

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

Civil Case 684 of 2005

NAIROBI PROJECTORS SERVICES LIMITED PLAINTIFF

VERSUS

PATRICIA KABULEETA 1ST DEFENDANT

PATRICK MUYONGO 2ND DEFENDANT

RULING

This is an application to set aside the Order granting leave to serve the summons outside the jurisdiction of the Court, and for the Plaint to be struck out, on the following grounds:

(a) Both the first and second defendants reside and carry on business outside Kenya. The defendants are not domiciled or ordinarily residents in Kenya.

(b) No facts showing that the court has jurisdiction have not (sic) been pleaded.

(c) (i) None of the circumstances detailed in Order 5 Rule 21

of the Civil Procedure Rules is apparent in this case.

(ii) There is no jurisdiction to grant leave to party to serve summons outside the jurisdiction of the court in the absence of the conditions set out in Order 5 Rule 21.

(d) Both the first and second defendants reside and carry on business outside Kenya. The defendants are not domiciled or ordinarily resident in Kenya.

(e) The subject matter of the claim pleaded at paragraph 4 of the amended plaint is not in Kenya.

(f) The agreement under which the defendants took possession of the subject matter in this suit was not made in Kenya.

It has been brought under Order 5 Rule 21 and Order 6 Rule 13 of the Civil Procedure Rules “and is supported by the affidavit of George S. N. Macharia sworn on 6th June, 2005”, among other things.

Now, the said George S. N. Macharia is the Managing Director of the Plaintiff Company, and has sworn an affidavit dated 6th June, 2005 in connection with a separate and unrelated application filed before this Court. Nowhere in that affidavit can I see the evidence of how and where the contract was made, and certainly I cannot decipher any evidence of the contract being made by phone while the Applicant was out of Kenya. For this is what the Applicant has submitted through his Advocate. However, Mr Kimani, advocate for the Applicant, is completely wrong in presenting “evidence” from the bar. These important facts, if indeed they are “facts”, ought to have been presented through a deposition. Mr Kimani submitted further that the “offer” to enter into the contract between the parties, came from the 1st Defendant while he was out of the country, and “acceptance” was given “on the phone”. Where are all these facts?

On the other hand, the Respondent has submitted that the contract was made in Kenya, as evidenced by annexure GSN 1 to the affidavit of Mr Macharia, and that the place of payment was Kenya.

Accordingly, in his view, the Kenyan court has jurisdiction to hear this case {see ***Karachi Gas Company vs H. Issaq (1965) E A 42***}. In the absence of any other evidence to the contrary, I would tend to agree with him, and hold that this case is a proper one to go forward to a full hearing, and only the Trial Judge, based on all the evidence before the Court, can and should determine the issue of Jurisdiction. It is too early and premature to do so.

Accordingly, I dismiss this application with costs to the Plaintiff/Respondent.

Dated and delivered at Nairobi this 2nd day of November, 2006.

ALNASHIR VISRAM

JUDGE