

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
DISTRICT REGISTRY**

CIVIL CASE NO. 342 OF 1997

SUKUMA MINES LTD-----1ST PLAINTIFF
LAKE VICTORIA GOLD MINES LTD--2ND PLAINTIFF
VERSUS
PACIFIC MINES LTD -----1ST DEFENDANT
EAST AFRICA MINES LTD -----2ND DEFENDANT
EAST AFRICA GOLD CORP-----3RD DEFENDANT

R U L I N G

NSEKELA, J.

This is an ex parte application for leave to serve summons out of jurisdiction under Order V Rule 29 and section 95 of the Civil Procedure Code (CPC) 1966. It is taken out by the Plaintiffs who seek orders to the effect as stated in the summons –

- “ (1) That notice to the Respondent of the application herein for service out of the jurisdiction of the Court be dispensed with;
(2) That service of the summons on the 1st and 3rd Defendants/Respondents in this suit be effected by courier.”

Mr. Mujulizi, learned advocate, appeared for the plaintiffs and adopted the affidavit sworn by one William Kagaruki in support of the application. Order V Rule 29 of the CPC provides for the conditions to be fulfilled under which the court may order to serve summons out of jurisdiction. It reads as follows: -

“ 29 Where the defendant is believed to reside outside Tanzania, elsewhere than in Kenya, Uganda, Malawi or Zambia and has no known agent in Tanzania empowered to accept services the court may, on the application of the plaintiff order that service of the summons be effected

- (a) by post;
(b) by the plaintiff or his agent, or

(c) through the courts of the country in which the defendant is believed to reside."

Paragraphs 2,3,4 and 7 of the supporting affidavit reads as under:-

" 2. The 1st and 3rd Defendants/Respondents are foreign companies with no address of service in Tanzania.

- 1. The address of service on the 1st Defendant Respondent is c/o Advokaturburo, Kuuzil & Seeholzer, Kapplegasse 14, Zurich, Switzerland,*
- 2. The address of service on the 3rd Defendant Respondent is at Suite 630, 625 Howe Street, Vancouver, British Columbia, Canada.*

7. That under the contract which is the subject matter of the suit, the parties have subscribed to the Tanzania Law."

These paragraphs are apparently the circumstances by which it is sought to justify service of the summons outside Tanzania under Rule 29. The details of the matter as disclosed in the plaint are briefly as follows. The plaint was filed in court on 12.12.97. The 1st Respondent/Defendant is described as a limited liability company organized and existing under the laws of Vanuatu and its address for the purposes of this suit is in the care of Advokaturburo, Kuuzli & Seeholzer Kapplegasse 14, Zurich, Switzerland. The 3rd Respondent/Defendant is similarly described as a limited liability company, incorporated and existing under the laws of British Columbia, Canada and its address for purposes of service in this suit is at suite 630, 625 Howe Street, Vancouver, British Columbia, Canada. Paragraph 15 of the Plaint provides and I quote –

" 15. The impugned royalty Deed purports to create a mining interest over mineral rights situate within Tanzania, and that any payments or liabilities undertaken thereunder will be borne over assets in Tanzania, and the value of the interest so created is over and above Tshs. 10,000,000 -. This Court has jurisdiction to entertain the suit."

Order V Rule 29 prescribes as it were conditions which must be satisfied in an application of this nature. The defendant should be a resident outside Tanzania including Kenya, Uganda, Malawi and Zambia. From the brief summary narrated above, I think there is no doubt that the 1st Respondent/Defendant and 3rd Respondent/Defendant do reside outside Tanzania in terms of Rule 29. The second requirement under the Rule is that the defendant should have no known agent in Tanzania to accept service. In the instant case, there is affidavit evidence of one William Kagaruki who is a Director and Secretary of the applicant Companies to be found in paragraphs 2 and 3 of his affidavit. The 1st and 3rd Respondent/Defendant are indeed foreign Companies and they do not have an address for service in Tanzania. Under these circumstances, the court has a discretion, on an application by the plaintiff being made to that effect, order that service of summons be effected in any of the three modes stipulated therein. I should perhaps digress a bit and quote a passage from the case of **Vitkorice Horni v Komer** [1951] 2 ALL ER 334. Lord Radcliffe said at page 339 as follows

" Service out of jurisdiction is of course, an exceptional measure. The principles of International comity are invaded by permitting it, and that quite apart from the question whether judgment will, or will not, ultimately be given against the person served. It is only natural, therefore, that the courts should approach with circumspection any request for leave to issue a writ against such a person."

Lord Radcliffe made these remarks in connection with Order II Rules of Supreme Court, but in my view, do provide useful guidance in construing Order V Rule 29. The jurisdiction of the Court, which is discretionary, should be exercised with caution. The reason for this I think is that our courts do not have extrajudicial jurisdiction. Reverting to the issue at hand, the applicants want to effect service of summons by courier. The question is, is this mode of service of summons permitted under Rule 29(a)? In Civil Appeal No.2 of 1997 (CAT) between **Tanzania Cotton Marketing Board and Cogeat Cotton Company S.A.** the Court had occasion to construe rule 4 of the Arbitration Rules, 1951. Under the said rule an award is to be forwarded to the Registrar of the High Court by registered post, but it was forwarded by courier i.e. DHL. It was contended that this

was not the method as prescribed by rule 4 of the Arbitration Rules. His Lordship Lubuva, J.A. delivering the judgment of the Court, had this to say

" While it is an undisputed fact that under rule 4 of the Arbitration Rules, 1957 the award is to be forwarded to the Registrar of the High Court by registered post, the words 'registered post' should be interpreted widely enough in order to take into account the current development in communication technology that has taken place since 1957 when the rules were enacted. It is common knowledge that since that time other modes of postage have been introduced. The DHL system which was used in this case is among such modes of communication.....it is our view that it would be impractical, and unrealistic on the part of the court to give such a restrictive interpretation to the words "registered post" which excludes other courier systems".

I am in entire agreement with what his Lordship Lubuva, JA stated above. In similar vein Rule 29(a) of Order V should be given a wide construction so as to include other courier systems in keeping up with modern trends in technology.

In the circumstances, I do hereby grant both prayers as contained in the chamber summons. It is so ordered.

(H.R.Nsekela)

JUDGE

23/12/97

Ruling delivered in the presence of Mr. Mujulizi, learned advocate for the applicants.

(H.R. Nsekela)

JUDGE

AT DAR ES SALAAM

23rd December, 1997.