

REPUBLIC OF KENYA

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

Civil Suit 132 of 2007

DAVID MACHARIA NJUKIRA.....PLAINTIFF/APPLICANT

VERSUS

1. TRIDENT ENTERPRISES LIMITED.....1ST DEFENDANT/RESPONDENT

2. CMC AVIATION LIMITED.....2ND DEFENDANT/RESPONDENT

3. GEMINI RELIEFS SUPPORT LIMITED.....3RD DEFENDANT/DEFENDANT

RULING

By a chamber summons dated 17th August 2007, the plaintiff/applicant seeks to have the 1st defendant's statement of defence struck out of the record and judgment entered against the 1st defendant as prayed in the plaint.

It is contended that the defence filed by the 1st defendant is frivolous and calculated to delay or preclude the plaintiff from his lawful entitlement. It is further contended that the 1st defendant was served with a notice to admit facts on 6th July 2007, and has failed to respond to the said notice.

The application is supported by an affidavit sworn by David Macharia Njukira, in which it is deponed that 1st defendant is undergoing a period of financial and administrative hardships and therefore, it is necessary that the application be determined expeditiously.

The 1st defendant opposes the application. It is contended that the 1st defendant has filed a defence which extensively responds to plaintiff's case, and that this was not a plain and obvious case such as would be appropriate for summary judgment. **Civil Appeal Number 187 of 1994, Achkay Holdings Limited vs N. M. Shah t/a Braidwood College,** was relied upon.

Regarding the failure of the defendant to respond to the notice to admit facts, it was submitted that, that was not a ground for striking out the defence but can only lead to a penalty in costs.

In its statement of defence filed on 13th April 2007, the defendant has not only denied the plaintiff's claim, but has raised various issues, such as whether 2nd and 3rd defendants are its successors or assigns, whether the plaintiff executed his duties as line pilot with diligence, or whether he was guilty of gross misconduct and whether plaintiff is entitled to any general damages.

In my considered view, this defence raises serious issues and there is no particular paragraph in the defence that can be said to be frivolous or vexatious. The allegation that the plaintiff is undergoing financial hardship even if proved to be true cannot be a ground for striking out a defence under Order VI Rule 13 (1), (b), (c) and (d) of the Civil Procedure Rules. I concur with the submissions of the defence counsel that under Order 12 rule 4 of the Civil Procedure Rules, failure to admit facts is not a ground for striking out pleadings but can only lead to penalty in costs.

For the above reason, I find no merit in the chamber summons dated 17th August 2007, and therefore

dismiss it with costs.

Dated, signed and delivered this 28th day of November 2007.

H. M. OKWENGU

JUDGE