



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 127 of 2006

EXPORT TRADING LTD. PLAINTIFF

- Versus -

THE UNITED KINGDOM MUTUAL STEAMSHIP

ASSURANCE ASSOCIATION ((BERMUDA) DEFENANDANT

Coram: Before Hon. Justice L. Njagi

Mr. Khagram for the Defendant

Court clerk – Kinyua

R U L I N G

This application seeks orders that service of the summons to enter appearance herein upon Mitchell Cotts P & I Ltd. be set aside and that costs of the application be provided for. It is made by way of a notice of motion dated 21st June, 2006, and expressed to be brought under sections 3A and 63 of the Civil Procedure Act.

The application is supported by the annexed affidavit sworn on 21st June, 2006, by Robert Minnis, a manager in the employment of Mitchell Cotts P & I Limited. It is based on four grounds. First, it is not clear from the plaint and the summons to enter appearance who the intended defendant is as the entity sued, “The United Kingdom Mutual Steamship Assurance Association (Bermuda) (also known as UK P & I Club), does not exist. Secondly, Mitchell Cotts P & I Ltd. are only correspondents/agents for Thomas Miller P & I Ltd. (known as “UK P & I Club” who are in turn agents for Thomas Miller (Bermuda) Ltd. Thirdly the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited do not have any manager or agent who carry on their business within the local limits of the jurisdiction of this court. Fourthly, no cause of action can, in any event, accrue as against Mitchell P & I Limited’s principals in this matter.

On 4th July, 2006, the plaintiff’s advocates on record filed some five grounds of opposition. These were that the application is an abuse of court process; that it is unprocedural; it is misconceived and brought in bad faith; that the defendant has no locus to bring the application; and that the application is of a nuisance value, harassing, vexatious, scandalous, frivolous and lacking in merit.

At the hearing of the application, Mr. Khagram appeared for the applicant. There was no attendance by or for the respondent. According to an affidavit of service sworn by Josephat Munika Sore, a court clerk in the firm of the applicant’s advocates and an authorized process server, the respondent’s advocates

were served on 29th June, 2006. Accordingly they were aware that the matter was coming for hearing on 5th July, 2006. In their absence, the court elected to proceed ex parte.

Mr. Khagram adopted the grounds on the face of the application and submitted that the service of the summons was a nullity as it was not clear from the body of the plaint who the intended defendant was. He then referred to paragraph 4 of the supporting affidavit and Order V rule 10(1) of the Civil Procedure Rules and submitted that it was only possible to effect service of summons locally upon a defendant resident overseas if that defendant has a manager or representative of its business in Kenya. Otherwise the only way in which this court can assume jurisdiction is when the plaintiff seeks leave to serve the summons out of jurisdiction. He referred to **NANJIBHAI PRABHUDAS & CO. LTD. v. STANDARD BANK LTD.** [1968] E.A. 670 and urged the court to set aside the summons to enter appearance upon Mitchell Cotts P & I Ltd.

This action was commenced by a plaint filed in court on 16th May, 2006. In paragraph 2 thereof, the plaintiff states –

“The defendant is the United Kingdom Mutual Steamship Assurance Association (Bermuda) incorporated in Bermuda and carrying on business in England and elsewhere through its agents and correspondents. The defendant has representative offices within Kenya at Mitchell Cotts P & I Limited Mombasa. Summons will be served on the aforesaid representatives through the plaintiff’s advocates.

Pursuant to this statement, M/s Mitchell Cotts P & I Limited were on 25th May, 2006, served with the plaint, verifying affidavit, and summons to enter appearance. On 9th June, 2006, M/s A.B. Patel & Patel, Advocates, filed a conditional memorandum of appearance for the defendants. It was followed closely thereafter by this application for setting aside the summons to enter appearance.

Order V rule 9(1) of the Civil Procedure Rules requires that wherever it is practicable, service of summons should be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient. In paragraph 4 of his affidavit in support of the application, Mr. Minnis deposes that Mitchell Cotts P & I Limited are not the managers of or in any other way connected with the defendants in this suit, nor does it have instructions to accept service of process on behalf of the defendants. In my view, even if an agent is not expressly empowered to accept service of process, provided that such an agent is a recognized agent within the provisions of Order III of the Civil Procedure Rules, service on such an agent will be effective. Under Order III rule 2(b), such recognized agents include:-

“... persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court ... in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts”.

In terms of Order III rule 3(1), process served on the recognized agent of a party is as effectual as if it had been served on the party in person, unless the court otherwise directs. This is given further support in Order V rule 10(1) which states:-

“In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the court from which the summons is issued, service on any manager or agent, who at the time of service personally carries on such business or work for such person within such limits shall be deemed good service.”

In the instant case, the plaintiff alleges that the defendant has representative offices within Kenya at Mitchell Cotts P & I Limited, Mombasa. Mitchell Cotts P & I Limited deny the allegation and instead admit to being only correspondents/agents of Thomas Miller P & I Limited, who are agents for Thomas Miller (Bermuda) Ltd., who in turn are the managers of the defendants. This per se, does not constitute

Mitchell Cotts P & I Ltd. agents for the defendants, as the former are not personally carrying on the defendants business or work in Kenya. The plaintiffs could have shed more light on the matter as they were served with the application and its supporting affidavit. Instead of doing so, they opted to file grounds of opposition, which do not make anyone any wiser, and further decided to keep away from the court. Consequently, they have not established that Mitchell Cotts P & I Ltd. are the defendant's recognized agents and therefore service on Mitchell Cotts P & I is ineffectual.

For the above reasons I allow the application and order that service of the summons to enter appearance upon Mitchell Cotts P & I Ltd. be and is hereby set aside.

In paragraph 5 of the supporting affidavit, Mr. Minnis deposes that the process was wrongly served upon Mitchell Cotts P & I Ltd. who accepted the same under a misapprehension of fact and in error. I wonder as to what misapprehension Mitchell Cotts could have been when they were not the defendants and when paragraph 2 of the plaint stated clearly that the defendant has representative offices at Mitchell Cotts P & I Ltd., Mombasa. They brought it upon themselves. I therefore further order that each party will bear its own costs of this application.

Dated and delivered at Mombasa this 8th day of September, 2006.

L. NJAGI

JUDGE