



**Trans -Africa Energy Limited & another v Alten Re Development Africa B.V & another  
(Civil Suit E023 of 2023) [2024] KEHC 1036 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E023 OF 2023  
RN NYAKUNDI, J  
FEBRUARY 8, 2024**

**BETWEEN**

**TRANS -AFRICA ENERGY LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**KENSID SOLAR SYSTEMS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALTEN RE DEVELOPMENT AFRICA B.V ..... 1<sup>ST</sup> DEFENDANT**

**ALTEN KENYA SOLARFARMS B.V ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Applicant’s application dated 20/11/2023, in which the applicants seeks orders that:
  1. The suit herein be and hereby struck out or dismissed forthwith for want of jurisdiction.
  2. Costs of the suit and the application be awarded to the Defendants.
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by Luis Castellanos on 16/11/2023.

**Applicants’ Case**

3. He deposed that he is the Chief Executive Officer of the I Defendant/Applicant herein. He further deposed that he has read the Complaint, the Notice of Motion dated 8th November 2023, the Supporting Affidavit and the ex-parte Court Order dated 10th November 2023 and where necessary the contents of the said documents have been explained to him by the Defendant/Applicant's Advocates on record.
4. According to the Applicants the suit herein to be struck out forthwith for want of jurisdiction for the reasons stated hereunder, that on 23<sup>rd</sup> June 2014, the 1<sup>st</sup> Defendant/Applicant and the 1<sup>st</sup> Plaintiff/



- Respondent entered into a Joint Development and Investment Agreement ("the JDIA"), by which the Parties set out, among other agreements related to different projects. the preliminary basis for the joint development of a 40 MW' Solar Power Plant thereafter referred to as the Kesses ProJet") through a Special Purpose Vehicle (the "SPV" incorporated by the 1<sup>st</sup> Defendant/Applicant. Clause 3.5 of the JDIA expressly provided that the Parties would enter into the relevant shareholders' agreement to regulate the undertakings of each party and the relationship between the shareholders within the SPV. Subsequently, the 1<sup>st</sup> Plaintiff/Respondent assigned its rights in the SPV of the Kesses Project under the JDIA to the 2<sup>nd</sup> Plaintiff/Respondent through a deed of assignment dated 23, December, 2019.
5. The Applicants maintain that the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Defendant/Applicant entered into an Agreement for the Sale and Purchase of 15% of the Issued Shares in the SPV that is in Alten Kenya Solarfarms B.V the 2<sup>nd</sup> Defendant/Applicant. (hereinafter "the Share Purchase Agreement) dated 23<sup>rd</sup>, December 2019. Further the Applicants deposed that on the same date 23<sup>rd</sup>, December 2019, the 2<sup>nd</sup> Plaintiff/Respondent and the 1<sup>st</sup> Defendant/Applicant entered into a Shareholders Agreement Regarding Alten Kenya Solarfarms. B.V, the 2<sup>nd</sup> Defendant/Applicant amended and restated on 3<sup>rd</sup> March, 2020.
  6. The Applicants further deposed that as part of the Kesses ProJet requirements and as set out in recital (F) of the Shareholders' Agreement, it was agreed that the SP'V (the 2<sup>nd</sup> Defendant/Applicants-would centre into agreements with financial institutions to finance the Kesses Project. That one such agreement is the Equity Support, Subordination and Share Retention Agreement (ESSSRA) between the SPV, its shareholders the 2<sup>nd</sup> Plaintiff/Respondent and the 1<sup>st</sup> Defendant/Applicant) and inter alia the Standard Bank of South Africa Limited and Stanbic Bank of Kenya Limited. Further that the ESSSRA required each shareholder to provide equity contribution and ensure retention of shareholding.
  7. The Applicant further maintains that in the course of performing the ESSSRA, the 2<sup>nd</sup> Plaintiff/Respondent noted that its liquidity would not enable it to meet its obligations under the ESSSRA. which would occasion an event of default against the Standard Bank of South Africa, this resulted in the parties concluding a Loan Agreement dated 27th November 2020 (hereinafter the Loan Agreement") in their capacity as joint shareholders in the SPV. The Applicants further deposed that by the said Loan Agreement, the 1<sup>st</sup> Defendant/Applicant advanced to the 2<sup>nd</sup> Plaintiff/Respondent an amount equal to the required equity to be contributed by the 2<sup>nd</sup> Plaintiff/Respondent in the SPV. In essence, the 1<sup>st</sup> Defendant/Applicant loaned to the 2<sup>nd</sup> Plaintiff/Respondent the amount commensurate to its required equity contribution to the SPV to ensure compliance with the terms of the ESSSRA. That Clause 3 of the Loan Agreement provided that the term of the loan would be 18 months from the date of commercial operation and Clause 4.1 provided that interest would accrue at an annualized rate of 15%. based on interest being compounded daily. Further, that clause 5.2 of the Loan Agreement provided that pending the repayment of any amount due under owing under the Loan Agreement, all distributions due to the 2<sup>nd</sup> Plaintiff/Respondent from the SPV would be applied to the repayment of the loan. According to the Applicants, the dispute before this Court in the end relates solely to the parties rights and obligations under the Shareholders' Agreement and the Loan Agreement.
  8. The Applicants added that three agreements; the Share Purchase Agreement, the Shareholders Agreement and the Loan Agreement provide that the law governing the agreements is the laws of the Netherlands. The Loan Agreement provides that the Court with jurisdiction to hear and determine any dispute arising therefrom is the Courts of Amsterdam, the Netherlands while the Shareholders' Agreement provides that all disputes arising from the agreement are to be resolved by arbitration and that the seat of arbitration shall be the Netherlands. The provisions of the Shareholders' Agreement with respect to dispute resolution apply mutatis mutandis in the Share Purchase Agreement.



9. The Applicants maintain that in view of the express terms of the Shareholders' Agreement and the Loan Agreement, this Honourable Court does not have the jurisdiction to entertain, hear and determine any disputes arising from the Shareholders' Agreement and the Loan Agreement. The Applicants contend that any disputes arising from the Loan Agreement ought to be determined by the Courts of Amsterdam, the Netherlands and the disputes arising from the Shareholders' Agreement ought to be referred to Arbitration and that In any event, such referral can only be done by a Dutch Court of Law.
10. The Applicants further contend that the prayers sought by the Plaintiffs/Respondents in both the Complaint and the Application dated 8<sup>th</sup> November 2023 relate exclusively or substantially to the rights and obligations of the 1<sup>st</sup> Defendant/Applicant and those of the 2<sup>nd</sup> Plaintiff Respondent under the Shareholders' Agreement and the Loan Agreement
11. The Applicants maintain that it is settled law that where the jurisdiction of a Court is called to question and is established that the Court lacks jurisdiction, that Court cannot take any other further step in the suit.

### **The Respondents' Case**

12. The application is opposed by the Respondents vide the Replying Affidavit sworn by Edward Njoroge on 1<sup>st</sup> December, 2023. He deposed that he is the director of the Plaintiffs/Respondents herein.
13. According to the Respondents, the Application as filed and served is grossly misconceived, gravely misplaced, frivolous, vexatious, an abuse of the court process and should therefore be dismissed with costs.
14. The Respondents maintains that the Court has the requisite original jurisdiction to entertain and determine the dispute between the Plaintiffs and the Defendants herein as more particularly set out in the Complaint herein dated 8<sup>th</sup> November 2023.
15. The Respondents deposed that on 23<sup>rd</sup> June 2014, the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant executed a Joint Development and Investment Agreement ("the Investment Agreement" or "the JDIA") and agreed to jointly develop a 40MW Solar Plant known as Kesses 1 Solar Photovoltaic Plant in Eldoret, Uasin Gishu County ("the Solar Plant") and other subsequent solar projects within the Republic of Kenya. That pursuant to Clause 3.5 of the Investment Agreement, the 2<sup>nd</sup> Plaintiff and the Defendants entered into a Shareholder's Agreement ("the SHA") dated \_\_\_\_ 23<sup>rd</sup> December 2019 for purposes of setting out the terms and conditions that would govern the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff's relationship with the 2<sup>nd</sup> Defendant.
16. The Respondent further deposed that as set out in paragraph 15 of the Complaint, it is not in dispute that the 2<sup>nd</sup> Plaintiff entered into a Loan Agreement dated 27<sup>th</sup>, November, 2020 with the 1<sup>st</sup> Defendant in which it was agreed that the 1<sup>st</sup> Defendant would loan USD 3,352,089.10 to the 2<sup>nd</sup> Plaintiff.
17. The Respondents maintain that the execution and existence of the SHA and the Loan Agreement aforesaid did not extinguish and/or alter in any manner whatsoever, the respective obligations of the parties to the Investment Agreement which is still in full force and effect. The parties are still bound to the terms and conditions set out therein.
18. The Respondents further deposed that under the Investment Agreement, it was the understanding of the parties that all the project success fees ("Project Fees") would be shared between the parties in an equitable manner. The following fees would be payable in respect to the Solar Plant ("Project Fees"):



- a. Development Fees: payable to the sponsors of the project and payable by the 1st Defendant.
  - b. Procurement and Engineering Fees: payable by the 1st Defendant for engineering and procurement for the project
  - c. Construction Service Agreement Fees and any surplus under the Construction Management Agreement Costs: payable to the parties in connection with the construction works.
  - d. Modules Procurement Margin Amount: Amount provided for in the Side Letter dated 5th November 2020 signed by the 2nd Defendant and the Contractors.
19. With respect to the Project Fees, it is the Plaintiffs'/Respondents case as set out in the Plaint that the same would be split equitably between the parties as joint developers and project managers of the Solar Plant, based on each party's overall contribution to the success of the implementation of the Solar Plant project. In this regard, the 1st Plaintiff had requested 1st Defendant to provide written confirmation on the apportionment of the Project Fees and further requested an equitable apportionment taking into consideration the amount of time and effort invested by the 1st Plaintiff towards the realization of the Solar Plant. All these are matters and issues governed by the Investment Agreement and not the SHA or the Loan Agreement. These are issues that fairly and squarely belong to the Investment Agreement as contemplated by the parties.
20. Further, it is Plaintiffs case in the Plaint that the 1st Defendant has declined the 1st Plaintiff's demand on Project Fees and instead proposed to apportion the same in accordance with the parties' shareholding in the 2nd Defendant which is not acceptable to the Plaintiffs. This is not a dispute under the SHA as alleged by the Defendants. Indeed, issues on shareholding are not in dispute at all in this case since the same have not arisen anyway.
21. The Respondents maintain that no dispute has arisen between the Plaintiffs and the Defendants on the SHA and the Loan Agreement as alleged by the Defendants in their Application under reply. The dispute herein pertains to the sharing of the Project Fees as contemplated by the Investment Agreement.
22. That to demonstrate that the dispute herein and the Plaintiffs claim is solidly anchored on the Investment Agreement, the Plaintiffs have set out the particulars of breach in paragraph 31 of the Plaint as follows:-

Particulars of Breach on the Part of the 1st Defendant

- a) Failing to pay the 1st Plaintiff USD 8,048,500 being fifty percent (50%) of the net total amount of the Project Fees.
- b) Insisting to have the Project Fees split according to the 1st Plaintiff's and 1st Defendant's shareholding (85:15) in the 2nd Defendant as opposed to splitting the same equally (50:50) in respects to the project.
- c) Failing to adhere to the terms and conditions set out in the Investment Agreement.
- d) Consenting to a reduction of the amounts deposited by the Contractors for the Modules Procurement Margin amount without the consent of the Plaintiffs."



23. Further to the foregoing, the Plaintiffs have sought in the Plaint dated 8th November 2023 inter-alia, the following prayer:
- d) An Order for specific performance of the Joint Development and Investment Agreement dated 23rd June 2014 against the 1st Defendant on the net total amount of the Project Fees and (50%) of the additional Modules Procurement Margin."
24. The Respondents maintain that according to clause 8 of the Investment Agreement, any dispute arising thereunder is to be governed and interpreted in accordance with Kenyan laws and the Kenyan Courts have original jurisdiction to determine any such dispute, like the current one in these proceedings. The said clause read as follows:
8. Laws and Submission
- 8.1 The JDIA will be governed and interpreted in accordance with Kenyan law.
- 8.2 Any dispute, controversy or claim arising from or related to the JDIA, including its breach, termination or voidance shall be submitted to the jurisdiction of the Courts and Tribunals of Kenya."
25. The Respondents further deposed that part of their case as set out in paragraph 30 of the Plaint is that the 1st Defendant is in breach of an understanding and agreement between the parties on the Project Fees being apportioned equitably, taking into consideration both parties' efforts in bringing the Solar Plant to conclusion.
26. Further, Applicants added that their case in the Plaint is that under the Investment Agreement, parties had agreed to jointly develop the Solar Plant and there is no provision in the Investment Agreement which provides that the share participation of the parties dictates the terms of any payments made with respect to the work done by the parties. The payment with regard to the shareholding of the parties is a creation of the 1st Defendant which proposal the Plaintiffs have rejected since it is inconsistent with the spirit of the Investment Agreement. This is essentially the dispute between the Plaintiffs and the Defendants and the relevant Agreement is the Investment Agreement. In light of all the foregoing, the Respondents verily believe that this Honourable Court is clothed with the requisite original jurisdiction to hear and determine the dispute herein. In the circumstances, the Defendants' Application dated 20th November 2023 is hopelessly incompetent and should therefore be dismissed with costs to the Plaintiffs.

### **Hearing of the Application**

27. The application was canvassed vide written submissions. The Defendants/Applicants filed their submission on 13/12/2023 while the Plaintiffs/Applicants filed theirs on 6/12/2023 and also filed further submissions on 21/12/2023 which I have carefully considered

### **Analysis and Determination**

28. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of *The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1. Where Nyarangi J.A. held as follows:

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 it. Jurisdiction is everything. Without it, a court has no power to make one more 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.'

29. Where does jurisdiction emanate from? A Court's jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court of Kenya in the case of Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No. 2 of 2011 stated thus:

A Court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

30. This Court draws its jurisdiction from *the Constitution*. Article 165(3) provides that:

(3) Subject to clause (5), the High Court shall have:

- (a) Unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
  - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
  - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - (iii) any matter relating to Constitutional powers of State organs in respect of county governments and any matter relating to the Constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

31. In the present, case the Applicants contend that the Court herein does not have jurisdiction to hear and determine this suit on the basis that the dispute before it, as disclosed in the Plaint dated 8/11/2023, relates solely to two agreements between the Parties, both of which oust the jurisdiction of the Court of Kenya and provide that the Court of Amsterdam, the Netherlands and an arbitration in Netherlands have respectively the exclusive jurisdiction to determine the dispute arising therefrom. According to the Applicants, it is not what the Plaintiff avers in its Affidavit but the substance of the dispute as revealed in the pleadings that determines whether this Court has jurisdiction. The Applicants cited various clauses of the Joint Development and Investment Agreement, the Share Purchase Agreement



& Shareholders' Agreement and the Loan Agreement to demonstrate that this Court lack the requisite jurisdiction to hear and determine the dispute at hand.

32. The Applicants maintain that in order for this Court to assess the veracity of the monetary claims made by the Plaintiff, the Court would have to interpret the Loan Agreement, the Shareholders' Agreement and the ESSRA, all which oust the jurisdiction of this Court. The Applicants further argued that the Plaintiffs have deliberately and blatantly failed to disclose the various agreements that would inform, where provided, the monetary claims made in the Plaintiff, specifically prayers (b), (c) and (d) of the Plaintiff. According to the Applicants the contractual basis for the claim herein is not the JDIA but the Shareholders' Agreement and the Loan Agreement. The Applicants contended that the only prayer in the plaintiff that makes reference to the JDIA is prayer (d) by which the Plaintiffs seeks specific performance. In respect to this prayer, the Applicants argued that the Plaintiffs have not disclosed any particulars of breach in respect of the JDIA but have simply made reference to the preliminary agreement between the parties and made a claim unrelated to the JDIA. According to the Applicants, this is an attempt by the Plaintiffs to mislead the Court by purporting to expand the scope of the JDIA in a blatant effort to circumvent the binding terms of the Shareholders' Agreement and the Loan Agreement.
33. The Applicants argued that the Plaintiffs/Respondents own pleadings demonstrate that the JDIA is a preliminary agreement that was fully performed upon the conclusion of the Share Purchase Agreement and the Shareholders' Agreement between the Defendants and the 2<sup>nd</sup> Plaintiff. The Applicants contend that in absence of the Shareholders' Agreement, the Plaintiffs would have no basis to claim any project fees or dividends and distributions from the 2<sup>nd</sup> Defendant, more importantly, there is no way this Court can determine the real issue in dispute between the parties without considering the terms of the Shareholders' Agreement and the Loan Agreement. The Applicants maintain that the two agreements expressly oust the jurisdiction of this Court.
34. The Respondents on the other hand maintain that their case as in the Plaintiff is that under the Investment Agreement, parties agreed to jointly develop the Solar Plant and there is provision in the Investment Agreement which provides that the share participation of the parties dictates the terms of payments made with respect to the work done by the parties. The Respondents contend that the payment with regard to the shareholding of the parties is a creation of the 1<sup>st</sup> Defendant which proposal the Plaintiffs have rejected since it is inconsistent with the Spirit of the Investment Agreement, that the position by the 1<sup>st</sup> Defendant on the mode of sharing the Project Fees does not invoke the terms and conditions of the Shareholders' agreement or the Loan Agreement at all. The Respondents maintain that this is essentially the dispute between the Plaintiffs and the Defendants and that the relevant Agreement is the Investment Agreement. The Applicants contend that they have not invoked the jurisdiction of this Court on the Shareholders' Agreement or the Loan Agreement at all.
35. In this case, it is not in dispute that 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant executed a Joint Development and Investment Agreement (JDIA) and agreed to jointly develop a 40MW Solar Plant known as Kesses 1 Solar Photovoltaic Plant in Eldoret, Uasin Gishu County ("the Solar Plant") and other subsequent solar projects within the Republic of Kenya. That pursuant to Clause 3.5 of the Investment Agreement, the 2<sup>nd</sup> Plaintiff and the Defendants entered into a Shareholder's Agreement (SHA) dated 23<sup>rd</sup> December 2019 for purposes of setting out the terms and conditions that would govern the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Plaintiff's relationship with the 2<sup>nd</sup> Defendant. It further not disputed that the 2<sup>nd</sup> Plaintiff entered into a Loan Agreement dated 27<sup>th</sup> November 2020\_\_ with the 1<sup>st</sup> Defendant in which it was agreed that the 1<sup>st</sup> Defendant would loan USD 3,352,089.10 to the 2<sup>nd</sup> Plaintiff.



36. The Applicants herein have based their case to the Shareholders' Agreement and the Loan Investment Agreement whereas the Respondents have maintained that the execution and existence of the SHA and the Loan Agreement aforesaid did not extinguish and/or alter in any manner whatsoever, the respective obligations of the parties to the Joint Development Investment Agreement which is still in full force and effect and the parties are still bound to the terms and conditions set out therein.
37. The Applicants have argued that Clause 2.2, 2.7, 3.5 and Clause 4.1 and 4.2 of the JDIA clearly demonstrate that by entering into the JDIA, the parties intended to lay a basis for the joint development of each project. The Applicants have further argued that JDIA is a preliminary agreement that was fully performed upon the conclusion of the Share Purchase Agreement and the Shareholders' Agreement between the Defendants and the 2<sup>nd</sup> Plaintiff. The Applicants contend that in absence of the Shareholders' Agreement, the Plaintiffs would have no basis to claim any project fees or dividends and distributions from the 2<sup>nd</sup> Defendant. The Respondents on the other hand have opposed the Applicants' case stating that citing that dispute at hand is on the position by the 1<sup>st</sup> Defendant on the mode of sharing the Project Fees which does not invoke the terms of the SHA or the Loan Agreement but the JDIA. The Respondents further submitted that Clause 8 of the JDIA provides that any dispute arising thereunder is to be governed and interpreted in accordance with Kenyan Laws and Kenyans Court have original jurisdiction to determine any such dispute, like in the instant case.
38. In Samuel Kamau Macharia & another V Kenya Commercial Bank & 2 others (2012) eLKR the court pronounced itself as follows;

A Court's jurisdiction flow from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain in a matter before it, is not one of mere procedural technically, it goes to the very heart of the matter, for without jurisdiction, the jurisdiction extensively in the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

39. In transnational contracts the question of forum selection requires courts to balance the interest of convenience against bargained for expectations of the parties. In some contracts of this nature the forum for dispute resolution mechanism is provided for as one of the terms in the instrument binding both parties. The common law doctrine of forum non conveniens provides that a court may in its discretion dismiss a litigation filed in Kenya in favour of a litigation in a more convenient foreign forum. Therefore, dismissal of a suit in those circumstances is appropriate only if an adequate alternative forum exists. Once that has been established a Kenyan court considering dismissal must evaluate various public interest and private interest factors. In this respect the private interests relate primarily to the convenience of the parties and other interested parties in the dispute, including such factors as access to the relevant evidence, cost of obtaining attendance of witnesses and other factors that make trial of a case easy, expeditious and inexpensive. Whereas the public interest on the other hand touch more to the convenience of the court and the judicial system of Kenya in general. One of the central issue in this litigation is whether it would be in the interest of justice in having localized controversies



between the plaintiff and the defendants decided at home for the subject matter is located within Uasin Gishu County. The question which has not been answered squarely is whether the court in Kenya would be applying foreign law in adjudicating the terms of the agreement. There is no prima facie evidence that the impugned transnational contract has to be decided in interpreting and construing Dutch law. The combination of private-interest and public-interest factors reveals that there are two quite different objectives likely to be served by the Dutch forum non conveniens analysis. One goal is to prevent the defendants from oppressing the plaintiffs by inflicting upon them expenses and trouble not necessary to their own right to pursue the remedy in Dutch courts. The other is to shield this court itself and other interested parties besides the plaintiffs from unreasonable burdens imposed by the defendant's choice of forum. It is worth noting that there is substantial confusion from the materials placed before this court surrounding the procedural aspects of enforcing a forum selection clause as contented by the defendant's applicants. Borrowing from the closely related issue of choice of law the court notes that the cause of action being locally domiciled is unlikely to be adjudicated applying Dutch law. So there is a connection between the dispute and the particular location of the subject matter. In Kenya's Civil Legal System there are three major bases in determining the national court's jurisdiction on matters involving foreign elements. Firstly, the competent court must have a certain defined jurisdiction by *the Constitution* or statute law in connection with relevant parties in the civil dispute in case of jurisdiction in personam or with assets in case of jurisdiction in rem. Secondly in order to conduct a hearing the court's jurisdiction is determined according to the object of the dispute. Thirdly, there is no limitation of jurisdiction due to immunity. Given this consideration I am not persuaded by the defendant's submissions that the agreements in question ousted the jurisdiction of this court as a forum of conveniens

40. From the parties' pleadings on record, it is clear that the JDIA herein forms the primary basis for both the Shareholders' Agreement and Loan Agreement in question. It is further not in dispute that the Project forming the substratum of the aforementioned agreements is based in Kenya, at Kesses within Uasin Gishu County and not the Netherlands. The Applicants seem to argue that the basis for the Plaintiff's case is the SHA and the Loan Investment whereas the Respondents contend that the bone of contention solely lines with the sharing of the Project fees which touches on the JDIA alone. The 1<sup>st</sup> Plaintiff has further argued that it not a party to the SHA and Loan Agreement and such is not bound by the terms and conditions of the two agreements.
41. At this interim stage without going into the merits or otherwise of the case, from the prima facie evidence that has been tendered before this Court, it crystal clear that the Court herein is clothed with the requisite jurisdiction to hear and determine the suit at hand. This is view of the provision of Clause 8 of the JDIA which exclusively provides that Investment Agreement will be governed and interpreted in accordance with the Kenyan law and further that any dispute, controversy or claim arising from or related to the JDIA, including its breach, termination or voidance shall be submitted to the jurisdiction of the Courts and Tribunals of Kenya.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8<sup>th</sup> DAY OF FEBRUARY, 2024**

.....

**R. NYAKUNDI**

**JUDGE**

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