

REPUBLIC OF KENYA

IN THE HIGH COURTS OF KENYA

AT MOMBASA

COMMERCIAL CIVIL CASE 36 OF 2006

SAMAKI INDUSTRIES (K) LTDPLAINTIFF

VERSUS

BULLION BANK LTD.(UNDER

CENTRAL BANK OF KENYA).....DEFENDANTS

R U L I N G

Bullion Bank Ltd. (under Central Bank of Kenya Management), the defendant herein, took out a summons dated 14th February 2007 in which it sought for leave to have the defence amended with a view of indicating its change of its name and for purposes of incorporating a counter claim. The summons is supported by the affidavit of Wilfred Oroko sworn on 13th February 2007. Samaki Industries (K) Ltd, the plaintiff herein, filed grounds of opposition and a replying affidavit of Salim Verjee to oppose the application parties agreed with the approval of this court to file and rely on written submissions.

The summons before this court is brought under Order XXXIX rules 1 and 3 of the Civil procedure Rules. The plaintiff, in its grounds of opposition and in the written submissions has urged this court to strike out the summons because the defendant has not properly invoked the jurisdiction of the court. In response to the preliminary issue, the defendant admitted the mistake in its reply to the plaintiff's submissions. The defendant urged this court to regard the defect as a typographical error and excuse it under order VI rule 12 of the Civil Procedure Rules. It is also argued that the two previous applications dated 12/1/05 and 14/1/2005 properly invoked the jurisdiction hence there was mistake. On the face of the current summons.

I have considered the arguments of both sides over the preliminary issue. It is not in dispute that the summons now before court is brought under Order XXXIX rules 1 and 3 of the Civil Procedure Rules. I have urged to excuse it as a typographical error under Order VI rule 12 of the Civil Procedure rules. The question is whether or not the same should be treated as a typographical error and if so whether this court should amend it and consider the merits of the application? I have perused the summonses filed prior to the summons now before court. The one dated 12th January 2005, was premised on order XXXIX rules 1 and 3 of the Civil Procedure Rules. The same was withdrawn by consent on 11th March 2005. The aforesaid application was seeking for similar orders like those prayed for in the application now before court. After its withdrawal, the defendant filed the summons dated 14.1.2005 which application was subsequently withdrawn by consent on 21st September 2006. The application was brought under order VI A rule 3 of the Civil Procedure Rules. It is obvious from the two summonses that the defendant's submissions that the previous applications had properly invoked the jurisdiction of this court. On this account I am unable to agree that there was a typographical error. What emerges from the record is that the defendant's Counsels have not been keen to carefully scrutinize their applications before lodging the same. The defect was either committed because the learned advocates were in a hurry to file or they were simply incompetent. This is one of those instances when the court will allow the client to suffer for the mistakes of its advocate. I have been urged to invoke the provisions of order VI rule 12 of the Civil Procedure Rules to excuse the defect. The aforesaid provision urges courts not to dismiss pleadings on ground for want of form. With great respect to learned counsel, the defect pointed out cannot be said to be that of form. It goes to the jurisdiction of the court. The defect in my view is fundamental renders the

entire summons fatally defective.

I uphold the plaintiff's preliminary objection by striking out the summons dated 14th February 2007 with costs to the plaintiff.

Dated and delivered at Mombasa this 8th day April 2009.

J. K. SERGON

J U D G E