



**EK v PT (Miscellaneous Application E173 of 2023)
[2024] KEHC 11722 (KLR) (Family) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 11722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E173 OF 2023
PM NYAUNDI, J
JULY 19, 2024**

BETWEEN

EK APPLICANT

AND

PT RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion dated 17th October 2023 brought at the instance of Patricia Thambo (the Applicant) seeking the following orders:-
 1. Spent.
 2. That the Originating Summons dated 27/07/2023 and filed on 17/08/2023 in this court be struck out.
 3. That the cost of this application and the Originating Summons dated 27/07/2023 be paid for by the Respondent herein.
2. The Application was premised upon Section 3A, Section 5 of the *Civil Procedure Act* as read together with Order 5 Rule 21, 22, 23, 27, Order 51 Rule 1 of the *Civil Procedure Rules 2010* Laws of Kenya and all other enabling provisions of the Law, and was supported by the Affidavit of even date sworn by the Applicant.
3. She avers that she is resident of Luton, United Kingdom which is outside the jurisdiction of this court. She averred that the applicant did not seek leave to serve her with the Originating Summons and Mention Notices by way of email. The applicant did not also seek leave in order for her to submit to the jurisdiction of this court. She urged the court to allow her application.



4. The Respondent opposed the application vide a Replying affidavit dated 30th November 2023. He avers that the Respondent is a dual citizen of Kenya and British. That service of the Originating Summons was served via email according to Order 5 Rule 22B of the *Civil Procedure Rules 2010*.
5. According to him, the Respondent submitted to the jurisdiction of this court by filing a memorandum of appearance. She was required to file a conditional memorandum of appearance if she intended to challenge the jurisdiction of this court. That the application is an afterthought meant to frustrate the Originating Summons. When the matter was mentioned on 12th October 2023, she did not inform the court that she intended to raise a preliminary objection on the court's jurisdiction.

Background

6. The Respondent vide Originating Summons dated 27th July 2023 seeks the following orders;
 - I. Spent.
 - II. That an order do issue that the properties known as RESO Consult Company Ltd and Golden Gate Nairobi/Block/93/349 are company property which cannot be dealt with under the *Matrimonial Property Act*.
 - III. That an order do issue that the property known as Spring Valley, LR 7158/153 be subjected to the provisions of the *Matrimonial Property Act*, Kenya.
 - IV. That an order do issue estopping the Luton Family Court from apportioning the parties the Applicant's properties situate in Kenya and the same be dealt with under the Kenya Law. Upon grounds that: -
 - a. The parties to the suit herein are residents of the UK as well as Kenyan Citizens and have begun divorce proceedings at the Luton Family Court in the UK.
 - b. That a decree nisi has since issued to be made absolute once the financial disputes between parties has been settled.
 - c. That in her quest to prejudice the applicant, the respondent has listed the applicant's properties situate in Kenya, some of which are owned by a company as part of matrimonial property subject to division.
 - d. That it is only fair that the properties in Kenya be dealt with under the Kenyan *Matrimonial Property Act*.
7. The application was canvassed by way of written submissions. The applicant filed written submissions dated 2nd May 2024 whilst the Respondent's submissions are dated 9th May 2024.

Applicant's Submissions.

8. The Applicant identified the following issues;
 - i. Whether the court has jurisdiction to entertain this suit filed against the applicant as a resident outside jurisdiction of this court without prior leave to serve summons and process outside jurisdiction being obtained.
 - ii. Whether or not the suit should be struck out.
9. On the first issue, the Applicant relies on Order 5 rule 21(a), Order 5 rule 25 and 27 which provides for service outside Kenya and leave to serve summons outside the jurisdiction. Counsel argued that the



dispute in this case is about the domicile of the Respondent and not her nationality. In the applicant's case, she does not carry any trade or business in Kenya which may make her assume residence in Kenya. She relied on the decision of *Law Society of Kenya v Martin Day & 3 others* [2015] eKLR.

10. On the 2nd Issue, whether the suit should be struck out, the Applicant argued that the Originating Summons ought to be struck out because she has no claim on the applicant's properties listed in the Originating Summons and that the matrimonial property suit filed by the applicant in the UK was concluded on 22nd November 2023 and therefore, the Originating Summons is moot.

Respondent's Submissions.

11. It was the respondent's submission that a party challenging the court's jurisdiction should file a conditional memorandum of appearance. That once the Applicant filed a Memorandum of Appearance, she submitted herself to the jurisdiction of this court. The Respondent relies on the following decisions; *Raytheon Aircraft Credit Corporation v Air Al-Faraj Ltd* [2005] eKLR, *James Kala Ngolya v Registered Trustees of Nairobi Club* [2022] eKLR, *Kanti & Co Ltd v South British Insurance Co Ltd* [1981] KLR 6; *Billy Graham Owour v Daudi Sabin Babira & Anor* [2012] eKLR

Analysis And Determination.

12. I have considered the pleadings filed, the rival submissions and the relevant law. The following are the issues for determination;
 - i. Whether the failure by the Respondent to comply with the Provisions of Order 5 rule 21 of the *Civil Procedure Rules* results in the striking out of the Originating Summons dated 27th July 2023?
 - ii. Who should pay costs herein

Whether the failure by the Respondent to comply with the Provisions of Order 5 rule 21 of the Civil Procedure Rules results in the striking out of the Originating Summons dated 27th July 2023?

13. It is the applicant's case that the Court cannot assume jurisdiction over her as the Respondent did not comply with Order 5 rule 21 and that therefore the Originating Summons should be struck out. I am persuaded by the reasoning of the Court in *Kipkorirkirui v Vuclip Inc & another* (Civil Suit E011 of 2021) [2023] KEHC 24642 (KLR) (31 October 2023) (Ruling), where the Court citing with approval the decision in *Zanele Investment Holding Limited v Alexander Forbes Emerging Markets (PTY) Limited* [2017] eKLR and *Raytheon Aircraft Credit Corporation & Another v Air Al-Faraj Ltd* [2005]eKLR proceeded to strike out the suit for failure to comply with Order 5 Rule 21.
14. In all these cases the Courts reiterated that Order 5 rule 22B did not override the mandatory provisions of Order 5 rule 21.
15. The secondary issue for determination is whether the Applicant by filing an unconditional memorandum of appearance subjected herself to the jurisdiction of the Court. On almost similar facts in *DNK v GS* [2022] KEHC 547 (KLR) (Civil Suit 4 of 2021) the Court proceeded to strike out a summons that was served without leave, notwithstanding that the Defendant had entered an unconditional defence.
16. In conclusion therefore, I find that the application dated 27th October 2023 has merit, I will allow it and strike out the originating summons dated 27th July 2023.
17. There shall be no order as to costs.



18. It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 19th DAY OF JULY, 2024.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Fardosa Court Assistant

