



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

**Civil Suit 419 of 2007**

**DAVID NGUGI MBUTHIA .....1<sup>ST</sup> PLAINTIFF**

**TEXTILE DYE STUFF LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FINA BANK LIMITED..... DEFENDANT**

**RULING**

When the application dated 16<sup>th</sup> August, 2007, an amended chamber summons, was filed, the Respondent's advocate filed a notice of preliminary objection on points of law in which four grounds of objection were raised. Mr. Chege, Counsel for the Respondent, abandoned ground 2 of the notice and argued the remaining three. The first ground raised is that the amended chamber summons is incurably defective. Secondly that the chamber summons is not a pleading as defined by section 2 of the Civil Procedure Act, and therefore it was incapable of being amended. Thirdly the amended chamber summons is incompetent.

Mr. Chege submitted that under Section 2 of Civil Procedure Act, chamber summons is not defined as a pleading. Counsel relied on **CIVIL APPEAL NO. 61 OF 1999 BOARD OF GOVERNORS, NAIROBI SCHOOL VS JACKSON GETAH**. In cited case the Court of Appeal held that an application under Order VI rule 13(1) of Civil Procedure Act, should be confined to complaints or defences or such modes prescribed for instituting suits and statements of defences. The Court of Appeal did not in that case say that chamber summons applications could not be amended at all. The Court of Appeal's interpretation of what a pleading is was made in regard to applications made under Order VI rule 13(1) of Civil Procedure Act and it cannot be extended to include amendments of chamber summons.

Mr. Chege also relied on **JACINTA WANJIRU MUIRURI VS JANE MWANGI & ANOTHER [2006] E KLR** where **Osiemo J**, rules that a chamber summons is not a pleading and therefore ruled that it could not be amended.

Mr. Mwaniki for the Applicant drew the courts attention to the fact that leave to amend the instant chamber summons, was granted by **Okwengu J**, and that in the circumstances, the only step the Respondent could take to challenge the leave granted by this court was through an appeal in the Court of Appeal. He sought to distinguish **MUIRURI CASE**, Supra, and **Osiemo J's** ruling therein, by submitting that unlike the cited case where Preliminary Objection was raised before an application to amend could be argued, an amendment had already been effected in the instant case.

I did not buy Mr. Chege's argument that since leave by **Okwengu J**, was granted ex parte, it was open for him to raise the issue at this stage. In my humble view once leave was granted to the Applicant to amend the chamber summons by the court, this court, being of parallel jurisdiction as the one which granted leave, cannot entertain a preliminary objection challenging the exercise of the powers of the same court to grant leave. That avenue can only be pursued through an appeal to the Court of Appeal.

Having come to this conclusion I find that the Preliminary Objection raised herein is incompetent and the same is dismissed with costs.

**Dated at Nairobi this 26<sup>th</sup> Day of October, 2007.**

**LESIIT, J.**

JUDGE

Read, signed and delivered in the presence of:

Miss Njoroge for Chege for Respondent

N/A for Applicant

**LESIIT, J.**

JUDGE