



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 400 OF 2001**

**BAHRIYA PETROLEUM LIMITED.....PLAINTIFF**

**-VERSUS-**

**1. GULF OIL COMPANY WLL**

**2. GIRO COMMERCIAL BANK LIMITED.....DEFENDANTS**

**R U L I N G**

The plaintiff/Respondent raised a preliminary objection against the defendants' chamber summons dated 4th September 2003. The grounds of the objection are contained in the Notice dated 30th September 2003. The preliminary objection had to be disposed of first before considering the merits and demerits of the aforesaid chamber summons.

The main ground submitted by Mr. Kyampia for the respondent was that the application was incurably defective and that it should be struck out. The learned counsel further submitted to the effect that the chamber summons is an omnibus fashion or an application which sought for separate orders which cannot be interchanged. The other contention is that the applicant did not cite the legal provisions of Order XXXIX rule 4 of the Civil Procedure Rules which in any case should be filed by way of a Notice of Motion.

Mr. Tindika who appeared for the defendants/applicants opposed the preliminary objection terming it as misconceived. He was of the view that the applications sought could be argued in a single application because they all arose out of the same transactions. It was his submission also that it was not necessary for a party to quote the provisions in which he has filed an application by virtue of order L rule 12 of the Civil Procedure Rules.

I have perused the Notice of preliminary objection dated 30th September 2003. I have further considered the submissions of both learned Counsels. It is clear that the preliminary point raised by the plaintiff merits to be referred to as a preliminary objection. Hence I will now consider its merits.

From the face of the Chamber Summons the applicants are seeking for the following orders:-

- (i) An order to set aside an order allowing the plaintiff to serve the first defendant summons to enter appearance by substituted service i.e by way of registered post.

- (ii) An order to set aside an order of injunction entered by consent on 6/9/2001.
- (iii) An order for setting aside of an exparte judgment dated 15.3.2002 and
- (iv) For an order for leave to be granted to the defendant to join a third defendant.

Each of these prayers are premised on various orders and rules of the Civil Procedure rules. The applications under the cited orders and rules on the face of the Chamber summons can all be brought by way of chamber summons – save for the prayer seeking to set aside an order of injunction which obviously can only be brought under Order XXXIX rule 4 of the Civil Procedure rules. It is not fatal if one inadvertently omitted to cite the provisions of the law under which the application is based in view of the provisions of order L rule 12 of the Civil Procedure rules. It is trite law that applications to set aside or vary or discharge orders of injunction can only be brought under Order XXXIX rule 4 of the Civil Procedure Rules by way of a Notice of Motion.

I have taken time to consider each of these prayers sought by the applicants in relation to the preliminary objection raised herein. It is apparent that one has to dispose of the following prayers before considering the others:-

- (i) The prayer for an order to set aside the order of 6.9.2001 granting leave to the plaintiff to serve summons by registered post and
- (ii) The prayer for an order to set aside the exparte judgment of 15.3.2002.

What is clear is that the applicants have filed an omnibus kind of an application mixing applications which the law requires them to be brought by way of chambers and others by way of Notice of Motion. This is undesirable in law. Even if the same was to be held that it would save costs, the situation cannot be excused in this instance because certain applications must be dealt with first before others are considered. No court of law can deal with the application seeking for leave to join another party to the suit without first considering the application seeking to set aside existing orders and judgment against the applicants. Litigants must choose to come to a court of law in a systematic manner instead of filing applications which appear premature mixed with ripe ones.

In the final analysis I am in agreement with the submissions of Mr. Kyampia that the application by way of Chamber Summons dated 4th September 2003 is incurably defective. Consequently, the same is ordered struck out with costs to the respondent.

**Read this.....day of.....2003.**

**J.K. SERGON**

**J U D G E**

In the presence of Mr. Kyampia for the plaintiff/Respondent and

Mr. Otieno is for the 2nd Defendant. Mr. Tindika is for the 1st Defendant.

**J.K. SERGON**

**J U D G E**



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