



**Mwilu v British Broadcasting Corporation (Civil Case E165 of 2022)
[2024] KEHC 7937 (KLR) (Civ) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E165 OF 2022

JN MULWA, J

JUNE 27, 2024

BETWEEN

PHILOMENA MBETE MWILU PLAINTIFF

AND

BRITISH BROADCASTING CORPORATION DEFENDANT

RULING

1. The Plaintiff suit herein was filed by Plaint dated 5/09/2022 and summons to enter appearance issued on the 8/09/2022.
2. The defendant a corporation established under a royal charter with it's registered office in the United Kingdom was served with the summons to enter appearance and pleadings through its Advocates M/S Kaplan & Stratton Advocates on 15/09/2022, informed by earlier communication and correspondence on a demand letter on the subject but which bore no fruits leading to litigation before the court.
3. The cause of action as may be discerned from the pleadings is alleged defamatory articles of and concerning the plaintiff and published and or caused to be published in the defendant's online issues of 9/09/2021 in the bbc.com upto 18/09/2021.
4. The Plaintiff claims that the said articles were not only offensive, false, malicious but also depicted her as a bad seed in the institution she served, and by the innuendo was made to defame her, scandalizing and destroying her reputation yet the Defendant knew or ought to have known that the said articles were to be consumed as the truth and fact by both the general public and the world at large.
5. The plaintiff therefore sought several reliefs from the court as stated in the plaint.



6. Prior to filing of the suit the Defendant had instructed the law firm M/S Kaplan Stratton Advocates to respond to a demand letter from the plaintiffs advocates M/S Kemboy Law Advocates dated 17/09/2021 who responded by a letter dated 21/10/2021 as captured in its Affidavit sworn by Advocate Nicholas Wilcox, the legal Director in the said Law firm denying that the impugned Articles and for reasons set out at the said response any liability arose from the publication.
7. Upon receipt of the above letter the plaintiffs advocates wrote a response to the defendants Advocates dated 16/11/2021 seeking to ascertain whether M/S Kaplan & Stratton had instructions to receive summons on behalf of its client the defendant to which no response was send back.
8. On 15/09/2022, summons to enter appearance together with the pleadings were duly served upon M/S Kaplan & Stratton Advocates on behalf of the Defendant who accepted received and appended its stamp and signature thereto and an affidavit of service filed.
9. On 28/09/2022 M/S Kaplan and Stratton Advocates returned the summons and pleadings to the plaintiffs Advocates citing lack of instructions to receive summons on behalf of the Defendant. They were received on 29/09/2022, 14 days after they had accepted the same.
10. On 29/09/2022 the plaintiffs advocates purported to have served the said summons upon the defendant in the United Kingdom via its emails stated at paragraph 3.4.16 of the applicants Supporting Affidavit to the motion. No Memorandum of Appearance was filed by the defendant.
11. Upon request by the plaintiff for interlocutory judgment against the defendant for failure to enter appearance or file defence interlocutory judgment was thus entered against the defendant on 24/11/2022.
12. Before the suit could be set down for assessment of damages and upon realization that interlocutory judgment had been entered again it, the defendant by its same Advocates M/S Kaplan & Stratton filed a Notice of appointment of Advocates “under protest” dated 12/04/2023 and at the same time filed an application before the court seeking to set aside the interlocutory judgment and also sought leave to file a preliminary objection on the courts jurisdiction to hear the suit.

The Application dated 12/04/2023

13. By the application the defendant sought ORDERS:-
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 2. That the interlocutory judgment entered by this court on 4/10/2024 against the Applicant/ Defendant in default of appearance and defence and all consequential orders attendant thereto be set aside ex debito justitiae.
 3. That the Applicant be granted leave to file its Preliminary Objection opposing the hearing and determination of the dispute in Kenya for want of jurisdiction.
14. The application is premised under Sections 1A, 3A and 63 of the *Civil Procedure Act* and Orders 10, Rule II and Order 51 Rule 1 of the *Civil Procedure Rules*, and supported by an affidavit sworn on 30/03/2023 by Nicholas Wilcox the Applicants Legal Director-litigation, and grounds found at the face of the application.
15. For clarification and or avoidance of doubt, upon perusal of the proceedings in this matter the court finds no entry of interlocutory judgment entered against the defendant on the 4/10/2021 as stated at prayer No 2 of the application under review.



16. The interlocutory judgment subject of dispute herein was entered on 24/11/2022. Both parties referred to the said judgment and submitted extensively on the same despite the date being wrong. The court shall therefore deem the date of the impugned interlocutory judgment to be 24/11/2022 to avoid injustice or hardship resulting from (I think) inadvertence error or mistake by both counsel.
17. The Respondent/Plaintiff opposes the application by a Replying Affidavit sworn on 26/04/2023 by the plaintiff and supported by submissions dated 10/07/2023.
The applicant/defendant also filed submissions dated 16/05/2023.

Issues for Determination

1. Whether interlocutory judgment entered against the defendant on 24/11/2022 ought to be set aside.
2. Whether the Defendant has waived its rights to challenge the courts jurisdiction by filing a notice of appointment of advocates “under Protest” dated 12/04/2023 to challenge the courts jurisdiction to hear the suit.

Issue No 1

18. There is no issue as to whether the defendant is a foreign Corporation having its registered office at the United Kingdom.

Service of summons out of Kenyan jurisdiction is provided under Order 5 Rules 21 25 and 27 of the [Civil Procedure Rules 2010](#).

Rule 25 provides that:-

“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 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”

19. Upon leave being granted and the service of the summons upon the foreign defendant effected, it is only then that the jurisdiction is assumed by the court upon the defendant who is outside the courts jurisdiction.

The above is the view adopted by the Court of Appeal in the case of [Raytheon Aircraft Credit Corporation and another v Air Al-Faraj Limited](#) (2005) eKLR and later in [Misnak International \(UK\) Limited v 4MB Mining Limited C/O Ministry of Mining Juba Republic of South Sudan & 3 others](#) [2019] eKLR where the court held:-

“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 maybe outside the country----- After such summons are served in accordance with the machinery stipulated therein”



20. There is no contestation in this matter that no leave was applied for or granted. This is made clear by the Respondent's letter dated 28/09/2022 when the summons were returned to the plaintiff albeit having been served on the 15/09/2022 advising the plaintiff that the said law firm had no instructions to accept service of summons and proceeded to state that all future pleadings and/or documents in the matter be served directly upon the defendant.
21. In my view, the plaintiffs advocates accepted the above position and on the following day, 29/09/2022 purportedly served the summons to enter appearance and the pleadings upon the defendant by email a fact denied by the defendant citing provisions of Order 5 Rule 22B (2) of the Civil Procedure Rules that provides:
1. Summons by electronic mail services shall be sent to the defendants last confirmed and used email address.
 2. Service shall be deemed to have been effected when the sender receives a delivery receipt.
 3. Summons shall be deemed to have been served on the day which it is sent, if it is sent within the official business hours on a business day in the jurisdiction sent or and if it is sent within the official business hours on a business day it shall be considered to have been served on the business day subsequent.
 4. An officer of the court who is authorized to effect service shall file an affidavit of service attaching the Electronic Mail Service delivery receipt confirming service.
22. Despite the Plaintiff's submissions that it indeed effected service via Email addresses of the defendant it failed to proof such service by filing an Affidavit of Service of the process server attaching the Electronic Mail Service delivery receipt to confirm such service.
- In the case of Sifuna & Sifuna Advocates Patrick Simiyu Khaemba [2021] eKLR, while discussing subject on Proof of service under sub-rule 2 of Rule 22B, the court stated:-
- “----Sub-rule 2 provides that the sender must receive “a delivery receipt” as a confirmation that service has been effected. In my view, the sub-rule was meant to cure the mischief of parties sending documents to emails of others keeping quiet about it and taking advantage of others lack of knowledge of the activity in their email--
23. To that extent therefore, the plaintiff having failed to tender proof of service of the summons and the pleadings by e-mail to the defendant in terms of Order 5 Rule 22B(2), the court finds that the alleged e-mail service on 29/09/2022 upon the defendant to have been defective, if in the first place it was effected.
- The importance of service of summons cannot be overemphasized. It accords the sued party the opportunity to be heard before any orders are issued against it as a tenet of natural justice which all legal systems applaud as ably held by the court of Appeal in Patrick Omondi Opiyo t/a Dallas pub v Shaban Keah & another [2018]eKLR.
24. While the Plaintiff puts forth very spirited submissions that the Defendants had knowledge of the suit, having been served and accepted the said summons and thereafter returning them, and despite the not acceptable conduct by the said advocates, I am unable to find that the said summons were duly served in accordance with the laid down legal provisions of the law stated above.
25. Had the Plaintiff complied with provisions of Order 5 Rule 25 of the Civil Procedure Rules 2010, the court would have had no difficulty in finding that the Notice of Appointment of Advocates “under



protest”, filed six months after service upon them was of no consequence and decline to set aside the interlocutory judgment.

In such circumstances the court would have assumed jurisdiction over the defendant as held in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 other* [2012]eKLR wherein the supreme court of Kenya held that:-

“A courts jurisdiction flows from the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot abrogate to itself jurisdiction exceeding that which is conferred by law”

Issue No 1 is therefore found infavour of the Defendant/Applicant. The interlocutory judgment entered against the defendant on 24/11/2022 is set aside on account of irregular service of summons.

26. Having been sufficiently persuaded to set aside the interlocutory judgment entered against the defendant on 24/11/2022, the defendant is allowed to file its Notice of preliminary objection on terms appearing here below.

1. The defendant is granted leave to file a preliminary objection in terms of prayer No 3 of the motion:-
 - a. Within 14 days together with submissions thereto.
 - b. Upon service, the Plaintiff shall file submissions also within 14 days.
 - c. Costs of the application shall abide outcome of the suit.
 - d. Mention on 29/07/2024 to take a ruling date.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2024.

JANET MULWA

JUDGE

