jurisdiction to grant them leave to amend that appearance. To allow parties to willy-nilly deal with documents already filed and amend them when and how they wish would be to invite chaos and may lead to some parties suffering prejudice. For example in this case the Defendants having submitted to this Courts jurisdiction and the Plaintiff having that knowledge that they so submitted any amendment that would affect that knowledge and the rights acquired by that knowledge had to be with the participation of the Plaintiff. In other words the Defendants should have filed a formal application to amend the Appearance which application the Plaintiff would have had an opportunity to respond to. Defendants submitted that the Court should not disallow the Amended Appearance in view of the provisions of Article 159 (2) (d) of The Constitution of Kenya. That Article was reproduced above. The Supreme Court in the case **RAILA ODINGA -Vs- THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & OTHERS PETITION NO. 5 OF 2013** held-

“The provisions of Article 159(2) (d) were never meant to oust the obligation of Litigants to comply with procedural imperatives as they seek justice from the Court of Law.”

It cannot be said that to require a party to obtain Court’s leave to amend an appearance is a technicality. As I have stated above on 20th June 2014 the Defendants firstly submitted unconditionally to this Court’s jurisdiction with their unconditional Appearance served on the Plaintiff. That submission to jurisdiction triggered the term of the parties contract which permitted Defendants to waive the jurisdiction of England. The Plaintiff having had that Notice of submission to jurisdiction and because as stated an Appearance cannot be amended without leave of the Court it follows that the Amended Memorandum of Appearance filed on 7th July 2014 is a nullity and the same is hereby expunged from the record. This Court has jurisdiction to hear and determine this case.

SETTING ASIDE ORDER OF 3RD JUNE, 2014

25. Defendants argued that the Order of 3rd June 2014 should be set aside because Plaintiff was guilty of non-disclosure of fact. What are those facts? The facts Defendants outlined were that the Defendant was owed money by Lumber Logs International Trading where Rami was a major shareholder and the Plaintiff’s Company was incorporated as a façade to defraud the Defendants of that money.

26. The Plaintiff attached to its Notice of Motion the Certificate of Incorporation of PETRA DEVELOPMENT SERVICES LIMITED. That Company according to that Certificate was incorporated on 10th December 2013 in Uganda. Attached also to that Notice of Motion is

Company Resolution of the Plaintiff dated 4th February 2014 where the Plaintiff's Board of Directors resolved that the share of the Plaintiff's Company held by Mr. Baker Mkleed Musallam Al-Dabaibeh be transferred to Rami. It was also resolved that Rami be appointed a Director of the Plaintiff's Company. The Plaintiff attached the Notification of Change of Director's Form which reflected the Plaintiff's share holding as follows-

- **Rami Bassam Musa Fakhour – 900 Shares**
- **Samer Bachour – 100 shares**

27.The Memorandum of Articles of Association of Lumber Logs International Trading Limited bearing a stamp of the Registrar of Companies Kampala shows the share holding as follows-

- **Imad Aqrug – 45% shares**
- **Jasbir Singh – 45% shares**
- **John Ocato – 1% share**
- **Jasper Edule – 1% shares**

It does not take much to note that Rami is not a share holder of Lumber Log. Defendant presented Rami's business card of Lumber Logs International Trading LLC, seemingly registered in Jordan. Rami in that business card is titled "Managing Partner". On the opposite side of that card is reflected-

"Lumber Logs International

Trading LLC

Branch Offices:

UNITED ARAB EMIRATES

UGANDA

...

...

..."

It is that business card the Defendants seek the Court to base its finding that because Rami is a shareholder of Plaintiff's Company and Managing Partner of Lumber Log Jordan the debt owed by Lumber Log can be collected by raising a lien on Plaintiff's goods. The passage from the book 'Charlesworth and Morse: Company Law' had this to say on Corporations-

"It was established in Salomon v Salomon and Co Ltd that a registered company is a legal person separate from its members. This principle may be referred to as 'the veil of incorporation'. In general the law will not go behind the separate personality of the company to the members, so that, for example in Macaura v Northern Assurance Co Ltd, ante, it was held that the largest shareholder had no insurable interest in the property of the company. Similarly an employee cannot bring an action for unfair dismissal against the majority shareholder of a company which employed him. However, there are exceptions to the principles in Salomon's case where the veil is lifted and the law disregards the corporate entity and pays regard instead to the economic realities behind the legal façade. In these exceptional cases the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated concerns."

