



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 12 OF 2019

DR. ERASTUS NDEGWA WANGAI.PLAINTIFF

VERSUS

KLM ROYAL DUTCH AIRLINE.1ST DEFENDANT

AIR FRANCE.2ND DEFENDANT

R U L I N G

1) Dr. Erastus Ndegwa Wangai, the Plaintiff herein, filed an action against KLM ROYAL Dutch airline and Air France, the 1st and 2nd Defendants respectively, vide the plaint dated 1st January, 2019 in which he sought for inter alia damages for breach of contract plus costs and interest.

2) In his plaint, the Plaintiff averred that on 9th September, 2018 through one Priscilla Nduku Wangi he bought online a multi-city return ticket from the 1st Defendant for a flight from Nairobi/Toronto/Montreal/Nairobi for tourism purposes.

3) The Plaintiff averred that he together with his entourage successfully travelled to Canada and on their return they departed Montreal Canada aboard an Air France Flight to whom the 1st Defendant had off-loaded them to and arrived at terminal 2F Charles De Gaulle Airport Paris France on 16th October, 2018.

4) Upon arrival at the aforesaid terminal, the plaintiff averred that they were stopped and arrested by French Immigration Officials on the basis that the terminal was a domestic and not international terminal and hence they required to possess a transit visa. As a consequence the plaintiff and those accompanying him were detained in holding cells at the airport. They were eventually deported to Kenya aboard a Kenya Airways flight.

5) The Plaintiff being aggrieved was prompted to file this suit seeking for the reliefs earlier indicated hereinabove.

6) When served with the suit papers, the defendants entered appearance under protest.

7) The Defendants have now taken out the amended notice of motion dated 31st May, 2019 together with an amended preliminary objection, the subject matters of this ruling.

8) In the aforesaid motion, the defendants sought for the following orders:

i. This application be certified urgent and heard ex-parte in the first instance.

ii. Pending the hearing of this application inter-partes, there be a stay of proceedings; and the time within which the defendants are to file a memorandum of appearance and defence be suspended.

iii. Pending the hearing and determination of this application, there be a stay of proceedings; and the time within which the defendants are to file a memorandum of appearance and defence be suspended.

iv. The claim against the defendants be struck out with costs.

v. The costs of this application be the defendants in any event.

- 9) In the notice of preliminary objection dated 4th March 2019, the defendants averred that this court has no jurisdiction to entertain this suit. The motion is supported by the affidavit of Arthur Dieffenthaler. When served, the plaintiff filed a replying and further affidavit he swore plus the grounds of opposition to oppose the motion.
- 10) When the notice of preliminary objection and the motion came for hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support and against the motion. I have further taken into account the grounds of opposition and the rival written submissions. The main issue which commends itself for determination is whether this court has jurisdiction to entertain this suit.
- 11) It is the submission of the defendants that this court lacks jurisdiction to entertain this suit hence the same should be dismissed. It is pointed out that the cause of action arose in Paris, France which is outside the territorial jurisdiction of this court.
- 12) It is also the defendants' averment that the 1st and 2nd defendants are incorporated in Netherlands and France respectively hence they cannot be sued in Kenya.
- 13) Finally, the defendants argued that the acts which gave rise to the plaintiff's deportation were acts of sovereign state doctrine therefore not subject to court action outside the sovereign state.
- 14) In response to the defendants' arguments the plaintiff stated that the defendants' preliminary objection did not raise to pure points of law. The plaintiff also stated that the defendants misread and misunderstood the plaintiff's cause of action as the act of deportation from France to Kenya yet the correct cause of action is an action based on a breach of contract by the defendants.
- 15) The plaintiff pointed out that the air tickets were bought in Kenya and were meant to take the plaintiff and his entourage from Nairobi to Montreal Canada via Schipol in Netherlands and in breach of that arrangement the 1st defendant offloaded the plaintiffs to the 2nd defendant who took them to Paris, France where they were deported to Kenya.
- 16) In short, the plaintiff is of the submission that they were transported to a destination other than the contracted one. The plaintiff further stated that the defendants have offices in Nairobi Kenya and operate both at Barclays plaza, Nairobi and from Jomo Kenyatta International Airport therefore this court has jurisdiction to entertain the suit.
- 17) The plaintiff also argued that the defendants invoked the wrong provisions of the Civil Procedure Act i.e Section 1A, 1B, 3 and 3A instead of invoking Order 2 rule 15 of the Civil Procedure Rules in seeking to have this suit struck out.
- 18) After a careful consideration of the rival arguments I have come to the following conclusions. **First**, that there is no dispute that the plaintiff and those accompanying him were arrested, detained in France and later deported to Kenya for lacking a transit visa.
- 19) **Secondly**, it is also apparent from the material placed before this court that what triggered the plaintiff's miseries were the actions taken by the French immigration officials to have him and those accompanying him deported to Kenya.
- 20) **Thirdly**, it is not in dispute that the plaintiff bought an air ticket from the 1st defendant to take him from Jomo Kenyatta International Airport, through Paris, Montreal, Nairobi/ Toronto/Montreal/Nairobi. It is averred in paragraph 7 of the plaintiff's plaint that they took an outward flight from Nairobi which had a lay-over Charles De Gaulle Airport in Paris France and eventually travelled to Montreal in Canada.
- 21) It would appear that on the return journey from Montreal, the 1st defendant offloaded the plaintiff and his team through internal arrangements using Air France flight to arrive at terminal 2F Charles De Gualle Airport France on 16.10.2018. This arrangement required the plaintiff to obtain a transit visa unlike the time when he was travelling to Montreal. In this matter the question to be answered is where was contract breached?
- 22) It is apparent from the material given to this court that the breach occurred either in Montreal, Canada or in Paris, France where the plaintiff was instructed to disembark at terminal 2F. In the circumstances, therefore, if one was to sue in the place where the cause of action arose, then the plaintiff should file an action in Canada or in France. However, under the Civil Procedure Act and the Rules therein, the places of suing have been defined. First, one can file a suit where the cause of action arose. Secondly, one can also sue where the defendant resides or does business.
- 23) It is not in dispute that he contract was executed in Nairobi. In the replying and further affidavits of Dr. Erastus Ndegwa Wangai, it is averred that the defendants have offices in Nairobi, Kenya and operate both at Barclays Plaza, Nairobi and from Jomo Kenyatta international Airport. In my humble view, the plaintiff has a choice of either filing an action in Kenya where the defendants have offices where they operate or in Canada or France where the cause of action arose. I therefore find that this suit is properly before this court.
- 24) The other issue which was ably argued is whether the act of state doctrine applies to this case. I have already considered the rival arguments over the issue. The U.S Court of Appeal in the case of **Galu =vs= Swissair Air Transport Co. Ltd (1989) USSA 2 422: 873 F 2d 650** held *inter alia* as follows:

“The act of state doctrine precludes the courts of this country “from inquiring into the validity of the public acts a recognized foreign power committed within its own territory”. The doctrine applies when the challenged conduct was the public act of those with authority to exercise the sovereign powers” of the foreign state”.

25) There is no doubt that what prompted the French Immigration officials to take action is the plaintiff's failure to obtain a transit visa. I am however persuaded by the plaintiff's argument that his suit is mainly that of a breach of contract. It is not in dispute that the plaintiff initially had a stop-over Charles De Gualle Airport while on his way to Canada and had no hitch.

26) It would appear the plaintiff's problems were provoked by the defendants alleged act of breaching the contract when they altered the plaintiff's itinerary that saw him disembark at terminal 2F which required him to obtain a transit visa. It cannot therefore be said that the cause of action was the action taken by the French Immigration officials.

27) The final issue which the defendants argued is the question of service. It was pointed out that since the defendants reside outside Kenya, the procedure of service outlined under Order 5 rule 21 of the Civil Procedure Rules should have been followed. In my view, since this court has concluded that the defendants operate their business in offices based in Nairobi Kenya, the defendants can be served with process in Kenya, therefore the argument cannot stand.

28) In the end and on the basis of the above reasons, I find the amended motion dated 31st May 2019 and the Notice of Preliminary Objection dated 14th March 2019 to be without merit. They are ordered dismissed with costs to the plaintiff. Since the parties to this suit agreed to have this decision apply to:

- i. Nairobi H.C.C.C no. 13 of 2019.
- ii. Nairobi H.C.C.C no. 14 of 2019 and
- iii. Nairobi H.C.C.C no. 15 of 2019, this court directs that it should apply so.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent