



Petkim Petrokimya Holding A.S v Hannings & 5 others; Mediterranean Shipping Company S.A & 4 others (Interested Party) (Civil Case E097 of 2020) [2021] KEHC 153 (KLR) (Commercial and Tax) (22 October 2021) (Ruling)

Neutral citation: [2021] KEHC 153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E097 OF 2020
A MABEYA, J
OCTOBER 22, 2021**

BETWEEN

PETKIM PETROKIMYA HOLDING A.S PLAINTIFF

AND

ANTHONY HANNINGS 1ST DEFENDANT

PAUL MYRERS 2ND DEFENDANT

NICHOLUS ANDREW 3RD DEFENDANT

TRADE LINKS 4TH DEFENDANT

BARKING & DAGENHAM TRADING PARTNERSHIP LTD .. 5TH DEFENDANT

SINOJET TRADERS LIMITED 6TH DEFENDANT

AND

MEDITERRANEAN SHIPPING COMPANY S.A INTERESTED PARTY

LONDON BOROUGH OF BARKING AND DAGENHAM INTERESTED PARTY

KENYA PORTS AUTHORITY INTERESTED PARTY

INTERNATIONAL POLICE (INTERPOL) INTERESTED PARTY

DIRECTORATE OF CRIMINAL INVESTIGATIONS INTERESTED PARTY



RULING

1. Before me is a Preliminary Objection dated 11/12/2020. It was brought by the 6th defendant seeking the striking of the entire suit. The same was expressed to be made under Article 159 (2) (c) of the *Constitution of Kenya*, sections 3A, 5, 19 and 20 of the *Civil Procedure Act* and Order 5, Rules 21, 23 and 27 of the *Civil Procedure Rules 2010*.
2. The objection was based on the grounds that; the suit is defective as the plaintiff should have first sought leave to serve the 6th defendant with Summons to Enter Appearance out of the jurisdiction in accordance with Order 5 Rule 21, 23 and 27 of the Civil Procedure Rules 2010. That the plaintiff having failed to seek such leave, it deprived the Court of its jurisdiction to grant any of the prayers sought.
3. The 6th defendant filed submissions dated 7/5/2021 in support of the objection while the plaintiff opposed the same vide submissions dated 12/9/2021. The Court has considered the respective submissions.
4. The plaintiff submitted that the summons was properly served on the 6th defendant via electronic mail as stipulated under Order 5 Rule 22B of the Civil Procedure Rules 2010. That since the 6th defendant had acquiesced to being served and had appeared the service was effective.
5. That the subject matter of the suit had been passed over to the plaintiff which it had subsequently disposed of. That in the premises, the application before Court was an academic exercise.
6. On its part, the 6th defendant maintained that since the rules required leave to be sought first, this Court did not have jurisdiction to entertain the matter.
7. Order 5 Rule 22B of the *Civil Procedure Act* provides: -
 - “(1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
 - (2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 - (3)
 - (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.”
8. The above provision was added to the Civil Procedure Rules 2010 through the Kenya Gazette Supplement No. 11 of 26/2/2020 vide the Civil Procedure (Amendment) Rules, 2020.
9. Further, vide Gazette Notice No. 3137 of 20/3/2020 the Chief Justice issued the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Coronavirus Pandemic.
10. Practice Directions number 5 thereof provided that: -
 - “Service of documents and court process: During this period, parties are directed, whenever possible and unless otherwise directed by the court, to serve court documents and processes



through electronic mail services and mobile enabled messaging applications as provided for under Order 5 Rules 22B and 22C of the Civil Procedure Rules”.

11. The present suit was filed on 3/4/2020 during the Covid-19 Pandemic. The 6th defendant did not deny that the plaintiff served it with Summons via email. The introduction of service by way of email in my view is in accordance with Article 159 of the Constitution of Kenya to avoid delaying the causes of justice.
12. All that leave under Order 5 Rule 21 of the Civil Procedure Rules sought was for the Court to satisfy itself that the defendant sought to be served was outside the jurisdiction and the subject matter was under the Court’s jurisdiction.
13. In enacting Order 5 Rule 22B, the Legislature was aware of the existence of the requirement for leave under Order 5 Rule 21. Rule 22B was not made subject to the provisions of Order 5 Rule 21. In this Court’s view, apart from the decree in Article 159 as to technicality and expedited justice, Rule 22B being latter in time supersedes Rule 21.
14. Counsel for the 6th defendant 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*. Firstly, the Counsel did not give the citation. Secondly, he never supplied a copy of that decision. I tried to google the same from the Kenya Law Reports, but what came out was the interlocutory application being CA No. 94 of 2018 and not the appeal itself as contended by Learned Counsel. As a result, the Court could not verify Counsel’s extract that was contained in his submissions.
15. In this regard, this Court was unable to discern if the Court of Appeal in that decision considered the effect of Order 5 Rule 22B of the Civil Procedure Rules and the Covid-19 Practice Directions.
16. In any event, the plaintiff stated that the subject matter of the suit has since been extinguished. The goods were returned back to the plaintiff and the suit was determined.
17. Accordingly, I find the objection to be without merit and I dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE

