



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO.3 OF 2020**

**PREMIER HOSPITAL LIMITED.....PLAINTIFF**

**-VERSUS-**

**1. MEDITEC SYSTEMS LIMITED)**

**2. SIEMENS HEALTHCARE GMBH).....DEFENDANTS**

**RULING**

1. Before court for determination is the 2<sup>nd</sup> Defendant's **Notice of Motion** application dated **18<sup>th</sup> May, 2021** AND brought under the provisions of **Section 3A** and **63** of the **Civil Procedure Act** and the inherent jurisdiction of this court. The Application seeks for inter alia orders that;

**a) Spent;**

**b) That the order made herein on 8<sup>th</sup> March, 2021 and service upon the Defendant of the summons to enter appearance and Plaint as well as the other pleadings pursuant thereto be set aside;**

**c) That the suit against the second Defendant herein be struck out; and**

**d) That the costs of this application be provided for.**

2. The application is predicated on the grounds in the body of the application and the **Supporting Affidavit** of **Theresa Bartoszek**, the 2<sup>nd</sup> Defendant's legal counsel sworn on **17<sup>th</sup> May, 2021**, the **affidavit** of **Dr. Brent Bieber**, the 2<sup>nd</sup> Defendant's Senior Vice President Direct Export Sales sworn on **12<sup>th</sup> May, 2021** and further on the **affidavit** of its advocate on record **Mr. Sanjeev Khagram** sworn on **9<sup>th</sup> July, 2021**.

3. Those grounds are that; the 2<sup>nd</sup> Defendant is a company incorporated in the **Federal Republic of German** and does not carry on business in Kenya; the cause of action arose out of Kenya hence the court lacks jurisdiction to enjoin the 2<sup>nd</sup> Defendant in the present suit unless an application is made under **Order 5 Rules 21** and **25** both of the **Civil Procedure Rules**, that in the circumstances, the orders of **8<sup>th</sup> March, 2021** should be set aside *ex-debitio justitiae*.

4. In the **affidavit** of **Theresa Bartoszek**, she deponed that the 2<sup>nd</sup> Defendant had received documents from the Plaintiff on **6<sup>th</sup> April, 2021** in regard with the present suit but avers that the 2<sup>nd</sup> Defendant had no contractual relationship with the Plaintiff or any direct supply of medical equipment to the Plaintiff. She added that the suit against 2<sup>nd</sup> Defendant is based on an oral application as the Plaintiff had not filed a formal application to enable the court satisfy itself that the Plaintiff had a good cause of action against the 2<sup>nd</sup> Defendant. In her view, the tort now complained of happened outside the jurisdiction of the country and since there was no direct Scope CT Scanner contract between the Plaintiff and the 2<sup>nd</sup> Defendant, then this court lacks the requisite jurisdiction unless the same is properly invoked as provided for under **Order 5** of the **Civil Procedure Rules**.

5. In his **affidavit**, **Dr. Bernet Bieber** confirmed that on **6<sup>th</sup> April, 2021** the 2<sup>nd</sup> Defendant received copies of Summons to enter appearance, amended plaint and list of bundles of documents which they forwarded to their legal officer on the **23<sup>rd</sup> April, 2021**. He added that the 2<sup>nd</sup> Defendant had not sold the faulty **SOMATOM Scope CT Scanner** directly to the Plaintiff but rather the same was sold to the Plaintiff by independent distributor acting on their own account.

6. Lastly, the **third affidavit** sworn by learned counsel, **Sanjeev Khagram** was meant to merely produce correspondences referred to as “**TB-1**” in the **affidavit** of **Theresa Bartoszek** but was mistakenly omitted.

7. The application is opposed by the Plaintiff and in doing so, a **Replying Affidavit** sworn on **31<sup>st</sup> May, 2021** by the Plaintiff’s **Chief Operating Officer, Dr. Sam Oula** was filed on **3<sup>rd</sup> June, 2021**. He described the application as incurably defective and went on to fault the application for among other reasons that; the dispositions made in the affidavits sworn in support of the application are false as it can be seen that the affidavits were sworn on **17<sup>th</sup> April, 2021** before the existence of the application, that no authority to swear the affidavits was exhibited and the exhibits referred to in the affidavits have also not been annexed, and further, that the affidavits merely contain hearsay statements.

8. It is averred that under **Order 1 Rule 3, 7 and 9**, all of the **Civil Procedure Rules**, the Plaintiff is at liberty to enjoin defendants whom it thinks a redress lies and if the Plaintiff is in doubt as to the person from whom he is entitled to obtain redress, then he may join the defendants so that the question as to who is liable may be addressed. The foregoing was the basis of the Plaintiff orally seeking the leave to serve the defendants outside the jurisdiction and the plaintiff avers that it convincingly persuaded the court vide the oral application that the 2<sup>nd</sup> Defendant ought to be enjoined in the suit. In that regard, the Plaintiff then served the summons via email as provided for under **Order 5 Rule 22B** of the **Civil Procedure Rules** and since the 2<sup>nd</sup> Defendant acknowledged the service then the provision of **Order 5 Rule 22A** of the **Civil Procedure Rules** was overtaken by events.

9. It is further averred that the cause of action arise not only in **Federal Republic of German** but also in Kenya where the faulty machine was imported to. It is said that the machine was shipped to Kenya by the 2<sup>nd</sup> Defendant as per the **Bill of Lading** exhibited as “**PHM-3**”. That although the 2<sup>nd</sup> Defendant affirmed that the machine was brand new, vide a letter dated **11<sup>th</sup> February, 2020**, the same developed faults in a period of less than a year and the Plaintiff complained to the 2<sup>nd</sup> Defendant. They then engaged in negotiations seasonally and at last the 2<sup>nd</sup> Defendant introduced the Plaintiff to its agent, **Pacific Diagnostics** which is based in Tanzania, who was to diagnose the machine and identify which parts were to be sourced from the 2<sup>nd</sup> Defendant for the purpose of fixing the machine.

10. The Plaintiff also avers that owing to the foregoing facts, it can claim against the supplier or the manufacturer for the faulty machine and in the event that the 2<sup>nd</sup> Defendant thinks that there is no reasonable cause disclosed in the plaint, then it is a liberty to move the court formally under **Order 2 Rule 15** of the **Civil Procedure Rules**

11. The 2<sup>nd</sup> Defendant’s application was canvassed by way of written submissions which were later highlighted on **24<sup>th</sup> September, 2021**. I have read through the Plaintiff’s submissions dated and filed on **2<sup>nd</sup> July, 2021** and the 2<sup>nd</sup> Defendant’s submissions filed on **30<sup>th</sup> July, 2021** as well as the oral highlights made before me on **24<sup>th</sup> September, 2021** by **Mr. Khagram** for the 2<sup>nd</sup> Defendant and **Mr. Karega** for the Plaintiff.

#### **Analysis and Determination**

12. I have carefully considered the 2<sup>nd</sup> Defendants **Notice of Motion** application, the affidavits sworn in support and rebuttal of the same and the parties’ rival submissions together with relevant statutory provisions and case law. The following are the main issues for consideration and determination by the court;

- a) Whether the deponent of the affidavits sworn in support of the application had the authority to do so;*
- b) Whether the orders made on 8<sup>th</sup> March, 2021 should be set aside owing to irregular service of summons;*
- c) What orders should this court make?*
- d) Who should bear the costs?*

#### **a) Whether the affidavits in support of the application were sworn with authority**

13. This is a relatively straight forward issue and in its depth, the Plaintiff seeks the **affidavits** of **Theresa Bartoszek** and **Dr. Bernt Bieber** sworn in support of the application dated **18<sup>th</sup> May, 2021** to be struck out because no authority to do so was annexed given that the 2<sup>nd</sup> Defendant is a juristic person with separate legal capacity. The Plaintiff further lamented that the Supporting Affidavits were sworn before the existence of the application connoting that the averments therein were complete lies made on oath.

14. The 2<sup>nd</sup> Defendant responded that the deponents expressed that they were swearing the affidavits in their capacities as employees of the 2<sup>nd</sup> Defendant and they therefore had the authority to swear as they did. It is further stated that there was an inadvertent mistake in indicating the dates in the affidavits which in any case was rectified by presenting the correct notary certificates.

15. In my view, it is enough for an officer of a company to state in the affidavit that he/she is authorized to swear the affidavit or that he/she has sworn the affidavit as part of the duties assigned to him/her by the subject company without necessarily filing a separate document of authorization passed by Board of Directors. A similar view is adopted in the case of **Fubeco China Fushun –vs- Naiposha Company Limited & 11 others [2014] eKLR**. It will then be observed that the Plaintiff erred in arguing that the **affidavits** of **Theresa Bartoszek** and **Dr. Bernt Bieber** were sworn without authority. Both deponents stated that they swore the affidavits in the course of their duties as directed by the 2<sup>nd</sup> Defendant and the failure to specifically use the word “**authorized**” does not prove the contrary.

***b) Whether the orders made on 8<sup>th</sup> March, 2021 should be set aside owing to irregular service of summons.***

16. The main contention raised by the 2<sup>nd</sup> Defendant is that the Plaintiff never followed the correct procedure in serving summons to it as provided for under **Order 5 Rule 25** of the **Civil Procedure Rules**. It is averred that the Plaintiff merely made an oral application seeking leave to serve the summons to a Defendant outside Kenya as opposed to filing a formal application supported by an affidavit and therefore, the court did not address the issue of whether a reasonable cause of action had been disclosed as against the 2<sup>nd</sup> Defendant.

