



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 149 OF 2010

CANELAND LIMITED.....PLAINTIFF

-VERSUS-

JOHN DEERE (PROPRIETARY).....DEFENDANT

RULING

On the 29th of September, 2010 the plaintiff **CANELAND LIMITED** a Limited Company incorporate in the Republic of Kenya with its registered offices in Kisumu moved the court by way of a plaint claiming that the defendant **JOHN DEERE (PROPRIETARY)LIMITED** a limited liability company incorporated in the Republic of South Africa has by its acts and/or omissions frustrated, undermined and negated Global Operating Module and fundamentally breached the dealer agreement between the parties causing a complete failure of consideration and rendering the contract substantially incapable of performance and that having so breached the dealer agreement the defendant purportedly gave notice of termination of the agreement. The plaintiff claimed violation of Sections 48 & 50 of the Kenya Constitution despite clause 9.9 of the dealer agreement stipulating that the law applicable is the law of the Republic of South African and the forum for adjudication of any dispute would be under the arbitration founder of South Africa, the plaintiff sought for the following Orders:-

- a) **General, exemplary and aggravated damages for misrepresentation.**

- b) **Specific performance of the exclusive agricultural dealer agreement in accordance with the terms thereof.**

- c) **A declaration that Clause 9.9 of the exclusive agricultural dealer agreement is unconstitutional and therefore unenforceable and of no effect in the Republic of Kenya.**

- d) **A permanent injunction restraining the defendant by itself or through its officers, employees servants and/or agents from terminating the exclusive agricultural agreement on the grounds stipulate in the letter of termination.**

e) **In the alternative to D, a temporary injunction restraining the defendant by itself or through its officers, employees, servants and/or agents from terminating the exclusive agricultural dealer agreement on the grounds stipulated in the letter of termination pending the hearing and determination before an arbitration panel constituted under the Arbitration Foundation of Southern Africa of the dispute between the parties.**

f) **The costs of this suit both party and party as well as client and advocate together with interest thereon at court rates from the date of the filing hereof and until payment thereof in full.**

g) **Any other or further relief as the court may deem just and fit to award.**

Simultaneous with the plaint was filed under certificate of urgency a chamber summons under Order XXXIX Rule 2, Order L Rule 2 and Order V Rule 17 of the old Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Act Sections 48 and 50 of the Constitution.

The application sought for the following Orders:-

1. Service be dispensed with in the first instant for the hearing hereof ex parte and for the issue of orders of temporary injunction in terms of prayer 2 herein pending the hearing hereof *inter partes* and for the granting of prayer 4 herein.

2. The defendant, its employees, servants and/or agents be restrained by orders of injunction from terminating the exclusive agricultural dealer agreement pending the hearing *inter partes* of this application.

3. The defendant, its employees, servants and/or agents be restrained by orders of injunction from terminating the exclusive agricultural dealer agreement pending either the hearing and determination of this suit or in the alternative before the hearing and determination before an arbitration panel constituted under the Arbitration Foundation of Southern African of the dispute between the parties.

4. Service of this application, of any order issued and of summons to enter appearance and the notification of the date for hearing be effected upon the defendant by means of the service thereof upon the Commercial Attach'e at the High Commission of the Republic of South Africa in Nairobi or by such other means as the court may direct.

5. The costs of this application follow the cause.

The application was supported by the affidavit of **MR. MANMINDER SINGH PANDHAL** and on the grounds on the face of the application.

The grounds upon which the application was based are that; the purported termination of the agricultural dealer agreement is an act in breach and compounds earlier acts of fundamental and substantial breach by the defendant; the granting of the orders sought shall protect and preserve the plaintiff's Constitutional right to access fair justice; the plaintiff unless granted the orders shall suffer disruption of its business in the distribution and dealership in **John Deere** equipment, parts, products and risks cancellation of orders and exposure to contractual claims; its business and reputation would be irretrievably broken the defendants would have been in breach of the dealer agreement and the Global Operating Module (GOM) under conceived by proprietor of **John Deere** brand; lastly the defendants may replace the plaintiff as the authorized dealer.

The defendant objected to the application by filing a notice of preliminary objection as follows:-

1. Article 165 of the Constitution of Kenya does not authorize the High Court of Kenya to disregard private

international law on the status of the choice of law and exclusive jurisdiction clauses in internal commercial agreements and assume jurisdiction over persons outside Kenya.

2. The defendant is a foreign corporation incorporated in the Republic of South Africa and does not trade in the Republic of Kenya nor does it have a domicile office in the Republic of Kenya. The High Court of Kenya cannot assume jurisdiction as matters arising in the Exclusive Agricultural Dealer Agreement dated 2nd October, 2009 are to be governed by and implemented in accordance with the laws of the Republic of South Africa.

