



REPUBLIC OF KENYA



KENYA LAW
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Waweru Kihara & Co. Advocates LLP v Clifford Law Offices P.C & another (Commercial Case E1002 of 2023) [2024] KEHC 11946 (KLR) (Commercial and Tax) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11946 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E1002 OF 2023
AA VISRAM, J
OCTOBER 3, 2024

BETWEEN

WAWERU KIHARA & CO. ADVOCATES LLP APPLICANT

AND

CLIFFORD LAW OFFICES P.C 1ST RESPONDENT

**JANE WAIRIMU KABUGI AND GEORGINA WAMBUI GIKONYO (SUED
AS CO-ADMINISTRATORS OF THE ESTATE OF GEORGE GIKONYO
KABUGI) 2ND RESPONDENT**

RULING

1. I have considered the Notice of Preliminary Objection dated 20th December, 2023; the submissions in support and in opposition to the same; and the applicable law.
2. The basis of the objection is that this court has no jurisdiction to deal with the present matter because no leave was sought by the Applicant to serve the 1st Respondent outside the jurisdiction as stipulated under the *Civil Procedure Rules*.
3. Order 5, rule 21 (h) states as follows:-

“any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya.”
4. Order 5, rule 25 states as follows :-
 25. Application to be supported by evidence [Order 5, rule 25.]



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 not resident in Kenya 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.

5. In *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others* [2019] eKLR, the Court of Appeal stated that:-

“The manner in which such jurisdiction is assumed by the court is that firstly, the Plaintiff has to seek leave of the court to serve such summons outside the court’s jurisdiction. The purposes of seeking leave is to enable the court to weigh the reasons adduced by the Plaintiff and determine whether a proper case has been made out for service of summons outside its jurisdiction.”

6. The same court went on to state that:-

Secondly, upon such leave being granted, the summons has to be served upon such a Defendant. It is only upon such service of the summons that a court assumes jurisdiction over a foreign Defendant and not a moment sooner. This Court in *Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Limited (supra)* appreciated as much by stating that:

“The High Court assumes jurisdiction over persons outside Kenya by giving leave, on application by a Plaintiff to serve summons or notice of summons, as the case may be, outside the country after such summons are served in accordance with the machinery stipulated therein.”

7. Further to the above, the same court quoted with approval, the decision of Aburili, J. in *Law Society of Kenya vs Martin Day & 3 Others* in the following terms:-

“It is not sufficient for a Plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the Defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked.”

8. In the present matter, it is not in dispute that the 1st Respondent is a foreign entity. As such, the provisions outlined above are, in my view, mandatory, and it is evident that the same have not been complied with by the Plaintiff.

9. Based on the record, leave was not sought, and nor was it granted by this court. Therefore, in my view, the service upon the 1st Respondent was improper. It could only have been effected after leave had been granted and not before.



10. As regards the Respondent’s submission that because the 1st Respondent entered appearance, it submitted to the jurisdiction of the court by doing so. Respectfully, I do not agree with this proposition. In my view, entering appearance is not in itself a substantive step, which may waive the mandatory requirements set out above, or confer jurisdiction in the manner stated above.
11. Entering appearance is merely a procedural step, which a party may be bound to take for the purpose of putting its view forward, as is the case in the present matter, and in order to protect its most basic of rights.
12. Based on the record, after entering appearance, the 1st Respondent proceeded to file the present preliminary objection, and took no further steps. A similar situation, or example, may be found in arbitral proceedings, where a party may enter appearance for the sole purpose of informing the court that the matter ought to be referred to an arbitral tribunal pursuant to a valid Arbitration Agreement, and to seek a stay of proceedings before the court. In my view, this is an analogous situation, and in both cases, such a party may not be deemed as having submitted to the jurisdiction of the court, simply by entering appearance for that sole purpose.
13. Accordingly, and based on reasons set out above, the preliminary objection is upheld, and the same succeeds, in so far as this court lacks jurisdiction to entertain the suit against the 1st Respondent. The suit is accordingly struck out with costs as against the 1st Respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF OCTOBER 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

..... For the Applicant

.....

For the 1st Respondent

.....

For the 2nd Respondent

