IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL CASE No. 25 of 2023

CONTINENTAL DIGITAL MEDIA CO. LTD .... PLAINTIFF

VERSUS

AZERCOSMOS OPEN JOINT STOCK COMPANY .... DEFENDANT

RULING

9/2/2024 & 15/3/2024

ROBERT, J

This ruling pertains to preliminary objections raised in Civil Case No. 25 of 2023 in which the Plaintiff, Continental Digital Media Co. Ltd, sued the Defendant, Azercosmos Open Joint Stock Company, alleging breach of various agreements related to the provision of satellite services. These agreements encompass broadcasting services, leasing of transponder capacity, and other satellite-related services, totaling USD 600,000. In her Written Statement of Defence (WSD), the Defendant raised preliminary objections on two grounds: **One**, that the suit is instituted in violation of section 18(a) of the Civil Procedure Code, (Cap. 33 R.E. 2019). **Two**, that the suit breaches the choice of law and forum clauses in the agreements between the parties.

As a matter of practice, the Court invited parties to address the Court on the objections raised. When the matter came up for hearing parties were represented by Messrs. Boniphace Sariro and Juvenalis Joseph Ngowi, learned counsel for the Plaintiff and Defendant respectively. At the request of parties, hearing proceeded by way of written submissions.

Submitting in support of the first point of preliminary objection, Mr. Ngowi contended that the suit has been instituted in violation of Section 18(a) of the Civil Procedure Code, which requires suits to be filed in the jurisdiction where the defendant resides or carries on business.

In support of this argument, he quoted Section 18(a) of the Civil Procedure Code and referred to the case of **Abdallah Ally Selemani t/a Ottawa Enterprises (1987) versus Tabata Petrol Station Co. Ltd and Mohamed J. Lardhi**, Civil Appeal No. 89 of 2017, where the Court of Appeal observed that, "We firmly think that only suits for immovable property were meant to be filed within the local limits in which such properties are situated. **Any other suits as provided under section 18 of the CPC are to be filed where the cause of action arose or where the defendant resides or works for gain"**.

From the excerpt above, he submitted that, this Court has no territorial jurisdiction over the matter based on the fact that the Plaintiff did not plead facts showing how the Court is vested with jurisdiction based on the location of the satellite.

He maintained that, the Defendant as a liquidated company, was incorporated under the laws of the Republic of Azerbaijan and does not reside or carry on business in Tanzania. He agreed with contents of paragraph 5 of the Plaint that the service agreed upon between the Plaintiff and the Defendant was to provide satellite services.

He submitted that, since the Defendant does not reside in Tanzania and there are no facts explaining the cause of action, the provision of Satellite services and how it should be deemed to have occurred in Tanzania, this Court has no jurisdiction.

Coming to the second point of objection, Mr. Ngowi submitted that the suit violates clauses 5.6 of the Satellite Service Agreement, clause 6 of the Contract for Payment of Lease Charges, and clause 13 of the Master Agreements, which stipulate that the governing law is that of the Republic of Azerbaijan, and any dispute shall be referred to the jurisdiction of the

Baku Administrative – Economic Court. In all agreements under which the Plaintiff may institute a claim, it is provided that the parties had to choose the venue to refer the dispute in case of misunderstanding and that is a Commercial Court of Baku in Azerbaijan.

He submitted that, the Plaintiff has chosen to breach the agreement regarding the place of referring the dispute by filing the suit in the High Court of Tanzania contrary to the express provisions of the Agreements between the parties. He maintained that it is a settled principle that the parties must abide by contracts that they entered with their own free will and the court must ensure that parties to contract uphold their binding obligations as stated in the celebrated case of **Abualy Alibhai Aziz versus Bhatia Brothers Ltd** (2000) TLR 288.

He submitted further that, the law under section 7(1) of the Civil Procedure Code stipulates that the High Court can try all suits of a civil nature except those suits of which their cognizance is either expressly or impliedly barred as is the case with this matter which considerably is also not in contravention to section 28 of the Law of Contract Act, (Cap. 345 R.E. 2019) since it does not restrict either party from enforcing their rights.

He argued further that, although parties to a contract cannot by agreement oust the jurisdiction of courts as much as they cannot confer jurisdiction to courts which otherwise do not have jurisdiction to determine a matter as correctly put into context by the Court of Appeal in the case of **Scova Engineering SPA & Irtec S.P.A versus Mtibwa Sugar Estates Limited & 3 Others**, Civil Appeal No. 133 of 2017 (unreported) on pages 14 – 15.

He argued further that, the sanctity of a contract dictates that the parties to the contract are free to choose applicable law and forums competent to decide their disputes when they arise, and once decided, that choice cannot be termed as ousting the Court's jurisdiction as long as that choice is objectively in accordance with the law. He submitted that, this is cemented by the Court of Appeal on page 14 in **Scova Engineering S.P.A (Supra)** that:-

"Choice of law and forum clauses are not contrary to public policy, nor would they be a contravention of section 28 of the LCA. Parties do not, by agreement, oust the jurisdiction of one court when they commit to submit themselves to the jurisdiction of another court competent to deal with the matter".

He argued further that, a similar position was upheld by the Court of Appeal in the case of **Sunshine Furniture Co. Ltd versus Maersk (China) Shipping Co. Ltd versus Nyota Tanzania Limited,** Civil Appeal No. 98 of 2016 (unreported) where at page 16, the Court stated that:

"with respect, we disagree with the learned counsel. By that provision (section 7 of the Civil Procedure code), a court may not entertain a suit, the cognizance of which has either been expressly or impliedly barred. This includes a suit arising from a dispute which, by agreement, the parties have agreed to be determined by a court of their choice, being it a local or foreign court".

He submitted further that, given that parties to a contract are bound to the terms and conditions of the agreements mutually consented to, the Plaintiff and the Defendant are bound to the Agreements, including the relevant clause on dispute resolution. To cement this, he cited the decision of the Court of Appeal in **Sunshine Furniture Co. Ltd (supra**) which stated that:

"Basically, therefore, the parties did not, by agreement, oust the jurisdiction of the courts in Tanzania. They only chose the law and the court at which a dispute arising from their shipment contract shall be determined. Where in a bill of lading, the parties' express choice of forum of a court, that agreement has always been found to be binding on them."

He argued that, when all the above is properly considered, it is in the light that this Court does not have jurisdiction to try this matter, and the Plaintiff has failed to abide by the Agreement, at least to the extent of choice of proper forum and law as discussed above.

In conclusion he stated that, since the jurisdiction of any court is basic as it goes to the root of the matter, and the provisions of section 18(a) of the Civil Procedure Code are very clear on the place to institute the suit and also the Agreement between the parties expressly provided for the venue to refer the dispute to. Parties are bound by their agreement and therefore, the matter should be dismissed for being instituted in an improper forum.

In response, counsel for the Plaintiff argued that the powers of the High court to entertain any matter are unlimited, as per Section 95 of the

Civil Procedure Code. Additionally, he contended that section 5 of the Judicature and Application of Laws Act, (Cap. 358 R.E. 2019) empowers the Judges of the High Court to exercise all or any of the jurisdiction conferred on the High Court.

He argued that the jurisdiction of the court is conferred by law and not by the parties. He contended that parties cannot confer or oust the jurisdiction of the Court by agreement. To support his argument, he cited the case of **Tanzania Electric Supply Company (TANESCO) Versus Independent Power Tanzania Limited (IPTL),** TLR (2000) at page 324, where the Court held that, "...it is a trite parties cannot by agreement or otherwise confer Jurisdiction upon the court..."

He maintained further that, clause 5.6 of the Satellite Services agreement, clause 6 of the contract for payment of the lease charges and clause 13 of the Master agreement allow both parties to institute proceedings in any jurisdiction, including Tanzania. He argued that, the jurisdiction of this Court was not ousted by the cited agreements. Hence, he submitted that the points of preliminary objection raised by the Defendant lack merit and should be dismissed.

In his rejoinder, counsel for the Defendant maintained that the Plaintiff has not pleaded facts showing that the suit has been instituted in accordance with Section 18(a) of the Civil Procedure Code. He argued that inherent powers under Section 95 of the Civil Procedure Code cannot remedy a suit instituted contrary to the law. He emphasized further that the choice of law and forum clauses are binding and must be adhered to.

He maintained that, the jurisdiction of the High Court in any civil or criminal matter is unlimited if it is at first seized with the requisite jurisdiction and the same is exercised in conformity with the applicable law. The High Court can invoke its inherent powers in cases where there are no specific provisions of the law providing for a specific matter which is not the case at hand. He argued that, this matter apart from the agreed choice of law and forum in the Satellite Service Agreement, Lease Charges Agreement and Master Agreements it is instituted contrary to section 18(a) of the Civil Procedure Code and this cannot be remedied by section 95 of the Civil Procedure Code.

In support of this argument, he quoted the case of **Tanzania Electric Supply Company (TANESCO) versus Independent Power Tanzania Limited (IPTL) & 2 Others** [2000] TLR 324, where the Court

of Appeal clearly explained, "Section 95 of the Code does not confer any jurisdiction on the High Court or courts subordinate thereto. What it was intended to do, and does, is to save inherent powers of those courts..."

He also quoted the case of **Scova Engineering S.p.A & Irtec S.p.A versus Mtibwa Sugar Estates Limited & 3 Others**, Civil Appeal No. 133 of 2017 (unreported) at page 12 which cited in affirmative the case of **Carl Ronning versus Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] eKLR**, where the Court held that:

> *"Basically, therefore,* ***the parties did not, by agreement, oust the jurisdiction of the courts in Tanzania. They chose the law and the court at which a dispute arising from their shipment contract shall be determined****. Where in a bill of lading, the parties express choice of forum of a court, that agreement has always been found to be binding."[Emphasis added].*

The Court went further and stated at page 13 that:

> *"We, therefore, agree with Mr. Mwakingwe that choice of law and forum clauses are not contrary to public policy nor would they be a contravention of section 28 of the CA.* ***Parties do not, by agreement, oust the jurisdiction of one court when they***

commit to submit themselves to the jurisdiction of another court competent to deal with the matter." *[Emphasis added]*

He argued that, Clause 5.6 of the Satellite Services Agreement and Clause 6 of the Contract for Payment of the Lease Charges, and Clause 13 of the Master Agreement, as attached to the Defendant's Written Statement of Defense clearly stipulates that only the Defendant's right to institute proceedings against the Plaintiff in any country where the Plaintiff resides or where its property is located is not affected by that clause. Otherwise, any dispute arising between the parties must be dealt with in accordance with the laws of Azerbaijan and be submitted to Baku Administrative Economical Court No. 1. This does not equally apply to the Plaintiff. The Plaintiff signed the Agreements accepting all its terms and conditions and now cannot avoid the same by alleging that the Plaintiff reserves the same rights to institute a suit in Tanzania just like it was reserved for the Defendant under certain circumstances.

In conclusion, he submitted that, it was a duty of the Plaintiff to plead facts which will show that the suit had been properly filed in accordance with provisions of Order VII Rule 1 (f) of the Civil Procedure Code. In absence of such facts even if the Court would want to use its

inherent powers under section 95 of the Civil Procedure Code, it would be impossible because there would be no material facts upon which to exercise such inherent powers. He submitted that the suit ought to have been instituted where the Defendant resides as per section 18 of the Civil Procedure Code and also in accordance with the agreed provisions of the Agreements.

The Court has carefully considered the provisions of Section 18(a) of the Civil Procedure Code, which mandate that suits should be instituted within the jurisdiction where the Defendant resides or conducts business. While the Defendant maintains its residency and business operations in the Republic of Azerbaijan, the Plaintiff has failed to sufficiently establish a nexus to the jurisdiction of this Court. Therefore, the Court finds that the institution of the suit in this jurisdiction does not comply with the requirements of Section 18(a) of the Civil Procedure Code.

The Defendant contends that the Plaintiff's suit violates Section 18(a) of the Civil Procedure Code, which stipulates the criteria for determining the appropriate jurisdiction for filing suits. This section mandates that suits should be instituted where the defendant resides, carries on business, or where the cause of action arose. In light of this provision,

the Plaintiff bears the burden of demonstrating how the Tanzanian court possesses jurisdiction over the matter.

The Defendant correctly points out that the Plaintiff has not pleaded facts demonstrating the basis for the Tanzanian court's jurisdiction. Specifically, the Plaintiff has not established how the location of the satellite or any activities of the Defendant within Tanzania confer jurisdiction upon the Tanzanian court. As per the case law cited by the Defendant, particularly the case of **Abdallah Ally Selemani t/a Ottawa Enterprises (1987) versus Tabata Petrol Station Co. Ltd and Mohamed J. Lardhi** (supra), the Court of Appeal clarified that Section 18 of the CPC should be interpreted to mean that suits other than those concerning immovable property must be filed where the cause of action arose or where the defendant resides or carries on business.

Moreover, the Defendant, being a liquidated company incorporated under the laws of the Republic of Azerbaijan, does not reside or carry on business in Tanzania. The absence of facts explaining how the provision of satellite services should be deemed to have occurred within Tanzania further underscores the jurisdictional challenge faced by the Plaintiff.

