



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 82 of 2008

GREMMO DANIELLE.....1ST PLAINTIFF

HPT HOLDINGS DE PARTICIPATION TOURISTIQUES.SA.....2ND PLAINTIFF

VERSUS

KILILY SPADEFENDANT

RULING

By the plaint dated 10th April 2008, Gemmo Danielle and H.P.T holding de participation Touristiques S.A, the 1st and 2nd plaintiffs herein sought for judgment in the sum of ksh.21,074,380.10 plus interest at 18% p.a. from 14.8.2001 until full payment and costs of the suit against Kilily Spa, the defendant herein.

The defendant filed a defence to deny the plaintiffs' claim. The defendant took out the summons dated 18th February 2009, in which it sought to have the plaintiff suit struck out for want of service out of jurisdiction. The defendant also sought for an alternative order to set aside the irregular service of summons upon the defendant. The summon is supported by the affidavit of Giacomino Mauzotti sworn on 18th February 2009. The plaintiffs opposed the summons by filing the replying affidavit of Giovanni Gremmo sworn on 13th March 2009.

It is the submission of Mr. Ole Kina. Learned advocate for the defendant, that since the defendant company was incorporated in Italy, service of summons could only be effected upon it outside jurisdiction with leave of court. In this case, Mr. Ole Kina submitted, leave was not given hence the suit and service of summons are invalid hence they should be struck out. It is also averred that the agreement between the protagonists did not contain a clause stating that service of process be effected within Kenya. It is further submitted that the defendant company does not operate within Kenya but it only owns shares in Raba Investment ltd.

Mr. Asige, learned advocate for the plaintiffs was of the view that the summons has no merit. It is his argument that the 2nd plaintiff's company is trading and resides in Kenya, hence there is no need to obtain leave to effect service of summons out of jurisdiction. The learned advocate pointed out that the parties in their agreement submitted themselves to the jurisdiction of Kenyan courts. Mr. Asige also submitted to the effect that the moment the defendant entered appearance it submitted itself to the jurisdiction of Kenyan courts.

I have considered the able submissions made by both learned counsel. I have also keenly considered

the authorities cited and supplied to me by learned counsels. I have further taken into account the material placed before this court. It is not in dispute that kilily Spa, the defendant herein, is a company incorporated in Italy. It is also not in dispute that service of summons upon such a company can only be effected outside jurisdiction with leave of court under order V rule 21 of the civil procedure. There is however a rider that leave may not be necessary if it is shown that the foreign company is either trading or domiciled in Kenya. Learned counsels both relied on the decision of the court of appeal in **RAYTHEON AIRPORCE & ANOTHER –VS- AIR AL-FARAJ LTD C.A. NO. 29 OF 1999 [Ureported]**. In his judgment **Githinji J.A** at page 5 stated in part as follows:

“The first appellant, Raytheon is a foreign corporation incorporated under the laws of Kansas, U.S.A, and having its registered office in Kansas. It was not trading within the jurisdiction by a subsidiary company at the time it was sued and it is not domiciled in Kenya. In such a case, the High court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in order V rule 21(e) of the Civil procedure Rules, that is interalia, the contract is made in kenya or if it is governed by the laws of Kenya or if a breach of contract is committed in Kenya.

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 under order V rule 23 and after such summons are served in accordance with the machinery stipulated therein.....

It follows that at the time the objection to jurisdiction was made, the high court had not been moved to assume jurisdiction over Raytheon and had not infact assumed jurisdiction over Raytheon.....

The general rule is that where parties have bound themselves by the exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the noncontractual forum discharges the burden cast on him showing strong reasons in that forum.”

It is obvious from the above excerpt that order V rule 21B(b) of the Civil Procedure rules gave the parties to the discretion to contract on where to file their dispute for resolution. In essence exceptions to the application of the rule was entertained. In the dispute before court there is affidavit evidence that the parties bound themselves to submit to the jurisdiction of Kenyan courts. This is clearly expressed in paragraph 17 of the agreement dated 12th August 1999 annexed to the replying affidavit of Giovanni Gremmo. I agree with the submission of Mr. Ole Kina that the existence of such a clause did not *ipso facto* authorize the parties to ignore the laid down law under order V rule 21 of the civil procedure. The fact remains that the parties have submitted themselves to the jurisdiction of the court but the process of service must be followed. I will come later to the process of service. It has been argued that the defendant is trading and is domiciled in Kenya through Raba Investments Ltd. With great respect to Mr. Asige, that cannot be true. In the replying affidavit of Giovanni Gremmo, the plaintiff purchased shares in Raba Investments Ltd, a local company. In a nutshell, the plaintiffs are mere shareholders. They are distinct persons from the company. It has not been averred that the Raba Investments Ltd is a subsidiary of the defendant. It is therefore not right to state that the defendant is trading and residing in Kenya through Raba investments ltd. Raba investments Ltd is a distinct entity from kilily Spa.

The last issue which was argued by Mr. Asige is the fact that the defendant entered an unconditional appearance. This argument prompts me to resist the issue I had earlier in this ruling promised to go back to. It is conceded by Mr. Ole Kina that the defendant entered an unconditional appearance. Mr. Asige was of the view that by entry of an unconditional appearance the defendant waived its right to question the jurisdiction of the court. In **Raytheon Aircraft & Another = Vs= air al-Faraj Ltd [supra]** the court of appeal seem to suggest that a party who seeks to challenge jurisdiction can only do so, if entered conditional appearance or filed a protest to entry of an unconditional appearance or defence. The court of Appeal was very explicit **Kanti& Co. Ltd –VS= South Briton Insurance Co. ltd [1985] KLR page 1** at page 2 it was by court of appeal held interalia:-

“ a defendant by entering an unconditional appearance to a summons to enter appearance, submits to the jurisdiction of the court and as long as the unconditional appearance stands, the court is seized of

jurisdiction to try the suit, and the defendant cannot after filling such a memorandum of appearance abrogate or annul it unilaterally by entering an amended appearance under protest, without an order of the court releasing him from his admission and acceptance of the jurisdiction.”

I will apply the above principles in this suit. With respect I agree with Mr. Asige’s last submission that the defendant waived its right to challenge jurisdiction when it filed an unconditional appearance and defence. On this account alone I dismiss the summons dated 18TH AprilL 2009 with costs to the plaintiffs.

Dated and delivered at Mombasa this 6th day of May 2009.

J. K SERGON

JUDGE

In open court in the presence of Mr. Mwakireti h/b Asige for lplaintiff and

N/A Ole Kina for Defendant.