



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E316 OF 2019**

**THE INTERNATIONAL AIR TRANSPORT ASSOCIATION....1ST PLAINTIFF**

**SAHAM ASSURANCE COMPANY LIMITED.....2ND PLAINTIFF**

**-VERSUS-**

**HANIIF TOURS & TRAVEL AGENCY LIMITED.....1ST DEFENDANT**

**MOHAMED HASSAN MOHAMUD.....2ND DEFENDANT**

**MOHAMED KASSIM MOHAMUD.....3RD DEFENDANT**

**J U D G M E N T**

1. Before Court is a Notice of Motion dated 28/02/2020 brought under **sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 15(1)(b), (c) and (d) of the Civil Procedure Rules**. The Motion seeks the striking out of the defendants' defence dated 30/10/2019 and for judgment to be entered as prayed for in the Plaintiff.
2. The Motion was supported by the affidavits of **Sidy Gueye** and **Karen Njagi** sworn on 28/2/2020. The said affidavits reiterated what the plaintiffs had pleaded in the plaint and referred to the plaintiffs bundle of documents on record.
3. The same was opposed vide the replying affidavit of **Isaac Munyao** sworn on 19/10/2020. He also reiterated the averments in the defence and contended that the defendants' statement of defence raises triable issues and should not be struck out.
4. By their plaint dated 28/08/2018, the plaintiffs alleged that vide a Passenger Sales Agreement dated 29/7/2011 between the 1<sup>st</sup> plaintiff and the 1st defendant was appointed a travel agent for the Carrier for the sale of air tickets in Kenya and elsewhere. The 1<sup>st</sup> defendant would issue a Traffic Document immediately it received money by the Agent for passenger air transportation or ancillary services sold under the agreement and thereafter forwards the remittance to the Carrier.
5. By a deed of indemnity between the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, the 2<sup>nd</sup> plaintiff was to provide an insurance cover for the 1<sup>st</sup> defendant by virtue of the Passenger Sales Agency Rules of IATA. In return, both the 2<sup>nd</sup> and 3<sup>rd</sup> defendant would keep the 2<sup>nd</sup> plaintiff fully indemnified against all actions, proceedings, claims and losses arising from the default of the 1<sup>st</sup> defendant.
6. In breach of the aforesaid agreement, the 1<sup>st</sup> defendant failed and/or neglected to surrender or furnish payments received from the ticket sales during the period of October, November, December 2014 and January 2015. In this regard, the 1<sup>st</sup> plaintiff contended that the sum not surrendered by the 1<sup>st</sup> defendant amounted to Kshs. 11,001,088.65 and USD 843,674.37. Out of this a sum of USD 110,494.50 and Ksh.90,000/- was paid leaving a sum of Kshs. 10,911,088/65 and USD 733,179/89 which the plaintiffs claimed.
7. In their defence, the defendants denied having refused or neglected to furnish payments received as alleged. They contended that they had remitted the sums claimed when the same fell due. That however, due to the fact that the 1<sup>st</sup> plaintiff revoked its license, the defendants lacked business and could not remit the proceeds collected.
8. In this regard, the defendants disputed the amount claimed and contended that, due to the fact that 3% premium was being deducted to cater for untimely loss and liability, the plaintiffs' claim amounted to unjust enrichment. Demand of the claim was accordingly denied.
9. Although the Court directed that submissions be filed, only the plaintiffs had filed theirs as at the time of writing this ruling. The Court has considered the said submissions and the depositions on record.

10. Order 2, rule 15 of the Civil Procedure Rules 2010 provides: -\

***“1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that***

***a) it discloses no reasonable cause of action or defence in law; or***

***b) it is scandalous, frivolous or vexatious; or***

***c) it may prejudice, embarrass or delay the fair trial of the action; or***

***d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”***

11. The principles applicable in the striking out of pleadings are well settled. These were set out in **D. T. Dobie & Company Ltd v. Muchina [1992] KLR**, these are to the effect that, no suit or defence should be terminated summarily unless it is so hopeless that it plainly discloses no reasonable cause of action or it's so weak to be beyond redemption or cured by an amendment. If it can be injected with life by an amendment, it ought to proceed for the court to consider the facts at the trial. The exercise of the court's draconian powers of summary procedure should be hesitantly exercised. It is a jurisdiction to be exercised sparingly and cautiously. It is to be exercised in the clearest of cases only.

12. In the present case, the grounds upon which the application was grounded were that the defence was scandalous, frivolous or vexatious and otherwise an abuse of the process of court. A pleading is frivolous when it has no ground or is without substance. A matter will also be frivolous if it has no substance, it is fanciful, when the party is trifling with the court or when the defence will be wasting the court's time or is incapable of reasoned argument. (See **Dawkins v. Edward of Save Weimber [1976] 1 QBD 499**).

13. A matter will be vexatious if it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. (See **Bullen and Leake and Jacobs Precedents of Pleading (12<sup>th</sup> Edn) at 145**).

14. In **Fintech Kenya Limited V Alliance Hotels Limited [2006] Eklr**, it was held: -

***“In my considered view, once the plaintiff had not only set out in detail the particulars of its claim, but also produced copies of Invoices and Delivery Notes, it was incumbent upon the defendant, if it still denied the debt, to provide more substantive answers. The Defendant should have stated whether the services or equipment, for which the invoices were raised, had not been received by them. Or, it could have demonstrated that the invoices had been settled. Or, the defendant could have raised some other substantive issue, which could raise issues about the efficacy of the claim and the documents in support thereof. But the defendant did none of those.***

***It was wholly insufficient for the defendant to simply state that it did not owe the plaintiff the sum claimed. Such a bare statement is what is usually referred to as a bare denial, which does not give rise to a triable issue.”***

15. Nothing could be far from the truth. I agree with the foregoing in its totality. Once a plaintiff has raised a claim and produced documentary evidence in support of his/its claim in an application for striking out, summary judgment or judgment on admission, it behooves the defendant or respondent to specifically answer and offer cogent evidence to contradict or controvert the same.

16. In the present case, the defendants denied the plaintiffs claim. The plaintiffs produced the business account to show the failure by the defendants to repay or surrender the amounts in issue. There was no evidence of payment or settlement of the monies required to be surrendered to the carrier by the defendants.

17. In paragraph 5 of the defence, the defendants merely deny the contents of paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 of the plaint. Particularly, the defendants deny that they failed to furnish payments received from tickets sales for the period of October, 2014 to January, 2015. They contended that the sums were remitted when the same fell due until the 1<sup>st</sup> plaintiff suspended and/or revoked their license thereby depriving the 1<sup>st</sup> defendant of business.

18. Despite as aforesaid, the defendants did not provide any evidence to support their assertions or to rebut the plaintiffs' evidence. There was a running account that was produced but not challenged in anyway. The defendants contended that the amount claimed do not take into account the arrears and remittances by the defendant. There was no evidence of such arrears or remittances. The defendants further contended that, for the reason that they had been paying 3% premiums to the 2<sup>nd</sup> plaintiff to cater for untimely loss and/or liability, the claim herein would amount to unjust enrichment. With due respect, this could not be a defence to the claim for unremitted funds. That insurance had its own specific purpose.

19. On the other hand, the plaintiffs provided proof and particulars of their claim. The agreement in issue dated 29/07/2011 and the two

Deeds of Indemnity dated 29/07/2011 were produced by the plaintiffs. Produced also was a letter dated 11/05/2015 wherein the defendants admitted to being indebted to the 2<sup>nd</sup> plaintiff to the tune of USD843,674.37 and KES 11,001,088/-, respectively. They proposed therein to pay the debt in instalments of USD 4,000/- per month. This letter in my view was a clear admission of the defendants' indebtedness.

20. In **Guardian Bank Limited vs. Jambo Biscuits Kenya Limited [2014] Eklr**, the Court stated: -

***“The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern”.***

21. I am of the opinion that the contents of the Letter dated 11/05/2015, constitute a clear and unequivocal proof of debt owed to the 2nd Plaintiff by the 2nd and 3rd Defendants. There is no reasonable defence to that letter. The defence put forward is not only evasive, it is meant to delay the just and expeditious disposal of this suit.

22. Accordingly, in the premises, I find the plaintiffs application dated 30/10/2019 to be meritorious and I allow the same. The defendants' defence dated 30/10/2019 is hereby struck out and judgment entered as prayed in the plaint. Costs of the application and the suit is awarded to the plaintiffs.

**DATED at NAIROBI this 11th day of February, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**