REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 15 OF 2018

AFRICAN SERVICE MAINTENANCE LIMITED.....PLAINTIFF

VERSUS

1. COMARCO SUPPLY BASE (EPZ) LIMITED

2. PURMA HOLDINGS LIMITED..... DEFENDANTS

RULING

1. The 1st defendant, Comarco Supply Base (EPZ) Limited filed a Notice of Preliminary Objection (PO) dated 19th March, 2018 against the entire suit herein on the grounds that:-

i. This Honourable court lacks jurisdiction to hear and determine this matter by virtue of the fact that the charterparty agreements between the plaintiff and the 1st defendant dated 11th October, 2017 and 2nd November, 2017, respectively clearly state that the transactions therein are governed by English law and that disputes shall be settled by way of Arbitration with the seat of the said Arbitration being in London, England;

ii. The aforementioned charterparty agreement dated 11th October, 2017 states English Law and London Arbitration as the governing law and the dispute resolution mechanism both in **box 25** and in the notes to the charterparty in clause 19(a);

iii. Similarly, the aforementioned charterparty agreement dated 2nd November, 2017 states English law and London Arbitration as the governing law (sic) and the dispute resolution mechanism both in **box 25** and in the notes to the charterparty in clause 19(a) which actively cancels out the other options in respect of jurisdiction;

iv. Further to the above, the "rider" to the charterparty agreement dated 2nd November, 2017 reiterates the governing law in the said charterparty agreement to be English law and the mode of dispute resolution as London Arbitration in clause 28 of the said "rider";

v. Pursuant to the doctrine of "privity of contract" and the general rule that requires that this Honourable court upholds the intentions and bargain of the parties in respect of the aforementioned agreements, this Honourable court ought not to interfere with the parties' exclusive jurisdiction clause;

vi. Additionally, the plaintiff/applicant has not shown this Honourable court any extenuating or exceptional reason why this Honourable court should depart from the said doctrine or rule; and

vii. Following (sic) from all the above, the suit and application herein is therefore fatally defective and is otherwise an abuse of the court process and the same ought to be dismissed with costs.

2. The plaintiff's Counsel filed his submissions on 9th April, 2018. The 1st defendant's Counsel filed his on 13th April, 2018. In highlighting the submissions, Mr. Asige, Learned Counsel for the 1st defendant argued that this court lacks jurisdiction to determine the suit herein for the reason that the plaintiff and the 1st defendant entered into a charterparty agreement dated 9th October, 2017 for transportation of maize from Tanzania to Mombasa. It was stated that the agreement set out the dispute settlement mechanism as arbitration in London in accordance with English law. Counsel argued that the plaintiff wants to remove itself from the said jurisdiction. He cited the case of the **Owners of the Motor Vessel "Lilian S" vs Caltex Oil (K) Limited** [1989] KLR 1, where the Court of Appeal held that jurisdiction is everything without which a court has no power to make one more step.

3. Mr. Asige submitted that the plaintiff's argument is that the maize in issue is likely to go to waste. He cited the case of **Petra**

Development Services Limited vs Evergreen Marine (Singapore) PTE Ltd and Another [2014] eKLR where Kasango J held that the nature of the cargo did not matter but what mattered most was if the court had jurisdiction. In the said case, the decision in **Areva T and D India Limited vs Priority Electrical Engineers & Another [2012] eKLR** was cited where the court held that where there is a general rule, parties should be held to their bargain. This court was urged to determine if there is a special and exceptional case to override the agreement between the plaintiff and the 1st defendant.

4. Counsel for the 1st defendant submitted further that the suit and application by the plaintiff are delaying tactics in which this court is being asked to override an agreement that was entered into without duress. In his view, the suit and application herein are vexatious and an abuse of the court process.

5. It was submitted that clause 25 of the charterparty provided for arbitration in London. The court was referred to the said agreement attached to the plaintiff's application. Counsel stated that the said agreement was followed by another with similar terms, thus the plaintiff knew what it was getting into.

6. Mr. Kongere for the plaintiff opposed the application by stating that the essence of a preliminary objection (PO), was reiterated by the Supreme Court of Kenya in the case of **IEBC vs Jane Cheperenger and 2 Others** [2015] eKLR where the court held that a PO may only be raised on a pure question of law but not where the facts are contested or if what is being sought is an exercise of judicial discretion.

7. Counsel for the plaintiff cited the case of **Oraro vs Mtaya** [2005] eKLR where the court held that where a party needs to investigate facts, a matter cannot be raised as a preliminary point.

8. He made reference to the plaint which comprises 12 pages that refers to a charterparty agreement of 10th April, 2017, that refers to another charterparty agreement of 2nd November, 2017 between the plaintiff and the 1st defendant. The plaint also refers to a tripartite agreement incorporating the plaintiff, the 1st and 2nd defendants. Mr. Kongere made reference to paragraph 27 of the plaint where the plaintiff avers that the 1st defendant breached the tripartite agreement dated 22nd December, 2017. He added that the said averment is not admitted by the 1st defendant, it is thus disputed.

9. Counsel for the plaintiff argued that the dispute is not only on the charterparty agreements but also on the tripartite agreement as the right to exercise a lien is a factual issue which cannot be resolved through a PO. For the said reason as well, it was submitted that the matter should not go to arbitration.

10. It was contended for the plaintiff that when parties enter into agreements, at times, the previous agreements are extinguished. He stated that novation can also extinguish charterparty agreements. Counsel urged the court not to limit the plaintiff's case to chaterparty agreements as the tripartite agreement could have extinguished or derogated from the former agreements.

11. Mr. Kongere further submitted that 2nd defendant had filed a counter-claim against the plaintiff based on the tripartite agreement but it is not a party to the chaterparty agreements. He argued that this court can resolve all the disputes in this case but arbitration will not resolve the dispute between the three parties, yet the disputes are conjoined and can only be heard together.

12. It was argued that with regard to the case of **Areva I & D India Limited vs Priority Electrical Engineers & Another** (supra) the court held that there is a general rule to arbitral clauses and a court will hear a case if there are special circumstances that require it to be heard. Counsel for the 1st defendant urged this court to determine the dispute fully and with finality.

13. In response to the foregoing, Mr. Asige submitted that the law is applied to the facts. He posited that there was a series of transactions whose means of dispute resolution was agreed with parties who had equal bargaining power. He argued that by bringing in issues of the tripartite agreement, the plaintiff is trying to muddle the waters. He urged the court not to make assumptions on whether there was novation or extinguishment of some rights by virtue of the tripartite agreement. He argued that it is not for the plaintiff to put forward the 2nd defendant's case as it did not wish to participate in the PO.

ANALYSIS AND DETERMINATION

The issue for determination is if the 1st defendant's preliminary objection should be upheld.

14. A perusal of the plaint filed on 7th March, 2018 shows that the plaintiff's claim against the 1st defendant allegedly arose out of delay in freight of 21,500 metric tonnes of Non- GMO white Corn (maize) from the Port of Dar-es-Salaam to the Port of Mombasa, as per the charterparty agreement dated 11th October, 2017 attached to the plaintiff's affidavit and marked as AR3, in support of the Notice of Motion dated 5th March, 2018.

15. The plaintiff avers in the plaint that the barge that was to ferry the goods, namely Comarco 3651 broke down at Nyali Beach. It is further averred that the 1st defendant failed to send another barge known as Comarco 3652 as per an email sent to the plaintiff which stipulated the names of the barges that would ferry the cargo. It was averred that the 1st defendant purported to send a barge known as Osprey K232 with a dead weight of 2,500 MT to Dar-es-Salaam. The plaintiff refused the arrangement as the barge would have made 10 voyages to transport 21,500 metric tonnes of maize and that was not cost effective.

16. It is alleged that the plaintiff declined to accept the said barge and that the 1st defendant considered that it had fulfilled its charterparty agreement of 11th October, 2017. It is averred that the 1st defendant was not willing to send any other vessel to ferry the cargo. In the plaint, the plaintiff claims that the 1st defendant delayed for 22 days from 13th October, 2017 to 2nd November, 2017 before sending its first barge to Dar-es-Salaam. As a result of the delay, it is claimed that the plaintiff incurred demurrhage charges payable to Tanzania Ports Authority

and charges payable to Tanzania Revenue Authority.

17. It is alleged by the plaintiff that as a result of the non-transportation of the cargo by the 1st defendant, the two parties entered into a 2nd charterparty dated 2nd November, 2017 wherein the plaintiff contracted the 1st defendant to transport 24,000 metric tonnes of maize from the Port of Dar-es-Salaam to the Port of Mombasa at an increased cost of USD 34.75 per freight tonne aboard the MV Voula Sea which had a dead weight tonnage of 28,495 Metric tonnes.

18. The plaintiff avers that the MV Voula Sea loaded only 21,350 metric tonnes of maize as opposed to 24,000 metric tonnes at the Port of Dar-es- Salaam, and that there was a delay of 10 days before MV Voula Sea departed from the Port of Dar-es-Salaam to the Port of Mombasa. The plaintiff alleges to have paid charges in the sum of USD 1,896,883,355.3 to Tanzania Ports Authority and Tanzania Revenue Authority.

19. The plaintiff further avers that the MV Voula Sea arrived at the Port of Mombasa on 22nd December, 2017 but could not be cleared due to disputes between the plaintiff and the 1st defendant regarding who was to pay accrued demurrage charges.

20. It is also stated that the 1st defendant started communicating with the 2nd defendant and disclosed confidential information regarding port charges which the plaintiff was charging it. This resulted in the 2nd defendant declining to pay extra port charges which the plaintiff had preferred against it. Consequently, the plaintiff, the 1st and 2nd defendants entered into a tripartite agreement dated 22nd December, 2017. A copy of the said agreement was attached to the affidavit of Abdallah Rashid, one of the plaintiff's Directors, in support of the Notice of Motion dated 5th March, 2018. The depositions made therein by the said deponent bear semblance to the plaint in this case.

21. The General Conditions (GENCON) charterparty dated 11th October, 2017 attached to the plaintiff's supporting affidavit and marked as AR3, in part 1 at the box numbered 25 provides that the applicable law and Arbitration would be English law and the seat of Arbitration would be London. Part II of the GENCON 1994 uniform charter at clause 19(a) provides as follows:-

> **"This charterparty shall be governed by and construed in accordance with English law and any dispute arising out of this charterparty shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification on re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final. For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association."**

22. The 2nd charterparty dated 22nd November, 2017 in box No. 25 also provides that in the event of a dispute arising from the charterparty, English law would apply and the seat of arbitration would be England. Clause 19(a) thereof is captured in similar terms as clause 19(a) of the 1st charterparty agreement which is captured in paragraph 20 of this ruling.

23. The Rider Clauses to the charterparty dated 2nd November, 2017 at clause 28 provides for arbitration and general average in London and that English law would apply. It states as follows:-

> **"Any dispute arising out of the contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final Arbitration in London of two Arbitrators who shall be commercial men carrying on business in London in the shipping trade and who shall be members of the L.M.A.A. One to be appointed by each of the parties with power to such Arbitrators to appoint an Umpire whose decision shall be final and binding upon both parties. English law shall govern interpretation/execution of this contract. L.M.MA Small Claims Procedure shall apply to disputes less than USD 50,000."**

24. The foregoing clauses are indicative of parties who had entered into freely negotiated contracts for carriage of goods by the sea and had elected to be governed by English law and for the arbitral seat to be in London if a dispute was to arise as a result of breach of the charterparty agreements.

25. Mr. Kongele's view was that the tripartite agreement attached to the plaintiff's affidavit as anexuture AR-4 introduced a third party to the claim and changed the character of the charterparties. The tripartite agreement entered into on 22nd December, 2017 was between the plaintiff and the defendants. It was geared towards resolving issues arising from the charterpary agreement dated 2nd November, 2017 wherein the MV Voula Seas was contracted to ferry 24,000 metric tonnes of bagged maize from the Port of Dar-es- Salaam to the Port of Mombasa on a free in liner out basis.

26. Clause 3 of the said tripartite agreement states that Purma Holdings (2nd defendant) would not be responsible for any demurrage or delay charges in respect of the contract and CSB (1st defendant) would ensure to discharge the cargo as soon as possible (asap WP).

27. Clauses 1 and 2 of the said agreement apportioned the payment that was to be made by the plaintiff and the 1st defendant. The 2nd defendant was not to bear the costs of demurrage arising from the voyage made by the MV Voula Seas.

28. In deciding if the issue raised herein is a PO, it is necessary for this court to refer to the Supreme Court of Kenya decision in **Independent Electoral Boundary Commission vs Jane cheperenger & 2 others (supra), where it was held thus**:-

"As to whether a preliminary objection is one of merit, this court has already pronounced itself on the threshold to be met. The court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1969]EA 696, in the case of Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013 [2014]eKLR [paragraph 31]:

"To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969]EA 696:

'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." (emphasis added).

29. In this case, there is no doubt in my mind that the terms of chaterparties between the plaintiff and the 1st defendant have no ambiguity on the forum they were to resort to in the event of a dispute between them with regard to carriage of the maize in issue. The contestation herein with regard to the PO raised if the *plaintiff and the 1st defendant are bound by the contract giving rise to the suit to refer the dispute to arbitration. The holding in the case of* ***Mukisa Biscuits Manufacturing and West End Distributors*** *(supra) places the issue raised by the 1st defendant herein in the realm of a PO.*

30. The agreement between the plaintiff and the 2nd defendant was not governed by the charterparties but by the tripartite agreement. As such, any losses that the 2nd defendant incurred as against the plaintiff and vice versa can only be actionable in a separate suit between the plaintiff and the 2nd defendant. The plaintiff herein should have resorted to arbitration to resolve the dispute between it and the 1st defendant.

31. I am not persuaded that this court should usurp jurisdiction to hear the dispute herein just for the reason that the plaintiff has a claim against the 2nd defendant and vice versa arising from the same cargo of maize. The 2nd defendant was not a party to the two charterparties and rider clauses in issue.

32. The Court of Appeal in the case of **Adrec Limited vs Nation Media Group Limited** [2017] eKLR cited with approval the case of **Fairlane Supermarket Limited vs Barclays Bank Ltd**, NAI HCCC No. 102 of 2011, where it held that:-

"the option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of Corporate Insurance Company vs Wachira (1955-1958) 1 EA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence.....

any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

33. The 1st defendant did not file a defence herein which signifies that it was not willing to subject itself to the jurisdiction of this court and forego the arbitral process.

34. I have considered not only the submissions made but also the authorities cited. The case of the Owners of the motor Vessel **"Lilian S" vs Caltex Oil (K) Limited** [1989] KLR 1 and **Samuel Kamau Macharia and Another vs KCB Ltd. and 2 Others** [2012] eKLR, cited by Counsel for the 1st defendant apply in this instance. This court lacks jurisdiction to hear the suit herein.

35. The authorities cited by Counsel for the plaintiff cannot hold sway in light of the express terms of the two charterparties and rider clauses providing for arbitration.

36. In light of the foregoing, the preliminary objection raised by the 1st defendant is hereby upheld. The plaintiff herein has not shown any special or extenuating reasons for resorting to a suit instead of arbitration. The provisions of the charterparties and rider clauses were binding on the plaintiff and the 1st defendant. I therefore strike out the suit against the 1st defendant. It and the plaintiff should resolve their dispute by way of arbitration in London.

37. The suit between the plaintiff and the 2nd defendant subsists. The plaintiff is given 21 days to file and serve an amended plaint to reflect the said position.

38. The 2nd defendant will within 21 days of service of the amended plaint, file and serve its amended defence. Costs of the preliminary objection are awarded to the 1st defendant. It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **16th** day of **November, 2018**.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mwanzia for the plaintiff

Ms Oluoch Wambi for the 1st defendant

No appearance for the 2nd defendant

Mr. Oliver Musundi - Court Assistant