17. The said **Order 5 Rule 25** of the **Civil Procedure Rules** provides as follows with regard to foreign service of Court processes:

***“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 country such defendant is or probably may be found, and whether such defendant is not resident in Kenya or not, and the grounds on***

***which the application is made; and no such leave shall be granted unless it is made sufficiently to appear to the court that the case is a proper one for service out of Kenya under this Order.”***

18. Upon such leave being granted under **Order 25** above, the Summons has to be served upon the Defendant in the manner prescribed and it is only until then that jurisdiction is assumed by the court upon a Defendant who is outside the court’s jurisdiction. Such view was also adopted by the Court of Appeal in the case of **Raytheon Aircraft Credit Corporation & Another –vs- Air Al-Faraj Limited [2005] eKLR** and later adopted by the same court in the case of **Misnak International (UK) Limited –vs- 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 Others [2019] eKLR** where the court appreciated 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.”***

19. In the circumstances of this case, it is a common ground that leave to serve the 2<sup>nd</sup> Defendant, a company incorporated in the **Federal Republic of German** was orally sought for by the Plaintiff’s counsel on the **8<sup>th</sup> March, 2021** and the same was granted on even date. The counsel rigorously submitted that the 2<sup>nd</sup> Defendant was the manufacturer of the faulty scanning equipment and the Plaintiff believed that it had redress as against the manufacturer. It is in that breath that the court granted the Plaintiff leave to serve Summons upon the 2<sup>nd</sup> Defendant.

20. However, the 2<sup>nd</sup> Defendant laments that unless the Plaintiff files a formal application supported by an affidavit, the leave granted by this court is irregular and should be set aside. However, I respectfully disagree with the 2<sup>nd</sup> Defendant’s analogy for among other reasons, that a close scrutiny of **Order 5 Rule 25** shows that the granting of leave therein is at the discretion of the court and such discretion should only be exercised upon an Applicant adducing evidence to the satisfaction of the court that he/she has a good cause of action against a Defendant who is outside the jurisdiction of the court.

21. The same provision does not expressly preclude an application from being made orally and in my view, where a Plaintiff upon an oral application shows a good cause of action against such a Defendant, denying the leave on the ground of failing to file a formal application would be tantamount to sacrificing justice at the altar of strict adherence to provisions of procedural law.

22. Essentially the rules remain subservient to the Constitution and statutes and on that note **Article 159(2)(d)** of the **Constitution, Section 1A** and **1B** of the **Civil Procedure Act** place heavy premium on substantive justice and call upon courts to abhor technicalities in the dispensation of justice.

23. In the end, it is my conclusion that unless the rule under **Order 5 Rule 25** strictly calls for a formal application, an oral application could suffice where sufficient cause of action is shown as against the Defendant as is in this case. Therefore, the prayer for setting aside the order made on **8<sup>th</sup> March, 2021** for failure to file a formal application fails.

24. The next issue for consideration is whether service of summons upon the 2<sup>nd</sup> Defendant was properly effected. Admittedly in this case, the Plaintiff served the copies of summons to enter appearance, amended Plaintiff and list of documents on **6<sup>th</sup> April, 2021** through the digital platform and electronic mail address known of the 2<sup>nd</sup> Defendant. **Order 5, Rule 22A** of the **Civil Procedure Rules** provides for service of summons through internationally recognised courier services and service is deemed to have been effected once the person being served acknowledges receipt by affixing his signature on the document or on confirmation of delivery by the courier service provider. An extension of the means of service is **Rule 22B** which provides for alternative service of summons through electronic mail services and service is deemed to have been effected when the Sender receives a delivery receipt.

25. In the present case, the Plaintiff annexed a facsimile of emails sent and received by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant also acknowledged receipt of the electronic mail services and this court is equally persuaded that the 2<sup>nd</sup> Defendant was properly served. For the aforesaid reasons, it then follows that this court has properly assumed jurisdiction over the 2<sup>nd</sup> Defendant and the challenge on jurisdiction must fail.

26. Lastly, the 2<sup>nd</sup> Defendant has submitted that the Plaintiff cannot lay claim against it for the faulty machine in the absence of a valid contract with the Plaintiff. However, the 2<sup>nd</sup> Defendant does not deny that it manufactured the faulty machine and that it had earlier responded to complaints by the Plaintiff by sending its agent based in the **Republic of Tanzania** to diagnose the machine for purposes of

establishing the faults. In any event, that is, in my view an issue for determination upon considering evidence from both sides.

27. In the foregoing and for the above-said reasons, there are no meritorious grounds have been demonstrated for setting aside the orders of **8<sup>th</sup> March, 2021** or striking out the suit against the 2<sup>nd</sup> Defendant. Subsequently, the **Notice of Motion** application dated **18<sup>th</sup> May, 2021** is hereby dismissed. Costs of the application shall be in the cause.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED and SIGNED at NAIROBI this 20<sup>th</sup> day of DECEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Ongeso counsel holding brief for Mr. Karenga counsel for Plaintiff

No appearance for and by Respondent

Court Assistant - Gitonga