



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 85 OF 2016**

**FAIRDEAL UPVC ALUMINIUM & GLASS LTD.....PLAINTIFF**

**-VERSUS-**

**ASE EUROPE N.V.....DEFENDANT**

**RULING**

1. This ruling is in respect of the Defendant's Application and Notice of Preliminary Objection both dated 4.10.16.
2. The Application is brought under **Order 2 Rule 15(1) (a) & (d) and Sections 3A of the Civil Procedure Act (Cap 21)**, in which Applicant is seeking the orders that:-
  - a) That the Plaint herein dated 8, 7.2016 be struck out as it discloses no reasonable cause of action and/or is an abuse of the Court process.***
  - b) That the cost of this Application be awarded to the Defendant.***
3. The Application is anchored on two (2) grounds on its face but there is no Supporting Affidavit in support of the Application. On that basis I will consider the Application to only invoke Order 2 Rule 15(1) a.
4. The Preliminary Objection is based on five (5) grounds that:
  - a) The place of delivery and execution is Antwerp, Belgium, the domicile of the Defendant herein;
  - b) The place of fulfilment, payment and performance of the contract herein is Antwerp, Belgium;
  - c) Exclusive jurisdiction of Court in Antwerp, Belgium
  - d) The Belgium law as governing the contract;
  - e) Therefore, no Kenyan Court has jurisdiction to hear and determine the dispute herein.
5. The Plaintiff opposed the Application via its Replying Affidavit sworn on the 27.2.17 by **Mr. Mayuresh Kulkarni** the Plaintiff import Manager. He deponed that it cause of action pleaded is breach of contract which has been clearly particularized under paragraphs (f), (k) & (n) of the Plaint together with the prayers sought therein.
6. He deponed that the clause which forms the basis of the Defendant's resistance to the claim does not vest exclusive jurisdiction in Belgian Courts and/or specifically oust the jurisdiction of Kenyan Courts in relation to breach of contract, supply of defective products and consumer protection issues which are constitutional rights and property matters for adjudication by Kenyan courts. It was also deponed that the Plaintiff would invite and rely on the doctrine of ***Contra proferentum***.
7. On 30.3.2017, by consent, the application and the preliminary objection were ordered to be argued by written submissions. The applicant's counsel filed submissions dated 19.2.2018 while the plaintiff filed submissions dated 12.6.2017.
8. In his submissions, learned counsel for the Applicant referred to clause 11 of the contract and submitted that the contract was subject to the Belgian law, except for clause 9(g) where the law of the debtor's country is applicable. He further submitted that when the parties entered

into the contract, they had the intention to enforce the contract *en masse* and it was common knowledge that any dispute arising would be adjudicated in Belgium. Reliance was placed in the case of **Universal Pharmacy (k) LTD VS Pacific International Lines (PTE) LTD & Anor. [2015] eKLR.**

9. Counsel further submitted that parties are bound by terms of their contract unless coercion, fraud, or undue influence are pleaded and proved.

10. Learned Counsel for the Plaintiff submitted that clause 11 did not amount to an ouster of the jurisdiction of Kenyan Courts, as the clause does not expressly oust Kenyan law. Reliance was placed in the case of **Bakarat Exploration Inc VS Taipan resources Inc [2014] eKLR.**

12. Counsel further submitted that Kenya is the more convenient forum as the contract was performed in Kenya; payment was made in Kenya; all the witnesses are based in Kenya; the delivery of the defective goods was in Kenya and the Defendant has an operational branch in Nairobi. Therefore, it will suffer no prejudice if this suit is determined in Kenya. To support the same, reliance was placed in **Universal Pharmacy (k) LTD VS Pacific International Lines (PTE) LTD & Anor (supra).**

13. On the issue of the Plaintiff's suit not disclosing any reasonable cause of action, Counsel submitted that the breach of contract is not in dispute as the same resulted to the partial payment, and the Plaintiff suffered loss of business as pleaded in the Plaintiff. In addition, the issuance of the USD 8,000 credit note was an admission of guilt.

#### **Determination**

14. I have considered the entire application, the preliminary objection together with the replying affidavit and the submissions in this matter. The issue for determination is whether the orders sought in the application and the grounds of the preliminary objection are merited. At this stage, I must say that the Application and the preliminary objection being based on the same grounds, I will consider the objection as part of the Application and therefore the determination of the Application shall bind the objection.

15. It is trite law that jurisdiction is everything, without it the court has no power to make one more step, as held in the case of; *Owners of Motor Vehicle Lillian ("S") vs Caltex Oil (K) Limited (1989) 1 KLR*. Indeed where a court has no jurisdiction, any proceedings taken would be null and void. Therefore, the court must determine the issue of jurisdiction at the outset.

16. In determining the same, I note that the jurisdiction of the High Court is vested under **Article 165** of the Constitution and is unlimited save for the matters provided for under Sub-Article 5.

17. It is not in dispute that the contract between the parties at Clause 11 provided that the place of fulfilment regarding payment and jurisdiction for all parties concerned is Antwerp Belgium.

