REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 645 of 2007

SKODA EXPORT LIMITED ……..…..……..PLAINTIFF

VERSUS

TAMOIL EAST AFRICA LIMITED……DEFENDANT

RULING

In the plaint dated 13th December 2007, the plaintiff **M/S Skoda Export Limited** is described as a company wholly owned by the Government of the **Czech Republic**, while the defendant is described as a limited liability company incorporated in the Republic of Uganda but having its place of business in Kenya. It is also alleged that the defendant is a subsidiary of **Tamoil Holdings Africa Limited** and also part of the **Tamoil Group of Companies**.

It is contended in 2005, the Government of Kenya and Uganda through their joint co-ordinating committee invited bidders to submit proposals for the development of the Kenya-Uganda oil product pipeline extension through a request for proposals. The project to be undertaken is a substantial, which presents a unique opportunity to contribute to the economic development of East and Central Africa and in particular Kenya and Uganda. The joint coordinating committee allegedly pre-qualified 12 firms including plaintiff and defendant's consortium, based on information previously given. The intention was to get a project developer who could build, own, operate and transfer the petroleum products and finally transfer the facility back to the respective Governments after a period of 20 years.

It is alleged that the defendant invited the plaintiff to partner with it, in submitting a proposal, wherein the plaintiff, defendant and a contract consultant known as **Penspen Limi**ted formed a consortium to submit a response to the request for proposals for the Kenya- Uganda oil pipeline extension project.

In a contract entered into between the plaintiff and the defendant on 29th October 2005 and referred to as a memorandum of understanding, the defendant acknowledged that the plaintiff would be the Engineering procurement and construction contractor for the project in the event that the defendant which was the lead firm in the consortium won the tender. By a letter dated 21st July, 2006, the joint coordinating committee informed the defendant that the proposal by **Tamoil Group/Skoda Export** and **Penspen** had been found to be most advantageous and invited the consortium to negotiations on the contract after the award of the tender. And by a letter dated 27th July, 2006, the defendant allegedly informed the plaintiff that the consortium was poised to win the tender and had been invited for negotiations on the contract with joint coordinating committee in **Kampala, Uganda** on 17th August 2006.

The parties among others had signed a comprehensive and substantive agreements between themselves in case a dispute arose concerning their relationship and in the management and operation of the project. The central one to this dispute is the arbitration agreement dated 22nd March, 2007, which the plaintiff

relies on in seeking the prayers in the plaint and the application dated 13th December, 2007. The plaintiff contends that the contract entered into by the parties provides for arbitration in the event of a dispute arising. And that it has declared a dispute as a result of the defendant's actions and has given notice thereof to the defendant, of its intention to commence arbitration proceedings in the event that the defendant does not refrain from breaching the contract.

It is the case of the plaintiff that unless restrained by this Honourable court by way of an injunction, the defendant intends to continue in the breach of the contract and to illegally remove the plaintiff from the consortium which was awarded the contract for the project. The plaintiff also contends that the contract agreement dated 22nd March, 2007 contains an arbitration clause at clause No.12 thereof which provides for arbitration under the Rules of Arbitration of the International Chamber of Commerce Paris with the place of arbitration being **London**, **England**. And to show its intention, the plaintiff through its legal counsel on 20th November 2007 served a notice upon the defendant to withdraw its invitation to tender and to enter into an Engineering, Procurement and construction contract with the plaintiff. The plaintiff has also informed the defendant that in the event that the defendant fails to withdraw its invitation to tender immediately, the plaintiff will move for arbitration under the International Chamber of Commerce. It appears the defendant did not adhere to the invitation and demand to it by the plaintiff. The negotiation outside the legal process appears to have hit a dead end, making the plaintiff to seek injunctive remedies pending the resolution of disputes between the parties in arbitration under the Rules of the International Chamber of Commerce.

The plaintiff has now come to this Honourable court seeking prayers No. 2 and 3 in the Chamber summons dated 13th December, 2007. For clarity the prayers sought are:

(2) An injunction be issued restraining the defendant from inviting and or receiving any bids for the tender for the award of the Engineering, Procurement and Construction (EPC) Contract, pending the hearing and determination of this application and the reference to Arbitration.

(3) Pending the hearing and determination of this application and the reference to Arbitration, the defendant whether by itself, its servants, agents and or employees be restrained until further orders of the court from doing the following acts or any of them, that is to say,

a. Breaching the agreement between the parties made on the 29th of October 2005,

b. Breaching the contract between the parties made on 22nd March 2007,

c. Proceeding in any manner whatsoever with the tender process arising from the Invitation to Tender and the Instructions to Bidders dated 30th October 2007 for the provision of Kenya –Uganda Pipeline Extension Project between Eldoret (Kenya) to Kampala Terminal in (to be constructed in Uganda), including upgrading of the existing Jinja Terminal, Engineering, Procurement, Installation, Construction, commissioning and Start-up.

d. Inviting, negotiating or in any other manner howsoever, entering into an Engineering, Procurement and Construction contract with any other party other than the Plaintiff for the Kenya-Uganda Pipeline Extension Project between Eldoret (Kenya) to Kampala Terminal in (to be constructed in Uganda), including upgrading of the existing Jinja Terminal, Engineering, Procurement, Installation, construction, commissioning and Start-up.

At the interparties hearing the defendant filed and served a notice of preliminary objection in that this Honourable court has no jurisdiction to entertain and determine either the suit or the chamber summons dated 13th December 2007 for the following reasons:

(1) The arbitration Act 1995 has no application to the contract dated 22nd March, 2007.

(2) The contract dated 22/3/2007 alleged to have been breached was made in Prague in the Czech

Republic.

(3) The plaintiff is a Czech company while the defendant is a Ugandan company.

(4) The proper law of the contract dated 22nd March, 2007 is the Law of England and Wales.

(5) The seat of the proposed arbitration is London, England.

(6) The Honourable court has no jurisdiction over the proposed arbitral proceedings and

(7) The curial law of the proposed arbitration proceedings is English law.

Mr. Ohaga learned counsel for the defendant canvassed the preliminary objection on behalf of the defendant, while **Mr. Kiragu Kimani** submitted the case of the plaintiff. **Mr. Ohaga** urged me to consider the following issues namely;

(1) It is acknowledged and indisputable fact that the plaintiff is a company owned by a foreign country, while the defendant is a company incorporated in the Republic of Uganda.

(2) The contract relied on by the plaintiff is setting out the rights to have the dispute to be resolved by an arbitration is a contract dated 22nd March 2007.

(3) That it is instructive to note that the said contract is made in Prague in Czech Republic.

(4) The provisions of clause No.13 of the contract states that all relations between the parties and the legal consequences, validity of the contract are to be governed and construed with the laws of England and Wales.

(5) The arbitration is to be conducted under the Rules of arbitration of International Chamber of Commerce Paris.

(6) The place of arbitration is to be in London in England.

According to **Mr. Ohaga** Advocate, the contract dated 22nd March, 2007 has no connection whatsoever with **Kenya** in the face of it, therefore this court has no powers to grant an injunctive relief under Section 7 of our Arbitration Act No.4/1995. **Mr. Ohaga** Advocate posed the question that: "**Does our arbitration Act have any application to a Czech company contracting with a Ugandan company which have decided that they should be governed by the laws of England and Wales? And that their dispute should be resolved in London.**

Mr. Ohaga further submitted that under section 2 and 3 of our arbitration Act, Arbitration is consensual method of dispute resolution and it is incumbent upon parties in domestic or international arbitration to elect whether the laws of Kenya would apply in the determination of their dispute. And that having determined the Laws of England and Wales should apply to their contract, they have clearly excluded ourArbitration Act No.4/1995. He referred me to the **Channel Tunnel Group vs Balfour Beatly Ltd**. **[1993] 1 All E. R. 664**, where the House of Lords applying section 12(6) of the Arbitration Act 1950, which is similar to our section 7 of the Arbitration Act, which gives the power to grant an interim measure of relief pending referral or determination of the dispute to arbitration held;

"**where the court made an order staying an action pending a foreign arbitration, it had no power under section 12(6) of the 1950 Act to grant an interim injunction since none of the powers conferred on the court by that Act applied to arbitrations conducted abroad under a law other than English law. Accordingly the chosen curial law of the arbitration being Belgian law the court had no power under section 12(6) to grant an interim injunction requiring the respondents to continue work on the cooling system pending the decision of the power or the arbitrators".**

Mr. Ohaga Advocate contended that assuming that this court entertains the application and grants an injunction, sets a time frame for the arbitration, how it going to supervise the proceedings, which would be conducted outside its jurisdiction. In his view this court is being asked to exercise a power in respect of proceedings hereafter it would have no control over, since the dispute is to be determined under the laws of England and Wales.

Mr. Kimani learned counsel for the plaintiff/applicant responded by saying that they recognize that we are dealing with a contract for the carrying out of works in Kenya and Uganda. And that part performance of the contract is to take place in Kenya, therefore the subject matter of the dispute is being performed in Kenya.

He also contended that this court has supervisory jurisdiction to supervise the acts and conducts of the parties as it pertains to any contractual dispute. And any orders issued would not be in vain, for the court can stop performance of the contract in Kenya hence there is no way of getting away from the High court in Kenya.

According to **Mr. Kimani Kiragu** Advocate, it is permitted to go before a municipal court to obtain an interim measure of protection. And it cannot be that the arbitral tribunal is powerless if an order issued was disregarded. The parties can apply to any competent judicial authority for an interim or conservatory measures and article 23(2) of the International Chamber of Commerce permits aggrieved parties to apply to Municipal courts for an interim protection pending arbitration. He referred me to the case known as **Tononoka Steels Ltd. Civil appeal No.255/98 (2002) 2 E.A. 536**, where **Kwach JA** held;

"**Turning now to the arbitration clause, it was submission of Mr. Muthoga for P.T.A. Bank that by providing in the agreements that they would be governed and construed in accordance with the Laws of England and that any dispute or difference between the parties shall be finally settled by the rules of conciliation and arbitration of the International Chamber of Commerce sitting in London and that the arbitration award shall be final are binding on both parties, amounted to a complete ouster or exclusion of the jurisdiction of Kenya courts. With respect, I do not think that this submission is correct. While the jurisdiction to deal with substantive disputes and differences is given to the International Chambers of Commerce in London, the Kenya courts retain residual jurisdiction to deal with peripheral matters and see to it that any disputes or differences dealt in the manner agreed between the parties under the agreement. It would be absurd to suggest that a borrower, whose security is being sold in Nairobi illegally by P.T.A. Bank cannot approach the High court for a temporary injunction, because I cannot see how in those circumstances the International Chamber of Commerce in London can be of any assistance to him. The Kenya courts must retain the power to look at the securities and instruments be in a position to tell P.T.A. Bank in an appropriate case, that while the dispute is being referred to London for arbitration and final determination. It cannot realize its security in the meantime. That in my judgement must be what the officious bystander would have said he understood the parties to those agreements had in mind when they opted for arbitration in London".**

And because of the above proposition **Mr. Kimani** Advocate was of the view that the laws applicable does not take away the jurisdiction of the High court to give an interim order of protection. And if the intention of the parties was to take away the powers of this court then, that has to be expressly provided in the contract. Because they say the seat of arbitration in England, the law applicable is that of England and Wales and the rules of the International Chamber of Commerce cannot take away the jurisdiction of this court.

In short it is the position of the plaintiff that the provisions of section 7 give this court powers to issue an order on interim measure. And that section 7 is not incompatible with the arbitration agreement. In an arbitration agreement the forum for the adjudication of a substantive dispute and the forum for seeking an interim measure of reliefs is different. And it does not matter whether the plaintiff and/or defendant have no place of business in **Kenya** since they also do not have a place of business in **United Kingdom**, the seat of arbitration. According to **Mr. Kimani** advocate, the present proceedings are intended to achieve an interim relief pending arbitration. It is meant to stop the defendant from entering into a contract with

any other party, therefore he urged me to disallow the objection with costs.

I have considered the pleading filed by the parties in this suit. I have also taken into consideration the rival submissions made by **Mr. Ohaga** and **Mr. Kiragu Kimani** on behalf of their clients. The authorities cited to me have also not escaped my attention and consideration. Having done so, I get the view that the central issue for my determination is whether or not this court has jurisdiction to entertain the suit as presented by the plaintiff. In my understanding the issue of jurisdiction is so fundamental to any case for without jurisdiction the court has no powers to deal with the dispute. It does not matter whether the cause of action is attractive or one which can ordinarily succeed against the defendant for jurisdiction is the basis and/or foundation of the powers the court would be called to invoke and exercise.

In the case of owners of the motor vessel **Lillian s v Caltex Oil Kenya Limited, Nyarangi JA** held;

"**With that I return to the issue of jurisdiction and to the words of section 20(2) (m) of 1981 Act, I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before. Jurisdiction is everything. Without it a court has no power to make one step. Where act 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.**

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal depends on the existence of a Particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction, but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction, which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given".

See words and phrases legally defined volume 3 i – n.

In my understanding the limits of the court in exercising a particular jurisdiction must be ascertained before the court can proceed with the matter any further. If parties by their action or omission impose or restrict the mandate and powers of the court to deal with a particular matter, the court cannot *suo moto* invoke what is contrary to statute and intention of the parties.

Jurisdiction is meant to facilitate and guide the administrators of justice so that matters that come before it are determined in a fair, orderly and predictable manner, a such a court cannot not embark or undertake a deliberation and/or adjudication in a manner where it has no powers to do so.

The basis of the plaintiff's claim is a contract dated 22nd March, 2007 and the purpose of this litigation is said to be the pursuant of an interim injunction pending arbitration. According to clause No.12;

"**All and any dispute arising from and in relation to this contract that cannot be resolved by amicable agreement between the parties;**

(a) Shall finally be settled under the Rules of arbitration of the International Chamber of Commerce (Paris).

(b) The dispute shall be settled by one or more arbitrators appointed in accordance with these Rules

(c) The arbitration shall be conducted in the English language and

(d) The place of arbitration shall be London, England.

And clause No. 13 states;

"**all relations between the parties under this contract and the legal consequences thereof, including the validity of this contract and the consequences of invalidity of this contract are governed by and construed in accordance with Laws of England and Wales".**

Arbitration is a method of dispute resolution that parties may adopt and it is incumbent upon parties doing so, to determine the seat of arbitration, and the laws applicable in the determination of their dispute. The parties in this dispute decided that the seat of arbitration is **London**, **England** and the law applicable to be the laws of England and Wales. It is also pertinent to note both parties are a foreign owned and registered companies. The plaintiff is a company owned by the Czech Republic, while the defendant is Ugandan company but both companies are engaged and/or have a stake in the extension of the pipeline from Eldoret to Kampala.

The question for my decision is whether a company owned by a foreign sovereign state and a company incorporated in another foreign country can resolve part of their dispute and/or difference in a manner contrary to their agreement.

The plaintiff has come to this court and seeks an interim protection, in support of a cause of action which the parties had agreed should be subject of a foreign arbitration so that the agreed method of adjudication should take place since the cause of action remained potentially justiciable before the English court. The case of the plaintiff presupposes the existence of an action, actual or potential claim or substantive reliefs which the High court of Kenya has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary entitlement to it. In my view the thing that is sought to restrain the defendant from doing in Kenya must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment. No doubt the final reliefs will be granted by the arbitrators in the place of arbitration. No doubt the contract expresses the intention of the parties as to the place and laws applicable in their dispute. It is plain and needs no interpretation that clause No.12 and 13 was carefully drafted and it is equally plain that all concerned must have recognized the potential weakness of their relationship and concluded despite the project being conducted in Kenya and Uganda, there was a balance of practical advantage that any dispute be conducted and concluded in London. Having made that choice, I think it is in accordance to presume that those who make agreements for the resolution of disputes must show good reasons from departing what is contained in their mutual document. Speaking for myself, I would endorse the proposition that the court is against encroachment on the parties agreement to have their commercial disputes decided by their chosen jurisdiction. It is in only exceptional situation, that the court would depart from the intention of the parties.

