



**Advani v Aspen Pharmacare Holdings Limited (Cause E417 of 2024)
[2024] KEELRC 13363 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13363 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E417 OF 2024
SC RUTTO, J
DECEMBER 6, 2024**

BETWEEN

SANJAY MOHAN ADVANI CLAIMANT

AND

ASPEN PHARMACARE HOLDINGS LIMITED RESPONDENT

RULING

1. This Ruling is with respect to the Respondent's Notice of Motion Application dated 26th June 2024 and the Claimant's Notice of Motion Application dated 5th July 2024.
2. The Application dated 26th June 2024, by the Respondent seeks the following principal orders:
 1. That this Court lacks jurisdiction to hear and determine ELRC No. E417 of 2024 Sanjay Mohan Advani v Aspen Pharmacare Holding Ltd.
 2. That this Honourable Court be pleased to strike out the Claim dated 28th May 2024.
 3. The Application is premised on the grounds set out on its face and is supported by the Affidavit sworn by Carnie Van Der Linde who has described himself as the Respondent's Senior Group Executive Commercial (International Regions).
 4. Grounds in support of the Motion are that on 5th June 2024, the Claimant served a Notice of Summons upon Beta Healthcare International. That while Beta is part of the Aspen Group, it is a separate legal entity from the Respondent. That the Claimant has filed a Statement of Claim against the Respondent in ELRC No. E417 of 2024 Sanjay Mohan Advani v Aspen Pharmacare Holdings Ltd.
 5. It is further averred that the Respondent is a foreign corporation incorporated under the laws of the Republic of South Africa and is not present in Kenya. That this Court cannot assume jurisdiction over the Respondent as a matter of right. That the Claimant has neither sought



nor obtained leave of the court to serve the Respondent with a Notice of Summons according to the law in order for the court to assume jurisdiction.

6. In response to the Application, the Claimant filed a Replying Affidavit dated 5th July 2024 in which he avers that the Court does have the requisite jurisdiction to entertain the Claim against the Respondent. That the Claim is not only competent but sustainable against the Respondent.
7. The Claimant further deposes that he is advised by his Advocates on record which advise he verily believes to be true that the allegation of the requirement for him to seek the Court's leave before serving the Respondent is fundamentally flawed as it is not founded in law since the ELRC (Procedure) Rules 2016 do not provide for that requirement.
8. He is further advised by his Advocate on record that although this Court at times resorts to the provision of the Civil Procedure Rules, it only does so where the ELRC Rules are silent. That in the matter of service, the Rules are explicit on how it is to be done.
9. The Claimant further avers that the issue of mis-service of the Summons and the Memorandum of Claim is not so fundamental as to lead to the striking out of the Claim.
10. He is also advised by his Advocate on record that the issue of service properly can be regularly regularized by filing an application for leave of the court to do so.
11. In addition to the Replying Affidavit, the Claimant filed a Notice of Motion Application dated 5th July 2024 in which he seeks to be granted an order for leave to serve the Respondent with the Notice of Summons and Memorandum of Claim in respect of the Claim.
12. The Application is premised on the grounds set out on its face and is supported by the affidavit sworn by the Claimant on even date.
13. The Claimant avers that the Respondent is a foreign national since it is incorporated in South Africa. That being a foreign entity, leave to serve must be sought first to enable this court to assume jurisdiction over it. That he has a good cause of action against the Respondent as demonstrated in the Memorandum of Claim.
14. The Claimant further avers that his Advocates on record mistakenly served Beta Healthcare International an affiliate of the Respondent with the Notice of Summons. According to the Claimant, that mistake is not fatal as to lead to the striking out of the Claim as claimed by the Respondent.
15. The Claimant's Application is opposed through the Replying Affidavit sworn on 29th July 2024 by Carnie Van Der Linde, the Respondent's Senior Group Executive Commercial (International Regions).
16. It is Mr. Carnie's deposition that in the present circumstances, the Application does not meet the requirements under Order 5 Rule 21 as the Claimant merely indicates that the Respondent is a foreign entity and that there exists a claim against it. That the Claimant has not indicated that the matter falls within the parameters of Rule 21 and whether the nature of this claim is covered under the said Rule.
17. He is further advised by Esther Kinyenje-Opiyo, a partner in the firm of Kaplan and Stratton, that leave is not automatic and that there should be evidence placed before the court that the case is proper for service outside jurisdiction pursuant to Order 5 Rule 22 of the Civil



Procedure Rules. That the Claimant's Supporting Affidavit does not provide evidence to show that this court ought to and can exercise jurisdiction over the Respondent as a foreign entity.

18. In rejoinder, the Claimant filed a Supplementary Affidavit dated 9th September 2024 in which he avers that he is advised by his Advocate on record which advise he verily believes to be true that his application and by extension his claim against the Respondent falls squarely within the provisions of Order 5 Rule 21(e) (i).
19. He further states that the cause of action he is seeking against the Respondent is in respect of an employment contract signed between himself and the Respondent and which contract was made in Kenya. That as outlined in his Statement of Claim, he is seeking payment of his terminal dues amounting to Kshs 5,700,000/= being unlawfully held by the Respondent.

Submissions

20. On 11th July 2024, the Court directed that both Applications be canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

21. The Court has carefully considered the Applications dated 26th June 2024 and 5th July 2024, the Responses to the said Applications as well as the rival submissions and isolated the following issues for determination;
 - a. Was the leave of the court necessary before service of the Notice of Summons upon the Respondent?
 - b. Is the Claimant's Application dated 5th July 2024 merited?

Leave to serve out of jurisdiction

22. It is the Respondent's position that this Court cannot assume jurisdiction over it as a matter of right as it is a foreign corporation incorporated under the laws of the Republic of South Africa.
23. While admitting that the Respondent is a foreign entity, the Claimant has contended that the Application by the Respondent is not founded in law as the ELRC (Procedure) Rules 2016 do not provide for the requirement of leave.
24. Whereas the ELRC (Procedure) Rules 2016 did not expressly provide for service on a respondent domiciled outside the country, it is noteworthy that the 2016 Rules have since been revoked and the new ELRC (Procedure) Rules, 2024 which are now in force, provide for service of summons or pleadings upon a party residing or carrying on business outside the territorial jurisdiction of Kenya.
25. It is also worth pointing out that there have been different schools of thought on the applicability of the Civil Procedure Rules, 2010 to employment and labour relations matters in circumstances where the ELRC Act and Rules are silent.
26. It should be appreciated that there are several procedural aspects that have been left unaddressed by the ELRC (Procedure) Rules. In the premises, it is this court's view that where there is a lacuna in the ELRC (Procedure) Rules, the Court should where necessary and in the interest of justice, borrow from the relevant provisions of the Civil Procedure Rules, 2010.
27. On this issue, I hold the view expressed by the Court of Appeal in the case of TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel [2022] KECA 881 (KLR), that where it is established that



the ELRC rules and regulations have come up short of provisions that would aid in the making of such orders, nothing precludes the ELRC from relying on available Civil Procedure provisions to address the extant gaps.

28. With that being said, was the Claimant in this case required to first seek and obtain leave from the court to serve the Respondent with the Notice of Summons?
29. Order 5 Rule 21 of the Civil Procedure Rules, 2010 provides for service of service of Summons or Notice of Summons out of Kenya.
30. It is common ground that the Respondent is a company incorporated in the Republic of South Africa.
31. Therefore, it goes without saying that since the Respondent is a foreign entity, service of Summons ought only to have been effected with the leave of the court.
32. The court concurs with and is bound by the sentiments of the Court of Appeal in the case of Raytheon Aircraft Corporation & Another v Air Al-Farat Limited [2005] 2 KLR 47 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 under order V rule 23 and after such summons in accordance with the machinery stipulated therein.”
33. This being the case, the Court returns that it can only assume jurisdiction over the Respondent, upon granting leave on application by the Claimant to serve the Notice of Summons, outside the country.
34. Having so found, I now turn to consider whether the Claimant’s Application dated 5th July 2024 is merited.

Is the Claimant’s Application merited?

35. As stated herein, the Claimant has sought to be granted leave to serve the Respondent with the Notice of Summons and Memorandum of Claim in respect of the claim.
36. Order 5 Rule 21 of the Civil Procedure Rules prescribes the circumstances in which service of Summons or Notice of Summons out of Kenya may be allowed. It is couched as follows:

Service out of Kenya of a summons or notice of a summons may be allowed by the court whenever—

- a. the whole subject-matter of the suit is immovable property situate in Kenya (with or without rents and profits);
- b. any act, deed, will, contract, obligation or liability affecting immovable property situate in Kenya is sought to be construed, rectified, set aside, or enforced in the suit;
- c. any relief is sought against any person domiciled or ordinarily resident in Kenya;
- d. the suit is for the administration of the personal estate of a deceased person who at the time of his death was domiciled in Kenya, or for the execution (as to property situate in Kenya) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Kenya;



- e. the suit is one brought to enforce, rectify, rescind, dissolve, annul, or other wise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—
 - i. made in Kenya;
 - ii. or made by or through an agent trading or residing in Kenya on behalf of a principal trading or residing out of Kenya; or
 - iii. by its terms or by its legislation to be governed by the Laws of Kenya; or
 - iv. which contains a provision to the effect that any Kenya court has jurisdiction to hear and determine that suit in respect of that contract, or is brought in respect of a breach committed in Kenya, of a contract, wherever made, even though such a breach was preceded or accompanied by a breach out of Kenya which rendered impossible the performance of the part of the contract which ought to have been performed in Kenya; or
- f. the suit is founded on a tort committed in Kenya;
- g. any injunction is sought as to anything to be done in Kenya, or any nuisance in Kenya is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
- h. any person out of Kenya is a necessary or proper party to a suit properly brought against some other person duly served in Kenya.

37. A plain reading of the foregoing provision is that the court has discretion to allow a party to serve summons out of jurisdiction. Just like all discretions, this discretion must be exercised judicially.
38. In the case of *Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan, Total Link Logistics, Union Link Logistics & Freight Forwarders (K) Limited* [2019] KECA 471 (KLR), the court reckoned 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.
39. According to the Claimant, he has demonstrated that he has a good cause of action against the Respondent. He avers that his cause of action against the Respondent is in respect of an employment contract he signed with the Respondent and which contract was made in Kenya.
40. On its part, the Respondent has posited that the Claimant's Application is not supported by any evidence to justify the grant of leave. In this regard, the Respondent contends that the mere fact that it is a foreign company does not automatically clothe the court with jurisdiction over it.
41. In support of his Application, the Claimant has annexed to the Supplementary Affidavit, a copy of a revised letter of appointment dated 1st March 2017, addressed to him. The Claimant has further annexed a copy of the Statement of Claim in which he avers that he was an employee of the Respondent and that following his resignation on 20th September 2023, the Respondent has failed, refused and/or ignored to pay his terminal dues in the sum of Kshs 5,700,000.00.



- 42. A cursory examination of the revised letter of appointment reveals that the Claimant was employed by the Respondent as a Director and Chief Executive Officer; Sub-Saharan Africa. Fundamentally, this speaks to the existence of a contract of service between the Claimant and the Respondent.
- 43. In the circumstances, I am persuaded that the Claimant’s claim would fall under Order 5 Rule 21(e) of the Civil Procedure Rules, 2010.
- 44. As to whether the Claim dated 28th May 2024, should be struck out for want of proper service as prayed by the Respondent in its Application dated 26th June 2024, I hold the view that such a move is draconian as it drives away a party from the seat of justice in an arbitrary manner.
- 45. In light of the foregoing reasons, the court is persuaded that it is only fair and just that the Claimant be accorded an opportunity to comply with Order 5 Rule 21 of the Civil Procedure Rules, 2010 as regards service of Summons upon the Respondent.
- 46. Consequently, the Notice of Motion Application dated 26th June 2024 by the Respondent is disallowed while the Claimant’s Notice of Motion Application dated 5th July 2024 is allowed with an order that costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Simiyu for the Claimant

Mr. Bett instructed by Mrs Opiyo for the Respondent

Millicent Court Assistant

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

