REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 351 OF 2015

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

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

VERSUS

CONNECT TRAVEL LIMITED.....1ST DEFENDANT

LUCY WAMBUI KARANJA.....2ND DEFENDANT

SALOME NJERI KARANJA.....3RD DEFENDANT

RULING

1. The application before the court is the plaintiffs' Notice of Motion dated **22nd April, 2016.** The Plaintiffs thereby seek the striking out of the Statements of Defence filed herein by the Defendants dated **16th October 2015** and **18th November 2015,** respectively**,** and for judgment on admission to be entered against the 1st and 2nd Defendant together with costs, including costs of the application. The application is supported by the affidavits of **Salome Angela Osure** and **Caroline Laichena** both sworn on **22nd April, 2016**.

2. It was contended that the Plaintiffs brought this claim against the Defendants for the sum of **Kshs. 11,616,781.55** and **US$ 245,354.21** being the monies received by the 1st Defendant as a result of an agency relationship between the 1st Defendant and the 1st Plaintiff. The facts of this case are briefly that by an Agreement dated 7th May 2008, the International Air Transport Association (IATA) appointed the 1st Defendant as its Travel Agent in Kenya. The Contract authorized the 1st Defendant to sell air tickets. The 2nd Plaintiff, an insurance company, had insured or indemnified the 1st Plaintiff against all actions, proceedings, claims, demands or losses that would result from the default of the 1st Defendant. It was deponed that in breach of the agreement dated **7th May, 2008**, the 1st Defendant failed to pay the 1st Plaintiff the outstanding amounts sought in the Plaint. The 2ndPlaintiff in turn paid the 1st Plaintiff the said sums owed by the 1st Defendant. In exercise of its subrogation rights, the 2nd Plaintiff now claims those sums from the 2nd and 3rdDefendants by virtue of Deeds of Indemnity dated **16th May 2008** between the 2nd Plaintiff and the aforestated Defendants. The Plaintiffs expressed the view that the defendants had also expressly admitted that it owed the Plaintiffs the sums claimed through various e-mail correspondences and letters which also gave proposals on a structured repayment plan. As the said

admission was unequivocal, the plaintiffs asked the court to grant judgment in their favour, against the defendants. Apart from the alleged admission of liability, the Plaintiff was of the view that the defendants filed Defences which constituted mere denials.

3. In response to the Plaintiffs' application, the 1st and 2nd Defendant filed the Replying affidavit of **Lucy Wambui Karanja** sworn on **24th June, 2016**. It was averred that the application before the court was misconceived and without merit. According to the 1st and 2nd Defendant, their Defence on record raises triable issues that cannot be determined summarily without the matter going to full trial. That if the orders sought were to be granted by this court, the same would amount to a denial of justice on the part of the defendants. The deponent further contended that without prejudice to the foregoing, it was critical for accounts to be taken to confirm if there any outstanding amounts owing to the Plaintiffs. Further to this, it was the 1st and 2nd Defendant's assertion that if there are any outstanding amounts of money owing to the Plaintiff, the 3rd Defendant should also be held accountable since she was also a director of the 1st Defendant company at all material times to the suit. In view of the foregoing, it was the 1st and 2nd Defendant's position that it is in the interest of justice that the application herein be dismissed and for the matter to proceed to a full hearing.

4. The 3rd Defendant in reply to the application also filed her Replying affidavit sworn on **26th May, 2016**. It was deponed that the 3rd Defendant never admitted liability to any monies owed to the 1st and 2nd Plaintiff. That if any cause of action exists, the same existed solely between the 1st Plaintiff and the 1st Defendant. The 3rd Defendant further denied being a party to any transaction, debt, dealings or correspondence between the 1st Plaintiff and the 1st Defendant. The 3rd Defendant further stated that she was not a Director of the 1st Defendant Company and should therefore not be a party to this suit. She consequently urged the court to dismiss the application.

5. The application was canvassed by way of written submissions that were orally highlighted in court by the parties' counsel. **Mr. Khayota**, learned counsel for the Plaintiffs, relied on the grounds set out in the subject Notice of Motion and the affidavits of the plaintiffs as well as the bundle of documents filed herien. In their submissions, the Plaintiffs restated the facts of the case. **Mr. Khayota** submitted that the Defences on record were a mere sham as the same contained bare denials. That it was obvious from the defences that the Defendants did not attempt to traverse the allegations of the facts of the Plaint. The Applicants relied on the case of **Pharmaceutical Manufacturing & Co –vs- Novelity Manufacturing Ltf (2001) 2.A 521** and **Abdulrazak Khalfan and another –v- Supersonic Travel and Tours limited & another: Nairobi Hccc no.624 of 2004** in urging the court to find that the Defences constituted mere denials**.**

6. With regard to the Deeds of Indemnity executed by the 2nd and 3rd Defendants, it is the Plaintiffs position that the Defendants are therefore under obligation to indemnify the 2nd Plaintiff in case of any default by the 1st Defendant by virtue of the IATA Passenger Sales Agency Rules, the 2nd Plaintiff having indemnified the 1st Plaintiff in respect of all claims and demands arising from the default of the 1st Defendant. It was thus submitted that the 2nd Plaintiff is entitled to recover the monies it paid to the 1st Plaintiff from the 2nd and the 3rd Defendant under the Deed of Indemnity executed by them. **Mr. Khayota** posited that the 3rd Defendant, having executed the aforesaid Deed of Indemnity, was bound by it notwithstanding her purported resignation from the 1st Defendant Company on **1st September, 2014.**

7. The Plaintiffs further argued that they have satisfied the conditions set out with regard to the law on judgment on admission as set out in **Order 13, Rule 2 of the Civil Procedure Rules**. In this regard, **Mr. Khayota** told the court that the Defendants had on several occasions admitted the existence of the debt from the various letters and emails correspondences by their advocates and the Plaintiff's advocates. That further to this, the defendants reneged on their own proposals on how to settle the outstanding amount. In conclusion therefore, **Mr. Khayota** urged the court to grant the orders sought by the Plaintiffs contending that the same are merited.

8. In opposing the application, Learned Counsel for the 1st and 2nd Defendants, **Mrs. Wachira**, submitted that the defences on record by her clients contain triable issues. It was submitted that the amounts sought by the Plaintiff are colossal and it was therefore appropriate for the court to have the parties ventilate their respective cases in full trial. According to **Mrs. Wachira**, the 1st and 2nd Defendants have clearly and unequivocally refuted the allegations made in the Plaint. The 1st and 2nd Defendant's further claimed that the emails and letters relied on by the Plaintiff that allegedly constitute admissions emanated from a firm of advocates, i.e **Messrs Muriithi & Ndonye Advocates** that acted without the consent of the Defendants. That in any case, the correspondences were done on a "***without prejudice"*** basis and therefore the Plaintiffs could not rely on the same. **Mrs. Wachira** also submitted the 1st and 2nd Defendant intend to apply to this court to have accounts taken and this amounted to a triable issue.

9. The cases of **HCCC No. 67 of 2007 (Milimani) Nyati (2002) Kenya Limited –vs- Kenya Revenue Authority (2009) eKLR** and **HCCC No. 862 of 2000 (Nairobi) Safepack Limited & 2 Others vs. Gul Chemical Industries Limited & Another** were cited in support of these submissions and in urging the Court to dismiss the application with costs.

10. On her part, Learned Counsel for the 3rd Defendant, **Ms. Nyokabi,** submitted that the application before the court should be dismissed for the reason that there was no admission of debt on the part of the 3rd Defendant as she was not privy to the referred correspondences between the Plaintiffs' advocates and the firm of **Muriithi and Ndonye Advocates**. **Ms. Nyokabi** also submitted that during the period of the transactions, the 3rd Defendant was not even in the country as she was resident in the United Kingdom. It was her contention that the 3rd Defendant was not even aware of the debt alleged by the Plaintiffs and was never served with the letter of demand, summons and Plaint. That therefore, the 3rd Defendant had no opportunity to put forward her position on the matter. According to **Ms. Nyokabi**, the orders sought by the Plaintiffs are not tenable against the 3rd Defendant as she is no longer a director with the 1st Defendant Company. That further, her liability under the Deed of Indemnity could not arise, since she was not notified in writing of liability of the debt while she was still a director in the 1st Defendant Company. The 3rd Defendant therefore asserted that her defence does not constitute mere denials as alleged and the same should be ventilated through trial. **Ms. Nyokabi** therefore urged the court to dismiss the application or in the alternative, order that judgment be entered against the 1st and 2nd Defendant on admission, while the 3rd Defendant' case goes to trial.

11. I have carefully considered the application, the supporting Affidavit and the Replying Affidavits of the respective parties. I have also considered the various submissions and the authorities relied on by Counsel. The Motion is expressed to be brought under **Order 2 rule 15 and Order 13 Rule 2 of the Civil Procedure Rules**. Order 2 Rule 15 deals with striking out of pleadings and provides as follows;

> ***"15. (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."***

12. Needless to say that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal restated this in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** stated:

> ***"The principles guiding the Court when considering such an application which seeks striking***

out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChD 506, where the Lord Justice said:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

13. The same sentiments were echoed by **Danckwerts L.J** when the House of Lords considered a similar Rule in **WENLOCK V MOLONEY, [1965] 2 All E.R 871 at page 874**, as follows:

"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."

14. It is clear therefore that the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases and that a defendant who has bona fide issue worthy of trial should not be denied the opportunity to be heard on his defence on merit. (See the case of **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR)**

15. According to the Plaintiff, the Defendants Statement of Defence are a sham, in that they contain mere denials which do not specifically traverse the allegations made in the Plaint. I have looked at the Statements of Defence filed herein. As conceded by the 3rd Defendant, the same are simplistic and straightforward. It is noted however that, with regard to the 1st and 2nd Defendant's defence, the issue of limitation has been pleaded therein at paragraph 5 thus;-

"....the defendants plead that this suit is time barred and has been brought without the leave of this Honourable Court in contravention of the Limitation of Actions Act, Cap 22 of the Laws of Kenya and that the same should be dismissed as a nullity ab-initio."

16. Though the parties did make any reference to this point in their submissions, the same raises a triable issue that goes to the very foundation of the Plaintiffs' claims and by extension, the entire case. It is trite law that if a defence raises bona – fide triable issues, even one, then such a party should be given an opportunity to defend the suit. Indeed in the case of **Kenya Trade Combine Ltd vs. Shah, Nairobi Civil**

application No. 193 of 1999 the Court of Appeal made it clear that a defence that raises triable issues is not necessarily a defence that must succeed. The Court expressed itself thus:

> "**In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issue does not mean a defence that must succeed."**

17. With regard to the 3rd Defendant, I would agree with her Counsel that there are several triable issues that have been raised therein. The first is with regard to whether her liability under the Deed of Indemnity has crystallized. According to the submissions of the 3rd Defendant, the 2nd Defendant did not issue her with a written notification as a director of the 1st Defendant's default. The Plaintiffs on the other hand insists that the demand was sent to the 2nd and 3rd Defendants on the amounts due and owing. Given these contestations, it is my view that these are matters that are better resolved at the trial on the basis of tested evidence. The same holds true with regard to the issue of what effect the 3rd Defendant's resignation had on her liability under the Deed of Indemnity dated **16th May, 2008**. As such, it is my finding that the 3rd Defendant's defence does raise bona fide triable issues on the basis of which she should be accorded her day in court. Whether or not the defence will succeed at the trial is a different consideration altogether.

18.18. This now leads me to the issue second limb of the application, namely whether the debt has been admitted by the 1st and 2nd Defendants. It is the submission of the Plaintiffs that the Defendants made express admissions with regard to the Plaintiffs' claim on the basis of which they now seek judgment on admission pursuant to **Order 13 Rule 2 of the Civil Procedure Rules 2010**, which reads;

> ***"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just."***

19. The jurisprudence relating to applications made for judgment on admission was set out in the in the case of **CHOITRAM -V- NAZARI (1984) KLR 327** where the at Madan, JA stated as follows ;-

> ***"For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff 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."(emphasis added)***

In the same judgment, **Chesoni Ag. JA**, added:

> ***"Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions..."***

20. The Plaintiffs relied on various letters and email correspondences between the Plaintiffs advocate and the firm of **Messrs Muriithi & Ndonye Advocates**. In particular, the Plaintiffs relied on the letter by the firm of **Muriithi & Ndonye Advocates** dated **17th April, 2014** to buttress their posturing that the Defendants admitted the debt. The letter reads as follows ;-

> ***" Wamae & Allen Advocates,***
>
> ***Kindaruma Road,***

P.O.Box 40132-00100 ***"without prejudice"***

<u>Nairobi</u> ***"Advanced Copy via Email"***

Dear Sir

RE : DEMAND FOR USD 245,354/- AND KES. 11,616,781.55 OWED TO

IATA BY CONNECT TRAVEL LIMITED AND SECURED BY DEED OF IDEMNITY DATED 16TH MAY 2008 BETWEEN YOURSELVES AND SAHAM ASSURANCE COMPANY KENYA LIMITED FORMELY (MERCANTILE INSURANCE COMPANY LIMITED)

We refer to the above matter and we act for Connect Travel Limited and its Directors Lucy Wambui Karanja and Salome Njeri Karanja, who have placed in our hands your demand letter dated 15th April, 2014 and instructed us to address you as hereunder.

Our client kindly requests yours to hold any further legal action regarding the above debt as our client is in the process of obtaining a facility from Jamii Boraa Bank to liquidate the outstanding amount as per the attached Term Sheet. We shall be able to furnish you with a copy of the Offer letter on the 30th April, 2014. Our client should be able to pay the outstanding amount once the facility is received in the course of the following month.

We kindly request you to consider our client's plea as we believe this matter can be settled amicably. We await to hear from you.

Yours faithfully,

Muriithi & Ndonye Advocates

<u>Victor Mulindi</u>"

21. The above letter is plain, that there was a proposed settlement of debt; indeed the said advocates indicated that they were acting for the defendants. They outlined the fact that the defendants were in the process of acquiring a loan facility to offset the amounts owed to the Plaintiff and requested for more time to settle the issue amicably. However, the said communication bears the "without prejudice" rubric on the face of it. The question that then arises whether this letter is admissible in evidence for purposes of **Order 13 Rule 2 of the Civil Procedure Rules.**

22. First and foremost, **Section 23(1)** of the **Evidence Act, Chapter 80 of the Laws of Kenya,** recognizes that:

> ***"In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given"***

23. In the case of **<u>Cooperative Bank of Kenya Limited vs. Shiraz Sayani MSA HCCC No. 23 of 1999,</u> Waki, J** (as he then was) had occasion to give consideration to the aforementioned provision. He expressed himself thus:

> ***"The rubric "without prejudice" has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of dispute. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. The rubric simply***

means "I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which you may accept or not, as you like, but if you do not accept it, my having made it is to have no effect at all". It is a privilege that is jealously guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements...The rule, however is strictly confined to cases where there is a dispute or negotiation, and suggestions are made for settlement thereof.

24. Similarly, in the case of **Rush &Tompkins Ltd v Greater London Council [1988] 2 All ER 737 at 739-40 Lord Griffiths** had this to say:

"The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. The rule rests on public policy... and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. ...They should... be encouraged freely and frankly to put their cards on the table ... the public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. This well known passage recognizes the rule as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues..." (emphasis added)

25. It cannot be gainsaid therefore that the rubric **''without prejudice''** has gained currency as a matter of public policy aimed at encouraging parties to resolve civil disputes amicably and to engage into such negotiations, compromises and admissions without the fear of the admissions being used against them in formal court proceedings should they fail to fasten a settlement. However, for communication to receive the privilege and the protection of the practice of without prejudice, it must be one which is made during an amicable negotiation of a dispute with the intention of yielding a settlement or compromise of the dispute. The communication may be expressly signed to be on without prejudice basis or it may be inferred from the circumstances in which it was made that the parties agreed or intended it should not be given in evidence. The communication may be oral or in writing. Such communication or letter would therefore be inadmissible in evidence. (See ***Halsbury's Laws of England***, **4th Edition Vol. 17).**

26. The letter before the court is marked **"without prejudice"** and clearly shows that the same was in pursuit of an amicable resolution of the dispute at hand. It has not been demonstrated that it falls within the exceptions to that rule. I would accordingly take the view that the same is inadmissible in evidence, for purposes of recording judgment on admission. I have also looked at the other email correspondences attached to the Plaintiffs bundle of documents, the same contain proposals on how to settle the matter amicably without court action in furtherance to the letter dated **17th April, 2014**. Thought the said email correspondences do not bear the "**Without Prejudice**" tag, it is clear that the email correspondences were in furtherance to the letter dated **17thApril, 2014** as the same gave feedback on the progress of the Defendants' position in acquiring financial facilities to the cover the amounts that were outstanding. It is clear from all the circumstances of the case that subsequent communication between the Plaintiffs' Advocates and the Defendants' advocates was on a "**Without Prejudice**" basis, and pursuant to the letter dated **17th April, 2014**. As such, I find that the correspondences by the firm of **Muriithi and Ndonye Advocates** and the Plaintiffs advocates were cannot found the basis for the entry of judgment on admission herein.

27. In the result, it is my finding that the Respondents have not only demonstrated that their defences raise triable issues, but also that the documents relied on to support the prayer for judgment on admission were documents made on without prejudice basis and therefore inadmissible at this stage. Their admission

as evidence having been brought into question, their admissibility or otherwise can only be decided at the trial. In the premises, I would dismiss the Plaintiffs' Notice of Motion dated **22nd April, 2016** with an order that the costs thereof shall be in the cause. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2016

OLGA SEWE

JUDGE