



**DNK v GS (Civil Suit 4 of 2021) [2022] KEHC 547 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL SUIT 4 OF 2021  
SM GITHINJI, J  
APRIL 26, 2022**

**BETWEEN**

**DNK ..... PETITIONER**

**AND**

**GS ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of an application by the Respondent dated 17th December, 2021 brought under Certificate of Urgency. The application sought the following orders;
  - 1) Spent.
  - 2) That the interim Orders issued on 22<sup>nd</sup> November, 2021 be set aside or varied.
  - 3) Spent.
  - 4) That the Originating Summons dated and filed on 12<sup>th</sup> and 18<sup>th</sup> November, 2021 in this cause be struck out.
  - 5) That the costs of this Application and the Originating Summons and the Petitioners Notice of Motion dated 12/11/2021 be paid by the Petitioner.
2. The following are the grounds on the face of the application: -
  - 1) The Petitioner is estranged wife of the Respondent living, residing and domiciled in Lustenau, Austria outside the jurisdiction of this Court and the parties' permanent residence is Klaus and Lustenau, Austria.
  - 2) That the Respondent is a foreigner and non-citizen of Kenya living and residing at all material times of this suit in Klaus, Austria outside the jurisdiction of this court where he was served with summons and an application dated 12/11/2021 vide email.



- 3) That no prior leave has been sought and or obtained to serve the Respondent summons and notice outside jurisdiction by the Petitioner contrary to the mandatory provisions of Section 5 of the [Civil Procedure Act](#) as read together with Order 5 rule 21, 22, 23 and 27 of the [Civil Procedure Rules](#) 2010.
  - 4) That the Interim Orders granted on 22/11/ 2021 are ultra vires jurisdiction and ought to be set aside ex-debito jucticiae.
3. The application was also supported by the supporting Affidavit of GS sworn on the 16<sup>th</sup> day of December, 2021. He deponed that the Petitioner had deliberately failed to disclose that he is a foreigner living and residing in Klaus, Austria outside the jurisdiction of this Court. That on or about the 2<sup>nd</sup> day of December, 2021, he received an email from Kisoo Mutua & Associates Advocates with attached copies of an Order of this Court dated 22/11/2021, Certificate of Urgency, Notice of Motion, Originating Summons dated 12/11/2021 and a supporting Affidavit dated 25/10/ 2021.
  4. He also deponed that from the Order of this Court dated 22/11/2021 and the Petitioners' Application, it is clear that no prior leave had been sought and or obtained to serve summons, notice and or process in this suit on him outside the Jurisdiction, contrary to the mandatory provisions of Section 5 of the [Civil Procedure Act](#) as read together with Order 5 rule 21, 22, 23 and 27 of the [Civil Procedure Rules](#) 2010.

### **Response**

5. The Applicant/ Respondent in opposition of the application dated 17<sup>th</sup> December, 2021 filed a Replying Affidavit sworn on the 26<sup>th</sup> day of January, 2022. She deposed in her affidavit that service of the pleadings was clearly and properly done pursuant to the provisions of Order 5 Rule 22B of the [Civil Procedure Rules, 2020](#)(as amended) and the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic published in Gazette Notice No. 3137.
6. It was her assertion that the nationality of the Respondent was not contested but what is being challenged is his status of residency. She stated that the Respondent is a resident of Kenya the same having resulted from his extensive duration of stay in Kenya as well as his business dealings in the country. She also deposed that due to the frequent nature of the Respondent's travel in and out of Kenya, it was hard to ascertain where he was at any given moment and hence the choice of service by way of email.
7. She further deposed that the argument being presented by the Respondent trying to oust this Honourable Court's jurisdiction is founded on mischief and is aimed at depriving her of her entitled share to the matrimonial property.

### **Respondent's Reply**

8. The Applicant/ Respondent filed a Replying Affidavit on the 7<sup>th</sup> day of March, 2022. In his Affidavit he was in agreement that the allegations which is the subject matter is matrimonial property although the same can only be determined after this application has been dealt with. He also confirmed that it was not in dispute that no leave was sought to serve him with summons or court process outside the jurisdiction of this court despite the Petitioner having knowledge of his address and that he is a resident of Austria.
9. He averred that the purported amendments of the Civil Procedure Rules or the alleged Practice Directions cited in the Replying Affidavit did not in any way repeal mandatory provisions of Rule 21,



22, 23 and 27 of Order 5 of the [Civil Procedure Rules](#). Similarly, that the provisions of the said [Civil Procedure \(Amendment\) Rules 2020](#) cited by the Petitioner do not excuse or waive the requirement of prior leave being sought and obtained to a party who is not resident in Kenya.

10. He deponed that he exited the jurisdiction of this court on 10.11.2019 to Austria where he has been residing and living and only returned to Kenya once for holiday from 12.01.2022 until 05.02.2022. That he held work permits with each a duration of 2 years but he however did not renew the one issued on 09.11.2018 which expired on 08.11.2020.

### Submissions

11. The Respondent through his Advocate Litoro & Omwebu Advocates filed submissions on the 7<sup>th</sup> day of March, 2022. They identified two issues for determination; whether the court has requisite jurisdiction to entertain the suit against the Applicant who is a foreigner and resident outside jurisdiction of this Court without prior leave to serve summons and process outside jurisdiction on the Applicant; and whether the suit should be struck out and interim Orders vacated.
12. On the first issue for determination. He submitted that the instant suit is regulated by [Civil Procedure \(Amendment\) Rules, 2020](#), Section 19 of the [Civil Procedure Act](#) which provides that suits shall be filed in accordance with the Rules. He relied on the case of [Misnak International \(UK\) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others](#) [2019] eKLR where an appeal arising from a similar case as herein where the court had allowed a suit against a foreigner without compliance with the provisions of Order 5 Rules 21, 22, 25 and 27 of the [Civil Procedure Rules](#); The Court of Appeal held that court has no jurisdiction to entertain a party who is a foreigner and not a resident of Kenya.
13. The Respondent also relied on the authorities of [Zanele Investment Holding Limited v Alexander Forbes Emerging Markets \(PTY\)](#) [2017] eKLR and that of [E M M v E E G](#) [2018] eKLR which authorities set out the procedure of service of summons outside jurisdiction as set out under Order 5.
14. The Applicant/ Respondent through her Advocate, Kisoo Mutua & Associates filed submissions on the 4<sup>th</sup> day of March, 2022. She identified one issue for determination; whether the Applicant's pleadings filed herein were defective. It was her submission that her reading of Order 5 Rule 22B of the [Civil Procedure Rules](#) is that service under that provision did not require leave of court.
15. She submitted that in the instant case, they had complied with the provisions of the stated Order as service was effected to the last known email address of the Respondent. That the amendment of the [Civil Procedure Rules](#) brought about service by email while the development of technology and the outbreak of Covid- 19 had given parties other modes of service through email and WhatsApp. She relied on the case of Mombasa HCCC No. 35 of 2020 [Panchal Trading \(K\) Limited NF Metals Corporation](#) [2021] eKLR.
16. It was also her submission that the Respondent through its Advocate had waived their right to raise any irregularity on the issue of service when they entered appearance and filed their response dated 16<sup>th</sup> December, 2021 to the main motion. She relied on the case of Mombasa Civil Appeal 3 of 2020 [Premier Hospital Limited v Meditec Systems Limited & Another](#) [2021] eKLR.

### Analysis and Determination

17. I have analyzed the application, the response and submissions by both counsels. On one hand the Respondent asserts that the interim Orders given on 18.11.2021 were issued without jurisdiction and the same cannot stand as the same is a nullity and should be set aside; the Applicant on the other hand



argues that Order 5 Rule 22B does not require leave of court and according to them, the Respondent waived their right to raise any irregularity on the issue of service when they entered appearance and filed a response to the main motion.

18. I am being called upon to determine whether the interim orders issued on 22<sup>nd</sup> November, 2021 can be set aside or varied since no leave was sought or obtained to serve the Respondent summons outside the jurisdiction of this court, contrary to the provisions of Section 5 of the *Civil Procedure Act* as read together with Order 5 rule 21,22,23 and 27 of the *Civil Procedure Rules*, 2010 while at the same time ensuring that justice is done to the parties.

19. The question in this case is on service of persons or entities outside Kenya that is provided for under Order 5 Rule 21 and the observance of Rules 25,26,27, 28, 29 and 30 of the *Civil Procedure Rules*. With regard to foreign service of Court Processes, Order 5 Rule 25 provides as follows:

“Every application for leave to serve such summons or notice on a defendant out of Kenya shall be supported by affidavit or other evidence, stating that in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or county such defendant is or probably may be found, and whether such defendant is a common wealth citizen or British protected person or not and grounds on which the application is made, and no such leave shall be granted unless it is made sufficiently to appear to Court that the case is a proper one for service out of Kenya under this Order 26: Any order giving leave to effect such service or such notice shall limit a time after such service or notice within which such defendant is to enter an appearance. Such time to depend on the place or country where or within which the summons is to be served or the notice given.”

20. Once such leave has been granted, the summons has to be served upon such a Respondent. The stated Order provides that such service of the summons makes the court assume jurisdiction over a foreign Respondent. This Court in *Raytheon Aircraft Credit Corporation & another v Air Al-Faraj Limited* (2005) eKLR appreciated as much by stating that -

“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.”

21. I agree with the Respondent’s counsel that a court can only assume jurisdiction over a foreigner by first granting leave for service of the summons outside its jurisdiction. In the present case, the Petitioner did not seek such leave noting that the sole purposes of seeking leave is to enable the court to weigh the reasons adduced by the petitioner and determine whether a proper case has been made out to warrant service of summons outside it’s jurisdiction.

22. I am equally guided by the decision of Aburili, J. in *Law Society of Kenya v Martin Day & 3 others* [2015] eKLR where it was held:

“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.”

23. From the foregoing, I find merit in the application dated 17th December, 2021. The Application is allowed as prayed. The granted interim orders are vacated.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26 TH DAY OF APRIL, 2022.**

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

Mr Litoro for the Defendant/Applicant

Miss Mutua for the Petitioner/Applicant is absent

