



**Microsoft Mobile OY v Musimba Investments Ltd (Civil Suit 536 of 2008)
[2023] KEHC 20681 (KLR) (Commercial and Tax) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 536 OF 2008**

EC MWITA, J

JULY 21, 2023

BETWEEN

MICROSOFT MOBILE OY PLAINTIFF

AND

MUSIMBA INVESTMENTS LTD DEFENDANT

JUDGMENT

Plaintiff's Case

1. On 13th December 2005, Musimba Investments Limited (the defendant) executed an agreement with the Nokia Corporation, (Nokia), in which the defendant was to purchase and resale Nokia's mobile phones and accessories in Kenya at agreed prices. Nokia supplied phones and accessories and as at 29th May 2008, phones and accessories worth USD 3,755,686.51 had been supplied to the defendant but the defendant did not pay.
2. Nokia filed a plaint dated 1st July 2008 against the defendant claiming the outstanding USD 3,755,686.51 together with interest at the rate of 0.5% per month from 1st June 2008 until payment in full, costs of the suit plus interest.
3. The plaint was amended on 20th December 2019 whereby Nokia was substituted with Microsoft Mobile OY as the plaintiff. This was after Microsoft International Holdings BV (Microsoft International) entered into a stock and asset purchase agreement with Nokia in which Microsoft International acquired Nokia's devices and service business including equity interest and assets. Microsoft International also assumed liabilities including all claims against third parties in relation to Nokia's devices and service business with effect from 26th April 2014.



4. It was averred that following the acquisition Microsoft Mobile Oy acquired interests in all claims causes of action by Nokia against third parties resulting from the conduct of the devices and services business and the right to retain all proceeds and monies therefrom.

Evidence

5. Otilia Estere Phiri, (Ms. Phiri) an employee of Microsoft East Africa Limited (Microsoft EA) who was previously a legal counsel at Nokia Middle East & Africa FZ LCC, adopted her witness statement as her evidence in court. Ms. Phiri also produced the plaintiff's bundle of documents as exhibits.
6. Ms. Phiri testified that that she had been an employee of Nokia between May 2012 and April 2014 and was conversant with the facts in dispute.
7. She stated when cross examined, that she was the proper witness due to her previous employment with Nokia. Ms. Phiri pointed out that both Nokia's successor and her employer, Microsoft EA, are subsidiaries of Microsoft International.
8. Ms. Phiri testified that the phones that were being sold by Nokia were taken over by Microsoft International and that the suit fell under the claims that were acquired by Microsoft International. It was Ms. Phiri's testimony that all claims known or unknown at the time of the agreement between Nokia and Microsoft International were to be taken over by Microsoft International.
9. Ms. Phiri admitted that there was no evidence of sale of the devices and services business by Microsoft International to the joint venture between HMD Global and Foxxcon. She also admitted that there was no evidence on how Nokia changed to become Microsoft Mobile OY.
10. Ms. Phiri denied the claim that the defendant was contracted to supply end of use gadgets/products. She however admitted that there was no evidence, including inventories, to show that the defendant ordered phones and accessories worth US\$ 3,755,686.51 or that the phones and accessories were shipped to Kenya and delivered to the defendant.
11. Ms. Phiri maintained that the defendant did not issue a letter of credit or any security as was required under the agreement before the phones were delivered. She also disputed the claim that in the absence of any letter of credit or security, the defendant was to pay in cash. Ms. Phiri asserted that under the agreement the defendant could pay on delivery without prior security.
12. Ms. Phiri admitted that although Nokia issued an invoice and a credit note for US\$ 3,600,766 to the defendant, she could not confirm the validity of that credit note. She also admitted that she had not checked to confirm whether the invoice and credit note originated from Nokia's system. She, however, pointed out that the credit note cancelled an invoice bearing a different number from the invoice the plaintiff produced in its documents.

Submissions

13. The plaintiff submitted through written submissions, that it had locus standi to maintain the suit on behalf of Nokia Corporation because Microsoft International acquired the right to pursue this claim under the stock asset purchase agreement. This was because after Microsoft International sold the devices and services business to a joint venture between HMD Global and Foxxcon, Nokia ceased to operate under its original name and adopted the name Microsoft Mobile OY, thus took over the case.
14. The Plaintiff argued that Nokia having supplied phones and accessories to the defendant and since there was no proof of payment for those phones and accessories, the defendant owed US\$3,755,686.51 as claimed.



15. The plaintiff submitted that the defendant's witness confirmed in the witness statement that US \$3,755,686.51 (claimed) reflected the full value of the end of life handsets. Although it was conceded that the agreement provided that the defendant could be entitled to discounts and rebates, the plaintiff maintained that the defendant did not to prove that the amount was reduced, discounted after negotiations or that the outstanding amount was subsequently paid.
16. The plaintiff relied on section 109 of the *Evidence Act* as well as the decision in *Grace Nemayian Konchellah & another v Gideon Mwiti Irea* (Civil Appeal No. 93 of 2013) [2017] eKLR, to argue that since it had denied receiving payment, the burden shifted to the defendant to prove that payment was actually made.
17. The plaintiff did not agree with the defendant's assertion that goods could not have been supplied before payment. The plaintiff relied on clause 9 appendix II of the agreement to argue that goods could be supplied before payment, subject to a letter of credit or a grant of a 30-days payment term.
18. The plaintiff maintained that the defendant had an obligation to prove that goods were supplied on the basis of a letter of credit to guarantee payment. Reliance was placed on *SAJ Ceramics Limited v HMS Bergbau Attorney General & another* (HCCC No. 253 of 2018) [2018] eKLR and *Nairobi Hospice v Kenya Commercial Bank Limited & 2 others* (HCCC No. 569 of 2013) [2019] eKLR.
19. Regarding the defendant's claim that Nokia issued a credit note against the invoice for US\$3,900,766, the plaintiff argued that the claim had no basis and did not prove that the amount had been paid; the alleged credit note was neither signed nor stamped by Nokia and the alleged tracing document did not also show any email forwarding the credit note and invoice.
20. The plaintiff further argued that Yuan Mang is a stranger to Nokia; there was no evidence linking him with Nokia and could not have issued a credit note that would bind Nokia. Reliance was placed on *Pakatewa Investment Company Limited v Municipal Council of Malindi* (Civil Appeal No. 21 of 2015) [2016] eKLR to support its position.
21. According to the plaintiff, the alleged credit note purported to cancel invoice No. 678005980 which was not produced instead, the defendant produced invoice No. 6790005979. The credit note was also marked as 'bad debt' which was for purposes of annual returns and to make provision for tax as required under International Financial Reporting Standards (IFRS). It was not an admission of payment of the debt. The plaintiff relied on *Standard Chartered Bank Uganda Ltd v The Commissioner General & Uganda Revenue Authority* (Civil Suit No. 810 of 2015) [2017] UGCOMM 115 (18 August 2017) and urged the court to allow the claim as prayed in the plaint.

Defendant's Case

22. The defendant filed amended statement of defence, denying the plaintiff's claim. The defendant admitted entering into the supply agreement with Nokia but denied that Nokia supplied phones and accessories worth US\$ 3,755,686.51. According to the defendant, this was not the amount of the agreed discounted price but showed the balance of the full value of the end of life handsets as opposed to the negotiated price which had been paid in full to Nokia.
23. The defendant stated that the agreement was preceded by various oral discussions; that the defendant was entitled to discounts and rebates as was separately communicated by Nokia in writing from time to time and subject to such conditions as were to be set by Nokia.



24. The defendant averred that all payments were to be made either in cash or through approved letter of credit prior to delivery. Nokia also agreed to award the defendant a marketing contribution as a reward of agreed marketing activity.
25. It is the defendant's case that under the agreement, Nokia was to supply 60,000 end of life handsets at 25% of the list prices which money would assist Nokia offload those products. Nokia did not, however, supply all the handsets and accessories agreed and paid for in advance.
26. Nokia was informed about the shortfall in the delivery and Nokia's officer Yuan Mang sent an email informing the defendant that Nokia had corrected the error in its records. Nokia issued a credit note for \$3,900,766.00 against an invoice earlier issued for the same amount, which was an admission by Nokia that there was no existing debt.
27. The defendant averred that Nokia's decision to terminate the agreement prematurely was in breach of the terms of the agreement, and caused huge losses to the defendant as the primary supplier of the handsets in respect of which it had entered into agreements with other entities for the purposes of growing the business of the two parties. The defendant had set up a comprehensive service and support center at significant cost.
28. The defendant asserted that in substituting Nokia as plaintiff in the suit, the new plaintiff had no locus standi to maintain the suit. The plaintiff did not also establish that the schedule of liabilities was passed on upon purchasing interest from Microsoft International.
29. The defendant also denied the court's jurisdiction to determine the suit because there exists an arbitration clause requiring that the dispute be determined through arbitration.

Evidence

30. Dr Patrick Musimba, (Dr. Musimba), the defendant's director, adopted his witness statement as his evidence in court and produced the defendant's bundle of documents as Defence Exhibits.
31. Dr Musimba confirmed that he signed the agreement on behalf of the defendant and that mobile phones and accessories to be supplied under the agreement were end of life or end of user products which were no longer in production or being marketed. These were CDMA to GSM. CDMA that were being phased out globally as they did not have a provision for SIM card use. In Kenya, CDMA devices were only being used by Telkom at the time.
32. In cross-examination, Dr Musimba confirmed that the agreement was the only document signed between the parties; that the agreement did not state that the defendant was entitled to discount and rebates and that the credit limit in the agreement meant the amount to transact with clients and had nothing to do with rebates.
33. Although Dr. Musimba stated that the defendant paid Nokia up front US\$ 1,000,000 in 2008, he admitted that there was no evidence of such payment because the defendant's previous advocates were holding the documents under lien.
34. Regarding the claim that Nokia erroneously issued an invoice for US\$3,900,766 due to its failure to keep accurate accounting records of the deliverables and issued a credit note to cancel it, Dr Musimba admitted that the defendant did not produce an email from Yuan Mang. He, however, maintained that the invoice and credit note produced were sent to his email by Nokia's officer Yuan Mang and that the source of the documents was traced to Nokia Corporation.



Submissions

35. The defendant argued through written submissions, that the plaintiff had no locus standi to take over the suit from Nokia. The defendant argued that the agreement was signed with Nokia and any issue arising from the terms of that agreement could only be between the two parties. The defendant took the view, that the descriptive part of the agreement did not include the respective parties' successors in title or assigns as being entitled to enforce the terms of that agreement.
36. According to the defendant, no evidence was adduced to show how Nokia adopted the name Microsoft Mobile OY under the ownership of the joint venture; no agreement between Microsoft International and the joint venture of HMD Global and Foxxcon was produced and Ms. Phiri admitted that she was an employee of Microsoft East Africa Limited, a separate and distinct entity from the plaintiff.
37. The defendant also asserted that it was not possible for goods to be delivered to the defendant without payment in advance or through a letter of credit. The defendant relied on clause 9 of the agreement to support the argument that payment was to be made in advance, or on acceptable irrevocable letter of credit before delivery, or on a separate approval by Nokia within 30 days from the date of delivery of shipping documents.
38. The defendant posited that it had proved that the email from Yuan Mang dated 28th November 2011 and the attached invoice and credit note originated from Nokia's head office. In this regard, the defendant referred to its exhibit 1 which showed a screen shot of the email received from Yuan Mang. According to the defendant, the email was sent from Finland, using the domain name Nokia.com, attaching the invoice and credit note.
39. The defendant argued, therefore, that the plaintiff had not controverted the evidence regarding the source of the email and could not merely deny knowledge of Yuan Mang. It was also the defendant's position that the plaintiff was not in a position to confirm whether or not Yuan Mang was an employee of Nokia because the plaintiff was not Nokia and there was no evidence that the plaintiff had taken over Nokia's employees.
40. The defendant urged the court to dismiss the suit with costs.

Determination

41. I have considered the evidence, submissions made on behalf of the parties and perused the exhibits produced by either side. The issues that arise for determination are; whether the court has jurisdiction to determine this suit; whether the plaintiff has locus standi to maintain the suit and, depending on the answer to the above issues, whether the plaintiff is entitled to the relief sought.

Jurisdiction

42. The defendant argued that this court has no jurisdiction to determine this suit. According to the defendant, there exists an arbitration clause in the agreement requiring that any dispute arising between the parties on the terms of that agreement be referred to arbitration. The plaintiff argued that the court has jurisdiction. The plaintiff's witness stated that the issue was determined in Civil Appeal No. 138 of 2013-*Musimba Investments Limited v Nokia Corporation* in a judgment dated 22nd February 2019.
43. I have perused the amended statement of defence. It is true that the defendant pleaded that this court has no jurisdiction on account of an existing arbitration clause in the agreement executed by parties.



44. Where an agreement contains an exclusive arbitration clause, this court would defer jurisdiction to the forum parties chose for resolving their disputes. This court would, however, do so if a party relying on that exclusive clause moved the court to stay proceedings and refer the dispute to arbitration at the earliest opportunity.
45. In this regard, section 6 of the *Arbitration Act* provides that the court before which proceedings have been brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than after entering appearance or acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration.
46. The section makes it plain that the court will only decline to stay the proceedings if it finds that the arbitration agreement is null and void, is inoperative or incapable of being performed, or that there is no dispute between the parties with regard to the matters agreed to be referred to arbitration.
47. To take advantage of the arbitration clause, the defendant was required to file an application soon after entering appearance, and ask the court to refer the dispute to arbitration without taking any further steps in advancement of the suit.
48. In this case, the defendant did apply to stay this suit and refer the dispute to arbitration, but that application was dismissed. On appeal, the Court of Appeal held that clause 18 of the agreement allowed filing of the suit in the courts of this country. The court stated:

Which court or courts did the parties envisage? The clause alludes to “a court of any country” in relation to an application for injunction and other equitable relief. It refers to “the courts of agreed territory” or “any other court” in respect of proceedings for debt collection. There can be no valid debate as to the intention of the parties; that the courts in Kenya would be the forum for the respondent’s pursuit to recover the debt from the appellants. This is because the contract was performed in Kenya and the appellants carried out business in Kenya. It could not have been anywhere else.

49. The defendant having raised the issue of jurisdiction and lost, the same issue cannot be raised now. I find and hold that this court has jurisdiction to determine this suit.

Locus standi

50. I now turn to consider whether the plaintiff, (Microsoft Mobile OY), has locus standi to maintain the suit against the defendant. The defendant argued that it signed the agreement with Nokia and not Microsoft Mobile OY. That notwithstanding, the amended plaint brought in Microsoft Mobile OY as the plaintiff in place of Nokia. In substituting Nokia with Microsoft Mobile OY, the new plaintiff lost standing to maintain the suit against the defendant.
51. The defendant took the view, that the plaintiff did not demonstrate, first; that its name was included in the schedule of liabilities in the agreement between Nokia and Microsoft International. Second, the plaintiff did not lead evidence to establish that the schedule of liabilities passed on to Microsoft International was subsequently transferred to Microsoft Mobile OY to confer on Microsoft Mobile OY a right or interest to the claim brought against it by Nokia.
52. The defendant’s argument, as I understand it, is that Microsoft Mobile OY did not prove that it had assumed responsibility over the claim Nokia had raised against the defendant to enable Microsoft Mobile OY maintain this suit against the defendant on the basis of the agreement between Nokia and the defendant.