3. The jurisdiction of the High Court of Kenya has been contractually ousted by the exclusive Agricultural Dealer Agreement dated 2nd October, 2009.

4. The parties to this suit have irrevocably and unconditionally agreed to have their dispute determined by arbitration by the Arbitration Foundation of Southern Africa (FSA), Johannesburg.

5. The defendant has not been served with Notice of Summons in accordance with the provisions of Order 5 Rule 27 of the Civil Procedure Rules.

6. The ex parte order for injunction can only be granted once for not more than 14 days and cannot thereafter be extended. The ex parte order made on 29th September 2010 expired on 13th October, 2010 and cannot by law be extended. Any extension would amount to a nullity.

7. The suit should be dismissed with costs.

In support of the preliminary objection **Mr. Gichuhi** for the defendant argued that this court has no jurisdiction to hear this matter in view of the contract between the parties, that any dispute between them will be determined in accordance with the laws of the Republic of South Africa by 3 arbitrators. That the Kenyan Arbitration Laws allow application of International Law and the court ought to respect wishes of parties in a contract. Counsel further referred to Article 159(2) of the Constitution of Kenya, 2010 and submitted that under the said article courts are encouraged to adopt alternative dispute resolution mechanism especially arbitration.

The plaintiff's counsel **Mr. Okero** on his part argued that the issues before court cannot be disposed of by way of a preliminary objection as the court will have to examine facts of the case to determine the issues raised. He further contended that the plaintiff has not denied the arbitration in South African but that his Constitutional rights have been violated, which he argues, raises the question as to whether rights of persons and duties of institutions are subservient to Kenyan Laws, whether Kenyan Law is supreme to International Law and whether international partners need to observe the Constitution of Kenya. He also stated that they are seeking for a declaration that the arbitration clause is illegal.

Both parties wish so have the court determine the issue of jurisdiction and others based on the contract between the parties. The defendant cites lack of jurisdiction due to the contract clause relating to the law applicable incase of any dispute that may arise between the parties (the arbitration clause). From the pleadings the documents that created the contractual obligation between the parties are the Agricultural dealer agreement and the Global Operating Model conceived of by **Deere & Company Incorporated of Moline, Locna, USA**, proprietors of the **John Deere Brand**.

The plaintiff on the other hand while citing breach of the said documents also seeks the protection of the local laws, although the plaintiff admits that there is a clause on arbitration, it invokes the Kenyan Constitution, 2010 as a basis to oust the said clause.

Both parties have cited authorities for and against whether courts intervention where parties are bound by contractual agreement ousting its justice. This court may at some stage determine whether in this instance this court has jurisdiction or if the same was been ousted. However at this stage, for consideration is whether the issue of jurisdiction can be determined by way of a preliminary objection.

The issue of jurisdiction is an issue of law, however in this instance in order to arrive at a determination the court will inevitably have to consider the contracts binding the two parties.

In the notable case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED vs WEST END DISTRIBUTORS LIMITED** {1969} E. A at 696 at page 701 **Sir. Charles Newbold D. P.** set out what constitutes a preliminary objection. He states *inter alia*:-

“--- a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Coming back to the case before court, although both parties do agree that the disputes arising are to be considered under the laws of South Africa by way of arbitration. However one of the prayers sought is protection before the arbitration process is set in motion. The question that arises therefore is whether the jurisdiction of this court can be ousted entirely by a contract and in particular the exclusive Agricultural Dealer Agreement dated 2nd October, 2009. In the case of **TONONOKA STEELS LIMITED vs THE EASTERN & SOUTHERN AFRICA TRADE & DEVELOPMENT BANK (200)** E.A at 536 the Court of Appeal held *inter alia*:-

“The fact that the arbitration clause provide that English Law would be applicable did not completely oust the jurisdiction of the local courts. The Kenyan courts would still retain residual jurisdiction to deal with peripheral matters to see to it that any dispute or differences were dealt with in the manner agreed upon.”

Is the issue raised by the plaintiff peripheral matters? These are matters that can only be ascertained by considering the application and facts/evidence placed before the court.

The consent order of injunction was initially issued ex parte and thereafter extended from time to time by the consent of the parties the issue of nullity therefore does not arise. As regards the issue of notice of summons this in my view cannot be a ground for dismissal of the suit in view of Section 1 (a) and (b) and the Constitution of Kenya, 2010. For all the reasons stated above, it is the view of this court that the application pending be heard on its merit. The preliminary objection is declined. Costs to abide with the outcome of the case.

DATED AND DELIVERED IN KISUMU ON 18.02.2011.

ALI-ARONI

JUDGE

In the presence of:

..... for the plaintiff/applicant(s)

..... for the defendant/respondent(s)