



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**HIGH COURT CIVIL CASE NO. 311 OF 2011**

**BASH HAULIERS LIMITED..... PLAINTIFF**  
**VS**  
**DAMCO LOGISTICS KENYA LIMITED..... DEFENDANT**

**RULING**

1. This ruling restricts itself to the determination of a notice of preliminary objection filed by counsel for the Defendant on 6<sup>th</sup> October 2011 in which the Defendant prays for the suit in this matter to be struck out and/or dismissed on the ground that this court has no jurisdiction to hear and determine the suit.

2. The preliminary objection is premised on the grounds that the relationship between the Plaintiff and the Defendant in this matter was at all material times governed by an Agreement for Transport Services dated 1<sup>st</sup> January 2007 (hereinafter called the Agreement) and through which the parties vested jurisdiction for the determination of any disputes arising between them exclusively to English courts. Specifically, the Defendant referred the Court to Clause 19 of the Agreement where it is provided as follows:

***“This agreement shall be governed, construed and enforced in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts”.***

3. Consequently, it is the Defendant’s contention that only courts in England can entertain the dispute constituted in the present suit arguing that it is trite law that parties must be held to their bargain. Learned counsel for the Defendant submitted further that there are no exceptional circumstances as would reverse this position, as there was no fraud, mistake or misrepresentation in the formation of the contract as would vitiate its effect upon the parties or render it not binding.

4. To buttress its objection, the Defendant has referred the court to a list of authorities filed on 1<sup>st</sup> November 2011 and which I shall consider in the course of my analysis of the question before me.

5. The preliminary objection is opposed by the *Plaintiff/Respondent* on a number of grounds, namely:

(1) The challenge against jurisdiction of the court to hear this matter should have been lodged by way of a substantive application and not by way of a preliminary objection.

(2) The agreement of 1<sup>st</sup> January 2007 between the parties does not apply to the present proceedings in that the said agreement was entered into by parties who are not parties to the present suit. The Plaintiff submits that the agreement is between Maersk Logistics Kenya and Bash Hauliers Limited yet the suit is between Bash Hauliers Limited and Damco Logistics Kenya Limited the latter of which is a limited liability company with independent shareholding and capacity to sue and to be sued on its own. Further,

counsel submitted that the purported agreement is not executed by the parties to that agreement, it is not under seal and it is not properly witnessed by either two directors or a director and the secretary to the companies. There is therefore no privity of contract as regards the plaintiff and the defendant in this suit, as the defendant is not mentioned in the purported agreement.

(3) There is no evidence that the defendant in this suit is part of Maersk Group Limited and there is no evidence to connect the defendant to Maersk Group.

(4) The defendant's application for ouster of jurisdiction is not supported by any material as required under the Civil procedure Rules.

(5) The facts of this case are similar to the facts in the case of United India Company Ltd vs. East African Underwriters (Kenya Limited [1985] KLR in which the Court of Appeal held that a Kenya courts had discretion to assume jurisdiction where an agreement was meant to be performed in Kenya.

6. I have considered the submissions made by learned counsel for both parties and have had occasion to review the authorities referred to me.

7. The singular issue I am required to determine is whether a clause in an agreement conferring jurisdiction to a foreign court is completely unimpeachable or whether there are instances when a local court can assume jurisdiction even in the face of such a clause in an agreement.

8. Before I consider the main question before the court, the manner in which the preliminary objection has been brought before the court has been contested. Learned counsel for the Plaintiff contends that ouster of jurisdiction cannot be lodged through a preliminary objection but should be brought by way of a substantive motion framed within the Civil Procedure Rules. My quick answer to this issue is that under the Constitution of Kenya, 2010, the issue would fall within the ambit of the overbearing procedural technicalities that the constitution decries in favour of substantive justice. However, I am also alive to the holding in the case of **Mukisa Biscuit Manufacturing Company limited v. West End Distributors Limited (1969) EA 696** where the Court of Appeal held that an objection to the jurisdiction of the court was an example of a point of law which could be argued as a preliminary point. The court held that such a point needed not be brought by way of a proper motion seeking dismissal of the suit. I would therefore sustain the preliminary objection on the question of the form under which it has been introduced to the court.

9. Spirited arguments were exchanged between the parties as to whether or not the defendant, Damco Logistics Kenya Limited was part of Maersk Kenya Limited or Maersk Group hence whether the Agreement between Maersk Kenya Limited and the Plaintiff was binding upon it as to render the jurisdiction clause relevant in this matter. I have taken the liberty to study the Agreement of 1<sup>st</sup> January 2007 and to the best of my understanding have found no express or implied indication that the Defendant is a member of the group of companies described in the Agreement as "Maersk Logistics' Group". Neither can I make out a basis to suppose that the Defendant company is owned or controlled by A.P. Moller – Maersk A/S or whether it is a subsidiary, agent or sub-contractor of any company falling within the said categories. The affidavit sworn on 10<sup>th</sup> October 2011 by Terry Ngure to which the court was referred to by learned counsel for the Defendant, at paragraph 3 thereof merely states that the parties to this suit entered into the Agreement for Transport Services. That agreement is indeed the Agreement between Maersk Logistics Kenya and the Plaintiff. Nothing in the affidavit goes on to amplify the relationship between Maersk Kenya Limited or Maersk group and the Defendant. In the end, it would be stretching to the wildest of imagination for this court to suppose that the defendant company is a member of Maersk Kenya Logistics and therefore that the Agreement is an agreement to which the Defendant is a party. The preliminary objection therefore stands to fail on the basis that the Agreement is not one between the parties to the suit in this matter.

10. However, even if both parties were shown to be parties to the Agreement for Transport Services dated 1<sup>st</sup> January 2007, this court would still need to consider whether in the present case the existence of the jurisdiction clause in the Agreement exclusively subjecting dispute resolution to English

Courts would be sustainable within the established legal threshold regarding ouster of jurisdiction conferred on foreign courts. The *locus classicas* on this issue remains the case of **United India Company Ltd vs. East African Underwriters (Kenya Limited [1985] KLR** in which the Court of Appeal considered the circumstances under which Kenyan courts can assume jurisdiction notwithstanding a clause in an agreement conferring jurisdiction on a foreign court. In that case, the Court began by appreciating the general rule 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 a strong reason for not keeping them bound by their agreement”.***

The above position was guided by the general rule enunciated by Cairn LJ in the **Makefjell [1976] 2 Lloyd’s Law Reports** as follows:

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

Having warned itself as above, the court then went on to lay the criteria for departure from the general rule as follows:

***‘in exercising its discretion the court should take into account all the circumstances of the particular case and in particular the following matters:***

- i. On 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 defendant genuinely desires trial in the foreign country or is 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 the claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country”.***

11. Applying the above criteria to the instant case, it is fairly obvious that with regard to criterion (i), the place of performance of the contract is Kenya and the evidence relating to the suit herein is wholly available in Kenya. It is also not difficult to make the finding that the convenience and expense of trial as between Kenya and England would favour Kenya. The subject matter claimed in the Plaintiff filed on 19<sup>th</sup> July 2011 is a sum of Kshs. 9,339,720.00 being freight and transport charges payable by the defendant to the plaintiff for commensurate freight and transport services done exclusively within Kenya. The claim is fairly straightforward. Litigating such a claim in England would attract expenses that will easily exceed the sum claimed owing to legal costs, transport and subsistence expenses and other attendant costs of getting counsel and witnesses to England. Only a mischievous litigant would want to submit a claim of the present magnitude to such an expensive forum for litigation.

12. With regard to criterion (ii), it is well established that English law and Kenyan law do not differ in any material way especially as regards commercial disputes founded on contract. The Kenyan Law of Contract Act, cap 23, is indeed the written law that wholly imports English Law of contract to Kenya. The Act is described as:

***“An Act of Parliament to apply the English common law of contract to Kenya, with certain modifications”.***

Section 2(1) of the Act then crystallises application of English Law of Contract to Kenya. I need not say more.

13. As regards criteria (iii), (iv) and (v), it is fairly clear that the parties are more connected to Kenya than to England by virtue of being Kenyan incorporated companies and by virtue of the place of performance of the contract being Kenya. On whether the defendant genuinely wishes to litigate the matter in England, we have already stated that only a mischievous litigant would want to submit a claim of the present magnitude to such an expensive forum for litigation of the dispute. It is also for the same reason clear that litigating in London would be prejudicial to the Plaintiff.

14. For the above reasons, only one conclusion compels itself to me and which is that the preliminary objection is hereby dismissed with costs to the Plaintiff.

15. I further direct that the Plaintiff’s Notice of Motion dated 23<sup>rd</sup> September 2011 be fixed for hearing within 14 days from today.

IT IS SO ORDERED.

DATED AND DELIVERED in Nairobi this 19<sup>th</sup> day of January 2012.

**J. M. MUTAVA**  
**JUDGE**