



Case Number:	Civil Case 295 of 2008
Date Delivered:	11 Oct 2012
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	-
Judge:	Joseph Mbalu Mutava
Citation:	MOHAWK LIMITED V LEO INVESTMENT LIMITED & ANOTHER[2012]eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><b>PLEADINGS- APPLICATION TO SET ASIDE AN ARBITRATION AWARD</b></p> <p style="text-align: center;"><b>Reported by Njeri Githang'a</b></p> <p><b>Issue</b></p> <p style="padding-left: 40px;">i. Whether a Chamber Summons application to set aside an arbitration award can be termed as a pleading capable of being struck out</p> <p><i>Civil Practice and Procedure-pleadings-nature of pleadings –application for setting aside an arbitral award-whether a Chamber Summons application to set aside an arbitration award can be termed as a pleading capable of being struck out -Civil Procedure Rules, Order 2 Rule 15</i></p> <p><b>Held:</b></p> <p style="padding-left: 40px;">1. Pleading includes a petition or summons, and the statements in writing of the claim</p>

	<p>or demand of any plaintiff and of defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant.</p> <p>2. Chamber Summons application seeking to set aside an arbitration award does not answer to the definition of “pleading”. The application is neither a Plaint nor a Defence and neither is it a reply to either. Such an application cannot therefore be considered for striking out under any of the grounds stipulated in Order 2 Rule 15 of the Civil Procedure Rules.</p> <p><i>Preliminary Objection allowed</i></p>
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 295 of 2008**

**IN THE MATTER OF: THE ARBITRATION ACT, 1995**

**AND**

**IN THE MATTER OF: ARBITRATION**

**BETWEEN**

**MOHAWK LIMITED..... CLAIMANT**

**AND**

**LEO INVESTMENT LIMITED.....1<sup>ST</sup> RESPONDENT**

**R.S. GILL T/A GILL CONSULT.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Chamber Summons application dated 4<sup>th</sup> October 2011 and brought under Section 32(2) and 35 of the Arbitration Act, 1995 and Rules 42(2) and 7 of the Arbitration Act, the 1<sup>st</sup> Respondent applied to this court for orders that the arbitration award of Hon. Justice E. Torghbor dated 11<sup>th</sup> May 2011 be set aside. The application was based on grounds set out on the face of it and on facts deponed in a supporting affidavit sworn by Rahim Chatur, a director of the 1<sup>st</sup> Respondent.

2. By a Notice of Motion application dated 17<sup>th</sup> May 2012 and expressed to be brought under Order 2 Rule 15(1)(b)(c) and (d) of the Civil Procedure Rules 2010, the Plaintiff applied for orders that the 1<sup>st</sup> Defendant/Respondent's Chamber Summons The Application before me is brought by way of a Chamber Summons dated 4<sup>th</sup> October 2011 aforesaid be dismissed and/or struck out with costs on grounds, *inter alia*, that the same is frivolous, scandalous and/or vexatious and further that the same was meant to prejudice, embarrass and delay just and expeditious determination of the action in the matter.

3. In response to the said Notice of Motion of 17<sup>th</sup> May 2012, the 1<sup>st</sup> Defendant/Respondent filed a Notice of Preliminary Objection dated 5<sup>th</sup> June 2012 supported by a replying affidavit of Okongo Omogeni sworn and filed on the same day. The objection was premised on the following grounds:

1) *The Chamber Summons application dated 4<sup>th</sup> October 2011 was not a pleading over which Order 2 Rule 15(a)(b)(c) and (d) of the Civil Procedure Rules, 2010 could be invoked.*

2) *The application was bad in law as it did not fall within the ambit of Rule 7 of the Arbitration Rules.*

3) *The application on the whole was misconceived, bad in law and premised on erroneous principles of law.*

4. Both parties filed rival written submissions in respect of the Notice of Preliminary Objection.

5. I have considered the Notice of Preliminary Objection as guided and informed by the written submissions by counsel for the parties.

6. In the case of ***Mukisa Biscuit Manufacturers Company Limited vs. West End Distributors Limited (1969) E.A. 696***, the court made it succinctly clear that a preliminary objection should raise pure points of law. The Notice of Preliminary Objection filed by the 1<sup>st</sup> Defendant/Respondent is supported by a replying affidavit sworn by Mr. Okongo Omogeni, its counsel. An affidavit necessarily depones to facts hence I will not venture into looking at what the replying affidavit depones to in the context of the present application. I will merely consider the points of law raised in the Preliminary Objection.

7. The first point of law arising is whether a Notice of Motion application can be brought under Order 2 Rule 15 (a),(b),(c) and (d) of the Civil Procedure Rules, 2010 seeking to strike out a Chamber Summons application. My view on this point is that Order 2 of the Civil Procedure Rules as a whole deals with pleadings. The Order is titled "Pleadings Generally". The marginal note to Order 2 Rule 15 is titled "Striking out pleadings". The issue then is whether a Chamber Summons application can be termed as a pleading.

8. The Civil Procedure Act defines "pleading" as follows:

***"Pleading includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff and of defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant".***

9. The 1<sup>st</sup> Defendant/Respondent's Chamber Summons application dated 4<sup>th</sup> October 2011 seeking to set aside an arbitration award does not in my view answer to the definition of "pleading" reproduced above. The application is neither a Plaintiff nor a Defence and neither is it a reply to either. Such an application cannot therefore be considered for striking out under any of the grounds stipulated in Order 2 Rule 15 of the Civil Procedure Rules. What the Plaintiff is needed to do is to file its response to the application setting out grounds upon which the application should not be allowed. I would therefore uphold the first point in the Preliminary Objection by holding that the application sought to be struck out is not a pleading capable of striking out under Order 2 Rule 15 of the Civil Procedure Rules, 2010.

10. On the next point of objection based on the contention that the of 17<sup>th</sup> May 2012 does not fall within the ambit of Rule 7 of the Arbitration Rules, my view is that Rule 7 basically requires parties to support or oppose applications seeking to set aside arbitral awards through affidavit evidence. My perusal of the application of 17<sup>th</sup> May 2012 whilst cushioned in terms seeking to strike out the application to set aside is itself misplaced as a party cannot respond to an application through a contra application. Again, I would humbly think that the Plaintiff should have more resourcefully expended the energies directed at striking out the application to set aside by filing grounds of opposition and a replying affidavit to the application. This point of objection succeeds.

11. As to the third point of preliminary objection, that is an umbrella point that sums up the legal deficiencies of the application dated 17<sup>th</sup> May 2012 identified by the 1<sup>st</sup> Defendant/Respondent as discussed above.

12. For these reasons, I am inclined to uphold the Notice of Preliminary Objection and to dismiss the Plaintiff's Notice of Motion application dated 17<sup>th</sup> May 2012 with costs to the 1<sup>st</sup> Defendant.

**IT IS SO ORDERED.**

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER 2012.**

**J.M. MUTAVA**

**JUDGE**



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