



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 124 OF 2010**

**M.K.....PLAINTIFF**

**VERSUS**

**SEVENTH DAY MEDICAL HEALTH SERVICES &  
ANOTHER.....DEFENDANTS**

**Coram: Mwera J**

**Luseno for plaintiffs**

**Ojuku for defendants**

**Njoroge, court clerk**

**RULING**

The chamber summons dated 10/08/10 filed by the plaintiff under the now repealed Order VI rule 13 (b) (c) (d) of Civil Procedure Rules and section 3A of Civil Procedure Act sought orders to strike out the defence dated 13.4.10, have liability entered against the defendants jointly and severally then direct as to the assessment of damages.

With affidavits filed, the parties submitted. When highlighting the submissions it transpired that the parties had at no time attempted to settle the suit and so they were given 7 days w.e.f. 9.3.11 to endeavour to do so. They were unable to settle and now here follows a determination of the said application of 10/08/10.

The claim here generally is that the 1<sup>st</sup> defendant ran some medical facility where it employed the 2<sup>nd</sup> defendant to carry out activities including testing people for HIV status. The plaintiff went there, was tested and given a “positive” certificate. He got a second test that was negative. The test by the defendants was therefore claimed to have been false, prejudicial and wrong. The plaintiff suffered prejudice to his person and he lost a job.

The defendants whom the relevant medical board found not to have been certified to carry out the test

complained of, came by some shortcomings on the part of the 2<sup>nd</sup> defendant, and did a report to that effect. So the plaintiff saw the defendants liable with no need to prove this at the trial – hence the chamber summons.

The defendant denied all the claims put up by the plaintiff in rather a plain and vague manner as opposed to the plaintiff's specific averments. In essence they maintained that all they did was regular, proper and the plaintiff seemed contended. And that the plaintiff should prove every contention.

While the plaintiff asserted that the issue of liability was settled when the Medical Board found as it did in its report to the effect that the defendant should not have carried out the HIV test in the first place because of want of certification qualified personnel and equipment, and so negligent in what transpired, the defendants maintained that their:

**“..... Defence is meritorious and only seeks to state their part of the story ..... the defendants were not negligent ..... they ..... exercised due care and skill in the performances of their work.**

It was added that the plaintiff's claim about the competence of the 2<sup>nd</sup> defendant and capacities to carry out the HIV test can only be canvassed at a trial.

Striking out a pleading is a serious if not draconian step a court should take only in clear cases otherwise courts should ever be in a position to hear out the parties to a dispute. That is the fundamental duty of the courts and this court is alive to it. This court is also alive to the principle that a party should proceed to defend a claim even if it has one triable point only. And equally fundamental to litigation is the aspect that cases be tried as soon as possible saving on time, costs etc so that outcomes are known without delay and litigation comes to an end.

With all the foregoing and having gone through the defence and the submission on the part of the defence, this court is satisfied that it has not raised any issue worth going to trial.

On the other hand the Medical Board report which was not appealed against or put on review, is clear on its findings on this aspect. To have litigation proceed expeditiously this court considers the issue of liability against the defendants disposed of. It will not serve any purpose to prolong the matter by taking evidence on the board's report and having the plaintiff go through the stress again.

Having so found the parties may take a date to have damages herein assessed.

Prayers granted.

Delivered on 6/4/11.

**J. W. MWERA**

**JUDGE**