IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 118 OF 2018

BETWEEN

MISNAK INTERNATIONAL (UK) LIMITED.....APPELLANT

AND

4MB MINING LIMITED C/O MINISTRY OF

MINING, JUBA REPUBLIC OF SOUTH SUDAN.....1ST RESPONDENT

TOTAL LINK LOGISTICS.....2ND RESPONDENT

UNION LINK LOGISTICS.....3RD RESPONDENT

FREIGHT FORWARDERS (K) LIMITED.....4TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Mombasa (Njoki Mwangi, J.) dated 6th July, 2018

in

H. C. C. C. No. 30 of 2018)

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JUDGMENT OF THE COURT

1. Before us is an interlocutory appeal against a ruling of the High Court (Njoki Mwangi, J.) dated 6th July, 2018 wherein the appellant's preliminary objection challenging the competency of a suit before the High Court, **H. C. C. C. No. 30 of 2018**, was dismissed.

2. The facts which gave rise to the objection in question are that the Government of South Sudan awarded the 1st respondent a contract to undertake mining activities in Juba and Luri. Therefore, the 1st respondent needed to source, purchase and transport large consignments of mining materials to South Sudan. As a result, the 1st respondent vide a freight forwarding contract (the contract) engaged the appellant, a company registered and based in the United Kingdom, to undertake the aforementioned task.

3. The salient terms of the contract were that the consignments were to be transported from Thailand through the Port of Mombasa and arrive at the agreed destination on or before 17th March, 2018. As per the 1st respondent, the agreed timeline was of essence since it had obtained what it termed as a non diplomatic exemption of import tax on the consignments from the Government of South Sudan; and the exemption was conditional on the consignments arriving at the Kenyan/Sudan border on or before 5th April, 2018.

4. In line with the terms of the contract, the appellant raised invoices from time to time which the 1st respondent met. However, at least as per the 1st respondent's account, after the consignments landed at the Port of Mombasa on 4th March, 2018 the appellant raised exorbitant invoices hence it declined to pay the same. In turn, the appellant unlawfully detained the consignments through the 2nd, 3rd and 4th respondents who acted as its agents, under the pretext of exercising lien over the goods on account of the alleged non-payment. The resultant

stalemate occasioned the 1st respondent massive loss and damage.

5. It is the foregoing state of affairs that provoked the 1st respondent to file the suit in the High Court on 27th April, 2018 seeking an array of reliefs against the appellant as the defendant and the 2nd- 4th respondents as interested parties. Simultaneously, the 1st respondent also filed a notice of motion (the application) under a certificate of urgency. The application sought several orders and of relevance to this appeal:

> ***"THAT leave be and is hereby granted to the plaintiff to effect service of Summons and/or Notice of Summons and all other incidental process herein upon the defendant through her known email address, vis phil.challen@misnak.com and said correspondence be copied to her designated solicitors, M/S Bugden & Co. Solicitors, 10 Llyod's Avenue London EC3N paulbudgen@ budgenlaw.com, and any such Summons and/or Notice of Summons and/or process be deemed to be properly served within six (6) hours of its dispatch."***

6. The learned Judge certified the application as urgent and set it down for *interpartes* hearing on 8th May, 2018. The learned Judge also directed the 1st respondent's counsel to serve the application upon the parties within 5 days thereof. The manner in which the application was served is one of the reasons for the preliminary objection.

7. According to the affidavit of service sworn by the 1st respondent's advocate, Daniel Ngonze, the plaint and application were served upon the other parties on 27th April, 2018 through their respective email addresses. He deposed that thereafter, on 28th April, 2018 he received a telephone call from one Ms. Dinah of Gikandi & Co Advocates informing him that the firm had received instructions to act for the appellant. Consequently, the plaint, summons to enter appearance (summons) and other processes were served upon the said law firm on 30th April, 2018. Be that as it may, later that day, Mr. Gikandi called back indicating that the appellant had withdrawn its instructions and advised the 1st respondent's advocate to retrieve the served pleadings which he did.

8. Subsequently, Messrs Gikera & Vadgama Advocates lodged a conditional memorandum of appearance on behalf of the appellant on 7th May, 2018. In addition, a preliminary objection challenging the standing of the suit was filed. In essence, the objection was to the effect that the suit was fatally defective and a nullity because firstly, the 1st respondent had failed to prepare and file the summons with the plaint contrary to ***Order 5 Rule 1 (5)*** of the ***Civil Procedure Rules***. Secondly, the 1st respondent had not sought leave to effect service of the summons upon the appellant outside the High Court's jurisdiction as required by ***Order 5 Rules 21, 23 & 27*** of the ***Civil Procedure Rules.*** Therefore, the High Court lacked jurisdiction to entertain the suit and/or the application. Thirdly, notification of the suit and/or court process via email did not confer the High Court with jurisdiction over the appellant.

9. Similarly, the 3rd and 4th respondents also questioned the competency of the suit against them. Their position was premised on the grounds that they had not sought to be joined in the suit and further, no orders could properly issue against them as interested parties. However, unlike the appellant, they filed a notice of motion (interested parties application) dated 7th May, 2008 seeking for the suit against them to be struck out**.**

10. Based on the foregoing, the High Court on 8th May, 2018 directed parties to canvass the preliminary objection and the interested parties' application. Upon weighing the rival submissions by the parties, the learned Judge in the impugned ruling declined to allow both the preliminary objection and the interested parties' application. Of concern, as indicated in the opening paragraph of this judgment, is the learned Judge's decision with respect to the preliminary objection. Dismissing the objection the learned Judge expressed:

> ***"The record reveals that there are copies of summons to enter appearance in the court file that were given under the hand and the seal of the court on 30th April, 2018. The said date relates to when the Deputy Registrar executed the said documents. The said summons do not bear the registry stamp to show when they were filed. The fact however remains that the said documents are in the court file, thus they cannot be considered to be a nullity for lack of a court filing stamp. If at all they were not filed together with the plaint on 27th April, 2018 that is a procedural technicality under the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010."***

11. The learned Judge went on to address the mode applied by the 1st respondent to effect service through email addresses as follows:

> ***"… In line with the above decisions, it is my finding that in the circumstances surrounding this case, justice should not be sacrificed at the altar of procedural technicalities, more so as the defendant who filed the PO is very much aware of the existence of the suit herein and did instruct an Advocate to act for it; and the said Counsel was duly served with summons to enter appearance and other documents on behalf of the defendant. This court also notes that on 7th May, 2018, the law firm of Gikera &Vadgma Advocates filed a conditional memorandum of appearance for the defendant. Having taken into consideration all the foregoing factors, I decline to sustain the PO and order that the suit against the defendant will proceed to hearing on merit."***

12. The appellant's complaint with regard to the above decision is anchored on the grounds that the learned Judge erred by -

> ***a) Finding that the summons were properly filed and served.***
>
> ***b) Finding that failure to file the summons together with the plaint was a mere technicality capable of being remedied under Article 159(2)(d) of the Constitution.***
>
> ***c) Misdirecting herself that by filing a conditional memorandum of appearance the appellant had waived its right to challenge the mode of service of the summons.***

d) Directing the application to be served upon the parties within 5 days without first granting the 1st respondent leave to effect service of the summons outside the court's jurisdiction.

13. At the plenary hearing, Mr. Okere appeared for the appellant while Mr. Ngonze appeared for the 1st respondent and Mr. Inamdar appeared for the 3rd and 4th respondents. There was no appearance for the 2nd respondent either in the High Court or in this appeal. Nonetheless, the appeal was disposed by way of written submissions as well as oral highlights by the parties' respective counsel.

14. In his opening statement, Mr. Okere stressed that the appeal turns on three issues namely, whether there was a valid suit in the High Court; whether the 1st respondent was right in filing suit in a non-contractual forum; and whether the appeal was premature.

15. Contending that the suit is a nullity, counsel submitted that the summons in issue had not been filed and/or served in accordance with ***Order 5 Rule 1*** of the ***Civil Procedure Rules***. Elaborating further, he asserted that the summons was not filed together with the plaint because the summons did not bear a High Court stamp to that effect. According to Mr. Okere, the court's stamp is evidence of the date of receipt of documents by the court. Therefore, he urged, that the unstamped summons could not be swept under the carpet as a mere procedural infraction capable of being cured under ***Article 159 (2) (d)*** of the ***Constitution*** as the learned Judge purported to do.

16. Counsel went on to submit that the learned Judge disregarded the prescribed mode of service of summons to enter appearance on a foreign defendant as stipulated under ***Order 5 Rules, 21, 22 & 25*** of the ***Civil Procedure Rules***. In doing so, Mr. Okere claimed that the learned Judge formulated her own test which is not anchored on the law for determining proof of service of summons. In that, the learned Judge erroneously equated what she termed as the appellant's awareness of the suit through the filing of a conditional memorandum of appearance as sufficient proof of service of the summons.

17. Counsel argued that the conditional appearance filed on behalf of his client was merely for purposes of challenging the High Court's jurisdiction as evidenced by the wording employed thereunder. Laying emphasis that a conditional memorandum appearance has no other known function apart from challenging a court's jurisdiction, reference was made to this Court's decision in ***Evergreen Marine (Singapore), PTE Limited & Gulf Badar Group (Kenya) Limited vs Petra Development Services Limited [2016] eKLR***. Equally, counsel posited, the conditional appearance did not imply that the appellant had submitted to the High Court's jurisdiction.

18. It was also the appellant's argument that a court could only assume jurisdiction over a foreign defendant by first granting leave for service of the summons outside its jurisdiction, and upon such service having been effected. In this case, it was common ground that such leave had not been granted hence the learned Judge erred in conferring jurisdiction upon the High Court in the manner that she did. In that regard, we were referred to this Court decision in ***Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Limited [2005] eKLR.***

19. In conclusion, Mr. Okere asserted that the issue of whether the summons were filed and served in accordance with the law went to the jurisdiction of the High Court. Consequently, ***Article 159 (2) (d)*** of the ***Constitution*** could not be invoked to confer jurisdiction where none existed, such as in this case.

20. The 3rd and 4th respondents supported the appeal on more or less similar grounds as the appellant. Mr. Inamdar added that one prerequisite of granting leave for service of summons outside a Kenyan court's jurisdiction is that the court must be satisfied that the contract upon which the action is based falls within the parameters of ***Order 5 Rule 21***. To buttress that proposition, reference was made to the case of ***Karachi Gas Co. Ltd. vs Isaaq [1965] EA 42***. In counsel's view, the 1st respondent had not demonstrated that the suit in question met the aforementioned condition. Counsel went on to argue that, the contract between the parties is governed by English law and that being the case any dispute thereunder is subject to the exclusive jurisdiction of English Courts.

21. Making reference to the persuasive decision of the High Court in ***Law Society of Kenya vs Martin Day & 3 Others [2015] eKLR***, counsel asserted that the essence of a summons to enter appearance is to call upon a party to submit to the jurisdiction of the court. Therefore, failure to comply with the procedure of effecting service outside the court's jurisdiction as envisioned under ***Order 5 Rules 21 & 25*** meant that the 1st respondent had no right to invoke the High Court's jurisdiction to entertain this matter.

22. Mr. Inamdar further submitted that the manner in which the learned Judge dealt with the appellant's preliminary objection depicted that she had misconstrued the principles governing service of court processes outside the court's jurisdiction.

23. Opposing the appeal, Mr. Ngonze posited, the appeal was not only premature but unmeritorious. He reiterated the sequence of events that took place after the 1st respondent filed the plaint and application. He submitted that apart from seeking interim orders, the application also sought leave to effect service of summons and other processes upon the appellant outside the court's jurisdiction. Although, the application had been scheduled for hearing on 8th May, 2018 the court proceeded to hear the appellant's preliminary objection, the subject of the impugned ruling.

24. As such, the application and more so, the prayer for leave to serve the summons outside the High Court's jurisdiction is yet to be canvassed. Mr. Ngonze maintained that the summons have to date not been served upon the appellant outside the court's jurisdiction. To that extent counsel contended that both the preliminary objection and this appeal were premature.

25. On the issue of the exclusive contractual forum for tabling the dispute between the parties, counsel stated that the issue was never raised or considered by the High Court. He urged us to disregard it since it was not a ground in the appellant's memorandum of appeal.

26. We have considered the record, submissions by counsel as well as the law. Our jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make our own conclusion. This mandate certainly does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. See this Court's decision in ***Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR***. Otherwise, what would be the basis of this Court holding that the

trial court erred in respect of a matter which it had no benefit of applying its mind to? This is exactly what the appellant is calling upon us to do by raising the issue of exclusive contractual forum for the first time in this appeal. We decline to accede to such an invitation.

27. It is trite that one of the tenents of the rules of natural justice is that a party should not be condemned unheard. In other words, no proceedings should be conducted to the detriment of any person in his absence. It is in line with actualization of this right that the provisions for summons to enter appearance and service thereof come into play. The essence of such summons is to give notice to the party sued of the existence of the suit and invite him/her to enter appearance and defend the suit if she/he so wishes. This requirement has been reinforced in a number of decisions of this Court namely, ***Giro Commercial Bank Ltd vs Ali Swaleh Mwangula [2016] eKLR*** **&** ***Babs Security Services Ltd vs Mwarua Yawa Nzao & 19 Others [2019] eKLR***.

28. Additionally, summons to enter appearance also plays another pivotal role when it comes to a defendant who is outside the court's jurisdiction. The supplemental but equally important role is that it empowers the court in question to assume jurisdiction over such a party. See ***Order 5 Rules 21 & 22*** of the ***Civil Procedure Rules*** and this Court's decision in ***W K, M W K (Both suing as the Administrators of the Estate of Dr. W K) & Another vs British Airways Travel Insurance & Another [2017] eKLR.***

29. 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. The principles which govern the court in determining whether or not to grant leave are set out, though not exhaustively, under ***Order 5 Rule 25*** which reads:

> ***"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."***

30. 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."***

31. In our view, at the heart of this matter is whether the High Court assumed jurisdiction over the appellant as discussed herein above. The other concomitant issues of whether the summons was filed together with the plaint and the effect in default are contingent on the determination of the issue of jurisdiction.

32. It is common ground that the learned Judge never addressed her mind to the application and more specifically, to the prayer for leave to serve summons upon the appellant outside the court's jurisdiction. Equally, the 1st respondent's counsel admits that the summons have not been served upon the appellant outside the court's jurisdiction. In light of the foregoing, what was the basis of the learned Judge exercising her jurisdiction in the matter? Could she rightly have directed the service of the application in the way she did without delving into and determining the issue of leave? We do not think so.

33. It did not matter that the learned Judge deemed that the application was urgent. The learned Judge was required to first assume jurisdiction over the appellant and there was no short cut to that. In our view, the learned Judge by directing service of the application before determining the issue of leave placed the cart before the horse. In the end, we find that at the time the preliminary objection was heard and a decision rendered, the High Court had not assumed jurisdiction over the appellant. Thus, there cannot be any question that the appellant was not amenable to the jurisdiction of the High Court and the preliminary objection should have been allowed on this ground alone. In that regard, we concur with and adopt the following sentiments of Aburili, J. in ***Law Society of Kenya vs Martin Day & 3 Others (supra):***

> ***"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."***

34. For the aforestated reasons, we think we have said enough to demonstrate that the appellant's preliminary objection was meritorious to the extent that the learned Judge lacked jurisdiction to entertain the suit. Accordingly, we find that the appeal has merit and is hereby allowed. We set aside the High Court's ruling dated 6th July, 2018 to the extent that it dismissed the preliminary objection and substitute it with an order upholding the objection. The 1st respondent shall meet the costs both at the High Court and in this appeal.

Dated and delivered at Mombasa this 25th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR