



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.518 OF 2000

NATIONAL BANK (K) LIMITED PLAINTIFF

VERSUS

MARY S. NDETO & JAMES M. MANGOKA

T/A JAMA ECONOMIC PRINTERS &

GENERAL SUPPLIES DEFENDANT

RULING

Amended Chamber Summons dated 18th October 2002 came up for hearing before me on 14th November 2002 when Mr. Sangoro, the learned Counsel for the Respondent raised a Preliminary objection to the same Chamber Summons. The Notice of Preliminary objection was dated 6th November 2002 and filed on the same day. Four grounds of objection were raised and these were that a Chamber Summons and specifically the applicant's Chamber Summons dated and purportedly amended on 18.10.2002 is not a pleading capable of amendment; that the applicant has not served the Respondent with the initial Chamber Summons from which the purported amendment is preferred; that the applicant did not apply for and did not obtain leave of the court prior to the purported amendment; and lastly that even if leave was sought, the Respondent was not afforded an opportunity to contest the application for such leave to amend the application and the said amendment is defective. The Respondent, on those points sought that the amended Chamber Summons be struck out as being incompetent and incurably defective.

The Applicant in answer to the same points, maintained that Chamber Summons is a document and is capable of amendments and so was rightly amended. He went further and stated that leave was granted to amend the Chamber Summons on 18.10.2002' that court has inherent jurisdiction as there was not prejudice to the Respondent.

The original application came up for the first time under certificate of urgency. It had not been served as it was under certificate of urgency. It did not seek orders to dispense with service. It did not seek orders to have the application certified urgent, and the Applicant needed to have it amended to incorporate such orders as well as order for interim stay pending the hearing inter partes. Leave was granted by the Court to amend the Chamber Summons for that purpose only. Section 100 of the Civil Procedure Act states:

"100. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

These are general powers of the court to amend. Section 3A of the Civil Procedure Act states:

“Nothing in this act shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court:”

Section 2 of the Civil Procedure Act describes pleadings as follows:

“”Pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counter -claim of a defendant.”

It does not specify that summons therein is only originating summons but I do agree that the Court of Appeal decisions seem to contradict each other on this issue. I take the view in the case of **Commissioner of VAT vs. Anil Shah & Others** where they stated that pleading includes Chamber Summons. However, whatever it is, I feel certain that on the recognition of human frailties Section 100 was enacted and Section 3A was also enacted to avoid situations where injustice would be done to a party simply because of what could have resulted from no more than human mistakes. In all such cases what court has to look into is as to whether any prejudice has been occasioned. In this case the amendment did not occasion prejudice to the Respondent as the Applicant only sought that the matter be certified urgent and it be dealt with in the first place before service. As to the amendment seeking to have interim orders upto the determination of the application, that was unnecessary as the court before which an application under certificate of urgency is brought can still grant interim orders on the main prayers pending the inter-parte hearing.

I do not see the necessity of serving the Respondent with the original application as it is part and parcel of the amended Chamber Summons and if the Respondent cares to read it guided by Order 6A Rule 7 (1), (2) and 3 of the Civil Procedure Rules he cannot fail to see what was the original document.

As I have stated hereinabove, the matter came under certificate of urgency. It had not been served and in fact part of the amendment as can be seen from the Chamber summons was to dispense with service. Under those circumstances, I do not think it is fair to seek to strike out the Chamber Summons on grounds that the Respondent was not involved in the application for amendment. I may give an analogy with the case where a pleading may be amended once without leave of the court before the pleading's are closed. (see order 6A Rule (1). In this case the application had not been served and its amendment before service could not prejudice the Respondent. There is no merit in the Preliminary Objection . It is refused.

Costs of the objection to the Applicant.

Dated and delivered at Mombasa this 11th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE