



Ong’udi v Gor Construction and Hardware Ltd & another (Miscellaneous Civil Application E196 of 2023) [2024] KEHC 3977 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E196 OF 2023**

**RE ABURILI, J
APRIL 24, 2024**

BETWEEN

EDITH ALUOCH ONG’UDI APPLICANT

AND

GOR CONSTRUCTION AND HARDWARE LTD 1ST RESPONDENT

HEZEKIAH ONG’UDI 2ND RESPONDENT

RULING

1. The Applicant filed an application dated 29th November 2023 and before effecting service upon the Respondents, she filed an amended application dated 6th December 2023.
2. After effecting service of the amended application upon the Respondents, counsel for the 1st Respondent, Mr. Sala now claims that the Applicant could not amend the application.
3. After this court gave directions for the oral hearing of the application at the said hearing, the Applicant’s counsel did apply to withdraw both applications, the one dated 29th November 2023 and 6th December 2023.
4. Mr. Sala counsel for the 1st Respondent disclosed that there was a similar application pending before the lower court and the Ruling is due for delivery on 25th April 2024.
5. As stated above, the Applicant sought to withdraw the application as amended asserting that his client filed the application before this court seeking to set aside the *ex parte* taxation in the lower court because the lower court file had gone missing for a while but that after the lower court file was traced, the Applicant lodged an application to set aside the *ex parte* taxation.
6. Counsel submitted that it follows that the application herein filed had to be withdrawn.



7. What appeared to be a simple issue of withdrawal of the proceedings was procrastinated with argument after argument.
8. I will not belabour delving into those arguments which I found to be very unnecessary. I will simply determine that issue of whether an application, whether by way of Notice of Motion or Chamber Summons can be amended and therefore in this case, how many applications are on record and which one was withdrawn.
9. This determination is necessary to avoid frivolous and unnecessary arguments that have no legal basis in future thereby wasting the court's precious time.
10. Again, this court answers legal questions and not academic questions. So, can an application, and therefore the Chamber summons dated 29th November 2023 be amended and therefore, is the application dated/amended on 6th December 2023 valid, and, therefore, which of the two applications are capable of being withdrawn.
11. I observe that in the midst of confusion, with the Applicant's counsel not being sure of whether or not a chamber summons application can be amended and therefore which of the two applications could be withdrawn, felt cornered and applied to have 'both' applications withdrawn.
12. The Chamber summons dated 29th November 2023 was primarily brought under Paragraph 11 of the *Advocates Remuneration Order*. That paragraph sets out the procedure and timelines for challenging taxation proceedings, whether it is against a certificate of taxation or leave to enlarge time for filing of a Reference out of timer from a taxing Master's decision.
13. The procedure under Paragraph 11 of the *Advocates Remuneration Order* is so elaborate that the paragraph does provide for the mode of challenging the taxing master's decision on taxation up to the Court of Appeal level. Paragraph 11 of the *Advocates (Remuneration) Order* provides a detailed process of objection to taxation of costs as follows:

“ 11. Objection to decision on taxation and appeal to Court of Appeal.

- (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing



or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

14. The challenge is originated by way of chamber summons and therefore the question is whether that chamber summons is capable of being amended.
15. First and foremost, is that a Reference by way of a chamber summons is a pleading originating proceeding for challenging decision of a taxing master. What does the law say about pleadings and amendments thereto?
16. Order 8 Rule 1 – 5 is dedicated to amendment of pleadings. Order 8 Rule 5 of the [Civil Procedure](#) provides that:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either on its own motion or on the application of any party order any documents to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”
17. The power to amend pleadings can be exercised at any stage of the proceedings before judgment. See Bullen and Leake & Jacob’s [precedents of pleading](#), 12th Edition, which provides that:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal states); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless....a fresh action....”
18. In [Halsbury’s Laws of England](#), 4th Edition (reissue) Vol. 36 (1) paragraph 76, it is stated as follows on amendment of pleadings;

“...the purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion....”
19. Is a chamber summons a pleading? Paragraph 11 of the [Advocates Remuneration Order](#) provides for the mode of initiating challenge to the decision of the taxing master and in that process, which includes the filing of objection to items as taxed in the Bill of Costs to filing of a chamber summons which is a Reference.
20. As there is no definition of pleading or chamber summons under the [Advocates Act](#) and the [Advocates Remuneration Order](#), I will revert to the [Civil Procedure Act](#) for guidance.
21. Section 2 of the [Civil Procedure Act](#) defines a pleading to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence or any defendant thereto, and of the Reply of the Plaintiff to any defence or counter claim of a defence.
22. In [Vijay Kumar Davalji Kanji Kobil vs Suresh Mohanlal Fatania & 8 Others](#) [2006] eKLR, the defendants raised a preliminary objection to a chamber summons as follows: “that the said application is incurably defective as a chamber summons is not a pleading within the meaning of Section 2 of the [Civil Procedure Act](#) therefore it is incapable of being amended with or without leave having been sought and obtained.”



23. Kasango J referred to [*Black's Law Dictionary*](#) which defines a pleading as;
- “The formal allegations by the parties to a law suit of their respective claims and defence with the intended purpose of being to provide notice of what is to be expected at trial.”
24. The learned Judge, despite finding that a chamber summons is not a pleading because it was interlocutory in nature, unlike in this case where the chamber summons is originating the challenge to taxation and is synonymous to a petition/memorandum of Appeal, the learned Judge nonetheless went on to find and hold that as the purpose of amendment is to be able to determine the real question in controversy, the court could invoke its inherent in the absence of any specific power to amend the chamber summons, to grant leave to amend the chamber summons.
25. The above decision was rendered in 2006 before enactment of Article 159 of the [*Constitution*](#) which abhors procedural technicalities elevating themselves at the altar of substantive justice.
26. Nonetheless, unlike in the above case, in this case, the proceedings are initiated by way of Chamber summons. The chamber summons is not filed as an interlocutory application but as a pleading initiating a challenge to the decision of the taxing master, akin to Rule 55 (4) of the [*Auctioneers Rules*](#) 1997 which provides that an appeal against the decision of the taxing master magistrate or licencing Board, to the High Court, in matters involving auctioneers' fees, shall be by way of chamber summons filed within 7 days of the date of the decision.
27. In this case, as Chamber summons is the prescribed manner of instituting a challenge to the decision of a taxing master, I have no doubt in my mind that it is a pleading capable of being amended.
28. This position that I have taken is akin to the provisions of Order 53 of the [*Civil Procedure Rules*](#) where Chamber Summons is used to commence Judicial Review proceedings.
29. I reiterate that in this case, as the Applicant was filing a Reference which has to be initiated by way of chamber summons, an exception to the general rule and perception that a chamber summons is not a pleading is created.
30. This position was accepted by the Supreme Court in the case of [*Nathib Jama Adam vs Abdikhaim Osman Mohamed & 3 Others*](#) [2014] eKLR. (See paragraph (68) where the Supreme Court had this to say concerning whether or not chamber summons could be considered to be a pleading:

“(68) Pleadings institute suits and lead to joinder of issues, thereby forming “instituting documents,” and “responses”. Thus, a Chamber Summons when in use as an interlocutory application, cannot augment the substantive issues after joinder of issues has already occurred. One substance of the right to a fair trial, under Article 50(1) of the [*Constitution*](#), is that parties must know the case against them. This position has been upheld in several cases, *inter alia*: *Philip Mugo Mucheru v. Mbeu Kithakwa*, Nyeri High Court Civil Appeal No. 4 of 2007 (Kasango J.); *Samuel Ndiba Kibara & Anor. v. Housing Finance Company of Kenya Ltd. & 2 Others*, Nairobi HCCC No. 638 of 2006 (Kasango J.); *Jecinta Wanjiru Muiruri v. Jane Wangari Mwangi & Anor*, Nairobi HCCC No. 184 of 2006 (Osiemo J); and *Fredrick Mwangi Nyaga v. Garam Investments & Anor*, Nairobi HCCC No. 249 of 2013. The only exception arises under Order 53 of the [*Civil Procedure Rules*](#), 2010 where the Chamber Summons is used to commence judicial review proceedings. (See *Commissioner of VAT v. Atul Shah*, [1999] 2 EA 58, *Boniface M. Opiyo v.*



Afred Oyoko Olunde & Anor, [1997] LLR 7789, *In the Matter of Kenya Wildlife Service Act* and *In the Matter of the Civil Service Reform Programme and the Kenya Wildlife Retrenchment Programme*, [1998] LLR 7645). We would signal that, as the procedures of the legal process continue to evolve, yet other exceptions may emerge. This has already happened in the litigation of children’s matters, under the *Children Act*, 2001 (Act No. 8 of 2001), in which some causes are instituted using Chamber Summons.”

31. Having found that the Chamber summons in this case was a pleading, I have no difficulty in concluding that such pleading was capable of being amended and as the pleadings had not closed, the Applicant was at liberty to amend the same without leave of court, and serve the Respondents.
32. Accordingly, I find and hold that the amended Chamber summons dated 6th December 2023 substituted the Chamber Summons dated 29th November 2023 and therefore, only the Chamber Summons dated 6th December 2023 was capable of being withdrawn.
33. The applicant’s counsel having applied to withdraw the said amended chamber summons, I hereby allow the oral application to withdraw the same and hence, the Chamber summons as amended dated 6th December 2023 is marked as wholly withdrawn with an order that each party bear their own costs of the withdrawn application as the main dispute between the parties is before the lower court where they are still ventilating.
34. This file is therefore closed.
35. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2024

R. E. ABURILI

JUDGE

