



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Civil Suit 805 of 2006**

**PAN AFRICA BUILDERS AND CONTRACTORS COMPANY LIMITED...PLAINTIFF**

**VERSUS**

**COMMUNICATION COMMISSION OF KENYA .....DEFENDANT**

**RULING**

Parties who describe themselves as interested parties filed a Chamber Summons dated 18<sup>th</sup> September, 2006. The main prayers of that Chamber Summons are as follows:-

· **THAT the Applicants**

- a) **Security World Ltd.**
- b) **Raerex (E.A) Ltd.**
- c) **Lantech (Africa) Ltd.**
- d) **Pioneer Plumbers Ltd.**
- e) **Exemak Refrig. & con. Ltd.**
- f) **Central Electricals Int. Ltd.**
- g) **Power Engineering International Ltd,**

**be enjoined as Interested Parties.**

· **THAT leave may be granted to Security World Limited to defend and or represent the other interested parties.**

· **THAT the Injunctive Orders granted to the Plaintiff/respondent herein which are affecting the Interested parties be discharged forthwith for concealing material particulars thereby condemning the interested parties unheard.**

Before the application could be heard the Plaintiff raised a preliminary objection in the following terms:-

**“The application is frivolous, vexatious, an abuse of the court process and or is not maintainable in law”.**

The Plaintiff’s counsel expounded on the objection raised by saying that the main prayer of the Chamber Summons related to the parties seeking leave to be joined in this matter as interested parties. He was of the view if that prayer was to fail the interested parties would not be able to proceed with the rest of the prayers. He submitted that that prayer for joinder could only be made under Notice of Motion and not Chamber summons. This is because parties had moved under Order I rule 3 of the Civil Procedure rules but that that Order could not apply to the interested parties because it referred to joinder of defendants. Accordingly he stated that the interested parties should have moved under Notice of Motion. Plaintiff’s counsel further submitted that the interested parties in the aforesaid Chamber summons relied on an annexed contract which contract was not stamped in accordance with Section 19 of The Stamp Duty Act. Accordingly the contract was not admissible in evidence.

The interested parties’ counsel stated that the parties had also come under Section 3A of the Civil Procedure Act since there was no specific provision in the Civil Procedure Act or rules for the joinder of interested parties. He stated that the interest in this action of the interested parties was similar to the interest of the Defendant.

Order L Rule 1 of the Civil Procedure Rules provides as follows:-

**“All applications to the court, save where otherwise expressly provided for under these rules, shall be by motion and shall be heard in open court”.**

It is clear from that rule that where there is no specific provision of how a party should move in court a party ought to file a Notice of Motion. The interested parties’ counsel did concede that the Civil Procedure Act and Rules have no specific provisions for the joining of interested parties. The Act and the Rules only provide for the joining of the Plaintiffs and Defendants. The interested parties did also seek by their Chamber Summons the discharge of an injunction that had been granted in this matter. Such a discharge can only be brought under Order XXXIX Rule 4 of the Civil Procedure Rules. That rule does not have any specific provision of the manner of the application it is to be brought under. Accordingly and having in mind Order L Rule 1 of the Civil Procedure Rules the interested parties could only move the court by way of a Notice of Motion. One would then ask what is the effect of a party who moves by way of a Chamber Summons when the rules provide that he ought to have moved by way of Notice of Motion. In the absence of such a party seeking to amend such an application to ensure that they move in the correct procedure the court has discretion to adjourn a matter which in its view ought to be by Notice of Motion in to open court. This indeed was the finding in Civil Appeal No. 284 of 1997 JOHNSON JOSHUA KINYANJUI & ANOTHER AND RACHEL WAHITO THANKE AND ANOTHER as follows: -

**“If an application is brought under different rules, one calling for a Notice of Motion application and another calling for a chamber summons application then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of a Notice of Motion, the application does not become incompetent.”**

*Order 50 rule 11 provides:*

**“Where any application which is authorized to be made in court is made in chambers the judge may either adjourn the application into court or hear it in chambers.”**

*Order 50 rule 10 provides:*

**“Any judge or magistrate may adjourn into court an application made to him at chambers which he deems more convenient to be considered in court.”**

***It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in chambers”.***

The plaintiff objections regarding the interested parties application having been brought under chamber summons is therefore rejected.

On the issue of the contract not complying with The Stamp duty Act I confirm that I looked at the contract annexed to the application and I found that the same has the words “ORIGINAL Eleven Shilling Embossed stamp”. It is not clear to me whether this means that Stamp Duty of Shs.11/= was paid in respect of this contract. For that reason I am of the view that the preliminary objection taken in that regard cannot succeed for it will be necessary for the court to make investigation to find out whether that stamp relates to duty paid. The end of the matter is that the court does not uphold the Plaintiff’s preliminary objection in regard to the manner in which the interested parties moved this court and the court also rejects the objection in regard to lack of stamp duty on the contract. Accordingly the court rejects in its entirety the preliminary objection raised by the plaintiff and accordingly the same that is the preliminary objection dated 28<sup>th</sup> of September 2006 is hereby dismissed with costs to the interested parties.

Orders accordingly.

Dated and delivered this 23<sup>rd</sup> day of November, 2006

**MARY KASANGO**

**JUDGE**