Therefore, the Defendant's argument regarding the lack of jurisdiction of the Tanzanian court carries significant weight.

In considering the cited provisions of the Civil Procedure Code and the relevant case law, it becomes evident that the Plaintiff has not met its burden of establishing jurisdiction in Tanzania. The principles outlined in the case law emphasize that jurisdiction should be determined based on the factual circumstances surrounding the cause of action and the parties involved. In this case, the Plaintiff has not provided sufficient evidence to demonstrate the jurisdiction of the Tanzanian court, thereby strengthening the Defendant's objection on this ground.

In conclusion, the Defendant's objection regarding jurisdiction under Section 18(a) of the Civil Procedure Code is well-founded. As such, the Plaintiff's failure to establish jurisdiction in Tanzania constitutes a valid basis for dismissing the suit on this ground.

The Defendant's second point of objection centers on the alleged violation of choice of law and forum clauses contained in the agreements between the parties. The Defendant asserts that Clause 5.6 of the Satellite Service Agreement, Clause 6 of the Contract for Payment of

Lease Charges, and Clause 13.1 of the Master Agreement expressly dictate that the governing law is that of the Republic of Azerbaijan, and any dispute shall be referred to the jurisdiction of the Baku Administrative – Economic Court.

The Defendant contends that the Plaintiff's decision to file the suit in the High Court of Tanzania contradicts these explicit contractual provisions. In analyzing this objection, it is essential to examine the clauses cited by the Defendant. Clause 5.6 of the Satellite Service Agreement unequivocally states that any dispute arising out of the agreement shall be settled by Baku Commercial Court of the Republic of Azerbaijan. Similarly, Clause 6 of the Contract for Payment of Lease Charges and Clause 13.1 of the Master Agreement stipulate the exclusive jurisdiction of Baku Administrative – Economical Court No. 1 for resolving disputes.

The Defendant correctly argues that the Plaintiff's filing of the suit in Tanzania amounts to a breach of these clear and unambiguous contractual provisions. The Defendant relies on the principle that parties are bound by the contracts they willingly enter into, as emphasized in the case of **Abualy Alibhai Aziz versus Bhatia Brothers Ltd** (2000) TLR

288. The Defendant's position aligns with the decisions in **Scova Engineering SPA & Irtec S.P.A versus Mtibwa Sugar Estates Limited & 3 Others**, Civil Appeal No. 133 of 2017, and **Sunshine Furniture Co. Ltd versus Maersk (China) Shipping Co. Ltd versus Nyota Tanzania Limited**, Civil Appeal No. 98 of 2016, which both underscore the importance of upholding contractual obligations.

The Plaintiff's response asserts that the choice of law and forum clauses do not oust the jurisdiction of the Tanzanian court and that the agreements allow both parties to institute proceedings in any jurisdiction, including Tanzania. However, a closer examination of the clauses in question contradicts this interpretation. The clauses explicitly provide for the exclusive jurisdiction of Azerbaijani courts, and the Plaintiff's attempt to invoke the Tanzanian court's jurisdiction appears to contravene the agreed-upon terms.

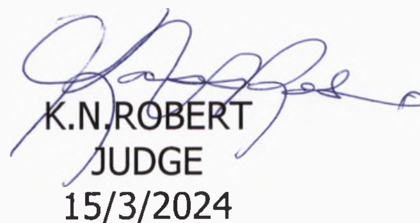
Upon careful consideration of the arguments and the contractual clauses involved, the Court finds merit in the Defendant's second point of objection. The Plaintiff's decision to file the suit in Tanzania contravenes the clear and binding choice of law and forum clauses in the agreements. As per the principles established in relevant case law, parties must adhere

to the terms of contracts they willingly enter into. The sanctity of contracts dictates that contractual obligations, including choice of law and forum, be honored.

Therefore, the Court upholds the Defendant's second point of objection, concluding that the Plaintiff's suit breaches the choice of law and forum clauses in the agreements. As a result, the Plaintiff's suit is dismissed for being instituted in an improper forum. The parties are encouraged to pursue legal actions in accordance with the agreed-upon terms specified in the contracts

In light of the foregoing analysis, this Court rules that, the Defendant's preliminary objections regarding jurisdiction are sustained. The suit is dismissed for lack of jurisdiction. The Plaintiff shall bear costs incurred in these preliminary proceedings.

It is so ordered.



K.N.ROBERT
JUDGE
15/3/2024