



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 73 of 2007

JETLINK EXPRESS LIMITEDPLAINTIFF

VERSUS

EAST AFRICAN SAFARI AIR EXPRESS LIMITEDDEFENDANT

R U L I N G

Jetlink Express Limited, the Plaintiff herein has brought a Chamber Summons under **Order XXXIX Rule 2** of the Civil Procedure Rules **Section 3A, 63 (c) and (e)** of the Civil Procedure Act, seeking *inter-alia* an interlocutory injunction restraining the Defendant, East African Safari Air Express Limited, its servants or agents from, commencing, advertising or otherwise prosecuting any winding up petition or cause against the Plaintiff in relation to a disputed business debt of US Dollars 902,143. The application was initially supported by an affidavit sworn by the Plaintiff's Managing Director Captain Elkana Mugalavai Aluvale on 15th February 2007 to which was annexed a total of 13 documents.

This application was certified as urgent on the 15th February 2007 and an ex-parte interim injunction issued pending the inter-parte hearing of the application which was scheduled for 26th February 2007. On that date however the matter was not listed for hearing but both counsels for the parties appeared before the judge and the Chamber Summons was fixed for hearing on the 20th March 2007 and the interim orders issued on 15th February 2007 were extended to 20th March 2007.

On the 13th March 2007, the Defendant filed grounds of opposition to the application under **Order 50 rule 16** of the Civil Procedure Rules. The Defendant also filed two replying affidavits one sworn by Edward Makori an accountant and the other by George Kivdyo the General Manager of the Defendant. On 15th March 2007, the Defendant filed another replying affidavit sworn by Kieran Day an accountant and Director of Business Advisory Group Limited. On 16th March 2007 the Defendant filed yet another replying affidavit sworn by Adam Craig Ogden the Managing Director of the Defendant's Company. This was an 89 paragraph affidavit to which was annexed a bundle of exhibits. The Defendant served the Plaintiff with a notice under **Order XVIII rule 2 (1)** of the Civil Procedure Rules requiring the attendance of captain Elikana Mugalavai Aluvale for purposes of cross examination on his affidavit filed in court on 15th February 2007. In turn the Plaintiff also served a notice on the Defendant under the same rules, for leave to cross examine Adam Craig Ogden on his affidavit sworn and filed on the 16th March 2007.

The applicant took issue with the grounds of opposition filed by the Defendant and the 4 replying affidavits contending that the same were filed in contravention of **Order 50 Rule 16 (1)** of the Civil

Procedure Rules. This was subject of a ruling delivered by this court on the 30th March 2007 in which this court issued orders:

- 1.) Striking out the grounds of opposition filed by the Defendant.
- 2.) That the 3 additional affidavits filed by the Defendant be deemed properly filed.
- 3.) That the Applicant be at liberty to file a response to the additional affidavits within 7 days.

Pursuant to that ruling the Plaintiff filed three affidavits on 5th April 2007, the first one sworn by Kiran Patel a Director of the Plaintiff, the second one sworn by Kennedy Nalwa the Chief Accountant of Plaintiff's Company and the 3rd one, an 84 paragraph affidavit sworn by Elkana Mugalava Aluvale. Having been served with these affidavits on the 12th April 2007, the Defendant filed yet another replying affidavit sworn on 25th April 2007 sworn by Adam Craig Ogden. There were several annexures to this affidavit including 3 further affidavits sworn by Edward Makori, Thota Venkata Chellarao and George Kivdyo respectively. The Defendant's advocate also filed skeleton submission as well as a list of authorities which He intended to rely upon.

The Chamber Summons came up for hearing on 30th April 2007, during which the counsel for the Plaintiff took issue with the filing of the further affidavits by the advocate for the Defendant without any leave from the court. Counsel also took issue with the filing of the skeleton arguments contending that it was a procedure which was unknown in law. Finally Counsel complained that He was being ambushed that morning by a list of authorities served on him that morning. He therefore urged the court to strike out all these documents.

The advocate for the Defendant admits that a list of authorities was served on the Plaintiff's advocate that morning but explains that another list had been served on the Plaintiff's advocate 3 weeks earlier which contained 15 of the authorities contained in the current list and therefore only 4 of the authorities were not included in the earlier list.

As concerns the skeleton submissions counsel for the Defendant submitted that the court has powers under **Order 50 rule 18** of the Civil Procedure Rules to direct the proceedings and the skeleton submissions were simply intended to shorten the time taken in arguing the application and therefore the applicant was not going to be prejudiced in any way.

As regards the filing of additional affidavits, it was submitted that the applicant's further affidavit which was filed in court on 5th April 2007 was only served on the Defendant's advocate on 12th April 2007. Since issues were raised and allegations made in the further affidavit which would be deemed accepted if not responded to, the Defendant found it necessary to file a further affidavit which it intended to seek leave of the court to have deemed as properly filed. Referring to the case of **Frank Fernandes vs S. N. Murray Wilson HCCC 253 of 1999**, Counsel for the Defendant submitted that the court could not ignore documents which are already on record. He therefore urged the court to grant leave to have the affidavits filed and also to deem the same as properly filed.

Before I deal with the issues which have been raised by counsels, I wish to address some "side-shows" which have apparently taken place. While this matter was awaiting my ruling, the Defendant's advocate by a letter dated 10th May 2007 addressed to the Deputy Registrar of the High Court forwarded two authorities observing that He was permitted under **Rule 74 (4)** of the Court of Appeal Rules to bring these authorities to the attention of the court. As would be expected the advocate for the Plaintiff wrote a letter vehemently objecting to this approach and further pointing out that the authorities forwarded have no bearing to the application pending before this court. I concur entirely with the Applicants' advocate, that it is wrong for a party to make submissions to the court through correspondence. I know of no rule that allows for such a procedure. I have perused **Rule 74 (4)** of the Court of Appeal Rules that was quoted by the Defendant's advocate, but find that it deals with notice of appeal and does not as alleged by the Defendant's advocate allow for filing of additional submissions by way of correspondence through the

Registrar.

The oral application having been argued before me and parties having submitted and closed their arguments, it now remained for the court to make its ruling. During that process the court cannot consider or accept other additional submissions or authorities availed later to the court by one of the parties, without leave of the court and without the other party having an opportunity to respond to the same. It is true that the letter forwarding the submissions was copied to the Defendant's advocate and that the advocate did respond to the letter. That however does not in any way validate the procedure adopted. For these reasons I decline to look at the authorities forwarded to the court after the closing of arguments. The same are accordingly struck off from the record.

As regards the issues raised during the oral application, I have compared the list of authorities filed by the Defendant on 20th March 2007 and the list filed by the Defendant on 30th April 2007 I find that the lists are similar except for 4 additional authorities added on the list filed on 30th April 2007, which ideally are the ones which ought to have been contained in that supplementary list. The supplementary list of authorities ought not to have been filed on the morning of the hearing of the application. However the application not having proceeded to hearing, the Plaintiff has not suffered any prejudice and there is no justification for the same being struck off.

With regard to the skeleton submissions, it is true that there is no specific rule which provides for the filing of skeleton arguments before the hearing of an application. That does not however mean that the filing of skeleton arguments is an unacceptable procedure. Indeed there is no rule in our Civil Procedure Rules providing for the filing of written submissions and yet the procedure has consistently gained root, with approval of the courts particularly in the Civil Courts where both parties are represented.

The bottom line is that filing of skeleton arguments does not prejudice any party in any way. It assists the court by clearly bringing into focus the issues and the parties submissions thereon. This is desirable particularly in a suit such as this one where numerous documents and affidavits have been filed and there is a risk of the real issues being clouded.

Moreover as submitted by the defence counsel the court has powers under **Order 50 Rule 18** of the Civil Procedure Rules to limit the time allowed for submissions by the parties or their advocate. In my considered view it is within the court's discretion in exercise of powers under **Order 50 Rule 18** of the Civil Procedure Rules, to order parties to file skeleton arguments so as to shorten the time taken in arguing the application before the court. I cannot by any stretch of imagination see any prejudice that is likely to be suffered by any party by the exercise of such a procedure. I therefore find no good reason to strike out the skeleton submissions filed by the Plaintiff. To the contrary I order that the Plaintiff's counsel shall also file skeleton arguments to facilitate the convenient hearing and speedy disposal of the application dated 15th February 2007.

As regards the issue of filing additional affidavits, it is evident that both parties herein have crossed the line. The Plaintiff's advocate was granted leave to file a response to the Defendant's additional affidavits. In my understanding the Plaintiff had leave to file one further affidavit and not 3 affidavits as He purported to do. The additional affidavits have therefore been filed without leave of the court.

The Defendant on the other hand also filed a further replying affidavit in response to the Plaintiff's further affidavits. This was without leave of the court. Although the defence counsel explains that the Plaintiff's advocate jumped the gun as He (i.e defence counsel) intended to seek the leave of the court for the filing of the further replying affidavit, it is evident that the Defendant had no further right of reply. Obviously there has to be an end to the filing of affidavits. The normal procedure provided under **Order 50 rule 16** of the Civil Procedure Rules is that the Respondent replies to an application after being served and if need be the applicant may seek leave to file a supplementary affidavit. That is the leave that was granted to the Plaintiff on 30th March 2007. This court magnanimously granted leave to the Defendant to file 3 additional replying affidavits. The Defendant had therefore all the opportunity to lay all the facts on the table. It does appear to me that the Defendant simply wants to have the last word on the affidavit evidence. There is however no provision for the Respondent to file any further affidavits after the

supplementary affidavit filed by the Applicant. For these reasons, I will strike out the further replying affidavit filed by the Defendant.

The upshot of the above is that I do make orders as follows: -

- 1.) *The application to strike out the list of authorities and the skeleton submissions filed by the Defendant is rejected and same deemed to be properly on record.*
- 2.) *The Plaintiff's advocate to file and serve the Plaintiff's skeleton arguments in respect of application dated 15th February 2007 within 7 days from the date hereof.*
- 3.) *The Plaintiff's advocate to withdraw 2 of the 3 further affidavits filed by him leaving only one for the record.*
- 4.) *The Defendant's further replying affidavit filed on 25/4/07 is hereby struck out.*
- 5.) *In view of the orders now made case shall be mentioned before the presiding Judge on 23/5/07 for fixing of a date for the hearing of application dated 15/2/07.*

Dated, signed and delivered this 21st day of May 2007.

H. M. OKWENGU

JUDGE