



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 237 of 2003

**VALENTINE INVESTMENT COMPANY (MSA) LTD.....
PLAINTIFF**

VERSUS

THE FEDERAL REPUBLIC OF GERMANY DEFEDANT

R U L I N G

Before the court is an application by Chamber summons dated 31.3.2004 seeking four orders. The first prayer settled by consent. The second prayer is abandoned by the applicant. It remains for argument on prayer 4 seeking stay of this suit which can only be heard and determined by Germany court of law and prayer 5 on costs.

The plaint shows that the plaintiff entered into an agreement with the defendant whose staff German Naval Group which had its headquarters at Giriama Beach Hotel, Mombasa, Kenya.

The agreement was in writing annexed to the supporting affidavit. In the agreement, the address of the defendant is given as “***Giriama Beach Hotel, Mombasa/Kenya***”.

The subject matter of the contract was the supply of general motor vehicles with drivers under conditions specified under Section one of the agreement.

One of the obligations is that the motor vehicle must be insured in accordance with applicable Kenyan regulations and must be licensed for road traffic. Kenyan Regulations governing the aptitude and qualifications of drivers must be observed. The drivers must speak English or German languages. Section 2 relates to payment which is described in Euro currency. The contractor shall take out Passenger Accident Insurance limited to 10 million Kenya shilling per each occurrence of damage or loss. The language of the agreement is English and German languages. In case of disputes concerning the interpretation of its contents the German context will prevail should legal disputes arise from this agreement the venue will be Mombasa. Agreement was executed in Mombasa the first agreement was signed on 9.08.2002 and 8.08.2002 by the parties respectively.

On 22.03.2003 another contract was entered into between the same parties commencing on 23.03.2003 at 12.00 noon terminating on 16.11.2003 at midnight. Will be renewed for 1 month unless terminated by one month’s notice. In this contract the language is specified to be German only and “***in case of disputes before the court arising from the contract the jurisdiction will be Bonn, Germany.***” This agreement is signed by both parties.

Notice of Cancellation dated 22.08.2003 issued regarding contract No. **VERTRAG 3.14/Z TERR**

WR/VOM KENIA/22.03.03. The dispute in court is the unlawful termination of the said contract and damages for breach.

The defendant states that the parties agreed to resolve any legal dispute regarding the second agreement in **Bonn/Germany Court of Law**. And that as result of this foreign jurisdiction clause the proceedings should therefore be stayed.

The first thing to be noted is that in the first two agreements the defendant had submitted to jurisdiction of Kenya courts. It had been agreed that the contracts would be made in both English and German language and if any dispute arose it would be settled in Mombasa. There is no change in the last agreement except to insert that the agreement was to be in German language only and that the jurisdiction clause was changed to exclude Kenya and add “... **a Bonn/Germany Court of Law**”. This being in the middle of the whole agreement the plaintiff agreed to avoid business loss (see par 9 of Replying Affidavit). It is quite clear that the parties were negotiating not on level ground. The plaintiff was disadvantaged. Secondly in the case of **R. vs. International Trustee for the protection of Bondholders HL ALLER L Reports Vol.2 [1937]** it was held where a government makes a contract in a foreign country the case is no exceptional to the general rule that the law applicable to a contract not relating to immoveables is governed by intention of parties not the law of such government. In that case of British Government issued Bond in America repayable at the option of the holder in New York or in London. The House of Lords held that the proper law of the contract was of United States of America.

The ouster clause in contract giving exclusive jurisdiction to foreign court by Kenya Courts was extensively discussed in the Kenyan case of **United India Insurance Co. Ltd. vs. E.A. Underwrites (Kenya) Ltd. [1985] KLR [898]**. This authority is quote by both parties and is Court of Appeal decision. In that case there was a clause in contract conferring exclusive jurisdiction on a foreign court. The application was made to stay the suit instituted in Kenya and the principles for consideration in such circumstances were set out clearly. The court held:

- 1. Kenya Courts have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause in it conferring jurisdiction on a foreign court. The discretion should be exercised by granting a stay of proceedings in local courts unless a strong reason for not doing so is shown.**
- 2. The onus of establishing a strong reason for avoiding the jurisdiction of Kenya courts is on the party who seeks to avoid that jurisdiction and that burden is a heavy one.**
- 3. In exercising its discretion, the court should take into account all the circumstances of the particular case.**

In the present case the facts show that the evidence of drivers and authorities under the traffic and licensing laws are here in Kenya and such evidence would be more readily available in Kenya and it would be convenient and less expensive in Kenya courts the law of foreign courts would not be applicable. Kenya being a common law country the Germans were operating in Kenya and they contracted with Kenya businessmen the plaintiff would be greatly prejudiced by having to sue in a foreign country. Limitation period is not known while in Kenya it is 6 years.

In this case the defendant does not genuinely desire trial in the foreign country they are only seeking procedural advantage. In the agreement the defendant had no obligation to examine the vehicles. Only right to request for replacement of any disabled vehicle within a short period. Previously the defendant had agreed to submit to Kenya courts.

I find the plaintiff did not freely agree on the resolving the disputes. It was pressed to agree under the circumstances. There was no compelling reason to change the forum of settling disputes from Mombasa away in Bonn courts. On either side I have read the affidavit of defendant officer Jens-Uwe Schroder apart from the three officers he mentions who may travel from Germany, the plaintiff would be calling evidence also expert evidence from Kenya where the contract has to be performed and was part

performed and therefore the plaintiff would incur heavier burden of expenses and as I have said the defendant had no obligation to examine the vehicles, the contract was for supply of road worthy vehicles. Looking at the first German language agreement dated 22.3.2003, translated in English for the court it was the obligation of supplier to provide road worthy vehicles. Disabled vehicles were to be replaced within a short time.

In this case, the contract commences on 23.3.2003 and the inspection by the defendant agents was not done until May 5th and August 14th 2003. The contract specified that in case of disabled vehicle replacement be made within shortest time. The defendant failed to comply with this part of agreement. They had no duty to inspect the vehicles if they had complied with the agreement. It is my view that if the plaintiff was to take his suit to Germany it would suffer prejudice. It is also my finding that the plaintiff has shown a strong reason why it should not be ordered to take its case in German court at Bonn.

I dismiss application with costs.

Dated this 24th day of March 2006.

J. KHAMINWA

JUDGE

24th March 2006

For Ruling

Mr. Bryant

Ms Gudka for Kagram

Ruling read in open court in their presence.

Mr. Bryant: -

I apply for leave to appeal. I also apply for certified copies of the proceedings. I apply also stay for 30 days.

Ms Gudka: -

I apply for copy of proceedings certified.

Court: -

Orders granted as prayed. Stay granted for 30 days.

J. KHAMINWA

JUDGE