



Karoki v Stepwise Inc (Employment and Labour Relations Cause E817 of 2021) [2024] KEELRC 612 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 612 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E817 OF 2021**

**AN MWAURE, J
MARCH 1, 2024**

BETWEEN

JOSEPH KAROKI CLAIMANT

AND

STEPWISE INC RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 25th September 2023 in opposition to Claimant’s Statement of Claim dated 22nd September 2021 on the following grounds:
 - a. The present suit is fatally defective for failure by the Claimant to take out summons for more than one year.
 - b. The present suit is fatally defective and is for dismissal for failure by the Claimant to seek leave to serve the Respondent outside the Court’s jurisdiction.
 - c. This Honourable Court does not have jurisdiction to determine the dispute herein as the contract between the parties is governed by the laws of the United States of America.

Respondent’s Submissions

2. The Respondent submitted that the Claimant failed to take out and serve summons in this matter since it was filed more than a year ago, hence it filed a notice of appointment of advocates under protest. It is trite law that taking out and serving summons is a mandatory requirement before a Respondent can be invited to defend a claim against him/her/it. It relied on *Juma Abdalla Vitu V Kwale Water and Sewerage Co. Ltd* [2015] eKLR.
3. The Respondent submitted that this court cannot exercise jurisdiction over it unless the Claimant has applied for leave to serve summons outside the court’s jurisdiction as it is an entity based in the



United States. It relied on *DNK v GS* (Civil Suit 4 Of 2021) [2022] KEHC 547 (KLR) (26 April 2022) (Ruling).

4. The Respondent submitted that the employment contract between the parties is governed by the Law of the United States and not the Laws of Kenya. The Court does not have jurisdiction to determine the dispute herein and the same should be determined by the Courts of the United States in accordance with the laws of the United States of America.

Analysis and Determination

5. The threshold of a valid preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

6. The Respondent raises a preliminary objection on grounds that the Claimant failed to take out summons for more than one year. The claim was filed on 30th September 2021.
7. Order 5 Rule 1 of the *Civil Procedure Rules*, 2010 deals with issuance and service of summons as follows:

“[Order 5, rule 1] Issue of summons.

- (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
 - (2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
 - (3) Every summons shall be accompanied by a copy of the plaint.
 - (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.
 - (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.
 - (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”
8. Further, in the case of *Grace Obuya Okumu (suing as the legal administratrix of the Estate of Obadia Ambar Okumu (Deceased) v Diriri Mohamed Diriri & another* [2018] eKLR the court held:

“I have carefully considered the 2nd defendant’s preliminary objection, the plaintiff’s grounds of opposition and submission by counsel herein. The issue for determination is



whether the plaint dated 12th April 2017 and filed on the even date violates Order 5 Rule 1 of the Civil Procedures Rules, 2010 (the Rules) which provides that :-

“Where a suit has been filed a summon shall issue to the defendant ordering him to appear within the time specified therein. (Emphasis added)

It was the contention of the 2nd defendant’s counsel that the plaintiff’s failure to serve summons on the defendant was not merely a procedural technicality but a fundamental omission. That order 5 Rule 1 of the Rules is mandatory and any omission thereof is incurable under Article 159 of the Constitution.

There is no dispute that the plaintiff failed to serve summons on the defendants. The plaintiff’s counsel termed the omission an oversight.

In *Karandeep case (supra)*, D.A. Onyancha J noted that a plaint filed in court on its own without issuance and service of summons was impotent. The plaintiff had no power to summon the defendant to court and I approve that position taken by the honourable judge accordingly.

In *Grace Wairimu Mungai case (supra)*, J.M. Mutungi, J observed that no summons had been served on the defendant in the suit within the prescribed period of time. The defendant had no basis to answer the suit until he is served with summons to enter appearance in the suit.”

9. Similarly, in *Lee Mwathi Kimani case (supra)*, J.M Mutungi J, held, inter alia:-

“Where no summons have been issued in accordance with order 5 of the Civil Procedure Rules there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are elaborate and comprehensive and are couched in mandatory terms and where for some reason a plaintiff has experienced difficulties in service of the summons order 5 Rule 2 provides a reprieve in that a plaintiff can apply for the validity of the summons to be extended.”

I consider *ICDC & Richard Ncharpi and Paola cases (supra)*, and Sections 1A and 1B of the Civil Procedure Act (Cap 21) as read with Article 159 of the Constitution. However, the cases especially, *Paola case (supra)* where the defendant was served with summons to enter appearance is distinguishable, in the present circumstances. Therefore, the plaint cannot stand alone, without summons issued to the defendants ordering them to appear within the period specified therein.

Based on the authorities cited above by the 2nd defendant counsel and Order 5 Rule 1 of the Rules which is couched in mandatory terms, I find the 2nd defendant’s preliminary objection dated 23rd May, 2017 merited. I uphold it accordingly.”

10. In view of the foregoing and with due regard that the Claimant did not respond to the notice of preliminary objection, the preliminary objection is merited as the Claimant’s action was in breach of the mandatory terms set under Order 5 Rule 1 of the Civil Procedure Rules.
11. The Respondent further raised a preliminary objection on grounds that this court lacks jurisdiction to determine the dispute herein as the contract between the parties is governed by the laws of the United States of America.



12. However, the undated employment contract provided by the Claimant shows that the Respondent operates in Kenya vide its wholly owned subsidiary Daphroim Africa Ltd, which is registered in Kenya.
13. Further, the contract states his principal place of employment shall be either Mirage Building, Chiromo Lane, Westlands Road or Nairobi Devan, 3rd Floor Crossway Road, Westlands.
14. In view of the foregoing, the Respondent has legal status in Kenya and the ground fails. As espoused in *Shadrack Wachira Gikonyo v Abt Associates Inc* [2017] eKLR in which the court held:

“ Apart from the above stated position, the Claimant submitted that the Court would decide on the matter based on a balance of convenience. Reference is made once more to the case of *American Express International Banking (supra)* where SC of Uganda considered the principle of balance of convenience and decided that the right forum to handle the case would have been Singapore but for the reasons of convenience decided that the High Court of Uganda was the convenient Court to handle the case of all Parties.

In this case, the contract was executed in Kenya and Claimant resides in Kenya. The Claimant was required to comply with tax laws and obligations of his home country as well as in the country of assignment. Infact he was a third country national employee meaning it was recognised that he was employed in Kenya and assigned in South Sudan on a foreign contract of service under Kenyan law.

The Respondent also is an International Organization and has offices in several Countries and Kenya is one of them. The Respondents were served with pleadings in this case in Kenya at their offices along Ngong Road in Nairobi.

It is apparent therefore that the Respondent waived jurisdiction to have this case determined in any other jurisdiction other than Kenya and the balance of convenience is to have the matter handled in Kenya where Respondents have an office.”

15. Having however established that the Claimant was in breach of the mandatory terms set under Order 5 Rule 1 of the *Civil Procedure Rules*, however the notice of preliminary objection is merited and is granted and the suit filed on 30th September 2021 is therefore dismissed. Each party to meet their costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1ST DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of



the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

