



**Kipkorirkirui v Vuclip Inc & another (Civil Suit E011 of 2021)
[2023] KEHC 24642 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL SUIT E011 OF 2021
PN GICHOHI, J
OCTOBER 31, 2023**

BETWEEN

ALEX KIPKORIRKIRUI PLAINTIFF

AND

VUCLIP INC 1ST DEFENDANT

SAFARICOM PLC 2ND DEFENDANT

RULING

1. The subject of this ruling is the 1st Defendant’s Preliminary Objection dated 21st December 2021 together with Application dated 24th December 2021. The background of the dispute is that the Plaintiff moved this Court by way of a Plaint dated 21st October, 2021 as against the 1st and 2nd Defendant.
2. His grievance as discerned from the Plaint and his witness statement is an infringement of his copyright and trademarks by the 1st and 2nd Defendant. He termed the actions by the Defendants as amounting to fraud , breach of contract, misrepresentation and malice calculated to defraud him. He therefore sought that judgment be entered against the 1st and 2nd Defendants severally for:-
 - a. Order of specific performance as stipulated in the agreement (contract).
 - b. Costs of the suit.
3. Simultaneously, he filed a Notice of Motion Application dated 21st October, 2021 against the Defendants but the only order sought as discerned thereof is that “the matter be certified as urgent fit to be heard exparte in the first instance.” The three grounds in support of the Application are sated verbatim as follows:-
 1. Obtaining money by way the contracted had already been terminated.



2. Purporting to advertise knowing that I could not have noticed .
3. As a consequence of aforesaid conduct, I have suffered loss and damage and hereby claims /seek orders of specific performance against the 1st and 2nd Defendants ordering to effect whatever they had and distribute in a manner they did with agreement in which they terminated.
4. In support of that Application, he swore an Affidavit where he deponed that he is the beneficial owner of the artistic works titled Makarao Character. The Plaintiff deponed that he discovered that his artworks were being used without his knowledge. He averred that he complained to the said Companies and requested for a refund of the money they made but there was no reply.
5. The 2nd Defendant filed its Defence dated 29th December 2021 generally denying the Plaintiff's claim. Simultaneously with its Defence, the 2nd Defendant also filed Grounds of Opposition dated 29th December 2021 to the Plaintiff's Application seeking that the said Application be struck out with costs for being fatally defective and incompetent as it does not seek any enforceable orders.
6. On the other hand, however, and under protest, the 1st Defendant filed its Defence dated 9th December 2021 denying the Plaintiff's claim and the onset termed the suit fatally incompetent and gross abuse of the Court process. It pleaded that it would be raising a Preliminary Objection on the following grounds: -
 - a. In breach of the mandatory provisions of Order 5 Rules 21 (Service out of Kenya) and 22 (Service of other Process out of the Jurisdiction) of the Civil Procedure Rules 2010, no leave was sought and obtained by the 1st Respondent (Plaintiff) to effect service outside the Kenyan jurisdiction upon the Applicant which is a foreign company operating in the United States of America.
 - b. The Summons to Enter Appearance dated 9th November 2021 is fatally defective noting that it has been signed by a Magistrate despite the High Court being seized of this matter.
 - c. The 1st Respondent (Plaintiff) is a stranger to the Applicant and is therefore bereft of any locus standi to institute these proceedings noting that the Doctrine of Privity of Contract postulates that an independent contract cannot confer rights or impose obligations on any person other than those who are party to the contract.
 - d. This Honourable Court lacks the pecuniary jurisdiction to hear and determine this matter noting that the value of the subject matter as discerned from the impugned contract dated 21st December 2016 is USD5,339/=.
 - e. The Plaintiff fails to disclose any reasonable or discernable cause of action noting that in breach of the Applicant's right to a fair hearing as enshrined under Article 50 (Fair Hearing) of our Constitution of Kenya, 2010, it is unclear as to: -
 - i. What allegations are being tabled against the 1st Defendant/ Applicant;
 - ii. What the nature of the dispute is; and



iii. What particular reliefs are being sought against the 1st Defendant/Applicant;

7. It is pursuant to the above that on 11th February 2022, the 1st Defendant formally filed a Notice of Preliminary Objection dated 21st December 2021 being a replica of what was pleaded in its Defence. It also simultaneously filed a Notice of Motion Application dated 24th December 2021 seeking orders that the plaint dated 21st October 2021 be struck out with costs to the 1st Defendant on the grounds that: -
1. The Plaintiff breached the mandatory provisions of Order 5 Rules 21 (Service out of Kenya) and 22 (Service of other Process out of the Jurisdiction) of the Civil Procedure Rules, 2010 in that he instituted these proceedings by irregularly filing and serving defective summons on the 1st Defendant which is based in United States of America without seeking leave of the Court.
 2. The Plaint fails to disclose any reasonable or discernable cause of action and in breach of the 1st Defendant's right to a fair hearing under Article 50 of the Constitution of Kenya 2010.
 3. Not even an amendment can render the Plaintiff's suit competent enough to prosecute.
8. In support of its Application is an Affidavit sworn by Hussein Sehorewala on 21st December 2021 in his capacity as the 1st Defendant's Vice President for Business Development. He, maintained the position in the Preliminary Objection.
9. In response to the 1st Defendant's Application, the Plaintiff filed on 7th October, 2022 an undated document titled "Answers to Counterclaim by 1st Defendant." That document contained material that appearS to have been cut and pasted on a paper and what the Plaintiff referred to as numerous emails between him and the 1st Defendant's representatives.

1st Defendant's Submissions

10. In their submissions dated 20th March 2023, the 1st Defendant submitted that as at the time of filing the submissions herein, the Plaintiff had not filed a Replying Affidavit to the Preliminary Objection and the Notice of Motion and therefore, the same is deemed as unopposed. It urged the Court to allow it as prayed.
11. Notwithstanding that, it submitted that under Order 2 Rule 15 of the Civil Procedure Rules, 2010, this Court has power to order that a pleading be struck out where the pleading does not disclose a cause of action in law, is scandalous, vexatious and an abuse of the process of court.
12. Further, it submitted that the Plaintiff lacks locus standi to file the present suit as the party who signed the Agreement was Mfalme Productions and not the Plaintiff. That Clause 4(a) of the Agreement exhibited to Court released and discharged the 1st Defendant from any claim, suits, damages or any nature whatsoever in connection with the use of the artwork owned by Mfalme Productions.
13. It further submits that if any action by Mfalme Productions subsists against the 1st Defendant, which is denied, the same would be untenable in the circumstances herein. Lastly, it submitted that the present suit did not disclose any cause of action against it and it would be against the tenets of natural justice to ask the 1st Defendant to respond to an action that is indeterminate.



Plaintiff's Submissions

14. On 11th May 2023, the Plaintiff filed further submissions with regard to the 1st Defendant's Preliminary Objection and Notice of Motion Application. He submitted that the Civil Procedure Rules 2010 have since eliminated the different processes for the service of summons outside Kenya. He submitted that the provisions of Order 5 Rules 21 and 22 are not applicable to the present suit since the Plaintiff and Defendants are within the jurisdiction of Kenya.
15. On the fatally defective summons, he submitted that the Magistrate is an officer of the Court with the requisite authority to perform various duties. He submitted that the summons were signed in accordance with the relevant laws and procedures governing the issuance of court summons.
16. On the issue that the 1st Defendant is a stranger to Plaintiff, he submitted that he is the sole proprietor who had a contract with the 1st Defendant and as the author and owner of the copyright works in question under Copyright Act of Kenya, he is entitled to file a suit to protect himself.
17. On pecuniary jurisdiction, he submitted that claim by the 1st Defendant that the subject matter is USD 5,339 is not accurate as that amount was on the contract that was terminated and was paid by the 1st Defendant. That the amount in dispute in this case is worth thousands of US Dollar being profits that the Defendants made unlawfully by using his copyrighted works after the termination of the contract as discovered in November 2018.
18. He submitted that in its Statement of Defence dated 9th December 2022, the 1st Defendant acknowledges sending emails to the 2nd Defendant apparently to stop the infringement without disclosing how much was made or even pay a single coin to the Plaintiff. That this action caused significant harm to his business resulting in loses that go beyond the initial contract and therefore, this Court has jurisdiction to determine the dispute.
19. On issue that the Plaint discloses no reasonable cause of action, he submitted that the allegation as baseless as the cause of action is discernible from the pleadings filed in Court, being breach of his intellectual property rights by the Defendants. He submitted that striking out his suit would be unfair and prejudicial as it would prevent him from seeking redress in his legitimate claim against the Defendants for using his copyrighted and trademarked material without permission or consent.
20. The 2nd Defendant indicated that it was not filing any other pleadings or submissions as it supported the 1st Defendant's Preliminary Objection and Notice of Motion.

Determination

21. I have considered the material before this Court and submissions by the Plaintiff and the 1st Defendant in relation to the 1st Defendant's Notice of Preliminary Objection dated 21st December 2021 and its Application dated 24th December 2021. The two broad issues that arise for determination are:
 1. Whether this Court has jurisdiction to entertain this suit.
 2. Whether the Plaintiff's suit discloses a reasonable cause of action.
22. To start with this Court, this Court will deal with the said issues as they flow noting that the Preliminary Objection and the Notice of Motion are replicated from the 1st Defendant's statement of defence. The first issue is therefore wide in the context of the matter before this Court and will cover both the Preliminary Objection and the Notice of Motion.



23. To start with and on the first issue, it is trite law that jurisdiction is everything and the Court should down its tools where it is demonstrated that it lacks jurisdiction to entertain a matter before it. Indeed, Nyarangi JA in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. [1989] KLR 1 held thus:

“...I think that it is reasonable plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before. Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

24. For emphasis, the issue of jurisdiction has been raised in the pleadings. A Preliminary Objection was defined by the Court of Appeal in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Lt. [1969] EA 696 thus: -

“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.”

25. In this case, the 1st Defendant’s Notice of Preliminary Objection includes pecuniary and geographical jurisdiction. In paragraph 3 (d) thereof, the 1st Defendant states: - “This Honourable Court lacks pecuniary jurisdiction to hear and determine this matter noting that the value of the subject matter as discerned by the impugned contract dated 21st December 2016 is USD,5,339. In paragraph 3 (f) thereof, the 1st Defendant states: - “In any event, this Honourable Court is devoid of any geographical jurisdiction to hear and determine this dispute as none of the parties hereto reside or work for gain in Kisii County.”

26. This is a strange, unsound and baseless argument in light of the provisions of Article 165 (3) of the Constitution that High Court has unlimited original jurisdiction in criminal and civil matters. However, subject to Article 165 (5), High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under the Constitution, or falling within the jurisdiction of the courts contemplated in Article 162(2).

27. Article 162(2) is in regard to special courts with the status of the High Court. These are the Employment and labour relations Court which has exclusive jurisdiction to hear and determine disputes relating to employment and labour relations and the Environment and land Court, which has exclusive jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

28. On the issue that the summons to enter appearance dated 9th November 2021 is fatally defective having been signed by a magistrate yet this is a High Court matter, Order 5 Rule 2 of the Civil Procedure Rules, 2010 provides that:

“Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.”



29. This Court is unable to comprehend how the 1st Defendant established and arrived at the conclusion that the summons, bearing the designation of a magistrate, filled by hand and signed was unauthorized and hence fatally defective. This argument is baseless and not backed by law.
30. On the issue of service of the summons on the 1st Defendant, there is no dispute that the 1st Defendant is a Company based in United States of America. Order 5 Rules 21 and 22 of the [Civil Procedure Rules, 2010](#) provide for service out of Kenya and service of other process out of Kenya. All the parties are in agreement that the 1st Defendant is a limited company situated in California, in the USA.
31. For this Court to assume jurisdiction over a party outside Kenya, service of such a party is elaborately provided for under Order 5 Rules 21, 22 and 25 of the [Civil Procedure Rules, 2010](#) that leave has to be sought by way of an Application supported by an Affidavit or other evidence, stating that the Plaintiff has a good cause of action and showing in what place or country such Defendant is probably or may be found, and whether such Defendant is not resident in Kenya or not, and the grounds upon which the application is made.
32. Indeed, the Court of Appeal in [Misnak International \(UK\) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 Others](#) [2019] eKLR adopted its decision in [Raytheon Aircraft Credit Corporation & Another v Air Al-Faraj Limited](#) [2005] eKLR where it was held: -
- “The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a Plaintiff to serve summons or notice of summons, as the case may be, outside the country...after such summons are served in accordance with the machinery stipulated therein.”
33. The Plaintiff’s argument that the [Civil Procedure Rules 2010](#) have since eliminated the different processes for the service of summons outside Kenya and that the provisions of Order 5 Rules 21 and 22 are not applicable to the present suit since the Plaintiff and Defendants are within the jurisdiction of Kenya seems jumbled up. Though the [Civil Procedure Rules](#) were amended in 2020, the amendments did not wish away with the requirement to seek leave before serving summons and other process out of Kenya. The amendments did not do away with the requirement of an Affidavit of Service either.
34. The question is, was service done on the 1st Defendant? This court record does not appear to have any Affidavit of Service filed herein. The Plaintiff however relies on emails exchanged between him and the 1st Defendant to show that the 1st Defendant had knowledge of the matter.
35. There is no doubt the 1st Defendant entered appearance and filed Defence under protest. The question therefore is whether this Court could assume jurisdiction over the 1st Defendant in the circumstances.
36. In [Misnak International \(UK\) Limited](#) (supra), the Appellant had filed a conditional Memorandum of Appearance on behalf of the Appellant and also Preliminary Objection. Two of the grounds thereof were the suit was fatally defective and a nullity because the 1st Respondent had not sought leave to effect service of the summons upon the Appellant outside the High Court’s jurisdiction as required by Order 5 Rules 21, 23 & 27 of the [Civil Procedure Rules](#) and therefore, the High Court lacked jurisdiction to entertain the suit and/or the Application. The other ground was that notification of the suit and/or court process via email did not confer the High Court with jurisdiction over the Appellant.



37. Allowing the appeal, the Court of Appeal found the Preliminary Objection was meritorious to the extent that the honourable Judge lacked jurisdiction to entertain the suit. While citing High Court case in Law Society of Kenya v Martin Day & 3 Others [2015] eKLR the Court of Appeal held:-

“...We concur with and adopt the following sentiments of Aburili, J. in Law Society of Kenya vs Martin Day & 3 Others (*supra*):

“It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked.”

38. Guided by the above holding, I am satisfied that failure to comply with the mandatory provisions of the Civil Procedure Rules regarding service on the 1st Defendant was fatal.
39. As whether the Plaintiff’s suit discloses a reasonable cause of action, the parties have correctly understood the position that though the Court has power to strike out pleadings on the above ground, that power should be used very sparingly as the effect of striking out pleadings is to drive a party from the seat of justice.
40. From what can be discerned from the material before this Court, and which this Court has briefly highlighted, the attack by the 1st Defendant on this ground based on the 1st Defendants allegation that it is unclear what the allegation is against the 1st Defendant, the nature of the dispute and the reliefs sought is unfounded.
41. The Plaintiff may have filed all manner of documents in support of his case, but it can clearly be discerned that this claim is an alleged infringement of his copyright by the Defendants and that the same caused him loss and damage, joinder or nonjoinder of parties notwithstanding.
42. The court is also not persuaded that this is a hopeless suit that cannot saved through amendment. To strike out the Plaintiff’s suit on this ground is to deny the Plaintiff, who is in person, a day in court.

Disposition

43. This court therefore finds that the 1st Defendant has only succeeded on one ground alone. The issues before this Court are disposed of as follows: -
1. The 1st Defendant’s Application dated 24th December 2021 and 1st Defendant’s Preliminary Objection are partially allowed and only to the extent that the Plaintiff failed to obtain leave to serve the 1st Defendant outside the jurisdiction of Kenya.
 2. The Plaintiff’s suit against the 1st Defendant be and is hereby struck out.
 3. Due to the nature of this matter, each party is ordered bear its costs.

DATED,SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 31ST DAY OF OCTOBER, 2023.

PATRICIA GICHOHI



JUDGE

In the presence of:

Mr. Alex Kipkorir Kirui the Plaintiff

Mr. Wafula for the 1st Defendant

Mr. Kenneth for the 2nd Defendant

Alphine - Court Assistant

