REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 400 OF 2001

BAHRIYA PETROLEUM LTD. …… PLAINTIFF

Versus

1. GULF OIL COMPANY

2. GIRO BANK LTD. …… DEFENDANTS

R U L I N G

Gulf Oil Company Ltd. (the Applicant) is a limited liability company said to be incorporated in the United Arab Emirates (UAE). By a rather prolific Chamber Summons dated the 11th November 2003 expressed to be brought under Section 3A of the Civil Procedure Act, Order 1 Rule 10, Order 5 Rule 17, and Rules 21 up to 32 and Order 9A Rules 9, 10 and 11 of the Civil Procedure Rules it seeks to set aside the order of this court of 6th September 2001 allowing the plaintiff to serve the summons to enter appearance in this case out of jurisdiction by substituted service. It also seeks to set aside the ex parte judgment entered against the first defendant consequent upon that service. The application is based on six grounds which in my view gravitate upon two main points namely:

1. That the first defendant was not served with the summons to enter appearance.

2. That the purported service was irregular and contrary to the mandatory provisions of Order 5 with regard to service out of jurisdiction.

The application is supported by the affidavit of Faisal Al Suwaidi the Chairman and Chief Executive Officer of the Applicant. The plaintiff alleges that the summons to enter appearance in this case was, pursuant to the order of this court of 6th September 2001, served by way of registered post upon the Applicant. The plaintiff had by a Chamber Summons dated the 13th August 2001 brought under Order 5 Rules 17 21(e), (h) 21A (c) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act applied for leave to serve the Applicant by registered post out of jurisdiction on the ground that it was **“not practical to serve the first defendant personally, as it is a foreign company and is based outside the jurisdiction of this court”.** The plaintiff had also in a separate application dated the 6th August 2001 applied for an injunction to restrain the second defendant from paying any money under some guarantee to the Applicant. The record shows that on 6th September 2001 Mr. Taib acting for the plaintiff and Mr. Munyithya recorded as acting “for the defendant” (it is not stated for which defendant) appeared before Justice Hayanga and recorded a consent allowing both the defendants’ said applications for injunction and for leave to serve by substituted service out of jurisdiction. Mr. Tindika for the Applicant contended before me, and I must say rightly so, that Mr. Munyithya was not appearing for the Applicant for at that time the Applicant had not been served to have instructed him. Mr. Tindika argued that the consent order was therefore irregular. Mr. Tindika also argued that no sufficient material was placed before the court to warrant that order for leave being made. Order 5 Rules 21, 21A, 21B and 22 provide for the type of cases

in which leave may be granted for service out of jurisdiction. As the provisions of Order 5 Rules 23, 25 and 26 are crucial to this application I will quote them in extensio .

> **Rule 23. "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 a Commonwealth citizen or a British protected person 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."**
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> **Rule 24 …….**
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> **Rule 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 sub sections (1) and (2) of section 95 of the Constitution or resides in any of the countries for the time being mentioned in sub section (3) of that section, the summons shall be served in such manner as the court may direct".**
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> **Rule 26(1) Where the defendant is neither a Commonwealth citizen as aforesaid nor resides in any of the countries referred to in rule 25, notice of the summons and not the summons itself shall be served upon him.**
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> **(2) Notice of summons shall be in Form No. 24 of Appendix A with such variations as the circumstances require".**

Apart from covering the other matters stated in Order 5 Rule 23 the plaintiff's Application for leave together with the supporting affidavit did not make mention of whether or not the Applicant is a "citizen" (in this case a company incorporated in any) of the Commonwealth countries. This is a serious omission. Service upon a Commonwealth citizen or a person resident in any of the countries mentioned in Section 95 of the Kenya Constitution is **"as the court may direct".** But service on a defendant who is neither a Commonwealth Citizen nor resides in any of the countries mentioned in Section 95 of the Constitution is quite different. Such defendant is not served with summons to enter appearance but with notice of summons.

The reasons why a notice of summons and not a summons is the correct document were stated by Sir Charles Newbold, the president of the former Court of Appeal for Eastern Africa in **Nanjibhi Prabhudas & Company Vs Standard Bank [1968] E.A. 670.** He said that the requirement of service of a notice and not the summons itself originated in England about the middle of the 19th Century and arises from the fact that under the English procedure the writ was a command from the sovereign. It was considered more courteous, where the writ was to be served on a person who was neither a British subject liable to that command, that notice of the command and not the command itself should be served.

It is not in dispute that the UAE, in which the Applicant is incorporated, is neither a Commonwealth country nor one of the countries mentioned in Section 95 of the Constitution. That being the case then the plaintiff should, after leave was granted, have made an application to court in a prescribed form and the Chief Justice would then have made an order and forwarded the notice of summons to the Minister for Foreign Affairs in the prescribed form for transmission through diplomatic channels to the Government of UAE requesting for service. It is not by a general order by the Chief Justice published in the Gazette as Mr. Kyampia contended. Rule 27 of Order 5 provides an elaborate procedure to be followed in such service. As these rules were not followed I agree with Mr. Tindika that the application for leave was defective and the order granting leave was irregular. Further more there is no provision under Order 5 for substituted service out of jurisdiction. I do not agree with Mr. Kyampia that Rule 17 of Order 5 applies in this case. It is manifest that the provisions for service out of jurisdiction start from Order 5 Rule 21 to Rule 28.

Mr. Kyampia submitted that the summons to enter appearance having been sent by registered and the same having not been returned to the plaintiff the assumption is that the Applicant received it but simply ignored it. That sounds like a legitimate argument but in my view it cannot be right. Why would the Applicant ignore the summons for about two years and then all over sudden, without any execution or other proceedings, apply to set aside the order for leave and the exparte judgment? I accept the Applicant's explanation that its attention was drawn to this case by the second defendant. In the circumstances I find that the Applicant did not receive the summons to enter appearance. Even if the summons had been received I hold that the mode of service adopted in this case was irregular and contrary to the provisions of Order 5 of the Civil Procedure rules with regard to service out of jurisdiction. Consequently I set aside the order of this court of 6th September 2001 granting leave to serve by substituted service out of jurisdiction.

Having found that there was no or no proper service of the summons to enter appearance upon the Applicant what I am supposed to do with the ex parte judgment premised upon that purported service? In such a situation the law is quite clear. I have no discretion to exercise in such situation. Justice Ringera put it succinctly in **Remco Ltd. Vs Mistry Javda Parbat & Co. Ltd. & others [2002] 1 E.A. 233 at page 235 – 6** thus:

> **"…. if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* (as a matter of right) on application by the Defendant. Such judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself".**

For these reasons I set aside the ex-parte judgment entered herein against the Applicant and grant the Applicant unconditional leave to defend this suit. The Applicant shall file its defence within 15 days of the date hereof. The Applicant shall have the costs of the application to be paid by the plaintiff.

Dated and delivered this 15th day of January 2004.

D.K. Maraga

Ag. JUDGE

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