From the evidence on record, the parties appear to be large commercial enterprises, the plaintiff representing the interest of the **Czech Republic**, therefore it can be said that they had ample opportunity and reflection on the complexity and difficulty that may arise from their relationship. In my view they must have negotiated at arms length in the light of what is at stake and their respective experience of construction constructs and of the types of disputes which typically arise under them and of the various means which can be adopted to resolve such likely and/or anticipated disputes.

In arbitration matters the court usually exercise supervisory and/or supportive role and it is for that reason that the court should bear in mind that it is a stranger to the arbitration agreement. In my understanding being a stranger to the arbitration agreement between the parties, the court should always be reluctant to displace the intention of the parties as expressed in their mutual contract.

Mr. Kimani learned counsel for the plaintiff submitted that this court has jurisdiction because the contract is to be partly performed in Kenya. I agree the main contract is for the extension of the Eldoret Kampala pipeline but in my view that is not an issue in this dispute since the parties have expressly

chosen to be governed by the laws of England and Wales in their various relationship. They cannot therefore be allowed to invoke the jurisdiction of this court independently and in contravention of any prior consent by the parties. The performance of the contract and the place where the contract is to be completed cannot be a basis to accord this court a jurisdiction, which was mutually and consensually ousted by the parties. It is also no answer to say Article 23 of the International Chamber of Commerce allows parties to apply to any competent judicial authority for interim or conservatory measures. The question is whether this court is a competent judicial authority. I do not think so. I will revisit that issue later in this ruling.

In my understanding the jurisdiction of the court in arbitration matters is either given by statute or by consent of the parties or that it is in the general interest of justice to intervene to give an interim measure of protection. A court does not become a competent judicial authority by virtue of a party coming before it with a dispute which requires a judicial intervention. The intervention of the court can only arise when there is, in existence judicial mandate to do so. The idea of the place and law applicable to the dispute between the parties was mooted and mutually agreed between the parties and having mutually agreed to refer any dispute arising between them to International Arbitration, none of them has any recourse to any Municipal court like ours.

The parties also agreed that the agreement be construed and governed in accordance with the **Laws of England and Wales**, no other laws including the laws of Kenya have any application to the dispute. In my humble view the courts of this country cannot be moved under local laws for any relief pursuant to the agreement between the parties herein. I add to say that the courts in this country cannot be called upon to adjudicate in support of a cause of action which parties had agreed should be the subject of a foreign arbitration. The parties knew that the cause of action and all residual issues remained potentially justiciable before the English courts.

The parties in their agreement dated 22nd March, 2007 conferred exclusive jurisdiction in English courts, thereby restricting any other court from venturing into the business dealings, disputes and differences between them, therefore this court is empowered to respect the rights of the parties to choose the place where they intended to resolve their disputes. The parties primarily and ordinarily knew that the place of performance of their would contract was to be in Kenya and Uganda but clearly excluded such jurisdiction and preferred method of enforcing their claim.

This court makes people abide by their contract and therefore will restrain a party from bringing an action which he is doing in breach of his agreement with the other party. The parties herein expressly agreed that any dispute shall otherwise be determined in terms of clause No.12 and 13 of their agreement. Clause No.13 states;

"**All relations between the parties under this contract and the legal consequences thereof, including the validity of this contract and the consequences of invalidity of this contract are governed by and construed in accordance with laws of England and Wales".**

In my view this court cannot assert a personal jurisdiction over parties who are foreigners and who have chosen the method of determining their dispute in a formal written document. This court has no territorial jurisdiction to enforce what the applicant calls protection and interim measures. In arbitration matters, the court is usually a stranger since the parties in appreciation and reflection of the real issues, gave remedies for any anticipatory disputes and/or claims. As stated earlier, the role of the court in arbitration matters is purely supervisory and supportive jurisdiction and it is incumbent upon the parties to ensure that they do not exclude a particular jurisdiction in determining their dispute. If indeed such exclusion exists, the court has no role to play except as was otherwise ably stated by **Kwach JA** in the **Tononoka** case. I do not sincerely think the **Tononoka** case has any reference to the present matter since the parties in that case were more concerned in the preservation of a security that was being sold in Nairobi. I am in total agreement with **Mr. Ohaga** Advocate that the **Tononoka** case has no relevance to the dispute between the plaintiff and defendant.