53. Locus standi refers to the right a party has to bring a legal action in a court of law, maintain the action and be heard in court over that action.
54. In Private law, litigation is usually concerned with private rights arising out of property, contract, or tort. A person who has suffered illegal injury whether actual or a threatened violation of his legal right or a legally protected interest, has the right, (locus standi), approach the court and institute a suit to protect that right or interest.
55. The court dealt with question of who is an “aggrieved person” for purposes of the right to maintain an appeal against a decision of a lower in the case of *Ex parte Sidebotham* (1880) 14 Ch D 458. It was held that the appellant was not entitled to maintain the appeal because he was not a ‘person aggrieved’ by the decision of the lower court. James, LJ stated:
- A ‘person aggrieved’ must be a man “who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.
56. In *Re Reed Bowen & Co.* (1887) 19 QBD 174, Lord Esher M R added that a “person aggrieved” must be a man who has been refused something which he had a right to demand.
57. The Supreme Court of India dealt at length with the issue of locus standi in *SP Gupta v President Of India And Ors.* AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365, where it stated as follows:
- The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action.
58. In *Four Wheel Drive CC v Lesbni Rattan* NO (1048/17) [2018] ZASCA 124 (26 September 2018) the Supreme Court of Appeal stated:
- [7] ..Generally, the requirements for locus standi are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove locus standi rests on the party instituting the proceedings.
59. In *Dalrymple & others v Colonial Treasurer* 1910 TS 372 at 379, Innes CJ put it, thus:
- The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.
60. The court again explained in *S.P. Gupta v President Of India And Ors.* (*supra*), that where a party has a legal right or a legally protected interest, the violation of which would result in a legal injury to him, there must be a corresponding duty owed by the other party to the injured party. That is why locus standi postulates a right-duty pattern which is commonly to be found in private law litigation.



61. The position articulated in the decisions above, is that the basis of entitlement to judicial redress is personal injury to property, body, mind, contract or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress.
62. Applying the above principles to this case, the issue is whether the plaintiff could legally maintain this suit against the defendant. The defendant's position is that it had an agreement with Nokia but not the plaintiff. For that reason, the plaintiff being a stranger to the agreement, could not maintain a cause action against it.
63. The plaintiff argued that it had locus standi to maintain the suit on behalf of Nokia because Microsoft International acquired the right to pursue this claim under the stock and asset purchase agreement with Nokia. This was because after Microsoft International sold the devices and service business to a joint venture between HMD Global and Foxxcon, Nokia ceased to operate under its original name and adopted the name of Microsoft Mobile OY, and took over this case.
64. I have perused the amended plaintiff, the basis of the plaintiff's claim in this court. The amended plaintiff pleads at paragraphs 3 and 4
 - (3) Pursuant to a stock & asset purchase agreement Holdings BV and Nokia Corporation which came into effect on 26th April 2014, Microsoft International Holdings BV and its related affiliates acquired certain equity interest, assets and assumed liabilities relating to Nokia Devices and Services.
 - (4) As a result, of the said acquisition, Microsoft Mobile OY acquired interests in all claims, causes of action (at the time or in any manner arising or existing, whether choate or inchoate, known or unknown, contingent or non contingent) by Nokia Corporation against third parties to the extent resulting from the conduct of the Devices & Service Business and the right to retain all proceeds and monies therefrom.
65. In the witness statement, Ms. Phiri stated that she was the legal counsel at Nokia between May 2012 and April 2014 when "Nokia phones and accessories business was acquired by Microsoft Mobile OY."
66. In the submissions, it was argued for the plaintiff, that Microsoft International sold off the business to a joint venture between HMD Global and Poxxon and pursuant to that acquisition, Nokia ceased to operate in its original name and adopted the name of Microsoft Mobile OY.
67. It is clear from the pleadings that there was no averment that there was an agreement between the plaintiff and the defendant regarding the claim the subject of this suit. The evidence does not also refer to any such agreement between the parties.
68. The amount claimed in the suit was said to be owed to Nokia and indeed Nokia filed this suit against the defendant claiming that amount. The plaintiff was later the plaintiff amended and introduced Microsoft Mobile OY as the plaintiff in place of Nokia.
69. According to the plaintiff, Nokia sold its stock assets and liabilities, part of which constituted the claim in this suit, to Microsoft international and Nokia transferred assets and liabilities to Microsoft International. The liabilities that were said to have been transferred included USD 3,755,686.51 that the defendant was said to owe Nokia.
70. The plaintiff maintained that Microsoft International having acquired the right to pursue this claim under the stock asset purchase agreement, sold the devices and services business to a joint venture



between HMD Global and Foxxcon. Nokia ceased to operate under its original name and assumed the name Microsoft Mobile OY, thus took over this case as the plaintiff.

71. The plaintiff's case that Microsoft International sold the devices and service business to the joint venture between HMD Global and Foxxcon is not evidence that the joint venture between HMD Global and Foxxcon passed on the rights to claim the amount the subject of this suit to the plaintiff. No evidence was led to show that there was a relationship between the joint venture and Microsoft International or that the joint venture was an its affiliate. In other words, there was no evidence on what was sold in terms of assets and liabilities and the relationship between the parties.
72. Ms. Phiri's witness statement alluded to the fact that "Nokia phones and accessories business was acquired by Microsoft Mobile OY." However, there was no evidence that Nokia assumed the name Microsoft Mobile OY and if so, when, and the relationship between Microsoft Mobile OY, the joint venture between HMD Global and Foxxcon and Microsoft International that would give the right to Microsoft Mobile OY to maintain the suit against the defendant.
73. Most importantly, there is no evidence that when Nokia sold its assets and devices to Microsoft International, Nokia became part of Microsoft International, or how Nokia metamorphosed to Microsoft Mobile OY, the plaintiff.
74. The right to knock at the door of the court for judicial redress, is available only to a person who has suffered a legal injury by reason of violation of his legal right or legally protected interest. That person must have been refused something which he had a right to demand, and there must be a corresponding duty owed to him by the person he claims from. That is to say, no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer.
75. In the present case, there is no evidence that the plaintiff suffered a legal injury to its legally protected right or interest. There is no evidence that the plaintiff had been refused something he had a right to demand from the defendant and the defendant had a corresponding duty to the plaintiff.
76. The plaintiff seems to have left a lot to be assumed. For instance, that it was affiliated to Microsoft International, that Nokia was part of Microsoft International or that the right to claim the debt giving rise to this suit was passed on to it, without leading evidence to show the link right from the time Microsoft International purchased stock and assets from Nokia, selling the businesses to the joint venture between HMD Global and Foxxcon to when Nokia adopted the name Microsoft Mobile OY, the plaintiff.
77. The defendant having raised the issue of standing, the plaintiff had the duty to prove locus standi in these proceedings. However, the plaintiff did not discharge this duty by showing that it had the right to take over the case from Nokia and d maintain the suit against the defendant.
78. I find and hold that Microsoft Mobile OY did not satisfy that it had an adequate and direct interest in the subject matter of this litigation and the relief sought; that the interest was actual or that the interest was not too remote or hypothetical.
79. Having come to the conclusion that the plaintiff (Microsoft Mobile OY) failed to prove locus standi to sustain this suit against the defendant, I take the view that this is sufficiently dispositive of the entire suit. The issue of whether the court should grant the relief sought in the suit becomes moot.
80. Consequently, and for the above reasons, the suit fails and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2023

E C MWITA



JUDGE

