IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, VISRAM, & KOOME, JJA)

CIVIL APPEAL NO 103 OF 2011

BETWEEN

AREVA T & D INDIA LMITED …….……..…… APPELLANT

AND

PRIORITY ELECTRICAL ENGINEERS ……...…...1ST RESPONDENT

EZETEC LIMITED ……...…....2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kimaru, J) dated 2nd September, 2009

in

H C C C No 536 of 2009)

JUDGMENT OF VISRAM, JA

This appeal raises one important legal issue: whether in the circumstances of this case, the Court should give effect to the "exclusive jurisdiction" clause in an agreement in which the parties freely and voluntarily conferred jurisdiction to the Courts of Delhi, India, to resolve any dispute arising from the performance of their contract in Kenya.

The appellant, a company incorporated in Kolkata, India, and having its principal place of business in Noida, India, entered into a contract with Kenya Power & Lighting Company (KPLC) , a parastatal substantially owned by the Government of Kenya, with respect to the reinforcement and upgrading of the electricity distribution network of KPLC in Kenya. That contract permitted the appellant to enter into sub-contracts with other parties, subject to KPLC's approval, for the due performance of the main contract. One such sub-contract that the appellant entered into, was with Priority Electrical Engineers Ltd (Priority), the 1st respondent herein. This sub-contract, dated 20/7/2007, and valued at Kshs 222,837,354/=, required Priority to undertake civil and electrical installation works, and set up and maintain field quality labs as per article 4 of the sub-contract.

The sub-contract agreement contained what has often been described either as an "exclusive jurisdiction" clause or a "forum selection" clause, in the following manner:

"Article 25 – ARBITRATION

> Any disputes arising out of or in connection with this agreement shall be finally settled by way of arbitration in accordance with the Indian Arbitration Act, 1996 as modified from time to time.
>
> The Arbitral award shall be final and binding and shall not be subject to any appeal or revision. The venue of the arbitration shall be at New Delhi, India.
>
> Article 26
>
> The Courts of Delhi shall have exclusive jurisdiction."

A dispute arose between the appellant and Priority regarding the performance of the sub-contract. In a plaint dated 27/7/2009, and filed in the High Court on 28/7/2009, Priority complained that the appellant had unilaterally, and without notice, terminated the sub-contract, and sought orders of injunction to restrain Priority from awarding the sub-contract to the 2nd respondent Ezetec Ltd (Ezetec).

Upon being served with the plaint, the appellant immediately filed an application in the High Court pursuant to section 6 (1) of the Arbitration Act and Rule 2 of the Arbitration Rules 1997, seeking to stay the suit, and for orders directing that the matter be referred to arbitration in accordance with the agreement between the parties. That is the application that was before the High Court and its ruling is the subject of this appeal.

The main issue before the High Court (Kimaru, J) was whether the court should compel the parties to honour the jurisdiction clause in the agreement, or should allow the suit to proceed in Kenya on the grounds, enumerated by Priority, the respondent, that the subject matter of the contract was based in Kenya; that payment was to be made in Kenya; that the entire evidence to be adduced was located in Kenya, as were the witnesses, and that the remedies sought were urgent, and could not await arbitration.

In its ruling, the subject of this appeal, the High Court stated, in part, as follows:

> "On my part, I am of the view that before this Court can stay proceedings in this suit and direct that the dispute be resolved by arbitration out of the jurisdiction of this Court, the Court must be satisfied that the dispute will indeed be determined by arbitration. As was held by the Court of Appeal in *United India Insurance Co Ltd v East African Underwriters (K) Ltd* [1985] KLR 998, 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.
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> Applying the above principles to the present case, it is evident that whereas the parties agreed that the dispute would be resolved by arbitration at the agreed venue of New Delhi India, it is clear that the plaintiff has a case when it argues that the arbitration proceedings ought to be conducted in Kenya under the supervision of the Kenyan Courts. The subject matter of the contract is to be performed in Kenya. The entity that is paying for the performance of the contract is a company substantially owned by the Government of Kenya. The entire evidence that will be adduced during the hearing of the dispute will be procured from Kenya. The majority of witnesses, if not all, are in Kenya. I think this Court would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other party where clearly there is no legal or logical justification. In the present case, it is clear that by invoking the arbitration clause, and by insisting that the venue of the arbitration be at New Delhi India, the 1st defendant is in actual fact seeking to take advantage of a procedural technicality to frustrate the hearing and determination of the pending dispute between itself and the plaintiff. If this Court were

> to uphold the argument advanced by the 1st defendant, the practical consequences of such decision would mean that the dispute between the plaintiff and the defendants would not be resolved expeditiously as the anticipation in any arbitration proceedings."

The learned Judge then went one step further when he said:

> "The parties are hereby ordered to agree on a single arbitrator to determine the dispute between them within fourteen (14) days of today's date failure of (*sic*) which the chairman of The Institution of Engineers of Kenya shall appoint a single arbitrator to determine the dispute."

That is the ruling that triggered this appeal. In his submissions before us, Mr P Gachuhi, learned counsel for the appellant, assisted by Ms A Waweru, urged the Court to uphold the sanctity of the contract, freely entered into by the parties, conferring exclusive jurisdiction to the Courts in New Delhi. Relying on the case of *Raytheon Aircraft Corporation & Anr v Air Al Faraj Ltd* (2005) Eklr counsel argued that there were no strong reasons or exceptional circumstances to warrant a departure from the agreement which had been entered into voluntarily with full knowledge of where the subject-matter was, and where witnesses were located. Finally, counsel argued, that to impose the choice of an arbitrator, was to vary the terms of the contract without the Court having any jurisdiction to do so.

Relying on the case of *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898, Mr A O Ombwayo, learned counsel for the respondent, argued that the burden of establishing a strong reason for avoiding the jurisdiction of the Kenyan Courts lies upon the person who seeks to oust that jurisdiction; and that in this case the appellant had not done so. He argued that the subject-matter of the dispute, and the witnesses, were based in Kenya and payment under the contract was to be effected in Kenya, and accordingly Kenya would be the most convenient forum for the resolution of the dispute herein.

The basic facts, upon which the appellant's application for stay in the High Court was resisted, are set out in two depositions – the Replying Affidavit of John Kinungi, sworn on 26/8/2009, and the affidavit in support of the application for injunctive reliefs, also sworn by John Kinungi on 27/7/2009. Mr Kinungi describes himself in both the depositions as the Managing Director of Priority.

In the affidavit sworn on 27/7/2009, Mr Kinungi states "that there are special and exceptional circumstances in this case" (to depart from the exclusive jurisdiction clause in the agreement). He does not specify what those special and exceptional circumstances are, nor does he elaborate on it anywhere else in his affidavit which runs into 20 paragraphs. Likewise, in his replying affidavit sworn on 26/8/2009 Mr Kinungi does not clearly expound on the special and exceptional circumstances, but avers as follows:-

> "8. THAT when the 1st defendant terminated its contract with the plaintiff, and also proceeded to, by implication terminate the plaintiff's contract with the 2nd defendant, it failed to appreciate the damage its actions would cause to the plaintiff, it cannot therefore seek to ask this Court to oust itself of jurisdiction.
>
> 9. THAT the 1st defendant, by fomenting the termination of the contract between the plaintiff and the 2nd defendant, acted in an oppressive manner and cannot hide under the exclusive clause on jurisdiction under its agreement with the plaintiff.
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> 10. THAT the remedies sought are urgent and cannot wait for the 1st defendant to decide on whether or not to take the dispute for arbitration."

Essentially, Priority is raising two major arguments to justify departure from the exclusive jurisdiction clause – that the appellant acted in an "oppressive manner", and that the remedies sought were urgent and could not await arbitration. In my humble view, neither of these two arguments are sufficient to depart from the contract. The particulars of the appellant's oppressive conduct are not outlined, while the issue of "urgency" may actually negate the reason for approaching the Court where cases may delay more than

they would in an arbitration. Business people choose arbitration over courts mainly because they want a more expeditious resolution of disputes.

The test in determining the effect of exclusive jurisdiction clauses was outlined by Willmer, J (as he then was) in *The Fehmarn* [1957] Lloyds Law Reports, 511, as follows:-

> "Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this Court that that agreement should be overridden and that proceedings in this country should be allowed to continue."

In the *EI Amria* [1981] 2 Lloyds Law Reports, 119 Brandon, LJ laid down the following principles:-

> "(1) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such a strong case is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case."

In the case *of United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898 Madan, JA (as he then was) observed as follows:-

> "The Courts of this country have a 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. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely 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 their agreement.
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> 'Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure. (per Cairns, LJ, in the *Makefjell* [1976] 2 Lloyds Reports 29).' "

In the case of the *Makefjell* (*supra*), Cairns LJ states at page 34:

> "…While no absolute rule can be laid down to this effect, the Court should be very slow to refuse a stay if the claim is just the sort of claim to be rejected. When a clause of this kind is introduced into a contract it must be supposed that the parties consider that, in general, trial in the place mentioned in the clause is more convenient than trial elsewhere. It does not lie in the mouth of one party to say when a claim arises; 'Although this claim differs in no way from the generality of claims that might be made by me under the bill of lading, I say that the specified place of trial is inconvenient.'
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> And Sir Gordon Willmer said at p 38;
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> "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. In my judgment the learned judge meant no more than this, as is, I think, made clear by the concluding words of the penultimate paragraph of his judgment, when he stated his conclusion in the following words: 'The plaintiffs have failed to show sufficiently strong reason why they should not be held to contract.' In these circumstances, I can find no fault with the learned judge's formulation of the principles on which his discretion should be exercised."

I fully agree that the rule that the parties should be held to their bargain should only be departed from in a special and exceptional case. Here, in the case before us, as I have pointed out, no such special and exceptional circumstances have been established to depart from the contract that the parties had freely and voluntarily agreed upon. The learned Judge's conclusion that his Court "would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other party where clearly there is no legal or logical justification" is based on no evidence that we can discern from the record, and the Judge's order that the arbitration be conducted by "a single arbitrator to determine the dispute between them within fourteen (14) days of today's date failure of which the chairman of The Institution of Engineers of Kenya shall appoint a single arbitrator to determine the dispute" is without jurisdiction.

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.

This judgment has been delivered under rule 31 (3) of the Court of Appeal Rules, and as Koome, JA also agrees, the orders shall be as outlined herein before.

Dated and delivered at Nairobi this 30th day of May, 2012.

ALNASHIR VISRAM

…….……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KOOME JA:

I have had the advantage of reading the judgment of Visram, JA. I agree with it and gratefully adopt his recitation of the material facts. The singular issue that was raised in this appeal is the effect of the 'exclusive jurisdiction' that was part of the sub-contract agreement the subject matter that was before the learned trial Judge.

The provisions of the sub-contract are clear that any dispute was to be settled by way of arbitration in accordance with the Indian Arbitration Act 1996 as modified from time to time. The venue of Arbitration was New Delhi in India. In my view, the parties entered into this sub- contract agreement voluntarily and there were no exceptional circumstances that had occurred during the sub-contract to warrant a departure from the terms agreed upon by the parties.

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 Judges 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.

Dated and delivered at Nairobi this 3oth day of May, 2012.

M K KOOME

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR