

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 693 of 2008

KRK IMPEX PVT LIMITED
PLAINTIFF

VERSUS

SAFMARINE KENYA LIMITED1ST DEFENDANT

ACCORD METALS (KENYA) LTD. 2ND DEFENDANT

R U L I N G

Chamber summons dated 23/3/09 brought under Order VII, 39 Rule 4 seeking orders to discharge orders of this court made on 6/3/09 on grounds that the plaint and application served on 12/3/09 were in complete variance with order that were sought in the plaintiff's chamber summons dated 24/11/08 and granted on 6/3/09. Such orders are a nullity and unavailable to the plaintiff and ought to be discharged.

The application is supported by affidavit of Dr. Kiplagat, advocate, sworn on 23/3/09 who swears that the first defendant was served with chamber summons and affidavit without the accompanying plaint and summons to enter appearance. A replying affidavit was filed on behalf of first defendant. Summons was served on 12/3/2009 when they noticed that orders sought in the chamber summons were at variance with orders sought in the plaint and therefore the orders granted on chamber summons and which were not expressly prayed for in the plaint became unavailable to the plaintiff.

Authorities relied upon are 1823/2002 – V.W. Nguu vs. St. Kahuki Kamau & another – advocate's affidavit struck out, Devji Meghji & Brothers vs. Prospectus Thika Ltd. where the court struck out defective application and Florence L. Makoten vs. Fortune Properties Ltd. & another where an application was struck out for not being brought to court in proper procedure. PHAZE Industries Ltd. vs. Shaman Holdings & 2 others where court held that a mandatory order can only be sought under Section 3A of Civil Procedure Code and by Notice of Motion not by Chamber Summons. The application was struck out for being incompetent. Morris & Co. Ltd. vs. KCB Ltd & others – notice of motion should be invoked under Section 3A.

I have perused the replying affidavit and the plaint. The prayer (a) seeks injunction restraining the first defendant from releasing containers to any other person other than the plaintiff. This is similar to paragraph (11) and prayer (a) of the plaint and also prayer 2 of Chamber Summons. Prayer (b) of plaint is similar to application prayer (3) Chamber Summons.

It is clear to me that the prayers sought in the chamber summons are based on the main pleading (plaint) and prayers thereon. Instead the replying affidavit shows that the supporting affidavit is sworn by an advocate not as provided under Order III Rule 12 and that the applicant has filed a notice of appeal against the ruling of this court delivered on 6/3/2009.

In the circumstances, the applicant is not acting in good faith seeking to set aside the ruling which he

intends to appeal against. I therefore find no merit in this application and it is dismissed with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 28th day of July, 2009.

JOYCE N. KHAMINWA

JUDGE