REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 118 OF 2018

TECHNO SERVICE LIMITED…………..................PLAINTIFF/APPLICANT

VERSUS

NOKIA INTERNATION OY-KENYA.............1ST DEFENDANT/APPLICANT

MICROSOFT MOBILE OY-FINLAND…......2ND DEFENDANT/APPLICANT

MICROSOFT INTERNATIONAL HOLDING

BV- NETHERLANDS……….…..................3RD DEFENDANT/APPLICANT

MICROSOFT CORPORATION –USA..........4TH DEFENDANT/APPLICANT

RULING

1. **TECHNO SERVICES LIMITED** (hereafter Techno) filed this case on 23rd March 2018 against four defendants. Techno by a Notice of Motion application dated 22nd March 2019 sought of the court an order to serve summons and plaint on the 1st defendant **NOKIA INTERNATIONAL OY-KENYA** (hereafter Nokia) by way of substituted mean through a newspaper advertisement in a Kenyan newspaper. On 10th July 2019 after an ex parte hearing of that application the court granted Techno leave to serve Nokia by substituted service through newspaper advertisement. On 9th October 2019 Techno served Nokia as ordered by the court. On Techno making an application for entry of judgment against Nokia in default of appearance the court entered judgment against Nokia as prayed in the plaint.

2. What is before court for consideration is a Notice of Motion application dated 12th March 2020. That application is filed by the defendants seeking orders:

· *THAT this Honourable Court be pleases to set aside the default judgment entered against Nokia International OY-Kenya, the 1st Defendant herein, and any other ex parte proceedings and consequential orders issued including the formal proof hearing scheduled for 18th March 2020 pending the inter partes hearing and determination of this application.*

· *THAT this Honourable Court be pleased to stay the hearing of this suit and or any other proceedings arising from the suit herein and to direct that the dispute be referred to arbitration in accordance with the Arbitration agreement which form the subject matter of this suit and in particular clause 22 of the Frame Repair Service Agreement and clause 25 of the Nokia Original Accessory Partner (NOAP) Agreement.*

3. The application to set aside judgment entered against Nokia is premised on the grounds that all the four defendants in this matter

are foreign companies; that the advertisement of this case through the Daily Nation newspaper did not get the attention of Nokia but rather it was later that a local counsel for Nokia found that advertisement; that Nokia has no physical address employee or director in Kenya but that it is a Finnish Company which is essentially dormant; that the other three defendants had not been served with summons; that the summons served on Nokia through newspaper advertisement had expired having been issued by the court on 2nd July 2018 and; that Nokia did not deliberately fail to enter an appearance and it is therefore in the interest of justice that judgment against Nokia be set aside. Nokia further seeks the orders in the application on the ground that Techno's claim, in this suit is based on allegation of defendants' liability under the **Frame Repair Service Agreements** between Techno and Nokia and because under clauses 22 and 25 therein exists an arbitration clause this matter should be referred to arbitration and; that the issues raised in this suit are currently the subject of an ongoing arbitration between Techno and Nokia Corporation before the **International Chamber of Commerce (ICC)** in Helsinki, Finland.

4. The application was opposed by Techno by means of the affidavit of **Clemence Wakio**.

ANALYSIS AND DETERMINATION

5. I wish to consider point by point the objection raised by Techno.

6. Techno objects to the application on the ground that it was filed by a law firm not on record for Nokia. Techno argued that no **Notice of Appointment** of advocate was filed on behalf of the defendants before the application in court was filed and neither has one been filed even though Techno has raised that issue.

7. Nokia responded that the application was filed during the COVID-19 pandemic when the court processes were scaled down and that although a Notice of Appointment was forwarded to court together with the application the advocate for Nokia has been unable to confirm if it indeed is in the court file since the court precinct has been inaccessible.

8. Order 9 Rule 1 of the **Civil Procedure Rules** (hereafter the Rules) requires an advocate acting for a party be appointed to so act. This is what that Rule provides:

1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the by time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf: (emphasis mine)

9. The fact is that there is no Notice of Appointment of the firm of advocates **Iseme Kamau & Maema Advocates**. That lack of Notice of Appointment by that firm indeed, as submitted by the Techno is contrary to the provision of the law for them to file an application when they have not been appointed by Nokia to act for it. The ramification of failing to file a Notice of Appointment of advocate was considered by Justice D. Musinga (as he then was) in the case **Joshua Nyamache T. Omasire v Charles Kinanga Maena (2008) eKLR**. The learned judge had this to say:

"Mr. Oguttu for the defendant responded to Mr. Bosire's submissions by stating that the application was a non starter as it had been filed by a stranger who had no capacity to do so. He pointed out that the plaintiff's advocates were F. N. Orora & Company Advocates and thus Nyairo Orora & Company Advocates were strangers who could not file an application on behalf of the plaintiff....

In this application, it is apparent that the application dated 3rd March, 2008 by Nyairo Orora & Co. Advocates is improperly before court as it was filed by a stranger. I strike it out with costs to the defendant."

10. The only way an advocate can prove he/she is an authorized agent of a party is by filing a Notice of Appointment. Having failed to file that Notice the firm of Iseme Kamau & Maema had no legal basis to file the Notice of motion application under consideration. To borrow the words of **justice D. Musinga**, that firm of advocates were and are strangers in this suit.

11. Techno argues that Nokia's prayer for this dispute to be referred to arbitration was time barred. Techno's argument in this regard is a little hard to follow. It argued that Nokia was obliged to make an application under Section 6 Arbitration Act at the time of entering an appearance or when they become aware of the action. That argument is difficult to understand because Techno stand in this matter is that judgment was entered in default of appearance and also because Nokia submitted, and I did not hear Techno

contradict it, that when Nokia's advocate become aware of service through advertisement it began to engage Techno's advocate seeking for documents relating to this action and Techno was not forthcoming with those documents. That as it may be it is important to look at Section 6 Arbitration Act to confirm if Nokia is barred from seeking stay of this case and referral of this dispute to arbitration. Section 6 provides:

" (1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:-

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

12. The first documents filed by Nokia in this action is the application under consideration. That section 6 of Arbitration Act simply requires a party seeking stay of proceedings and referral to arbitration to promptly file that application before court. The court of appeal in the case **Mt. Kenya University v Stepup Holding (K) Ltd (2018)eKLR** considered that section and stated:

"*The obligation of the court upon being moved in terms of the above provision has been crystalized by case law. We find it prudent to highlight a few as follows. In the case of* ***Niazsons (K) Ltd versus China Road & Bridge*** *(supra) the court held inter alia that:*

"All that an applicant for a stay of proceedings under section 6 (1) of the Arbitration Act of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things:

(a) Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;

(b) Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and

(c) Whether the suit intended concerned a matter agreed to be referred to arbitration"

13. I find and hold that Nokia did not take any other steps in the proceedings other than the application under consideration and there is therefore no basis for Techno to argue that Nokia's prayer for stay of proceedings and referral to arbitration was contrary to Section 6 of Arbitration Act.

14. Techno also argued that because the affidavit of Cynthia Randall in support of the application under consideration was dated earlier date than the application that affidavit was for a non-existing application.

15. That argument goes against the provisions of order 19 Rule 8 of the Rules which provides:

"*8. Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned."*

16. A case on that point is **Mohamed Moin Ahmad Malik v Joseph Muiruri Githongo (2006) eKLR** thus:

"In my response to the arguments before me I wish to start with the argument that an affidavit not dated the same date as the application is liable to be struck out. Order XVIII Rule 9 provides:

"Unless otherwise directed by the court an affidavit shall not be rejected because it was sworn before the filing of the suit concerned."

That means that the defendant could possibly have relied in this case on an affidavit sworn in the year 2002 even though this case was filed in 2003. For the court to direct that affidavit sworn before the filing of the suit, cannot be relied upon there has to be material information laid before the court. No such information was put before me by the plaintiff. The defendant explained the

difference in the date of the application and the date of the affidavit. The plaintiff prayer for the striking out the affidavit has no basis and the same is rejected."

17. Techno was in error to argue that the earlier dated affidavit could not support the later dated application.

18. Techno further opposed the application on the ground that the affidavit in support of the application was sworn before a **Notary** but that there was no evidence before court that the said Notary had the power to carry out purported notarial act, in other words the notary's signature was not legalized.

19. **Justice A. G. Ringera** (as he then was) in the case **Pasatificio Lucio Garofalo SPA v Security & Fire Equipment Co & Another (2001) eKLR** considered affidavits sworn outside the Commonwealth and stated:

"..it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that. However, as there was no translation of the same into English-which is the official language of the High Court-this Court cannot and will not know the position."

20. The learned judge made the above statement after finding that Section 88 of the Evidence Act permitted, as admissible in the Kenyan Court, documents which were admissible in the English court. The learned judge proceeded to find, as stated above, that for any documents from a non-commonwealth country, such as the subject affidavit in this matter, needed to have the Notary's signature and seal attesting proved or authenticated by affidavit or otherwise. Techno was right to argue that the affidavit of Cynthia Randall was sworn before a Notary public, Amber L. Brazier, in the state of Washington but there was no authentication of that Notary. That objection by Techno is accordingly upheld. This finding was also made in the case **Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumia Sugar Company Limited (2016) eKLR** thus:

"11. I am in total agreement with the reasoning of ***Ringera J. (as he then was)*** *and I do adopt the same herein. Indeed,* ***Section 88 of the Evidence Act, Cap 80 of the Laws of Kenya*** *provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of* ***Order 41 rule 12 of the Rules of the Supreme Court,*** *affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in* ***Dubai,*** *in the* ***United Arab Emirates****, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in* ***UAE*** *and that the signature and seal of attestation affixed thereto was that of such Notary Public.*

12. There is proof herein that this was done. The stamp of ***Ahmed Tamim*** *is affixed on the affidavit as well as a stamp from the Dubai Court Notary Public dated* ***15th April, 2015.*** *It may very well be that in Dubai such stamps are sufficient to show that such a document has been authenticated."*

21. Techno however erred to argue that Cynthia Randall was not properly authorized to swear the affidavit in support of the application before court. Cynthia Randall deponed:

"That I am the Assistant General counsel of the 4th Defendant/Applicant herein. I am conversant with the matters deponed to herein and being duly authorized by the defendant herein, I am competent to swear this affidavit."

22. The notion that when an official or director need to have authorization to represent a company, which authorization would be passed by Board of Directors was rejected by the court of appeal in the case **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** thus:

"44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; ***Bugerere CoffeeGrowers Ltd v Sebaduka & Anor(1970) 1 EA 147.*** *The court in that case held:-*

"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

*45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the**Bugerere cas**e has since been overruled by the Uganda Supreme court. The authority is**Tatu Naiga& Emporium vs. Virjee Brothers Ltd**Civil Appeal No 8 of 2000.*

*The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the**Bugerere case**was no longer good law as it had been overturned in the case of**United Assurance Co. Ltd vAttorney General: SCCA NO.1 of 1998.**The**latter case restated the law as follows:-***

"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

*The decision has since been applied in Kenyan courts, for example, in**Fubeco China Fushun v Naiposha Company Limited & 11 others[2014] eKLR."***

23. It follows that it sufficed that Cynthia Randall stated she had authority of the defendants to swear the affidavit.

24. It will be observed that from the above discussion that the affidavit of Cynthia Randall is incompetent because the Notary's signature is not authenticated. Consequently, the Notice of Motion application before me is unsupported by affidavit and it thereupon cannot stand. It fails.

25. Even though the defendants' application fail, for the reasons set above, I find that this court has power to strike out this suit because the summons even at the time they were served on Nokia had expired. I wish at this very initial stage to state that I am not persuaded by the argument of Techno that this court, even at this stage, has power to extend the summons. In that vein I am not persuaded by decision in the case **Tropical Foods International & another v Eastern and Southern African Trade and Development Bank & another (2017) eKLR**. In that case the court found that if a defendant is made aware of a suit and participates in the proceedings the suit will survive even if the summons served on the defendant had expired. I do not read such a finding Order 5 of the Civil Procedure Rules (the Rules). To show the preeminence that summons play in a suit one only needs to look at Order 5 Rule I(1) of the Rules. That Rule provides:

(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

26. Although a suit is filed against a defendant it is the summons which order the defendant to appear within a specified time, that is what the above Rule demonstrates.

27. Perhaps more importantly and relevant to this matter is Order 5 Rule 2(1). That Rule provides:

2 (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons. 2 (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

28. Techno's summons were dated 2nd July 2018. From the reading of Order 5 Rule 2(1) of the Rules it will be noted that those summons expired on 2nd July 2019. Under Order 5 Rule 2 (2) the court has power to extend, on an application being made, the summons from time to time. No application was made and none has been made to date to extend the validity of the summons. More importantly when the summons were served on Nokia, through the newspaper advertisement they were already expired. Service of the summons was effected on Nokia through the advertisement dated 9th October 2019. The summons served through

that service were dated 2nd July 2018. They had expired by 2nd July 2019. Having expired they could not be extended. A case on this point is **BARCLAYS BANK OF KENYA LIMITED V PATRICK NJUGUNA KUBAI (2014) eKLR** thus:

"In the case of **Elegant Colour Labs Nairobi Limited vs Housing Finance Company (K) Limited & 2 Others [2010] eKLR,** where Onyancha J held that:-

" It seems to me proper and correct to say that extension of Summons aforesaid can only logically be made while the original summons is still valid. If the original summons is left to expire, in my view it would be legally impossible to extend it when it has so expired and therefore ceased to exist…the summons under the said order which have capacity to be extended by the court on the application by the Plaintiff, are the summons that are still valid. This means an application to extend can only be made within the duration of 12 months under Rule 1 forecited or under any duration allowed in the extension of original summons…"

......................In the case of **Julius Njoroge Muira vs Harrison Kiambuthi Mburu [2011] eKLR**, Rawal J (as she then was) stated as follows:-

"…I shall thus without hesitation find that the Original Summons is not in existence and all the efforts to revive the same by reissuance were null and void. The Original Summons which has lost its life cannot be resurrected… I shall quote the passage by Lord Denning in the case of Macfoy vs United African Limited (1961) 3 ALL ER 1169 at 1172

""If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad…And every proceeding which it is founded on it is also bad and incurably bad. It will collapse."" The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers."

29. Although Nokia's application has failed as stated above the court is empowered under Order 5 Rule 2(7) of the Rules to dismiss a suit where summons have not been extended for twenty-four months. This is what Order 5 Rule 2(7) provides:

7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

30. Techno's summons having been issued on 2nd July 2019 expired after twenty four months as at 2nd July 2020. It follows that the summons served on Nokia on 9th October 2019 were expired, invalid and of no effect. They could not invite Nokia to enter an appearance in this matter. To that end it follows the judgment entered against Nokia on 26th November 2019 was invalid.

31. That judgment was also invalid because the Deputy Registrar entered judgment as prayed in the plaint yet the prayers in the plaint needed formal proof because they were prayers seeking declaratory orders. The Deputy Registrar's error in entering judgment as prayed in the plaint was prompted by Techno's request for judgment application dated 28th October 2019. By that request for judgment Techno requested for "*Judgment in terms of the prayers prayed in the plaint*". What Techno should have requested for was interlocutory judgment as per Order 10 Rule 6 of the Rules. It follows that the judgment entered by the Deputy Registrar cannot stand because it was final judgment and not interlocutory as it ought to have been.

COSTS:

32. Since Techno suit by this Ruling fails and Nokia's application also fails, I shall make no order on costs against either party.

CONCLUSION:

33. In the end the following are the orders of the court:

a. The Notice of Motion application dated 12th March 2020 is dismissed with no order as to costs.

b. This suit is hereby dismissed, with no order as to costs as per Order 5 Rule 2(7) of the Civil Procedure Rules because the summons expired after twenty four months of issue and have not been renewed.

Orders accordingly.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **29th** day of **JULY** 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendants

ORDER

This decision is hereby virtually delivered this **29th** day of **July, 2020.**

MARY KASANGO

JUDGE

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