REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 535 OF 2009

PRIORITY ELECTRICAL ENGINEERING LIMITED……..……..……..…… PLAINTIFF

- **VERSUS -**

AREVA T & D INDIA LTD ……..... 1ST DEFENDANT

EMPOWER INSTALLATION CONTRACTORS LTD……..…....2ND DEFENDANT

RULING

1. The first defendant prays that the plaintiff's suit be struck out with costs. By a notice of motion dated 9th July 2013, the applicant contends that this suit is *res judicata*. That plea is predicated upon a ruling of the Court of Appeal striking out a separate but related suit, *Areva Vs Priority Electrical Engineers & another*, in Nairobi Civil Appeal 103 2011. It is thus important to establish the nexus between that suit and the present suit.
2. The plaintiff contests the motion vide a detailed deposition of John Kinungi sworn on 20th November 2013. Four key propositions are made: first, that this suit and that other suit were never *consolidated* – accordingly, the decision of the Court of Appeal is not binding on the present suit; secondly, that since there is *pending* a separate appeal in the Court of Appeal from the present suit relating to an order (Kimaru J) made on 2nd September 2009, this Court lacks *jurisdiction*; thirdly that proceedings have been stayed pending the hearing of that appeal; and, fourthly, that the two suits plead distinct causes of action.
3. The genesis of the dispute is a sub-contract dated 20th July 2007 between the plaintiff and the 1st defendant. The 1st defendant, a company domiciled in India, had been awarded the main contract by Kenya Power & Lighting Company Limited (KPLC) to reinforce and upgrade the latter's power distribution network. A dispute arose. The plaintiff brought proceedings against the 1st defendant to restrain it from terminating the subcontract or awarding it to Empower Installation Contractors Limited, the 2nd defendant.
4. Since the contract contained an arbitral clause, the 1st defendant filed a chamber summons to stay the proceedings and to refer the matter to arbitration *in India* as per the contract. On 2nd September 2009, the High Court (Kimaru J) ordered that the matter be referred to arbitration *but* in Kenya. The 1st defendant was aggrieved and lodged the appeal I referred to. The Court of Appeal found as follows (Visram JA, with Koome JA concurring) –

"Accordingly, and for reasons stated, I allow the appeal, and set aside the orders made

by the High Court, and I allow all the prayers outlined in the Memorandum of Appeal. I also award costs to the appellant, both here and in the High Court".

Koome JA in her concurring decision stated further as follows:-

> *"I agree with the submissions by counsel for the appellants that when the parties signed the sub-contract agreement, they were aware that the contract was to be performed in Kenya, the payment was to be made in Kenya and the witnesses were located in Kenya. In my judgment, I find no exceptional circumstances that would support the learned Judge's findings that changed the terms of the sub-contract by changing the choice of law and jurisdiction. It is trite that a Court cannot re-write a contract for the parties. In the result, I agree that the appeal be allowed in the terms proposed by Visram JA".*

5. In order to fully appreciate the terms of that order, it is necessary then to set out verbatim the prayers in the memorandum of appeal before the Court of Appeal. The appellant had prayed for the following reliefs:-

> *"a) That the appeal be allowed;*
>
> *b) That the ruling and order of the Superior Court be set aside in as far as:*

i. *The arbitration is to be held in Nairobi, Kenya.*
ii. *The Arbitration Act 1995 applies to the dispute,*
iii. *That the Superior court has jurisdiction over the dispute,*
iv. *That the arbitrator be appointed by the Institution of Engineers of Kenya if the parties fail to agree to the appointment of a single arbitrator.*

> *c) That the dispute be heard and determined by arbitration to be held in India.*
>
> *d) That the Indian courts have exclusive jurisdiction over the sub contract.*
>
> *e) The first respondent's plaint be struck out;*
>
> *f) That the costs of the appeal be awarded to the appellant."*

6. In a synopsis, the Court of Appeal struck out the *related* suit at the High Court being HCCC 536 OF 2009 *Priority Electrical Engineers Limited Vs Areva T & D India Limited & Ezeetec Limited*. Two matters are *material*: first, the 2nd respondents in both suits are *different*; and, secondly, there now remains *pending* a separate appeal being Civil Appeal 102 of 2011 at the Court of Appeal arising from the present suit. That appeal is from the same decision of Kimaru J of 2nd September 2009.
7. Although the plaintiff states that both suits were not *consolidated*, it is not the full picture: the typed record in the High Court shows at page 6 that on 7th August 2009, the parties entered into the following consent:

> *"By consent HCCC 536 of 2009 be argued as a test case. Ruling to bind the current applications in the file"* [emphasis added].

