REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE. NO. 311 OF 2011

BASH HAULIERS LIMITED.....PLAINTIFF

VERSUS

DAMCO LOGISTICS KENYA LIMITED.....DEFENDANT

RULING

Introduction

1. On 20 March 2017, after hearing arguments on the Defendant's application dated 18 August 2016, I dismissed the application *ex tempore*. I intimated that the reasons would follow. These are the reasons.

Background

2. A brief backdrop is necessary to understand the ruling and the reasons. In 2011 the Plaintiff launched the suit against the Defendant claiming the amount of Kshs. 9,399,720/= for transport services. The Defendant denied the claim and quickly raised an issue as to want of jurisdiction. The Defendant contended that the contract under which the Plaintiff allegedly pegged its claim had expressly reserved the forum for dispute resolution between the parties to English courts. As a result too, the Defendant urged an objection *in limine* as to the local courts' jurisdiction.

3. On 19 January 2012, the court (Mutava J), dismissed the objection as to jurisdiction and the application which had sought to strike out the suit for want of jurisdiction.

4. Nearly five years later, the Defendant filed an application under Order 45 Rule 1 seeking to review the ruling and order of 19 January 2012. The Defendant also sought orders to the effect that the court lacks the jurisdiction to hear this suit. Alternatively, the Defendant asked that the suit be transferred to the Chief Magistrate's court for hearing and determination.

Arguments in court

5. Both parties filed written submissions (Defendant's, on 9 December 2016 and Plaintiff's, on 7 February 2017) which they highlighted before me.

Defendant's submissions

6. Mr. John Mbaluto urged the Defendant's case.

7. Mr. Mbaluto advanced the argument that the decision of 19 January 2012 had been pegged on a Court of Appeal decision rendered in 1985. The case was **United India Co. Ltd *v* East African Underwriters (Kenya) Ltd [1985] KLR 898** which had held that jurisdiction could be assumed by a Kenyan court notwithstanding any agreement by parties to the contrary. Mr. Mbaluto urged that the decision in *United India Co. Ltd*'s case had since been overturned by the subsequent Court of Appeal decision in **Areva T & D India Ltd *v* Priority Electrical Engineers & Another [2012]eKLR.** The *Areva T & D India Ltd's* case had been decided on 30 May 2012, just some four and a half months after the impugned decision in this suit.

8. Mr. Mbaluto urged that the decision of the Court of Appeal in *Areva T & D India Ltd's* case could not have been brought to the court's attention as it was determined later in time. The discovery of the decision was not only a new and important matter but also constituted sufficient reasons to warrant the review sought. According to Counsel, the decision in *Areva T & D India Ltd's* case had impliedly overruled the decision in *United India Co. Ltd's* case.

9. While admitting that there had been delay in filing the application for review, Mr. Mbaluto submitted that the delay was not inordinate and referred the court to the decision in **Orero *v.* Seko [1984] KLR 238** where a delay of two years was held not to be inordinate.

10. On the alternative prayer to transfer the case to the Chief Magistrate's court, counsel contended that the monetary jurisdiction of the magistrate court now topped Kshs. 10,000,000/= at stake before this court was less.

Respondent's submission

11. Mr Taib Ali Taib urged the Respondent's case.

12. Firstly, counsel pointed out that there had been inexcusable and inordinate delay on the part of the Defendant as the application for review had been filed over five years after the event.

13. Counsel then submitted that the court (Mutava J) had not relied on the decision in *United India Co. Ltd's* case while dismissing the Defendant's objection as to jurisdiction. Mr. Taib stated that the court had found as a fact that the Defendant was not party to the agreement which contained the ouster clause and that was the basis of the decision. According to Mr. Taib, the court had simply made reference to the *United India Co. Ltd's* case with a view to identifying the guideline to be followed where there was in existence a forum ouster clause and further that the court had made it clear that the forum ouster clause was not outlawed.

14. Mr. Taib concluded his arguments by stating that a new decision by the Court of Appeal could not constitute sufficient reason for purposes of an application for review and neither could it also be deemed a new and important matter. In the instant case, the decision sought to be relied upon had also not overturned the earlier court decision and both decisions were binding even upon the Court of Appeal itself.

Discussion and Determination

15. The power of review is circumscribed under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Any litigant must bring himself within any one or a combination of the three factors set out under Rule 1 of Order 45.

16. Unlike appeals where an applicant may lodge and establish any ground to show that the decision maker made an error of fact or law, review applications are limited to the prescribed and definitive grounds. The applicant must establish that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made. The application for review may also be pegged on the ground that there has been a mistake or error apparent on the face of the record. Finally, an

applicant may move for a review on the basis of some "other sufficient reason". This generic ground has been held to be analogous to the first two grounds: see **Kuria *v* Shah [1990] KLR 316.** Additionally, the applicant must exhibit some alacrity.

17. There is no doubt that the application has been brought after some delay. The delay was over four years, counting from the date of the decision in the *Areva T & D India Ltd's* case. The Defendant did not advance any explanation for the delay. The Defendant ought to and must be taken to have been aware of the Court of Appeal's decision in May 2012.

18. A delay which is not explained is certainly inordinate and robs the court of its powers to act in favour of the person guilty of delay: see **Allen *v* Mc Alphine & Sons [1968] 2 QB 245**. Thus in **Godfrey Ajuang Okumu *v* Nicholas Odera Opinya [2008]eKLR**, a delay of five years without explanation was held to be inordinate as to rob the court of its discretion under Order 44 (now Order 45) of the Civil Procedure Rules even though there was error apparent on the face of the record by the courts failure to appreciate section 7 of the Land Control Act (Cap 302).

19. Even if the delay was to be excused, I do not view it that the application was well founded.

20. Mr. Mbaluto, on behalf of the Defendant, had argued that the court had on 19 January 2012 relied upon a decision of the Court of Appeal which has since been overturned to decide that the court had jurisdiction. The decision referred to as the erroneous one and now bad law is the *United India Co. Ltd's* Case.

21. I have read the court ruling of 19 January2012. The learned judge (Mutava J , who is no longer attached to the court) made various and specific findings of fact . He was particular that the Defendant was not a party to the agreement which contained the forum ouster clause. The learned judge stated as follows:

> ***[9]…In the end, it would be stretching to the wildest of imagination for this court to suppose that the Defendant company is a member of Maersk Kenya Logistics and therefore that the Agreement is an agreement to which the Defendant is a party. The preliminary objection therefore stands to fail on the basis that the agreement is not one between the parties to the suit in this matter.***
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> ***[10]… However, even if both parties were shown to be parties to the Agreement for transport services dated 1st January 2007, this court would still need to consider whether in the present case the existence of the jurisdiction clause in the Agreement exclusively subjecting dispute resolution to English Courts would be sustainable within the established legal threshold regarding ouster of jurisdiction conferred on foreign courts. The locus classicus on this issue remains the case of United India Company Ltd –v- East African Underwriters Kenya Ltd [1985] KLR in which the Court of Appeal considered the circumstances under which Kenyan courts can assume jurisdiction notwithstanding a clause in an agreement conferring jurisdiction on a foreign court".*** (emphasis added)

22. It is clear that the decision of the court of 19 January 2012 to dismiss the Defendant's Preliminary Objection was not based on the decision of the Court of Appeal in *United India Co. Ltd's* case. The court was clear that the Preliminary Objection lacked merit because of privity of contract. The court then proceeded to state that if the facts were to change and the court shown that the parties to the suit were also party to the agreement containing the 'ouster clause', then the decision of *United India Co. Ltd's* case would be applicable. The effect is that even if the decision in the *Areva T & D India Ltd's* case was in place in 2012, the Preliminary Objection as to jurisdiction would still have been dismissed. The facts have not changed and the decision of 19 January 2012 factually remains constant.

23. Secondly, the only decision of relevance from the Court of Appeal as at 19th January 2012 in relation to ouster clauses was the *United India Co. Ltd's* case. This was well appreciated by the learned Judge then when he stated that "*the locus classicus on this issue remains the case of of United India Company*

Ltd –v- East African Underwriters Kenya Ltd [1985] KLR in which the Court of Appeal considered the circumstances under which Kenyan courts can assume jurisdiction notwithstanding a clause in an agreement conferring jurisdiction on a foreign court". The judge was not aware of any other Court of Appeal decision on the matter and indeed there was none until May 2012. Clearly, it cannot even be said that the learned judge made his decision *per incuriam*, to even warrant a review.

24. I further hold the view that the fact that a decision on a question of law on which the judgment of a court is based has been reversed or modified by a subsequent decision of a court of higher hierarchy in another case, should and cannot be ground for review of the earlier ruling or judgment. A ground of review ought to be something which existed at the date of the order or decree sought to be reviewed and if the order or decree was right when it was made, as in this case, I find it untenable to argue that because of a subsequent decision by a higher court the decision must now be deemed to have been wrong and subjected to review. It would not be 'sufficient reason' to so argue but rather it would amount to saying that the court was wrong so review the decision. In **Siree & Another –v- Lake Turkana El Molo Lodge [2000] 2 EA 521,** it was held that 'wrong' decisions ought to be appealed not reviewed.

25. I would also hasten to add that if decisions were to be reopened and reviewed on the basis of subsequent Court of Appeal or even Supreme Court decisions, the administration of justice would be thrown into jeopardy and one of the basic principles that litigation has to come to an end would be violated consistently as new precedents emerge from the higher courts. No doubt also, judge made law like primary legislation does not apply retrospectively in the absence of a clear expression or intention to the contrary.

26. I am not satisfied that the Defendant has shown that there has been evidence which after due diligence was not within its knowledge or could not be availed to court in November 2011 as the parties argued before Mutava J. The new matter was indeed non-existent. I am also not satisfied that the Defendant has shown some mistake or error apparent on the face of the record or that there is sufficient reason to warrant a review. Rather the application for review has been made after an inordinate and unexplained delay. The application ought to fail and it does.

27. On the alternate prayer that this suit be transferred to the magistrate's court for determination, I must state that I am not convinced that even though the magistrates' court has the requisite monetary jurisdiction, the suit ought to be transferred. This court too has the jurisdiction: see Article 165(3)(a) of the Constitution as to the High Court's unlimited jurisdiction.

28. The transfer of suits under Section 18 of the Civil Procedure Act (Cap 21) is relatively discretionary and the court should always look into all the circumstances of the case. One relevant factor to be taken into consideration is the stage of litigation. The litigation history of the instant suit reveals that the parties have prepared for trial. The parties have largely complied with the pretrial prerequisites. Case management conferences have been called and directions given. It would not be too ambitious to state that the parties now only await a hearing date. The amount claimed is just within the jurisdiction of the magistrate's court. When the suit was filed the magistrate's court lacked the requisite monetary jurisdiction. It would be inappropriate to transfer the case to the magistrate's court at this stage.

29. For the above reasons, I held the view that the application dated 18 August 2016 warranted a dismissal and I dismissed it. It still stands dismissed.

30. There is no reason to depart from the traditional approach that costs follow the event. I consequently award the costs of the application to the Plaintiff.

Dated, signed and delivered at Nairobi this 31st day of March, 2017.

J.L.ONGUTO

JUDGE