



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E299 OF 2019

AGRITECHNO EAST AFRICA LTD.....PLAINTIFF

VERSUS

CROP HEALTH TECHNOLOGIES LTD.....1ST DEFENDANT

PHILIP KING'OO TONDE.....2ND DEFENDANT

SPIRE BANK LIMITED.....3RD DEFENDANT

RULING

1. Through the application dated 15th October 2019, the plaintiff/applicant herein seeks the following orders:-

a) That this honourable court be pleased to enter summary judgment as against the 1st and 2nd defendants for the sum of Kshs 57,588,379/=, being the value of stock supplied by the plaintiff to the 1st defendant.

b) And or in the alternative, this honourable court be pleased to enter judgment on admission as against the 1st and 2nd defendants for the sum of Kshs 57,588,379/=, being the value of stock supplied by the plaintiff to the 1st defendant.

c) On the judgment sum of Kshs 57,588,379/=, against the 1st and 2nd defendants summary judgment be entered against the 3rd defendant to pay the sum of Kshs 25,000,000/=, whilst the balance to be paid by the 1st and 2nd defendant.

2. A summary of the plaintiff's case is that on 1st November 2017 entered into a Corporation and Distribution Framework Agreement with the defendant for the promotion and sale agricultural inputs and bio-stimulants in Kenya which was to run for a period of five (5) financial years. It states that soon after executing the agreement, the 1st defendant delayed in making payments for the products supplied and that as at 31st December 2017 the 1st defendant was in arrears to the tune of Kshs 31,292,272.00.

3. It is alleged that the 1st defendant procured a Bank Guarantee of Kshs 10,000,000 from the 3rd defendant to secure the sum owed to the plaintiff on account of the supplied goods and that when the Bank Guarantee expired on 19th February 2019, the 1st defendant replaced it with another Guarantee for the sum of Kshs 25 million.

4. The plaintiff claims that as at 30th July, it had supplied the 1st defendant with goods worth Kshs 50,674,010 which amount, it further claims, the 1st defendant admitted and was expressly guaranteed by 2nd defendant. The plaintiff's case is that the outstanding amount stands at Kshs 50,674,010.10 and Kshs 6,691,198.00 being the value of stocks held by the 1st defendant.

5. The 1st and 2nd defendants opposed the application through the Notice of Preliminary objection dated 7th November 2019 wherein they raise the following points:-

1. The court lacks jurisdiction in light of the existence of arbitration agreement.

2. The case offends Section 6 of the Civil Procedure Act Cap 21 and it is therefore "sub judice".

3. The case is res judicata in light of the Ruling in E. 261 of 2019.

4. The proceedings are an abuse of court process.

5. The application offends Order 36 of the Civil Procedure Act Cap 21 Article 25 and 159 of the Constitution of Kenya 2010.

6. The 1st and 2nd defendants also opposed the application through the 2nd defendants replying affidavit dated 11th November 2019 wherein he avers that the application and the pleadings herein are substantially and directly in issue in HCC NO. 261 of 2019 wherein the court had already pronounced itself on the dispute herein. It is therefore the defendant's case that the instant case is both res judicata and sub judice in view of this court's decision ousting the court's jurisdiction.

7. He confirms that the 3rd defendant issued the Bank Guarantee but that the plaintiff's attempt to realize the same is premature in view of the fact that the issues surrounding the subject agreement are yet to be determined by the Arbitrator.

8. He further states that the 1st and 2nd defendant's defence raises triable issues in which case the provisions of Order 36 of the Civil Procedure Rules are not applicable to this application.

9. The 3rd defendant opposed the application through the replying affidavits of its Senior Legal Officer **Mr. John Wageche** who avers that the alleged Bank Guarantee issued on 19th July 2019 is a forgery as the purported signatory did not have the approval from the credit team to sign the said Guarantee.

10. He contends that the issue of whether or not the Bank Guarantees are genuine is a triable issue and that Summary Judgment cannot be granted.

11. Parties canvassed the application by way of written submissions which I have carefully considered. Before I can delve into determining the issue of whether or not the plaintiff is entitled to the orders sought in the application, I will first consider the main issue raised in the 1st and 2nd defendant's Preliminary Objection regarding the jurisdiction of this court and depending on the finding on the said issue, zero in on the issue of whether the instant suit and application are sub judice and/or res judicata.

Jurisdiction.

12. The 1st and 2nd defendants argued that owing to the existence of an arbitration clause in the Agreement between the parties which clause not only vests jurisdiction in all disputes arising from the Agreement to arbitration but also to foreign jurisdiction, this court lacks the jurisdiction to entertain the dispute.

13. It was further submitted that this court, differently constituted, has already rendered itself on the issue of jurisdiction in a related case between the same parties being HCC No. E261 of 2019 (hereinafter "**the Earlier Case**") the issue of jurisdiction is res judicata and the suit between the parties res sub judice. I have perused the arbitration clause at Clause 18 of the Agreement and I note that it stipulates as follows:

" Any dispute arising from or in connection with this Agreement shall be submitted to the ICC (International Chamber of Commerce) International Court of Arbitration, commonly known simply as the "the court". The arbitral decision is final and binding upon both parties. The seat of arbitration shall be Paris. The number of arbitrators shall be one or three. The arbitration proceedings shall be conducted in English."

14. I have perused the Ruling in HCC No. E261 of 2019 delivered by Kasango J. on 5th November 2019. I note that the earlier case involved the 1st defendant herein and the plaintiff over an alleged breach of the same agreement that is the subject of this case.

15. In determining the application in the earlier case, Kasango J. rendered herself on the issue of jurisdiction as follows:-

The plaintiff's case is based on the parties' agreement which is entitled "Corporation & Distribution Framework Agreement." Under that agreement parties agreed to have their dispute arising in connection with the agreement to be subjected to Arbitration process. The seat to that Arbitration, is provided in that agreement, to be Paris. See the reproduced Arbitration clause above. It means that any party seeking to enforce, as the plaintiff wishes to do here, that agreement should firstly file such an application in Paris and it is the Law of Paris that would guide the Court or the Arbitration over the subject of that agreement. See the case of CVD [2007] EWHC 154 where the court held that:

"The seat of Arbitration brings in the law of that country as the curial law and it is analogous to an exclusive jurisdiction clause. Not only is there an agreement to curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the Arbitration, so that by agreeing to the seat, the parties agreed that any challenge to an interim or final award is to be made by the courts of the place designated as the seat of Arbitration"

It follows that this court has no jurisdiction to entertain the plaintiff's case and the interlocutory application before court. This court would have no jurisdiction to entertain the case because, as stated in CVD (supra), any challenge to the final or interim award can only be heard by a court in Paris.

It is because of the above findings that the plaintiff's Notice of Motion application dated 22nd August 2019 fails. And because it

is the court's view that it lacks jurisdiction to entertain this case that the defendant's application cannot be granted."

16. Considering that the above findings by this court, differently constituted, on the issue of jurisdiction I find that this court cannot reinvent the wheel and entertain a dispute over the same agreement that the court had already declared it has no jurisdiction to entertain. In this regard, I am reminded of the famous words of Nyarangi J. in the *locus classicus* on jurisdiction in the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] KLR 1 wherein it was held:

"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."

17. Having regard to the findings that I have already made in this ruling, I find that it is clear that the court lacks the jurisdiction to entertain the application dated 15th October 2019 and must down its tools and take no further step. I therefore dismiss the said application with costs to the defendants.

Dated, signed and delivered via skype at Nairobi this 23rd day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Kamau for the plaintiff

Mr. Muhatha Pala for the 1st and 2nd defendants.

Miss Karanu for 3rd defendant

C/A & DR – Hon. Tanui