



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 84 OF 2017

EAST AFRICA CAPITAL PARTNERS MANAGEMENT LP.....PLAINTIFF

VERSUS

WANANCHI NOMINEES LIMITED.....1ST DEFENDANT

ISP KENYA LIMITED.....2ND DEFENDANT

EAST COAST TELECOMS LIMITED.....3RD DEFENDANT

(By original action)

And Between

WANANCHI NOMINEES LIMITED.....1ST PLAINTIFF

INTERNATIONAL CONSULTING MARKETING SERVICES

LIMITED (formerly ISP KENYA LIMITED).....2ND PLAINTIFF

EAST COAST TELECOMS LIMITED.....3RD PLAINTIFF

VERSUS

EAST AFRICA CAPITAL PARTNERS MANAGEMENT LP...1ST DEFENDANT

AFRICA TELECOMMUNICATIONS MEDIA

AND TECHNOLOGY FUND I, LLC.....2ND DEFENDANT

WANANCHI GROUP HOLDINGS LIMITED.....3RD DEFENDANT

RICHARD BELL.....4TH DEFENDANT

(By Counterclaim)

And further Between

WANANCHI GROUP HOLDINGS LIMITED.....PLAINTIFF

VERSUS

WANANCHI NOMINEES LIMITED.....1ST DEFENDANT

INTERNATIONAL CONSULTING MARKETING SERVICES LIMITED

(formerly ISP KENYA LIMITED).....2ND DEFENDANT

EAST COAST TELECOMS LIMITED.....3RD DEFENDANT

(By Further Counterclaim)

RULING

INTRODUCTION

1. **East Africa Capital Partners Management** (Original Plaintiff) filed the original suit on **28th February 2017** against **Wanainchi Nominee Limited, ISP Kenya Limited** and **East Coast Telekoms Limited** as the 1st, 2nd and 3rd defendants respectively (original defendants). On being served with the plaint those defendants filed a defence and counter claim. In that counter claim, those defendants sued the original plaintiff as the 1st defendant and **Richard Bell** as the 3rd defendant amongst others.

BACKGROUND

2. The original defendants are share holders in Africa Telecommunications Media and Technology Fund 1, LLC which together with ATMT 1 Holdings LLC constitute the Fund. The original plaintiff became the manager of the Fund.

3. The relationship between the Fund and the original plaintiff is governed by the shareholders agreement and the management agreement.

4. The original defendants in their counter claim made various allegations against the original plaintiff and **Richard Bell**.

5. In respect to the original plaintiff, it is pleaded in the counter claim that the original plaintiff breached its duties as the Fund Manager in the following manner:

“(a) Has failed to effectively manage the Funds in a manner that would facilitate the investors recouping their investments within the time originally anticipated. This failure is continuing, despite the 1st Defendant seeking and obtaining extensions of the life of the Fund.

(b) Failed to prevent the theft of, and has failed to do enough to recover the \$30 million which the 1st and 4th Defendant in the Counterclaim claim to have been stolen by Richard Alden and/or Altice Capital. The Defendants aver that the theft occurred as a result of poor management and suspect that the 1st and 4th Defendants in the Counterclaim were directly or indirectly involved.

(c) Has failed to protect and defend the interests of the investors and the funds while instead focusing on securing its own selfish interests. For instance, while WBS is profitable and a number of investors, including the Defendants in the counterclaim are opposed to its sale, the 1st Defendant has not done anything to stop the proposed sale but instead submitted a bid for the purchase of WBS as part of a consortium.”

6. In that counterclaim, it was pleaded that **Richard Bell** committed the following breaches:

“(a) Is the Chief Executive Officer (CEO) of KOOBA Africa which is an entity operating in the ICT sector and is not related to the Funds or Wananchi Group.

(b) Does not devote sufficient time to the management of the Funds due to his other engagements, including as the CEO of KOOBA Africa.

(c) Has been involved in, or allowed, the theft of around \$30 million dollars from the funds.

