



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**CIVIL CASE NO. 438 OF 2017**

**ROBERT MUTESA.....PLAINTIFF**

**-VERSUS-**

**SOBERTRA KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**SOBERTRA UGANDA LTD.....2<sup>ND</sup> DEFENDANT**

**GIORGIO CAESAR ANTONIO PETRANGELI.....3<sup>RD</sup> DEFENDANT**

**GIORGIO PETRANGELI.....4<sup>TH</sup> DEFENDANT**

**CARLO BORELLA.....5<sup>TH</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendant approached the court through a notice of **Preliminary objection** dated 20<sup>th</sup> February 2018 on the grounds that;

- a. The court lacked jurisdiction.**
- b. The subject matter of the suit is situated in the Democratic Republic of Congo where the parties exclusively excluded the jurisdiction of the court providing that any dispute that would arise from the subject matter herein should be resolved through the courts of the Democratic Republic of Congo.**
- c. There is no privity of contract as the 1<sup>st</sup> Defendant is not a party to the subject contract**
- d. The suit offends the doctrine of corporate personality**
- e. The suit does not disclose a cause of action against the 1<sup>st</sup> Defendant**

**PLAINTIFF'S CASE**

The Plaintiff filed a replying affidavit dated 22<sup>nd</sup> October 2018 in response to Defendant's Preliminary Objection. He clarified that the subject matter herein was to restrain the 2<sup>nd</sup> Defendant from interfering with its shares with the 1<sup>st</sup> Defendant as it would have defeated the legal proceedings instituted against the 2<sup>nd</sup> Defendant in the main suit as stated in the plaint. He placed his reliance on **section 326 of the Companies Act** and averred that the court is ousted from issuing restraining orders against transfer of shares in a company.

The Plaintiff further clarified that he was not seeking to enforce the agreement via this suit but instead intended to restrain the 2<sup>nd</sup> Defendant from transferring its shares in the 1<sup>st</sup> Defendant to a third party.

The Plaintiff placed before the court through an application dated 20<sup>th</sup> February 2018, evidence demonstrating that the 2<sup>nd</sup> Defendant owned shares in the 1<sup>st</sup> Defendant and while acting through the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant it had initiated plans to transfer its said shares to a 3<sup>rd</sup>

party. The court in this application, then issued a restraining order against the Defendants.

The Plaintiff argued that the preliminary objection must be founded only on a point of law but the grounds on the above preliminary objection touch on facts and evidence.

## **1<sup>ST</sup> DEFENDANT'S WRITTEN SUBMISSIONS**

In the 1<sup>st</sup> Defendant's written submissions dated 24<sup>th</sup> January 2019, he submitted on the various issues that were brought out in the grounds of the preliminary objection as follows;

### **1. Jurisdiction of the court with regards to the subject matter**

The 1<sup>st</sup> Defendant submitted that when filing a suit, a party ought to identify the jurisdiction of a court which can either be territorial or pecuniary. In this case, the parties to the arbitration agreement of Hire and Equipment alleged to be entered between the 2<sup>nd</sup> Defendant and the Plaintiff on 18<sup>th</sup> April in the Democratic Republic of Congo, had agreed to the territorial jurisdiction of the Democratic Republic of Congo if any dispute was to arise. He relied on the case of Milkah Nanyokia Masungu vs Robert Wekesa Mwembe & 2 Others[2013]Eklr, where the court reiterated the 'Lilian S' case stating that;

**“Jurisdiction is everything. Without it, a court has no power to take 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 must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

He further relied on 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.”**

The 1<sup>st</sup> Defendant therefore submitted that the Plaintiff had not justified reasons as to why the jurisdiction clause should be departed.

The 1<sup>st</sup> Defendant also placed his reliance on section 14 and 15 of the Civil Procedure Act which provides that in cases of personal injuries, breach of contract or statutory obligation, suits should be instituted where the cause of action arose or where the defendant resides or works.

### **2. Privity of contract**

On this issue, the 1<sup>st</sup> Defendant relied on the case of Savings & Loan(K) Ltd vs Kanyenje Karangaita Gakombe & Another[2015]eKLR which reiterated the case of Dunlop Pneumatic Tyre Co Ltd vs Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC which stated;

**“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”**

### **3. Doctrine of corporate personality**

The 1<sup>st</sup> Defendants submitted that this doctrine connoted that a company is a juristic and legal person and has the right to sue and be sued. He further relied on the case of Arun C Sharma vs Ashana Raikundalia & 5 others [2015]eKLR which reiterated the case of Kolaba Enterprises Ltd vs Shamsudin Hussein Varvani & Ano (2014) eKLR that:

**“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of Salomon & Co Ltd vs Salomon [1897] A.C. 22 H.L. that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.”**

Additionally he relied on **section 326 of Companies Act** which allows that shares of a company are generally transferable unless restricted by the Articles of Association of the company.

## **DETERMINATION**

The court has considered the above submissions as regards to the preliminary objection and notes the following issues;

### **1. Jurisdiction of the court with regards to the subject matter**

The jurisdiction of the High Court is in **Article 165 COK 2010. Section 14 and 15 of the Civil Procedure Act** provides that in cases of personal injuries, breach of contract or statutory obligation, suits should be instituted where the cause of action arose or where the defendant resides or works.

However, the question of jurisdiction herein is specifically one of territorial jurisdiction. The application slated for hearing and determination filed on 11<sup>th</sup> November 2017 relates to alleged transfer of shares of the 1<sup>st</sup> Defendant Company incorporated in Kenya and the Plaintiff is of the view that the said transfer will vitiate his claim against the 2<sup>nd</sup> Defendant whose proceedings are lodged in **Democratic Republic of Congo**.

It is not disputed that the parties entered the agreement for Hire of Equipment in the Democratic Republic of Congo. In the said Agreement, the parties opted in any dispute arising out of the contract shall be resolved by mutual agreement or through the Courts of the Democratic Republic of Congo. Clearly, the Kenyan Courts jurisdiction on any issue arising from the said contract is expressly ousted. This Court lacks jurisdiction and cannot legally hear and determine the same.

The Plaintiff's claim in this particular suit is to seek orders from Court specifically restraining the transfer of 2<sup>nd</sup> Defendant's shares in the 1<sup>st</sup> Defendant Company which operates in Kenya as the alleged act would adversely affect the Plaintiff's claim against 1<sup>st</sup> Defendant in Congo.

The 1<sup>st</sup> Defendant is a company incorporated in Kenya as confirmed by the Registrar of Companies Certificate. **Section 15 of the Civil Procedure Act** provides that

**“every suit shall be instituted in a court within the local limits of whose jurisdiction—**

**a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain”**

The court relies on the case of *Areva T & D India Limited v Priority Electrical Engineers & Another [2012] eKLR* which reiterated the case of; *United India Insurance Co Ltd v East African Underwriters (K) Ltd [1985] KLR 998*, where the Court of Appeal held that

**“the onus of establishing a strong reason for avoiding the jurisdiction of the Kenyan Courts is upon the parties who seek to avoid that jurisdiction. In exercising its discretion in determining the venue of arbitration, where the arbitration clause provides for the arbitration proceedings outside Kenya, the Court must take into account the following factors: in what country the evidence on the facts in issue is situate or more readily available and the effect of that on the convenience and expense of trial as between the Courts of the two countries, whether and how differently the law of the foreign court applies, with what country either party is connected and how closely, whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantage and finally, whether the plaintiff would be prejudiced by having to sue in a foreign court.”**

The 1<sup>st</sup> Defendants, who are a company incorporated in Kenya, have not demonstrated to the court reasons as to why the Plaintiff's application dated 20<sup>th</sup> February 2018 which contests alleged transfer of its shares held by 2<sup>nd</sup> Defendant should not be heard by this court. In light of Section 15 CPA, The court is therefore inclined to uphold that it indeed has jurisdiction to hear the Plaintiff's application.

### **2. Privity of contract**

The court is guided by the case of *City Council of Nairobi vs Wilfred Kamau Githua t/a Githua Associates & another [2016]eKLR*, which sought reference to the case of *Agricultural Finance Corporation vs Lengetia, 1982-88 I KAR 772* which stated:

**“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it...”**

The Plaintiff has not demonstrated evidence in its pleadings to show that the 1<sup>st</sup> Defendant is a party to any agreement with the Plaintiff. The court is therefore inclined to agree with the 1<sup>st</sup> Defendant that it is not a party to the hire and equipment agreement and therefore proceedings in the Democratic Republic of Congo.

### **3. Doctrine of corporate personality**

The 1<sup>st</sup> Defendant submitted that the company is a separate legal person from its members. With regard to the claim by the Plaintiff who sought to restrain the 2<sup>nd</sup> Defendants from transferring its shares in the 1<sup>st</sup> Defendant to a third party. The court is indeed guided by **section 326 of Companies Act** which provides that shares of a company are generally transferable unless restricted by the Articles of Association. At this stage the Court is invited only to determine under the Preliminary Objection whether it has jurisdiction to hear and determine the claim if so then the matter shall be heard and determined on its merits.

### **DISPOSITION**

1. The Preliminary Objection filed on 28<sup>th</sup> February 2018 is dismissed with costs.

2. This Court has jurisdiction to only hear and determine the dispute regarding alleged transfer of shares of 2<sup>nd</sup> Defendant from 1<sup>st</sup> Defendant a company incorporated and resident in Kenya.

3. This Court lacks jurisdiction to hear and determine the dispute between the 2<sup>nd</sup> Defendant and Plaintiff as in their Agreement they have ousted this Courts intervention and expressly indicated that any dispute from their contract shall be resolved by Courts in Congo.

4. The matter be processed in the normal way in the Registry and parties to take date for hearing of the application or suit.

DELIVERED SIGNED & DATED IN OPEN COURT ON 20<sup>TH</sup> MAY 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KABUGU FOR APPLICANT- ABSENT

MR NGOLOMA HOLDING BRIEF MR. NYEUSI FOR PLAINTIFF

COURT ASSISTANT- JASMINE