

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 528 of 1998

1 LAWI DUDA

2 ABDULAZIZ AL-KATHIRI AND 20 OTHERS.....PLAINTIFFS

VERSUS

BAMBURI CEMENT LIMITED.....DEFENDANT

R U L I N G

The defendants application dated 5th April 2006 seeks the dismissal of this suit on the ground the plaintiffs having been informed of the termination of their services and having voluntarily accepted the terminal dues paid to them in full and final settlement the filing of this suit thereafter is an abuse of the process of this court.

It is brought under Order 6 Rule 13 (1) (c) and (d) of the Civil Procedure Rules and is supported by the affidavit Epimach Martin, the Human Resources Manager of the defendant which I have read.

The application is strongly opposed by the defendants who have filed a replying affidavit which I have also read.

The powers given to the court to strike out pleadings under Order 6 Rule 13 of the Civil Procedure Rules, sometimes referred to as summary procedure, are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with great care and circumspection and only in the clearest of cases as regards both the facts and the law. It should only be adopted when it can be clearly seen that the claim is on the face of it is obviously unarguable and incontestably bad. The procedure should not be resorted to in complicated cases requiring investigation and consideration of several documents. Authorities on this are legion. Suffice it to cite the Court of Appeal decision in **DT Dobie & Company (Kenya) Ltd –VS- Muchina [1982] KLR 1**.

The plaintiffs' claim is that they were all employees of the defendant under permanent and pensionable terms. In 1998 the defendant terminated their services and required them to leave the company premises within 5 days. The termination letters show that. In those circumstances, with no money they say they had no choice but to sign the discharge vouchers accepting the payment offered as being in full and final settlement.

If that was all I may have been persuaded to find that they had no case. But that is not all. They state that their services were terminated under a scheme which had been mooted and provided for *inter alia* a notice period of 6 months and that those of their colleagues whose services were terminated in 1996, 2003 and 2004 were given better terms. The terms according to them were supposed to apply equally across the board. The defendant did not refute those allegations and if true they smuck of discrimination.

These are in my view serious triable issues. I cannot therefore without the benefit of evidence accept the defendants contention that the plaintiffs' services were terminated in accordance with their respective contracts of employment as the termination letters in any case make no reference to the termination clause in those contracts. The plaintiffs' claim cannot therefore be said to be pikestaff and unarguably or uncontestably bad to require striking out. To the contrary it is the defendants application which is unmeritorious and is hereby dismissed with costs.

DATED and delivered this 9th day of February 2007

D.K. MARAGA

JUDGE