

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 154 of 2008

EAST AFRICAN EDUCATION PUBLISHERS LTD..... PLAINTIFF

VERSUS

THREE M MEDIA PUBLISHING LTD.....DEFENDANT

RULING

Before me is the plaintiff's notice of motion made pursuant to the provisions of Order VI Rule 13(1) (c) and (d) of the Civil Procedure Rules seeking the striking out of the defence filed by the defendant and thereafter the entry of judgment in the plaintiff's favour as prayed in the plaint. The plaintiff sought several orders against the defendant in its plaint. The plaintiff sought, *inter alia*, a declaration of the court that the defendant had infringed the plaintiff's right to exclusively distribute certain text books in Kenya. It further sought to be paid damages on what it claimed was infringement of its exclusive distribution rights on account of loss of profits. In the grounds in support of its application, the plaintiff stated that the defendant had admitted vide its letter dated 22nd November 2007 that the plaintiff was the sole authorized distributor of the text books in Kenya. The plaintiff was of the view that the defendant did not have a *bona fide* answer to the plaintiff's suit and had in fact admitted liability by the said letter. The application is supported by the annexed affidavit of Kiarie Kamau, the editorial manager of the plaintiff.

The application is opposed. The defendant's chairman, Barrack O. Muluka swore a replying affidavit in opposition to the affidavit. He deponed that the suit against the defendant was untenable in law and incurably defective. He deponed that the plaintiff's application did not have merit since the defence filed raised triable issues which ought to be considered on its merit. The defendant was of the view that the letter that the plaintiff relies on to hold the defendant liable was not an admission and therefore could not be used by the plaintiff to obtain judgment against the defendant. He reiterated that the defendant had a contract with a publishing company in United Kingdom which allowed it to market the text books in question. In the premises therefore, he urged the court to dismiss the application with costs.

At the hearing of the application, I heard rival submissions made by Mr. Ogunde for the plaintiff and by Mr. Oluoch for the defendant. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully considered the arguments made in this application. The issue for determination by this court is whether the plaintiff established a just case for the striking out of the defence filed by the defendant. The principles to be considered by this court in determining whether or not to strike out any pleadings are well settled. In **DT Dobie & Co (K) Ltd vs Muchina [1982] KLR1** at page 9, Mandan JA held as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (Supra)."

In **Kenya Airways Ltd vs Classical Travel and Tours Ltd Nairobi HCCC No.694 of 2003** (unreported) Emukule J held at page 17 of his ruling stated as follows:

*“So apart from all prescribed rules and orders the court has an inherent jurisdiction to stay or dismiss every action which is an abuse of its process or is frivolous or vexatious and to strike out all pleadings which are shown to be frivolous or vexatious. This inherent jurisdiction is distinct from the powers of the court conferred by the rules but is a most important adjunct to those powers because the powers under Order VI Rule 13 are coercive in operation and are exercised by summary process, that is to say, without the benefit or pre-trial discovery or other pre-trial processes, and without a trial, that is also, without hearing the evidence of witnesses examined and cross-examined orally and in open court, the court exercises those powers only with the greatest care and circumspection, and only in the clearest of cases. As Fletcher – Moulton. L.J. said in **Dyson vs Attorney General [1911] 1KB 410** at page 419:*

“To my mind it is evident that our judicial system would never permit a plaintiff to be evident from the judgment seat in his way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

This statement equally applies to a defence”

In the present application, it is the plaintiff’s case that the defendant had usurped its position as the sole distributor in Kenya of some text books published by Heinemann Education Publishers Ltd and whose agent in England is Harcourt Education Ltd. According to the plaintiff, it had entered into an agreement with the said publishers whereby it was appointed as the sole authorized distributor in Kenya of certain text books, including such popular texts as *“The River Between”* and *“Weep Not Child”* by Ngugi Wa Thiong’o and *“Arrow of God”* by Chinua Achebe. It was the plaintiff’s case that in breach of its exclusive mandate to distribute the said text books, the defendant had purported to offer the same text books to the market under the guise that it also had authority from the publishers to distribute the same text books. The plaintiff applied to strike out the defence of the defendant on the ground that the same did not disclose a *bona fide* answer to the plaintiff’s claim. In support of its application, the plaintiff annexed a letter written by a subsidiary of the defendant by which the defendant is allegedly said to have acknowledged the exclusive right of the plaintiff to distribute the said text books. The defendant, as is expected in such cases, is of a contrary view. It is the defendant’s case that its defence raises triable issues which ought to be referred to full trial to be heard and determined on merits.

It was clear to this court that for the plaintiff to establish that it has a water tight case that cannot be challenged by the defendant, it has to place all material evidence before the court that would establish beyond peradventure that indeed the defence ought to be struck out as it did not merit being retained on record. Unfortunately in this application, apart from the single letter allegedly written by the defendant’s subsidiary acknowledging the plaintiff’s exclusive right of distribution of the particular text books, the plaintiff did not present any evidence in court to support its claim that it had exclusive distribution rights from the publishers. The plaintiff cannot assume that the court would reach such a drastic determination to strike out pleadings filed by a defendant in the absence of cogent evidence.

I agree with the defendant that the correspondence annexed to the plaintiff’s application seeking the striking out of the defence could have been produced out of its context. It is trite that for the court to hold a party liable on account of its alleged admission of liability, such admission must be plain and obvious. The plaintiff would like this court to consider the letter in question as being, without doubt, an unequivocal admission by the defendant. This court has discretion to consider whether such a letter amounts to an admission. As was held by the Court of Appeal in **Agricultural Finance Corporation vs Kenya National Assurance Co. Ltd (in receivership) [1997] eKLR** at page 7:

*“...A judgment on admission is not a matter of right; rather it is a matter of discretion of the Court and where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion. In the case of **CHOITRAM V NAZARI (1982-88) 1KAR 437** Madan J.A (as he then was) said at pages 441 to 442:*

‘For the purposes of O.X11 r.6 admissions have to be plain and obvious, as plain as a spikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language

used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations on the definite contract. It matters not even if the situation is arguable, even if there is substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis.”

In the present application, it is evident that the said letter cannot by any stretch of imagination be said to be a plain and obvious admission by the defendant in the absence of other evidence. It was clear to this court that the issues in dispute between the plaintiff and the defendant cannot be resolved other than on full hearing. The defendant raised weighty issues in its defence that can only be determined in a fully trial.

It is obvious from the foregoing that the plaintiff's notice of motion dated 20th May 2008 is for dismissal. It is hereby dismissed with costs.

DATED AT NAIROBI THIS 8TH DAY OF JULY 2009.

L. KIMARU

JUDGE