**“FULFILMENT, JURISDICTION AND VALIDITY: The place of fulfilment for delivery and execution is the domicile of supplying works. The place of fulfilment regarding payment and jurisdiction for all parties concerned is Antwerp, even if, in virtue of or by Application of the contract, drafts would have been emitted/accepted in the country of residence of the buyer, the country of destination or any other county, and this contract is subject to the Belgian Law except for clause 9g, where the law of the debtor's country is applicable if any other above clauses would be conflicting with the law, the clause itself should be dropped, but the contract remains entirely valid.”**

18. The language of this clause is plain and straightforward. One of the principles of contractual interpretation is that parties have the freedom to contract; to contract even to resolve their disputes in a jurisdiction they choose and that courts should not re-write terms of a contract for them. The Supreme Court of the United Kingdom, in *Arnold v Britton* [2015] UKSC 36 that:-

**“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean’, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para**

19. However, the question that arises is whether it is always natural and automatic that whenever there exists an exclusive foreign jurisdiction clause in a contract then the Kenyan courts cannot preside over the dispute for want of jurisdiction.

20. In the case of *Five forty Aviation Ltd vs Lonzim Air (BVI) Ltd [2013] eKLR*, which reiterated the case of the *United India Insurance Company Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR* where Madan J. A. stated;

**“The Courts of this country have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. This exclusive jurisdiction clause however should normally be respected because the parties themselves fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by the agreement.”**

**Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. It must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure.”**

21. Similarly, In the UK case of; *Spiliada Maritime Corp v. Cansulex Ltd [1987] AC 460*. The court stated:

*“Where a Defendant had been served within England, so that jurisdiction had been founded as of right, he could apply to the court to exercise its discretion to stay the proceedings on the ground known as forum non-conveniens. If he did, the burden was on him to satisfy the Court that there was another forum having jurisdiction, which was the "appropriate forum" for the action because in it the case could be tried more suitably for the interests of all the parties and for the ends of justice. In discharging this burden, he had to satisfy the Court not merely that England was not the natural or appropriate forum, but that another forum was actually more appropriate. In this context, The Court had to look for connecting factors pointing to another forum. Those factors would include not only matters of convenience, eg availability of witnesses, but also matters like the law governing the transaction or the parties' places of residence or business. If the Court concluded that there was no forum more appropriate for trial of the action, it would normally refuse a stay. If it concluded that there was, it would normally grant a stay, unless the Plaintiff showed that there were special circumstances by reason of which justice required that a stay should nevertheless not be granted.”*

22. In *KARACHI GAS CO. LIMITED v ISSAQ [1965] E.A. 42 at 53*, the vice president of the east Africa Court of Appeal, Sir. Charles Newbold, Ag. V.P took the following view of law.

*“The two main issues which arise in this appeal are first, whether the Supreme Court had jurisdiction and, secondly, whether the contract was frustrated. As regards the first of these issues the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya. In such a case the courts of Kenya will not assume jurisdiction in relation to any matter arising out of contract unless the circumstances fall within the provisions of O. V, r. 21 of the Civil Procedure (Revised) Rules, 1948 (K). This rule details the circumstances in which service of a summons or a notice of summons may be allowed out of the jurisdiction in order to give effect to a jurisdiction which the courts have assumed. In the case of a contract the courts of Kenya will assume jurisdiction, inter alia, if the contract is made in Kenya or if the proper law of the contract is Kenya law or if a breach is committed within Kenya. While it is not perfectly clear where this contract was made, I shall assume that it was made in Pakistan. If, therefore, the Kenya courts are to have jurisdiction in this case, either the proper law of the contract must be Kenya law or a breach of the contract must have been committed in Kenya.*

*The various factors in this case, as is so often the position, point in different ways for the purpose of determining what the proper law of the contract is. The test to be applied is, in my view, the system of law by reference to which the contract was made, or that with which the transaction has its closest and most real connection.”*

23. I have looked at the Plaintiff dated 8,6.2016 and I note that paragraph (h) of the Plaintiff states that the Defendant supplied the goods to the Plaintiff premises on diverse dates. At paragraph (g) it is stated that the Plaintiff found the said goods not fit for purpose while in its premises in Mombasa Kenya. From the foregoing I conclude that the alleged breach of the contract occurred when the Plaintiff discovered that the goods were not fit for purpose while at the Plaintiff's premises in Mombasa Kenya. Consequently, the aforesaid breach having taken place in Kenya, I do find that the cause of action arose in Kenya and therefore this Court has jurisdiction to try the matter.

24. This Court also finds that the allegation made by the Defendant that the goods supplied were not fit for intended purposes raises triable issues and discloses a reasonable cause of action since in the Plaintiff's Replying Affidavit it is deponed that the USD. 8000 credit note issued by the Defendant was not enough to cover its loses.

25. For the foregoing reasons, the Application dated 4.10.2016 and Preliminary Objection dated 4.10.2016 by the Defendant fail and are hereby dismissed with costs to the Plaintiff.

**Dated, Signed and Delivered at Mombasa this 15th day of January 2020**

**P J O OTIENO**

**JUDGE**