



**Oilfields Engineering and Supplies Limited v Zakhem International
Construction Ltd & another (Commercial Case E028 of 2023)
[2023] KEHC 19881 (KLR) (Commercial and Tax) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E028 OF 2023**

NW SIFUNA, J

JULY 3, 2023

BETWEEN

OILFIELDS ENGINEERING AND SUPPLIES LIMITED PLAINTIFF

AND

ZAKHEM INTERNATIONAL CONSTRUCTION LTD 1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED 2ND DEFENDANT

RULING

1. This Ruling is on the 1st Defendant's application dated 8th February 2023, that seeks to strike out the Plaintiff's Originating Summons dated 27th January 2023. By the said Originating Summons, the Plaintiff sought interim orders to preserve the sum of USD 29,308,349/80 that an Arbitrator awarded it, and which award has not yet been adopted by any Court.
2. The said amount awarded by the Arbitrator, was in settlement of Nairobi HC Comm. Case No 322 of 2019, which was referred to Arbitration, and whose claim arose from a contract the subject of the said Arbitration proceedings. On being served with the said Originating Summons, the 1st Defendant instead of filing a response filed this Application by way of a Notice of Motion, seeking to strike out the said Originating Summons, for reasons that:
 - (a) The Application having been brought by way of an Originating Summons, is fatally defective;
 - (b) This Originating Summons unlike the conventional Originating Summons, is seeking only interim orders instead of final orders, hence does not qualify as a suit in terms of Order 37 of the Civil Procedure Rules, 2010.



3. Notably also, the said Originating Summons was so slovenly drawn, that any one reading it has to exercise additional wisdom and surgical-like caution to make it out. For instance, its prayers start at prayer 8 instead of prayer one! Such that the prayers are listed beginning from prayer (8) to prayer (14). Strangely therefore it lacks prayers (1), (2), (3), (4), (5), (6), and (7).
4. Faced with both the said Originating Summons and this striking out application, this Court in an interlocutory Ruling delivered on 14th February 2023 held that 1st Defendant's Application (this one), being for striking out takes precedence over the Plaintiff's said Originating Summons. It then stayed the latter, to abide the outcome of this striking out Application.
5. This Application (the Defendant's Notice of Motion dated 8th February 2023) was later, following the directions of this Court, heard orally. With each party first filing Skeleton Arguments, and then later on the scheduled date attending to the Court, and arguing the application orally.

Analysis and Determination.

6. This Court has read the substance of the Plaintiff's Originating Summons, the 1st Defendant's Application (this Notice of Motion dated 8th February 2023, as well as the oral arguments and oral submissions by all the three parties.
7. In Kenya, the legal provision relating to Originating Summons is Order 37 of the [Civil Procedure Rules 2010](#); which are Rules made by the Rules Committee to effect [Civil Procedure Act](#) Cap 21 Laws of Kenya. Indeed, there is no such provisioning in the [Arbitration Act](#) (Act No 4 of 1995) or in its [Arbitration Rules](#) of 1997, for Origination Summons. Neither do they have a correspondence provision for Originating Summons, nor even merely mention of the word. In consequence, the procedure of commencing legal proceedings and suits by an Originating Summons as did the Plaintiff herein, is alien to Kenya's [Arbitration Act](#) and Rules.
8. Neither does the Act and Rules have provision for conservatory or preservative or interim anticipatory relief, except in terms of Section 7 (1), which provides as follows:

“It is not incompatible with an arbitration agreement, for a party to request from the High Court, before or during arbitral proceedings, an interim measure.”
9. Such an application may be made only where there is a suit and in that suit. Therefore, it cannot be a stand-alone such was done by the Plaintiff. Let me turn to the forms of making applications under the [Arbitration Act](#). These are provided for not in the Act itself, but in the Rules (The [Arbitration Rules](#) of 1997, Legal Notice No 58 of 1997).
10. Rule 2 of thereof states that applications under sections 6 and 7 of the Act shall be made by summons in the suit. The summons being referred to, is Chamber Summons and not an Originating Summons. In taking this view, I am fortified by the fact an Originating Summons commences a suit, as the parties thereto are Plaintiff and Defendant.
11. The other rules in these Rules, that provides for the form of an application are Rules 3 and 9. Rule 3 (1) provides that Applications under sections 12, 15, 17, 18, 28 and 39 of the Act shall be made by Originating Summons. This provision is clear and enumerates the provisions for which applications shall be made by Originating Summons. Rule 4 (2) provides that all applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed. The summons referred to here is a Chamber Summons. Rule 9 provides that applications under Section 36 of the Act shall be made by Chamber Summons.



12. The Rules have therefore specified the mode of making applications under the Act, and clearly specified which applications shall be by Originating Summons, and which one shall be by Chamber Summons.
13. It can be deduced therefore, all applications under the *Arbitration Act* shall be by Chamber Summons. Except by Originating Summons where they have been made under sections 12, 15, 17, 18, 28 and 39 of the Act. Some commentators have said that under the *Arbitration Act*, applications will usually be by way of Chamber Summons or in any form prescribed by the Rules made thereunder i.e currently the Arbitration Rules of 1997. Therefore, the Plaintiff's Application having been for interim relief, it is by reason of having been filed as an Originating Summons, incompetent and fatally defective.
14. The legal regime comprised by this Act and Rules, is an almost self-contained one (on substantial law and procedure), subject to the exception provided in Rule 11 of the Rules. The Rule states that "So far as is appropriate, the *Civil Procedure Rules* shall apply to all proceedings under there Rules.
15. It noteworthy also, to clarify that the word summons as used in Rule 2, 3 (2), 4 and 9, refers to a Chamber Summons and not Original Summons; and Originating Summons is contemplated as in Rule 3 (1), it has expressly been so stated. Therefore, for any application under the Act to be by Original Summons as in the instant case, the word Originating Summons has been specifically provisioned.
16. A similar semantical paradox was attempted in *M/S Pathologist Lancet Kenya Ltd v Christa Marianne Mission Hospital* [2020] eKLR, where an application had been brought by way of Originating Summons just as in the instant case. The narrative was quickly shot down by Ougo J who rejected the suggestions that the word "Summons" as used in Section 7 of the *Arbitration Act* may mean Originating Summons or Chamber summons and that is a defect in form curable under Article 159(2) of the *Constitution*.
17. The same narrative had over 40 years ago arisen in *Shashikani Badian v Shree Santan Dharam Sabha* [1978] eKLR, where the application relating to arbitration proceedings had similarly been brought by way of Originating Summons. In dismissing the same for defect in form, Miller J (as he then was) held that the *Arbitration Act* and Rules relate to a special type of proceedings. He stated that an application brought under the *Arbitration Act*, must be brought using the procedure/form prescribed by the Act and its Rules.
18. Similarly, Chitembwe J in a recent case; *Revival Holdings Ltd v Graude Afrique Consulting* [2021] eKLR, struck out with costs an application that had been brought by a Notice of Motion instead of Chamber Summons as envisaged by Rule 2 of the *Arbitration Rules 1997*. Indeed, applications for interim orders under the *Arbitration Act* of 1995 are provided for under Section 7 of the Act as read with Rule 2 of the *Arbitration Rules 1997*.
19. Now finding myself in similar case, I have no difficulty at all agreeing with the said course of action adopted by my two brothers and my sister, as well as their accurate interpretation of the law. To this, I add that the failure to comply with a mandatory and unambiguous mandatory requirement of the law such as the one quoted hereinbefore, cannot be passed off or glossed over or wished away as a mere procedure error or defect of form only. In appropriate circumstances such as these it is certainly fatal and has to result in a dismissal or a striking out.
20. It is high time Advocates in this country upped their proficiency and mastery in the area of drafting pleadings. It is their mastery in pleadings that will set them apart from the ordinary folk that comprises their loyal or often unsuspecting pool of clients. It is really sad when a represented litigant's downfall in a suit, results from draftsmanship slovenliness of pleadings. This may in the end of slow down the proverbial Wanjiku's uptake or even demand for the much-needed legal services.



21. Before I make my final orders, I need to comment on something that arose at the preliminary stage of this Application. Learned Senior Counsel Ahmednasir Abdullahi for the 1st Defendant, had only filed this Application as a response to the Plaintiff's subject Originating Summons. At the status conference that the Court held, he insisted that this application was a sufficient response thereto. Even though this Court overruled him and he later filed a preliminary objection as a response, I have for avoidance of ambiguity deemed it fit to revisit that issue and finally rest it. In *Mohawk Limited v Leo Investment Limited & another* (2012) eKLR, Mutava J (as he then was) similarly held that a party cannot respond to an application through a contra application.
22. The final orders I make herein are that the 1st Defendant's application dated 8th February 2023 is hereby allowed, in terms that this Court having found the Plaintiff's Originating Summons herein dated 27th January 2023 incompetent and fatally defective, the same is hereby struck out, with costs to the 1st Defendant.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF JULY 2023.

PROF. NIXON SIFUNA

JUDGE

Delivered virtually in the virtual presence of:

Mr. Odero with Mr. Miiri, for the Plaintiff.

Mr Ahmednasir SC with Ms. Asli, for the 1st Defendant.

Mr. Kimanzi, for the 2nd Defendant.

Dennis - Court Assistant.