It is also my determination, the competence or otherwise of a judicial authority must flow from the laws

and statutes under which this court operates. That is why section 2 of the arbitration Act No.4/95 is crucial to the question of jurisdiction. Section, 2 does not give an absolute jurisdiction but it says;

"**except as otherwise provided in particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration".**

Section 2 does not say that our Arbitration Act shall apply to all or any arbitration whether domestic or international. The exclusion given supports the intention of the parties to have their disputes determined in Kenya whether the arbitration contract is entered in Kenya or outside. The option and/or election to choose the relevant jurisdiction and the relevant applicable laws is reserved for the parties. In this case the parties provide that their legal relations shall be governed by the laws of England and Wales. I pose to ask whether Parliament intended that the power to grant an interim relief should be exercised in respect of an arbitration to be conducted abroad under a law which is not the laws of Kenya. The answer to that question is plain and obvious for two reasons;

(1) Parliament cannot have intended section 7 to apply to a foreign arbitration because the chosen mechanism was to make those provisions into implied terms of the arbitration agreement and such terms could not be sensibly be incorporated into an agreement governed by a foreign arbitration law.

(2) I can see no justification why parliament should have had the least concern to regulate the conduct of an arbitration process carried on abroad pursuant to a foreign arbitral law.

By saying so, I am not excluding an ordinary citizen or a person who resides or an entity that ordinarily carries on business in this jurisdiction but a well known and reputed company incorporated under the laws of **Czech Republic** and owned by a foreign sovereign state. The applicant must have been in possession of a proper and sound legal opinion when it allowed the inclusion of clauses No.12 and 13 in the agreement dated 22nd March, 2007. In my humble view that underscores an important message to this court that the parties intended to resolve their dispute/difference as per the agreement. They knew substantial part of the main agreement was to be performed in **Kenya** and **Uganda**. However they opted to limit and restrict the jurisdiction of courts in these two states, therefore the parties must confine themselves to their bargain.

All in all it is my decision that rule 23 of the International Chamber of Commerce (Paris) which permits a party to apply for an interim measure of relief cannot be used by parties who in their own document restricted the laws applicable incase a dispute arises. The rules of the international chamber of Commerce by themselves cannot cloth a Municipal court with jurisdiction. I therefore make a finding that this court is not a competent judicial authority to give/grant the orders sought by the plaintiff. The facts and circumstances in this case under my determination is incompatible with section 2, 3, 7 and 10 of our Arbitration Act No.4/95. In my view a party cannot avail itself on the rules of challenge when the law applicable is that of England and Wales, the rules being International Chamber of Commerce Rules. It means the relationship between the parties are to be governed by a completely different law. I agree with **Mr. Ohaga** advocate that the plaintiff cannot elect to say that under section 7 it can come to Kenyan courts for an interim relief, when other provisions of our Act cannot apply to the circumstances at hand. I make a decision that the parties having promised to take their disputes to a particular jurisdiction, that is where the plaintiff ought to go and with the assistance of a compass, I think the plaintiff knows the direction to the seat of arbitration. If it needs this court's reminder, the answer is that the place of arbitration is in London, England, in accordance with Laws of England and Wales, the rules being the Rules of arbitration of the International Chamber of commerce (Paris).

I make another reminder to the plaintiff that the contract language and the language of communication is English. If it is not proficient in English it can seek the assistance of the persons who drafted the agreement dated 22nd March 2007. For me, I think they strayed onto the jurisdiction of Kenyan courts. And I am sure **Mr. Kiragu Kimani** being a brilliant lawyer would be in a position to direct the compass of the plaintiff's ship which appears to have lost its direction and/or bearing.

In the premises the preliminary objection dated 23rd January 2008 is allowed with costs to the

defendant.

Dated and delivered at Nairobi this 25th day of February, 2008.

M. A. WARSAME

JUDGE