THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 1028 OF 2017

WISSAM K. FAWAZ::PLAINTIFF

VERSUS

BHARTI AIRTEL LIMITED:::DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

On the 22nd of December 2017 Wissam K. Fawaz, the Plaintiff hereinafter, sued Bharti Airtel Limited, referred to hereinafter as the Defendant.

In the suit, the Plaintiff claimed USD 3,729,423.98 a sum being 2% of USD 186,471,199 being the value of Warid Group's Telecom's assets in Uganda which were allegedly acquired by the Defendant.

The Plaintiff also sought interest on the sum at a rate of 10% per annum from May 2013, general damages and costs of the suit.

The Plaintiff based his claim on an engagement letter dated 14th October 2009. The parties agreed that the Plaintiff would be the Defendant's 'exclusive advisor' in connection with the transaction concerning purchase and acquisition of Warid Group's Telecom Operations in Uganda and Congo Brazzaville referred to as the " TARGET."

For his labour the Plaintiff was to be paid by the Defendant as provided for in Clause two which reads;

> "*We have agreed that you will pay me a success fee of 2% of the enterprise value of the Target. Such amount will be paid in two tranches. The first tranche of 25% will be paid on signing of the relevant definitive agreement (s) and the second tranche of 75%*

will be paid on closure of the transaction as defined in the relative definitive agreements."

The Plaintiff contends that the Defendant acquired the Target but refused to pay the commission. When the matter came up for scheduling, the Defendant raised a preliminary objection and sought the dismissal of the suit.

One of the arguments for the Defendant was that the Court lacked jurisdiction to handle the matter because of Clause 10 of the Engagement letter which provided for the governing law and jurisdiction in these words;

" *10. Governing law and Jurisdiction.*

This Engagement shall be governed by and construed in all respects in accordance with the laws of England and Wales and shall be subject to the non-exclusive jurisdiction of the courts of England and Wales."

This meant that the preferred jurisdiction when any dispute arose would be that of England and Wales. The word non-exclusive jurisdiction of the courts of England and Wales left there room however that the dispute could be resolved anywhere if whoever wanted the change of venue gave sufficient reasons for the change.

Counsel for the Defendant submitted that none of the parties to the suit was a Ugandan or registered here. He further submitted that the Letter of Engagement was dated 14th October 2009 and therefore the filing of this suit on 22nd December 2017 was done in breach of the law of limitation.

Furthermore, that the Plaintiff had in any case earlier filed another suit in respect of the same matter in the Netherlands which was dismissed for lack of jurisdiction.

Counsel for the Defendant lastly submitted that in any case the Defendant did not acquire Warid Telecom's assets in Uganda and therefore cannot pay for a benefit he did not obtain.

In reply, Counsel for the Plaintiff conceded that he did not have any transfers or documents proving the Defendant's acquisition of Warid Telecom but that it did not matter because his role was simply to introduce Mr. Sunhil Bharti Mittal of the Defendant Company to His Highness

Sheikh Nahayan Mabarak Al Nahayan the Chairman of Abu Dhabi Group, Abu Dhabi United Arab Emirates.

He submitted that the cause of action arose on 13th March 2013 when the transaction was completed and therefore the filing of the suit in 2017 was not outside the limitation period of six years. He further submitted that Clause 10 of the Engagement Letter could not be relied on because of its ambiguity for not expressly excluding the jurisdiction of Uganda.

Lastly, that the subject matter Warid Telecom was situate in Uganda and that it would save costs if the hearing took place in Uganda. It is trite that public policy and promotion of businesses must be protected by respecting freedom of contract which includes choice of venue of dispute resolution between contracting parties. Where parties have bound themselves by an exclusive jurisdiction, they ought to comply with that obligation unless the parties suing outside the prescribed jurisdiction gave reasons for suing in a venue contrary to the contract. In this I base reliance on ***Raytheon Aircraft Credit Corporation and Another vs Air Al- Faraj Limited [2005] 2 EA 259 (CAK)*** in which their Lordships also cited the case of ***Donohue vs Armo INC [2002] 4 LRC 478***. They wrote;

> "*Where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the non- contractual forum discharges the burden cast on him by showing strong reasons for suing in that forum."*

By this decision, it is understood that notwithstanding the jurisdiction provided for in the agreement the party suing could change venue on good grounds. For example; where the signing of the agreement was encased in fraud or duress or undue influence or other evidence of malafides.

The Plaintiff in his reply did not allege any of the foregoing. Furthermore, the party resisting the forum and desires to remain in the jurisdiction he has filed the case has to prove that the forum he has now chosen has special expertise in resolving the dispute at hand, similar or better standard of judicial decision making, that there is no co-operation or other influence to affect the fairness of judgment, that the procedure adopted would minimize losses arising through any

delay in arriving at a judgment and that all major witnesses may be resident within the jurisdiction making the forum convenient.

The Plaintiff in his submissions also did not allude to any expertise that he would find in the forum he has chosen which would exceed the English courts. He has nowhere in his submission shown that the witnesses that he would require would be from this jurisdiction. In fact in his summary of evidence where he was required to give the list of witnesses the Plaintiff listed the Defendant as the first witness and then he listed witnesses whom he referred to as “others with leave of court.”

This means that the witnesses the Plaintiff intends to call included the Defendant and another called “others with leave of court.” This type of list of witnesses does not show where others are coming from but certainly shows that the Defendant whom he intends to call as a witness is an Indian Company and therefore there would still be the cost of bringing that witness here.

For the reasons above mentioned, the Plaintiff fails to show that the witnesses were resident within this jurisdiction which would have otherwise enabled Court to decide on whether they would be a reduction of costs of litigation by having the case handled here.

It is also important here to note that the issue of costs does not seem to matter to the Plaintiff because when he first decided to go to Court, he filed the matter in a Dutch Court. If he could afford the cost of going to the Netherlands, he could also afford the cost of going to the United Kingdom whose laws were according to Clause 10 the ones governing the contract between him and the Defendant.

The argument that the wording of Clause 10 did not exclude the Ugandan Court can also be determined that there was no explicit choice for the Ugandan Court. On the contrary, one can construe it to mean that by choosing the English law to govern those proceedings the parties intended to use the English Court. Moreover it is the Plaintiff who drafted the Engagement Letter. He must have intended to be bound by English law.

In conclusion the principle for determining the venue based on the balance of convenience of the witnesses has not been satisfied in as far as the Plaintiff did not show that the witnesses were from Uganda.

On the issue of venue, the question whether if the suit was not filed in Uganda there would be a multiplicity of proceedings in two different countries or more the submissions of the Plaintiff

that his role was simply to introduce the Bharti Chairperson Sunhil Bharti Mittal to His Highness Sheikh Nahayan Mabarak Al Nahayan the Chairman of Abu Dhabi Group, Abu Dhabi United Arab Emirates settled it

The activity of introduction did not take place in Uganda but in Abu Dhabi United Arab Emirates. Lastly the law governing the contract is English law and that coupled with exhibition of affordability of the Plaintiff going as far as Netherlands to file a similar claim, I would in my view find that their interest of resolving this matter under the English law would best be served in the United Kingdom.

This suit will therefore be dismissed with advice that it be filed in an English court where it would be administered in accordance with the laws of England and Wales as agreed by the parties in the Engagement Letter.

Costs to be borne by the Plaintiff.

Dated at Kampala this 16th day of August 2019

HON JUSTICE DAVID WANGUTUSI

JUDGE