(d) Has actively participated, as part of the owners of the 1st Defendant in bidding for WBS in clear breach of the conflict of interest provisions in the Shareholders Agreement and Management Agreement.”

APPLICATION UNDER CONSIDERATION

7. The original plaintiff and **Richard Bell** have filed a notice of motion dated **6th November 2017**, seeking that they be struck out of the counterclaim.

8. In support of that application an affidavit was filed by **Richard Bell**. That affidavit highlights the following grounds as the basis of seeking the orders for striking out those parties from the counter claim that:

“a. The counterclaim alleges breach by the 1st Defendant and 4th Defendant (hereinafter “EACP” and “Richard Bell” respectively) of obligations prescribed in the Amended and Restated Management Agreement (“Management Agreement”) dated 9th June, 2010. The parties to the said Agreement are EACP the 2nd Defendant in the counterclaim, (ATMT Fund 1) and ATMT 1 Holdings LLC.

b. The plaintiffs, who are shareholders in ATMT Fund 1, further challenge the management and activities of the ATMT Fund 1 including the sale of certain assets. The relationship between the plaintiffs and ATMT Fund 1 is governed by the Amended and Restated Shareholders Agreement dated 9th June 2010 (“Shareholders Agreement”).

c. This Honourable Court lacks the jurisdiction to entertain and determine the dispute herein, whereby the Management Agreement and Shareholders Agreement expressly provide that all disputes arising out of or in connection with the Agreements are to be resolved by way of arbitration in accordance with Clause 11 (h) and 12.9 respectively.

d. Pursuant to the above mentioned clauses, the disputes are to be settled under the Rules of Arbitration of the International Chamber of Commerce by three Arbitrators in London, United Kingdom.

e. Further, Clause 11 (f) and 12.8 of the Management Agreement and Shareholders Agreement respectively, expressly provide that the Agreements are to be construed in accordance with and governed by the law of Mauritius. Accordingly, the exclusive jurisdiction and governing law clauses ousts the jurisdiction of the Kenyan Court.

f. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved and this Honourable Court is enjoined to uphold the contractual terms.”

9. The deponent also stated in support of the application that there was no cause of action which arises against the original plaintiff and **Richard Bell** and that the counter claim would fail. Further, that the counter claim was filed in breach of the order made by this court on **28th February 2017**.

10. The Affidavit in reply was sworn by **Joe Kamau** Chairman of the Board of Directors of the Original 1st defendant. He deponed that the counter claim is competent and deserving full hearing because it raises legitimate and substantiated grievances which this court has jurisdiction to hear and determine. That the claims in the counterclaim against the original plaintiff and **Richard Bell** include allegations of Fraud, theft and conflict of interest: which are disputes that are not arbitrable, and that there was no agreement between the original defendants and **Richard Bell**.

11. It was also submitted on behalf of the original defendants that the original plaintiff and **Richard Bell** are proper parties and that their presence in the counterclaim is necessary to enable the court adjudicate and settle the issues in the original action and the counterclaim.

12. The original defendants also submitted that the court should consider that it is established principle of law that the power to strike out pleadings /party should be exercised sparingly.

13. Further that the existence of an arbitration clause does not take away the jurisdiction of the court. The original defendants submitted in that regard that the court can assume jurisdiction even though there exists an arbitration agreement because there are multiple defendants in the counter claim some of whom do not have an arbitration agreement with the original defendants. That the claim against the original plaintiff and **Richard Bell** are not arbitrable and because it is convenient, efficient, efficacious and prudent to deal with all the related disputes between the multiple parties together.

ANALYSIS AND DETERMINATION

14. It is pertinent to state that the original plaintiff filed the original suit seeking prayers in the plaint as follows:

“(a) A Declaration that all disputes relating to the conduct and activities of the ATMT F1, the Plaintiff and/or Wananchi Group Holdings Limited either as threatened or at all are to be resolved by Arbitration as provided by the Shareholders Agreement and the Management Agreement.

(b) The Defendants be strictly enjoined and restrained whether by themselves or by their servants, agents or otherwise howsoever from instituting any proceedings or complaints of whatever nature in Kenya with respect to the conduct and activities of the ATMTF1, the plaintiff and/or Wananchi Group Holdings Limited either as threatened or at all.

(c) The Defendants be strictly enjoined and restrained whether by themselves or by their servants, agents or otherwise howsoever from disclosing, broadcasting and/or in any manner howsoever divulging any information of whatever nature with respect to the conduct and activities of the ATMT F1, the plaintiff and/or Wananchi Group Holdings Limited.”

15. In filing that plaint the original plaintiff sought and obtained an ex parte injunction which injunction restrained the original defendants from filing court action over the dispute that is the subject of arbitration.

16. The parties and more particularly the original defendants confirm that the foundation of the action in the counterclaim is the way that the Fund was managed by the original plaintiff and **Richard Bell**. Indeed the original defendants by their written submissions in opposition to the application under consideration submitted this:

“the plaintiffs (the original defendants) in the action by counter claim have a close relationship with the 1st and the 4th defendants (original plaintiff and Richard Bell respectfully) in the action by counter claim. This relationship is rooted in the manner in which ATMT Fund 1 was managed and in the following agreements:

i. The ATMT Fund 1 amended and restated shareholders agreement dated 9th June 2010....

ii. The amended and restated management agreement dated 9th June 2010.”

17. The shareholders agreement and the management agreement, referred to above, both provide for all disputes arising from those two agreements to be referred for arbitration. In the case of the shareholders agreement the governing law is stated to be **Mauritius** and in the case of the management agreement, the place of arbitration is provided to be **United Kingdom**.

18. In the case of ***Leisure Lodge Ltd Vs Patcham Holdings Ltd & another [2016]eKLR*** the Court of Appeal held:

“the general rule is that where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in non contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum”.

19. The above was also the finding in the case ***United India Insurance Co. Ltd vs East Africa Underwriters (Kenya) Ltd [1985] KLR 898***, where the court also stated that courts have discretion to assume jurisdiction where there is exclusive jurisdiction then stated:

“the exclusive jurisdiction clause however, should normally be respected because the parties themselves freely fits the forum for the settlement of their dispute; the courts 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 keeping them bound by their agreement.”

20. That holding was echoed in the case of ***Areva T & D India Limited vs Priority Electrical Engineers & Another [2012]eKLR*** where the court of appeal stated:

“Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, any departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule.”

21. The agreements which are the root of the relationship between the parties clearly show that there was an exclusive jurisdiction clause. The original defendants have not shown any compelling reasons why the counterclaim should be sustained in the Kenyan Courts.

22. The agreements additionally, have arbitration clause. The original defendants submissions are that the disputes in the counterclaim are not arbitrable.

23. That statement that the disputes are not arbitrable, flies against the pleadings in the counterclaim. This is clear throughout the defence, which was adopted in the counterclaim, and in the counterclaim itself. For example in paragraphs 28 and 29 of the counterclaim, the original defendants plead the provisions of the management agreement before proceeding to set out how the original plaintiff and **Richard Bell** breached those provisions.

24. I have considered the parties submissions and I find merit in the original plaintiff's application on two grounds. That is, the two agreements, the very foundation not only of the relationship between the parties but also the dispute that has found itself before this court, provided for exclusive jurisdiction and arbitration as the choice of the dispute resolution. I have sighted the request for arbitration made by the original plaintiff and it follows that all the disputes between the parties, touching on their relationship identified in this ruling ought to be litigated before an arbitrator.

25. Accordingly the notice of motion dated **6th November 2017**, succeeds as follows:

a. The 1st and 4th defendants in the counterclaim are hereby struck out from that counterclaim with costs, which costs shall be paid by the plaintiffs in the counterclaim.

b. The costs of the notice of motion dated 6th November 2017 are awarded to the 1st and 4th defendants in the counterclaim to be paid by the plaintiffs in the counterclaim.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE