



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**

**Civil Suit 245 of 2005**

**TREADSETTERS TYRES LIMITED.....PLAINTIFF**

**VERSUS**

**A.A. KAWIR .....DEFENDANT**

**R U L I N G**

The plaintiff Notice of Motion application dated 26th August 2005, is brought under Order VI Rule 13 (1) (b), (c) and (d) and Order XXXV Rule 1 of the Civil Procedure Rules.

The plaintiff seeks the striking out of the defendant's defence, and the entry of judgment for the plaintiff as prayed in the plaint.

The plaintiff by its plaint dated 12th April 2005, describes the defendant as an adult male and pleads that the defendant purchased various goods from the plaintiff resulting in a debt of kshs 4, 629, 290. 20. That the defendant part paid the said amount to the plaintiff, of kshs 1, 065, 200, which then left a balance of kshs 3, 564, 090. 20. That further to an agreement between the parties, the interest applicable to that debt was 9% from 1st April 2004 until payment in full.

The defendant on being served with the summons and plaint filed, through counsel, a memorandum of appearance and a defence.

In his defence, the defendant denied his description, in paragraph 2 of the plaint. The defendant denied the debt pleaded in the plaint then pleaded as follows: -

**“The defendant contends that the alleged claim by the plaintiff is disputed, flat, baseless, oppressive financially to the defendant. The defendant states that the payments made by it to the plaintiff was to the extent of undisputed claim as per the goods received and acknowledged in full and final settlement of account with the plaintiff and is put into strict proof thereof.”**

The plaintiff annexed to the Notice of Motion an agreement between the defendant and a debt collection company, acting on behalf of the plaintiff, whereby the defendant is described as A.A. Kawir and where the defendant acknowledged being indebted to the plaintiff for the amount claimed in the plaint. The plaintiff also annexed the defendant's statement of account with the plaintiff.

The defendant's defence seen in the defence filed herein and in the replying affidavit is that the defendant was sued wrongly, that the plaintiff ought to have sued A.A. Kawir Transporters Company Ltd. To back this line of defence the defendant annexed a letter written by Department of Registrar General, which

confirmed the directors of 'A.A. KAWIR TRANSPORT COMPANY LIMITED'. That letter is dated 18th May 2004. The letter was written after the defendant acknowledged the plaintiff's debt by the agreement marked '**MGI**' in plaintiffs exhibits.

Perhaps, most importantly, the defendant failed to exhibit evidence of when the said company was incorporated.

I have examined the defendant's defence and I find that the same is frivolous and vexatious, because with one breath it pleads that the defendant has been wrongly sued, with the other it pleads that the defendant paid the plaintiff to the extent of undisputed claim. I also accept that the defendant, through his counsel, having filed a memorandum of appearance, which was not under protest, accepted that he was rightly sued. The defendant's allegation that he is wrongly sued can only be said to be an act of 'nitpicking' in an effort to create triable issues.

The plaintiff relied on the cases PABECO ENTERPRISES LIMITED VS PAN AFRICAN BUILDING CONTRACTORS LTD HCC NO. 362 OF 1998 (Unreported), where the court found the defendant's defence to have mere denials and the same was dismissed; FIRST AMERICAN BANK OF KENYA – VS – 1. YUSUF SUMAR JUSAB UARVANI 2. AYUB YUSUF SUMAR HCCC NO. 8 OF 1999 (Unreported) where the court found that the defendant had failed to satisfy the onus of burden to justify leave being granted to defend.

The defendant relied on the cases AUTOTRAVEL LTD – VS – ABC MACHINERY MANUFACTURERS HCCC NO. 2558 OF 1998 (Unreported) and TRUST BANK LTD – VS – SANJHIRA ENTERPRISES LTD AND OTHERS (Unreported), where the courts found that a defendant had a right to defend a suit where it shows a 'slight issue' to go to trial.

I find that the defendant's defence is frivolous, and I find the defendant has failed to show by pleadings or affidavit why he should be granted leave to defend. I accordingly find the plaintiff's application is merited. The orders of this court are: -

- (1) That the defendant defence dated and filed on 30th May 2005 is hereby struck out.**
- (2) That judgment is hereby entered for the plaintiff as prayed in the plaint.**
- (3) That the plaintiff is granted costs of the Notice of Motion dated 26th August 2005.**

Dated and delivered this 1st day of December 2005.

**MARY KASANGO**

**JUDGE**