



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 73 OF 2015

BURLY TRADING (K) LIMITED.....PLAINTIFF

VERSUS

CROME STAR GENERAL TRADING L.L.C.....DEFENDANT

RULING

1. Before court is an ex parte Notice of Motion dated 29th May 2015. The plaintiff by that application seeks an order that:

The Honourable court be pleased to grant leave to the plaintiff to serve Notice of Summons upon the defendant in accordance with Order 5 Rule 28 (1) and 29 of the Civil Procedure Rules 2010.

2. The main ground upon which the plaintiff seeks the above order is that the defendant is a foreigner who is not a commonwealth citizen but is a resident of Dubai, UAE. The prayer is sought on the strength of Order 28(1) which provides:

Where the defendant is neither a Commonwealth citizen as aforesaid nor resident in any of the countries referred to in Rule 27, notice of the summons and not the summons itself shall be served upon him.

3. Rule 28(2) goes on to state that the format of the notice to be served on the defendant shall be as in the Form No. 6 of the Appendix of the Civil Procedure Rules.
4. A case in point is **BAHRIYA PETROLEUM LTD. Vs 1. GULF OIL COMPANY 2. GIRO BANK LTD. [2004]** eKLR where the High Court coincidentally was faced with a similar application where service of the notice was sought to be served in UAE. The court had this to say:

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is neither a Commonwealth Citizen nor resides in any of the countries mentioned in Section 95 of the Constitution [now repealed] is quite different.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.

5. I have considered the affidavit of ALI JAWAID in support of the

Application. By that affidavit the deponent stated that the defendant offered to supply the plaintiff and the plaintiff accepted to purchase five hundred metric tones of bitumen at USD 290,000; and three hundred and thirteen metric tones of Pakistan white rice for USD 125,000. That the plaintiff paid in total USD 154,050.60. That despite that payment the defendant had breached the contract and had failed to supply the goods. That it due to that breach that the plaintiff filed this case.

6. The plaintiff application is merited and prayer NO. 1 of that Notice of Motion dated 29th May 2015 is granted as sought. The costs shall be in the cause.

DATED and delivered in Mombasa this 9th day July 2015

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

C/A kavuku

For the Plaintiff:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE