



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 161 of 2006**

**KENYA PORTS AUTHORITY .....  
PLAINTIFF**

**VERSUS**

**BAUMANN ENGINEERING LTD ..... 1<sup>ST</sup> DEFENDANT**

**SABRE ENGINES LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(1) The Plaintiff, Kenya Ports Authority (“KPA”), instituted this suit on the 31<sup>st</sup> March 2006 against the two Defendants, Baumann Engineering Ltd. (“Baumann”) and Sabre Engines Ltd., (“Sabre”) to recover damages for alleged breach of contract.

(2) KPA’s claim against Baumann and Sabre is based on the assertion by KPA that Baumann sold and supplied it with four defective generating sets manufactured by Sabre.

(3) Sabre is a company registered in the United Kingdom. Baumann is a local company and was served with process in the normal way in accordance with the Civil Procedure Rules. It entered appearance and filed its Defence to the claim on the 19<sup>th</sup> May 2005.

(4) In the case of Sabre, the Plaintiff applied under Order V rules 21, 22 and 32 of the Civil Procedure Rules for orders:

**“1. That leave be granted to serve the summons upon the Second Defendant out of Kenya at (sic) England, United Kingdom or elsewhere in the United Kingdom through an agent or in such other manner as the court may direct.**

**2. That the time for entering an appearance to the summons be 21 days from the date of service of the summons.”**

(5) The application was heard by Azangalala, J on the 18<sup>th</sup> October 2006 and His Lordship granted the application in terms of prayers 1 and 2 of the Chamber Summons filed on the 31<sup>st</sup> August 2006. His Lordship added:

**“I direct that the Registrar complies with the provisions of Order V rule 22 of the Civil Procedure Rules.”**

(6) Having obtained leave, Messrs. Kaplan & Stratton, the Advocates for the Plaintiff, extracted the Order which they then used to effect service of process on Sabre through the agency of Pengillys Solicitors, 67 St Thomas Street, Weymouth, Dorset, DT4 8HB, United Kingdom. There is an Affidavit of Service dated the 22<sup>nd</sup> December, 2006 sworn by Mr. David John Smith, a Litigation Executive employed by Pengillys Solicitors.

(7) After being served, Sabre entered appearance under protest on the 8<sup>th</sup> January 2007 and filed a Defence, also under protest, on the 22<sup>nd</sup> January 2007 through the firm of Walker Kontos, Advocates.

(8) On the 19<sup>th</sup> January 2007, Messrs. Walker Kontos on behalf of Sabre took out a Chamber Summons under Order IV rule 3, Order VI rule 13(1)(d) and Order V rule 27, of the Civil Procedure Rules for an order that the Summons and the Plaint be struck out. The application is based on the grounds that service on Sabre did not comply with the provisions of Order V rule 27 of the Civil Procedure Rules because the notice of summons was not sealed with the seal of the High Court for use out of Kenya; the summons were not forwarded by the Registrar to the Minister for Foreign Affairs requesting that the summons be served in the United Kingdom; and that the Plaintiff treated the Order of the Court made by Azangalala, J with contempt. The application is supported by the affidavit of Paul Anthony Freeman, the Commercial Director of Sabre.

(9) In response to Sabre's complaint, KPA filed a number of Grounds of Opposition, among them being:

**“1. The Plaintiff's application dated 31<sup>st</sup> August 2006 prayed for leave to effect service of Summons upon the 2<sup>nd</sup> Defendant in the United Kingdom.**

**2. This Honourable Court granted prayers 1 and 2 of the Plaintiff's said application.**

**3. The Civil Procedure Rules were thus complied with as the Second Defendant was traced and served in the United Kingdom.**

**4. The direction by the court for the Registrar to comply with the provisions of Order V rule 27 would only have been necessary if the Defendant was not in a commonwealth country and the Plaintiff had applied for leave to serve notice of summons in that foreign country which is not the case herein.**

**6. No prejudice has been occasioned to the second Defendant.”**

(10) I think this application is misconceived because Sabre being a company resident and registered in the United Kingdom, a Commonwealth country, service upon it is governed by Order V rule 25 of the Civil Procedure Rules which is in the following terms:

**“25. Where leave to serve a summons or notice of summons out of Kenya has been granted under rule 21, and the defendant is a Commonwealth citizen as defined in subsections (1) and (2) of section 95 of the Constitution or resides in any of the countries for the time being mentioned in subsection (3) of that section, the summons shall be served in such manner as the court may direct.”**

(11) Clearly, for purposes of service, the United Kingdom, in this case England, is not a foreign country so as to be caught by rule 27 of Order V.

(12) Sabre has been served which service I hold to be valid and legal. It has entered an appearance and filed a Defence. And no prejudice has been alleged or proved.

(13) Consequently, and for the reasons which I have given, the Chamber Summons filed on the 19<sup>th</sup> January 2007 fails and it is hereby dismissed with costs to the Plaintiff.

I so order.

Dated and delivered at Nairobi this Ninth day of October 2008.

**P. Kihara Kariuki**

**Judge.**