28.The first thing to note is that Plaintiff has a shareholder Samer who is not said to be a shareholder of Lumber Log. That fact does seem to give Plaintiff's Company its independence from Lumber

Log. Indeed the only tenuous connection between Plaintiff and Lumber Log is Rami.

29. It will assist to remind myself rudimentary principles of Company Law by referring to the book Gower's – "**Principles of Modern Company Law.**" On legal entity of a Corporation he wrote-

"As already emphasized, the fundamental attribute of corporate personality – from which indeed all the other consequences flow – is that the corporation is a legal entity distinct from its members. Hence it is capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members. In other words, it has "legal personality" and is often described as an artificial person in contrast with a human being, a natural person.

As we have seen, corporate personality became an attribute of the normal joint stock company only at a comparatively late stage in its development, and it was not until Salomon v. Salomon & Co. at the end of the nineteenth century that its implications were fully grasped even by the Courts."

Since a Corporation has a separate personality from its members, its members cannot be liable for its debt. Rami cannot be liable for Lumber Log debts and therefore the Plaintiff cannot be liable for debts of Lumber Log. It follows that the Plaintiff did not fail to disclose any material that would have affected the final Order issued on 3rd June 2014 because Plaintiff is not indebted to the Defendants.

30. Additionally there is no case made out by Defendants that can lead this Court to pierce the Plaintiff's Corporate veil. The U.K Court of Appeal, in the case **ADAMS –Vs- CAPE INDUSTRIES PLC (1990)ch. 433** as summarized in the book authored by Chris Shepherd "**Company Law**" considered a claim to pierce the corporate veil of Cape Industries where the Claimant wanted to execute a judgment obtained in United State against Cape Industries wholly owned subsidiary, Capasco Ltd. The Court of Appeal declined to pierce the corporate veil stating that the presence of subsidiary in United States could not be treated as presence of Cape Industries. The Court rejecting the claim held that the veil could only be pierced if-

"(1) that Cape and its subsidiaries should be regarded as a single economic unit;

e. that the subsidiaries were set up as a façade concealing the true facts; and

f. that an agency relationship existed between Cape and the subsidiaries."

31. Similarly in this case Defendant did not prove those three conditions existed. It was not enough and it did not have legal basis for Defendants to rely on a business card of Rami to show that he was the alter ego of the Plaintiff and/or Lumber Log. There was no evidence that can lead this Court to disregard the principles of **SALMON V SALMON & CO. LTD [1897]AC 22** merely because it considers it just to do so. It is useful to consider what was stated in our Courts in the case **CENTRAL BANK OF KENYA –Vs- NKABU [2002] IEA 34** as follows-

"And it is a well known principle of company law that the veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham, a device or stratagem for enabling the directors to hide themselves from the eye of equity. That may well be so if on the evidence it is clear that the directors have dealt with the assets and resources of the company as their personal bounty for use for their own purposes. The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation the law provides for remedies other than the director of the company being saddled with the debts of the company."

32. I do therefore reach a conclusion that there is no basis for setting aside

the Orders of 3rd June 2014. It is important to note that the Defendant also failed to explain why they did not attend the inter partes hearing of the Plaintiff's Notice of Motion. Since they fail to explain their absence they do not therefore deserve the exercise of the Court's discretion in their favour.

33. It has not escaped my attention that the Defendants, through its employee has threatened to ensure that this case does drag, to the detriment of the Plaintiff unless the Plaintiff withdraws this claim. To threaten anyone to stop them from taking legal action can indeed amount to contempt of the Court. At this point I will not say any more on that but the Defendants would best keep that in mind.

CONCLUSION

33. The Court grants the following orders-

- a. **The Notice of Motion dated 25th June 2014 is dismissed with costs to Plaintiff.**
- b. **The Amended Memorandum of Appearance filed herein on 7th July 2014 is hereby expunged from the record.**

DATED and delivered at MOMBASA this 13TH day of AUGUST, 2014.

MARY KASANGO

JUDGE