



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL SUIT NO. 246 OF 2003**

**CROWN BARGER KENYA LTD. .... PLAINTIFF**

**Versus**

**1. KALPESH VASUDEV DEVANI**

**2. SHORRET KENYA LIMITED ..... DEFENDANTS**

**R U L I N G**

By a Chamber Summons dated the 16th October 2003 the plaintiff sought orders of this court requiring the 1st defendant to furnish security in the sum of Sh. 3,000,000/= within seven days and also that pending the hearing and final determination of the application certain accounts of the second defendant be “freezed/broked”.

On the 20th November 2003 the plaintiff filed an amended application and sought an order that the defendants do attend court to show cause why they should not furnish security. The defendants also filed grounds of opposition on the same day - 20th November 2003. The grounds are that:-

**“1. The application is bad in law and without any merit**

whatsoever.

2. The plaintiff has not proven its case against the defendant.

**3. The suit is bad for misjoinder of parties”.**

During the hearing of the application Mr. Gitau decided to argue the issue of amendment to the application as part of his reply instead of raising it as a preliminary objection. He argued that the amendment should be disallowed as leave of court was not sought or obtained before it was filed. If it was amended without leave of court it appears it was, then the plaintiff should have stated the “number of the rule in pursuance of which the amendment was made” as required by Order 6A Rule 7(1) of the Civil Procedure Rules. Mr. Mogaka in response on that point argued that the amendment was filed without leave. Leave was not required as pleadings had not been closed. I agree with Mr. Mogaka that a Chamber Summons is a pleading. Section 2 of the Civil Procedure Act defines as pleading as including “a petition or summons ...”

In this case both the amended Chamber Summons and the grounds of opposition were filed on the 20th November 2003. In point of time, a perusal of the court file shows that receipt No. K903060 was issued in respect of court fees paid for the amended Chamber Summons. In respect of the grounds of opposition receipt No. K903093 was issued. It is therefore clear that the amended Chamber Summons was filed before the notice of grounds of opposition was. That being the case the plaintiff did not require

leave of court to amend the Chamber Summons. Failure to cite on the amended chamber summons the rule under which the amendment was made is cured by Order 50 Rule 12. Mr. Gitau's argument that Order 50 Rule 12 does not apply where a wrong provision is cited does not hold any water as there is no provision cited on the chamber summons under which the amendment was made.  
[www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke)

The other point Mr. Gitau raised on the competence of the application is that it failed to specify the property to be attached. According to him, the plaintiff's prayer in the amended application that certain accounts said to belong to the second defendant be "frozen/broked" is not attachment. The prayer, he said, should have specifically stated that those accounts be attached. I do not agree with that argument. If it was other property like a motor vehicle, before a final order is made for it to be sold, the rules require that such property be attached. In case of a bank account, in my view, an order freezing it is as good as an attachment. When a final stage is reached and a final order is made the court will order that the amount in that account or part thereof be deposited into court or be released to the plaintiff. The accounts sought to be frozen, according to the plaintiff, belong to the second defendant. Mr. Gitau stated from the bar that the accounts don't belong to the second defendant. That is a factual point. If the defendants wished to dispute the ownership of those accounts, they should have filed a replying affidavit. They did not. Mr. Gitau's statement cannot therefore be accepted.

For these reasons I hold that the amended application is properly before the court. I have not found it necessary to refer to the authorities cited by Mr. Mogaka as they relate to applications for amendment of pleadings. This is not an application for amendment. I agree with Mr. Gitau that in an application like this, the steps stated in the case of *Ndirangu Vs Abdalla [1984] KLR 746* should be followed. The plaintiff should first seek that the defendant do show cause why they should not furnish security. However that is what the plaintiff has sought in the amended chamber summons which I have held is properly before the court. If I grant the prayer for security and the defendants fail to furnish the same, then attachment of the accounts stated by way of freezing them will follow.

I think Mr. Gitau is on firm ground in his submission on the claim against the first defendant. He argued that the plaintiff's claim is for the value of goods sold and delivered to the second defendant. The first defendant, admittedly, was merely a director of the second defendant. That the first defendant signed the cheques issued by the second defendant to the plaintiff, some of which bounced, as argued by Mr. Mogaka, does not make him liable to the plaintiff for the debt incurred by the second defendant. Attachment before judgment is an extraordinary power that should be used very sparingly. The court should act with utmost caution. It can be made only on the courts satisfaction that the defendant with intent to obstruct or delay the execution of the decree that may be passed against him is about to dispose of the whole or in part his property or is about to remove the whole or in part of his property from the local limits of the jurisdiction of the court. The court must also be satisfied that the plaintiff has a prima facie case against the defendant.

In this case the plaint states that the goods, the subject matter of this claim, were sold and delivered by the plaintiff to the second defendant. The first defendant "is sued in his capacity as director/agent of the second defendant who is wholly in charge of the operations of the second defendant". In my view although the first defendant has not filed defence this averment does not disclose a prima facie case against him. He could be in charge of the affairs of the second defendant wholly as a director or even employee. That does not make him liable for the debts of the second defendant. The plaintiff has not sought to lift the corporate veil of the second defendant to make the first defendant liable for its debts. In the circumstances this application fails in respect of the first defendant.

In respect of the second defendant, Mr. Gitau argued that the affidavit in support of the application does not state that the deponent believes in the information received from the investigation report that it has sold its stock to Lamu Hardware. But the second defendant has not filed any defence or replying affidavit to deny the allegation. The mere failure to state that the deponent believes what is stated in the investigation report does not change the position. The deponent avers that he himself purchased goods from the shop previously owned by the second defendant and was issued a receipt by M/s Lamu Hardware. The deponent also himself confirmed from Mr. Shamlan whom he found in the shop informed

that the business now belongs to Mr. Abubakar Mohamed.

In the absence of replying affidavit or defence disputing the averments in the supporting affidavit I am satisfied that the second defendant with intent to obstruct the execution of the decree that might be obtained against it has sold the whole of its stock. Consequently I allow the amended application and order that the second defendant should within 14 days furnish security to the tune of Sh. 3 million failing which the stated accounts shall be attached. The plaintiff shall have the costs of the applications against the second defendant.

DATED this 5th day of March 2004.

**D.K. Maraga**

**Ag. JUDGE**