8. That is precisely why the impeached decision of Kimaru J provided that *"the orders issued herein shall apply in similar proceedings pending between the parties herein in Nairobi HCCC No 535 of 2009 Priority Electrical Engineers Limited Vs Areva T & D India Ltd & another"*. The latter is the present suit. Save for the 2nd defendant, the parties in both suits are similar and the disputes relate to similar sub-contracts for the works of KPLC. It would be to split hairs to say that one of the subcontracts was for a different segment or scope of the works. The truth of the matter is that

the proceedings in the High Court in both suits were brought to challenge termination of the sub-contracts and to restrain award of those contracts to the 2nd respondents as new subcontractors. The similarity of the suits and causes of action obviously led to the consent to have both matters determined in a single ruling and for one to be the *test suit*. True, that consent was at the interlocutory stage but the record and terms of it are self-explanatory.

9. The Court of Appeal in Civil Appeal 103 of 2011 was rendering a decision on the *single* ruling of Kimaru J. The *pending* appeal in Civil Appeal 102 of 2011 over the same ruling in the present suit is nearly a *fait accompli.* I say so with great respect and very carefully because the matter is beyond me. But facts are very stubborn. From the history of the litigation and the decision I have referred to at length, the plaintiff's submission that the two suits are different is prosaic. The decision of the Court of Appeal in the other suit on the *same* ruling of the High Court in this suit must surely *impact* on this suit.
10. The more erudite submission by the plaintiff is that the decision to *strike out* this suit truly *rests* with the Court of Appeal. Granted those circumstances, it is highly irregular to consider the merits whether this suit is *res judicata*. Two other things need to be said: first, that there remains pending in the Court of Appeal a memorandum of appeal praying that the suit be *struck down*. Secondly, section 6 of the Civil Procedure Act would frown upon the action in this Court to strike out the suit. It is thus inappropriate for me to strike out the suit in advance. It was never the intention of the framers of the Civil Procedure Act to have two *parallel* proceedings in different courts: the pitfalls are self-evident. I thus decline to strike out the suit at this stage.
11. Lastly, the plaintiff had submitted that this Court is *functus officio* or lacks jurisdiction to consider the application. Nothing can be further from the truth. Jurisdiction is everything and without it, the Court must lay down its tools. Per Nyarangi JA in *Owners of the Motor Vessel "Lilian S" Vs Caltex Oil (K) Limited* [1989] KLR 1. The interim order of the Court of Appeal in Civil Application 276 of 2009 (UR 192 of 2009) seeking to stay this suit pending appeal was couched in the following terms –

> *"That pending the lodging, hearing and determination of the intended appeal herein there be a stay of the order made on 2nd September 2009 and any further proceedings and in particular instituting, commencing or conducting any arbitral proceedings in Nairobi, Kenya pursuant to the ruling and order delivered by the Superior Court on 2nd September 2009 in High Court Civil Case No 535 of 2009 (Kimaru J)."*

12. Those words are plain and obvious. The further proceedings that were being stayed were *arbitral proceedings* in Nairobi. It is instructive that the High Court (Kimaru J) had stayed proceedings in the High Court and referred the matter to arbitration. That did not, by any stretch of imagination, bar any party from seeking the kind of reliefs sought in the present notice of motion to strike out the suit.
13. For all the above reasons, the 1st defendant's notice of motion dated 9th July 2013 is disallowed. The costs shall be in the cause.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 11th day of February 2014

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the plaintiff instructed by Odawa, Ombwayo & Ochichi Advocates.

Ms Kimani H/B for Mr. Peter Gachuhi for the 1st defendant instructed by Kaplan & Stratton Advocates.

No appearance for the 2nd defendant instructed by Nzavi & Company Advocates.

Mr. C. Odhiambo, Court clerk.