



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMARILTY DIVISION**

**CIVIL CASE NO. 615 OF 2012**

**MOHAMMAD HASSIM PONDOR (suing on behalf of**

**The International Air Transport Association – IATA) .... 1<sup>ST</sup> PLAINTIFF**

**MERCANTILE INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FALCON TRAVEL SERVICES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TIMOTHY NGERU ..... 2<sup>ND</sup> DEFENDANT**

**NADINE WANJIKU KARANJA ..... 3<sup>RD</sup> DEFENDANT**

**PETER KARANJA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed a Notice of Motion dated 30th April 2013 brought under the provisions of **Order 2 rule 15 (1) (a), (b), (c) and (d), Order 51 rule 1** of the *Civil Procedure Rules, 2010* as well as under the inherent jurisdiction sections of the *Civil Procedure Act* being **Sections 1A and 1B**. The Application sought Orders that the Defence of the third and fourth Defendants herein be struck out and that Judgement be entered in favour of the Plaintiffs as prayed in the Plaint. The Application was based on the following grounds:

**“1. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants were all material times Directors of the 1<sup>st</sup> Defendant company, and were aware of the default of the 1<sup>st</sup> Defendant and are therefore liable under the Deeds of indemnity.**

**2. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants are contractually obligated to indemnify the 2<sup>nd</sup> Plaintiff for any default of the 1<sup>st</sup> Defendant and are estopped from denying the existence of the Deeds of indemnity which were duly executed by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants before a commissioner of oaths and upon verification of their identity using their identification documents.**

**3. Defence filed by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is a bare denial of the Plaintiff’s Plaint, a sham, frivolous and vexatious and there are no grounds on which this case**

**should proceed to full trial.**

**4. The Defence by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is otherwise an attempt to delay and/or obstruct the Plaintiffs from recovering the claim set out against the Defendants.**

**5. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants Defence is therefore untenable and unsustainable at trial, as it constitutes a bare denial.**

**6. The Plaintiffs have obtained judgement against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and now seeks judgment against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants so that they can proceed to execute jointly against all the Defendants”.**

2. The Application was supported by the Affidavit of the General Manager of the second Plaintiff one **Shem Nyamai** sworn on even date. The deponent noted that by an Agreement in writing dated 15th December 1993 (hereinafter “the Agreement”) between each IATA member (hereinafter “IATA”) and the first Defendant, IATA appointed the first Defendant as one of its travel agents for the sale of airline tickets in Kenya. Under the terms of the Agreement, the first Defendant upon receiving money for specified passenger air transportation, would issue a Traffic Document (ticket) and would be responsible for the remittance to IATA for the amount payable in respect of such Traffic Document. Under the Agreement it was also a term that all monies collected by the first Defendant for transportation and ancillary services sold would be the property of IATA and must be held in trust for IATA until satisfactorily accounted for and settlement made. The deponent noted that subsequent to the Agreement, the third and fourth Defendants, being directors of the first Defendant Company, executed Deeds of Indemnity dated 10th August 2010 in favour of the second Plaintiff. The agreement was that in consideration of the second Plaintiff effecting an insurance policy to the first Defendant by virtue of the IATA Passenger Sales Agency Rules, the third and fourth Defendants would indemnify the second Plaintiff against all actions and proceedings, claims, demands, losses and default arising howsoever from and out of and as a result of the default of the first Defendant.
3. Mr. Nyamai noted that in breach of the Agreement the first Defendant wrongfully failed, neglected and/or refused to pay the first Plaintiff the sums of Kenya shillings 2,633,752.00 and US\$339,303.03. Formal demand was made upon the third and fourth Defendants as the Indemnities executed by them had crystallised. The deponent continued by saying that in his opinion, the Defence filed herein by the third and fourth Defendants was utterly untenable and no more than a strategy to obstruct the Plaintiffs from recovering the sum claimed in the Plaint. The Plaintiffs, having obtained judgement against the first and second Defendants, now sought judgement against the third and fourth Defendants in order that they could proceed to execute against all the Defendants.
4. The third Defendant **Nadine Wanjiku Karanja** swore a Replying Affidavit on 19th July 2013. The deponent narrated the history of the first Defendant company as set up by her father but at the time of incorporation, she and the fourth Defendant, her brother, were studying and working in the United Kingdom. She noted that the second Defendant was employed as the manager of the first Defendant Company. Upon the death of her father, the deponent noted that the second Defendant operated the first Defendant Company single-handedly and employ the third and fourth Defendants as sales and ticketing clerks in or about February 2009. Both the third and fourth Defendants did not play any role in the actual running and management of the first Defendant Company. In several paragraphs, Ms. Karanja went on to detail that there was a company meeting held on 30th January 2009 at which she and the fourth Defendant were ostensibly appointed as directors of the first Defendant Company. She had not attended that meeting and to the best of her knowledge, it never took place. She had never attended any meeting of the Board of Directors of the first Defendant company. She was not authorised to sign any bank documents or other financial documents on behalf the first Defendant company. She denied executing the Deed of Indemnity dated 10th August 2010 and she had been assured by her brother that he had not executed a second Deed of Indemnity bearing even date therewith.
5. The deponent then recited what she had been informed by her advocates on record as to the

validity of the said Deeds of Indemnity more particularly with regard to consideration therefore. She denied that any contractual obligation had been incurred by her and her brother as there had been no consideration given to her by either the Plaintiffs or the first Defendant Company in exchange for her giving her alleged Indemnity. Further, the third Defendant denied that she had ever appeared before Mr. Jamal for attestation of the Deed of Indemnity. She had not supplied the first Plaintiff with a copy of her passport to verify her identity for the purposes of the execution of the Deed of Indemnity. Similarly, she knew from her brother, the fourth Defendant, that he had not supplied a copy of his national Identity Card for the said purpose. The third Defendant maintained that she only came to learn about the Deeds of Indemnity when the Plaintiffs' advocates on record made demand at the institution of this suit. She verily believed that the said Deeds of Indemnity had been forged by the second Defendant and, as a result, all the liabilities arising therefrom should only crystallise as against the second Defendant.

6. The third and fourth Defendants herein lodged a Notice of Preliminary Objection in Court dated 6th December 2013. It detailed the following preliminary objections:

**“1. The Application is misconceived, untenable and totally unmerited.**

**2. The Application based on Sections 1A and 1B of the Civil Procedure Act is defective and misconceived as it fails to disclose the violation of the overriding objectives set out in the said sections.**

**3. The Plaintiffs' Application seeking to strike the Defences filed by the third and Fourth Defendant is fundamentally flawed and cannot be sustained in law for the following reasons:**

- a. **The Plaintiffs' Application on the face of it, is brought under Order 2 Rule 15(1)(a),(b),(c) and (d) contrary to the interpretation of the principle that an application for striking out can only be grounded on only one of the four grounds.**
- b. **That Plaintiffs' Application is bundled up by seeking to rely on all the four grounds which prejudices and embarrasses the Defendants in their Defence and the Third and Fourth Respondents are in opposition to the Application.**

**4. That no evidence is required while bring an Application under Order 15 91) (a) as the Application is required to be concise on the grounds only. It is clear that the Applicants' Application is defective as it seeks to introduce evidence by way of supporting Affidavit where none is required”.**

7. Before this Court 13th May 2014, counsel for the Plaintiffs and counsel for the third and fourth Defendants confirmed that they had each filed their submissions as regards the Plaintiffs' said Application as well as the third and fourth Defendants Preliminary Objection. It was agreed that this Court would rule on both the substantive Application and the Preliminary Objection. The Plaintiffs had filed their submissions on 24th July 2013 in relation to the substantive Application but subsequent to the filing of the Preliminary Objection, the Plaintiffs filed further submissions in response both to the Preliminary Objection as well as he substantive Application on 22nd April 2014. The third and fourth Defendants had in the meantime, filed their submissions on 9th December 2013.

8. It would seem sensible for this Court to deal with the Preliminary Objection of the third and fourth Defendants first for if that is successful, the substantive Application will fall away. The third and fourth Defendants maintained that the Application was, on the face of it, grounded upon **sections 1A and 1B** of the *Civil Procedure Act*. Those two sections define the overriding objectives and aims of the law which must be applied in all civil suits. The third and fourth Defendants submitted that their Defences as filed had in no way violated either of the two sections. Despite that, the third and fourth Defendants submitted that while parties are obligated under the law to observe the overriding objectives and the aims as set out in those two sections, they cannot be applied or called in aid of an application to strike out pleadings without the clearest evidence that such

pleadings offend or violate the overriding objective and aims. In this regard, the third and fourth Defendants referred this Court to the cases of City Chemist Mohamed Kasabuli v Or in Commercial Bank Ltd Civil Appeal No. 302 of 2008 (unreported), Kariuki Network Ltd & Anor v Daly & Figgis Advocates Civil Appeal No. 239 of 2009 (unreported), Deepak M. Kamani v Kenya Anti Corruption Authority & 3Ors Civil Appeal No. 152 of 2009 as well as Abok James Odera v John Patrick Machira (2013) e KLR.

9. All these cases detailed that the overriding objective should be used by Courts to determine cases on merit but could not be used as a basis for striking out pleadings. The third and fourth Defendants' submissions continued with reference to **Order 2 rule 15 (1) (a), (b), (c) and (d)** of the *Civil Procedure Rules, 2010*. Having set out rule 15, the third and fourth Defendants noted that the Application was bad in law because **rule 15 (1) (a)** must be read with **rule 15 (2)** which provided that no evidence shall be admissible on an application under that particular sub-rule. The third and fourth Defendants pointed to the renowned Court of Appeal the decision in D. T. Dobie v Muchina (1982) KLR 1 where the Court in relation to an application under **rule 15 (1) (a)**:

**“the Court was obliged in law to look at no evidence i.e. no affidavit or any evidence from the bar in considering whether or not a plaintiff or a pleading raises a cause of action. The Court must look at the pleadings only and not beyond the pleadings.”**

10. To this end, the third and fourth Defendants also referred to the authorities of Jevaj Shariff & Co v Chotail Pharmacy Stores (1960) EA 374 as cited in Crescent Construction Co. Ltd. v Delphis Bank Ltd (2007) 2 EA. The third and fourth Defendants maintained that the Plaintiffs had violated the principles as laid down in the aforementioned authorities by seeking to rely on evidence.

Continuing their submissions as regards to the Preliminary Objection, the third and fourth Defendants noted that the Application before Court was seemingly based on all four grounds listed under **Order 2 rule 15 (1)** of the *Civil Procedure Rules*. They maintained that the correct interpretation of the rule showed that the Application to strike out the Defence could not be brought on all four grounds. They maintained that the true meaning and effect of rule 15 was that the party applying could only attack the pleading on one of the four grounds. Such would explain why as regards every ground in the rule, the same ended with the conjunction “or”.

11. The third and fourth Defendants pointed to the case of Sunday Principal Newspaper Ltd (1961) 2 All ER 758 quoting from the same as follows:

**“It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the rule was applicable only in plain and obvious cases. For the purposes of this appeal, we are not in any way concerned with whether any of the defences raised is likely to be successful. The sole question in relation to each of the four headings is whether the case is sought to be set up is so unarguable that it ought to be struck out *in limine*. I have come to the conclusion in relation to each of the four headings, that it is quite impossible for us to take this drastic course.”**

In my view, this authority as quoted by the third and fourth Defendants does not hold water as regards their submission that a party seeking to strike out a pleading must bring its application on only one of the sub rules under **Order to Rule 15 (1)**. I do not accept that submission as being right in any way.

12. The Plaintiffs, in their submissions as regards the Preliminary Objection, maintained that it was mainly premised on one main ground, namely that evidence is not permitted when founding an application under **Order 2 rule 15 (1) (a)**. They submitted that Article 159 of the Constitution enjoined the courts to deal with matters substantively and not on technicalities. The spirit of the overriding objective, as applicable in the present suit, is for the just and expeditious resolution of

the same. The third and fourth Defendants noted that the grounds in support of the application under **Order 2 rule 15 (1) (a)** had been set out therein. There was absolutely nothing to prevent the Plaintiffs from relying solely on grounds (b), (c) and (d), thus abandoning ground (a). To this end, the Plaintiffs referred this Court to the cases of **G. B. M. Kariuki v Nation Media Group Ltd & 3 Ors (2012) eKLR**, **Equity Bank Ltd v Capital Construction Ltd & 3 Ors (2012) eKLR**, **Inland Beach Enterprises Ltd. v Sammy Chege & 15 Ors (2012) eKLR** and in relation to the overriding objective, the case of **Kenya Commercial Bank Ltd v Kenya Planters Cooperative Union (2010) eKLR** citing with approval the dicta in **Dorcas N. Wasike v Benson Wamalwa & Ors HCCC No. 87 of 2004 (unreported)**.

13. As regards the Preliminary Objection, I do not consider that the Plaintiffs' Application before this Court dated 30th April 2013, is misconceived, untenable and unmerited. The heading to the Application does detail that it is brought under **sections 1A and 1B** of the *Civil Procedure Act* as well as **Order 2 rule 15 (1) (a), (b), (c) and (d)** of the *Civil Procedure Rules, 2010*. Although this Court decries the practice of bringing such applications under the provisions of sections 1A and 1B of the Act, such seems rather prevalent amongst members of the bar practising in the Commercial Division of this Court. In my view, those two sections set out the overriding objectives of the Act and nowhere does the Act or indeed the Civil Procedure Rules made thereunder, specifically detail that an application can be brought before Court under the same. However, these are sections which encompass the inherent jurisdiction of this Court and where a party brings an application based on such jurisdiction, there can be no real objection to the same being brought under the provisions of those sections and indeed **section 3 A**. Further and as pointed out by the Plaintiffs, *Article 159 (2) (d)* details that justice shall be administered by Courts and tribunals without undue regard to procedural technicalities. That Article is clearly supported by the provisions of **rule 10 of Order 51**, of the *Civil Procedure Rules* which reads as follows:

**“10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

14. As regards the Preliminary Objection, I found considerable help from the Ruling of my learned brother **Odunga J.** in the **G. B. M. Kariuki** case (supra) when he detailed:

**“As already indicated at the beginning of this ruling, this application is based on the provisions of Order 2 Rule 15 (1) (a) (b) and (d) of the Civil Procedure Rules. Where an application is based on rule 15 (1) (a) no evidence is admissible and where a party swears an affidavit in support of an application grounded thereon, the court would not hesitate in striking out such an affidavit. However, the answer is not as simple where the application is grounded on the other sub rules as well. In D. T. Dobie vs Muchina (supra) the application was based on grounds other than subrule (a) aforesaid and while the Court held that the application made under the said subrule was incompetent, the Court went ahead to consider the other grounds. I will therefore not consider the application in so far as it is grounded on failure of the suit to disclose a cause of action. I will, however, consider the same on the grounds of the suit being frivolous and vexatious.”**

I would adopt the finding of my learned brother **Odunga J.** as above. I would strike out the Plaintiffs' Application under the provisions of **Order 2 rule 15 (1) (a)**.

15. However, that leaves the Application being brought under the other grounds other than **subrule (a)** as above. In other words, I must determine the Plaintiffs' Application on whether the Defence herein is scandalous, frivolous or vexatious or that it may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the court. I have already found, as above, that

an application such as the one brought by the Plaintiffs herein need not only be grounded on one of the four grounds as stipulated in **rule 15 (1)** as above. I do not consider that the authorities referred to this Court by the third and fourth Defendants in relation to the principle of the overriding objective to be of any assistance to this Court in the face of the provisions of *Article 159 (2) (d)* and **Order 51 rule 10** of the *Civil Procedure Rules, 2010*. As a result, I find no merit in the Preliminary Objection of the third and fourth Defendants dated 6th December 2013 and dismiss the same with costs to the Plaintiffs.

16. Turning now to the substantive Application of the Plaintiffs, their submissions dwelt upon the salient features of the Indemnities and detailed that none of the Defences of the Defendants herein expressly traversed the averments made by the third Defendant in her said Replying Affidavit. The Plaintiffs maintained that the only explanation put forward by the third and fourth Defendants was a mere denial of not having executed the Deeds of Indemnity. There was however no scintilla of evidence in support of their averments, the same was just a bare denial just like the Defence. As regards the claim made by the third and fourth Defendants that there was no consideration to support the Indemnities, the Plaintiffs pointed out that the Deeds clearly stated that the indemnity was in consideration of the second Plaintiff effecting an insurance policy to the first Defendant. As regards the law, the Plaintiffs referred this Court to the cases of **Abdulrazak Khalfan & Mercantile & General Assurance v Supersonic Travel & Tours & Anor** HCCC No. 624 of 2004 (unreported), **Pharmaceutical Manufacturing Co. v Novelty Manufacturing Ltd** (2001) 2 EA 521, **Mohamed H. Pondor & Anor. v Debonair & 2 Ors** HCCC No. 130 of 2006 (unreported), **Diamond Trust Bank Ltd v Dhanjal & Ors** HCCC No. 1755 of 2000 (unreported), **Murri v Murri & Anor.** (1999) 1 EA page 212, **Bank of Africa (K) Ltd v Pavement Ltd & 2 Ors** HCCC No. 495 of 2008 (unreported) as well as **Halsbury's Laws of England Vol. 20 para 305** and page 48 of **Robert Burgess' The Law of Borrowing**.

17. The submissions of the Plaintiffs in relation to the substantive Application suggested that no evidence had been adduced whatsoever by the third and fourth Defendants to support their allegations that the Deeds of Indemnity were forgeries. In this connection, the Plaintiffs referred this Court to the finding of the Court of Appeal in the case of the **Lalchand F. Shah v I & M Bank Ltd** (2000) e KLR where the debtor was challenging the validity of a document. The Court found:

**“If a document which is ex-facie totally valid and properly attested, a party to be charged therewith cannot simply get away from it by stating that an advocate did not attest it. Quite obviously if the Shahs had called upon Mr. Sheth to say that he appended his signature and placed his stamp in the absence of the Shahs, Mr. Sheth would deny the allegation. It would be very simple for any chargor to postpone an auction sale by simply saying that the charge is not properly attested. If such a state of affairs was allowed to be taken cognizance of there would be no end to the chargors streaming to courts to stop an auction sale on that ground.**

**I also note that no irregularity is alleged against the Bank. None is pleaded or particularized. Even if I were to assume that the charge was not attested by Mr. Sheth, the Bank upon receiving the document was not required to inquire into the authenticity of the attestation. If a banker is presented with a charge ex-facie valid he is not put on any inquiry to ascertain if the advocate had signed in the presence or in the absence of the chargor”.**

18. The Court was also referred to the case of **International Air Transport Association & Anor v Akarim Agencies Company Ltd & 2 Ors** (2014) eKLR as per my learned brother Gikonyo J's Ruling delivered on 11th March 2014 in which the learned Judge found as follows:

**“The Applicant has established that there existed a fiduciary relationship between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant through a Passenger Sales Agency Agreement which was made on 30<sup>th</sup> March, 1994 between 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Defendant. In that agreement, the 1<sup>st</sup> defendant was appointed by the 1<sup>st</sup> Plaintiff to be the travel agent to sell tickets for air passenger transportation on the services of the Carrier in Kenya. The sale of air passenger**

transportation means all activities necessary to provide a Document and collection of monies thereof. The agent is also authorized to sell all such ancillary and other services as the Carrier may authorize. All monies collected by the Agent for transportation and ancillary services were held in trust and were to be remitted to the 1<sup>st</sup> plaintiff. All these things have not been disputed. The defendants only generally denied the claim and alleged that the system used to sell the tickets was blocked by the 1<sup>st</sup> Plaintiff. They did not deny the agency that the system used to sell were any sales or what became of the sales they made before the system had been blocked. The defendants also did not respond to the demand letters which were issued by the principal – IATA. It is also not disputed that all ticket sales and proceeds thereof were held in trust for 1<sup>st</sup> plaintiff. And the 1<sup>st</sup> defendant was under an obligation in accordance with the agreement to keep records and accounts together with supporting documents on the sale of tickets and proceeds thereof and avail them to the 1<sup>st</sup> plaintiff. Although the defendants stated that the system is paperless, it was a term of the contract that the 1<sup>st</sup> defendant will keep records and subject them to inspection by the 1<sup>st</sup> Plaintiff as well as remit all proceeds of ticket sales to the 1<sup>st</sup> Plaintiff”.

It was the Plaintiffs’ submission that the similarly in this case, third and fourth Defendants could not escape their contractual obligations pursuant to the Deeds of Indemnities that they executed.

19. In my view to succeed in their Application before Court, the Plaintiffs have to satisfy the Court that the pleadings which they seek to have struck out are scandalous, frivolous or vexatious, disclose no reasonable cause of action or defence in law and that it may prejudice, embarrass or delay the fair trial of the suit. The Plaintiff also has to show that the third and fourth Defendant’s pleadings in this case, are an abuse of the process of the Court and as such should be dismissed. Has the Plaintiff, therefore, shown that it has a *prima face* case as against the Defendants? The principles set out in **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** are clear that if the pleading does not disclose *any reasonable cause of action or defence* or that the pleading is scandalous, frivolous and vexatious, or that such pleading may prejudice, embarrass or delay the fair hearing of the suit or that it is an abuse of the process of the court, then it ought to be dismissed. In that authoritative case, it was held:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it.”** (Underlining mine).

Later in the Court’s Ruling it is held:

**“As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.”**

20. In this connection, I would also refer to the case of **Metro Petroleum Ltd v. Wamco Petroleum Ltd (2006) eKLR** as per **Waweru J.** who had detailed therein:

**“The remedy of striking out a pleading is a drastic one as it denies a party the right to a trial. It is a remedy not to be lightly granted. It will normally be granted only on the clearest of cases.”**

Similarly in the Nakuru case of **Cabro East Africa Ltd v Rosoga Investments Ltd (2013) eKLR** my learned sister **Wendoh J.** quoted extensively from **Bullen and Leake and Jacob’s Precedents of Pleadings 12th Edition** as regards frivolous and vexatious pleadings as well as the intention to prejudice, embarrass or delay the fair trial as follows:

**“Any pleading or an action is frivolous when it is within substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus a proceeding may be said to be frivolous when a party is trifling with the court or when to put it forward would be wasting the time of the court or when it is not capable of reasonable argument. Again a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some forceful advantage or when it can really lead to no possible good”.**

and

**“Any pleadings or indorsement of writ which may prejudice, embarrass or delay the fair trial of the actions may be ordered to be struck out or amended. The power is designed to prevent the pleadings from being evasive or from concealing or obscuring the real questions in controversy between the parties, and to ensure as far as the pleadings are concerned, a trial on fair terms between the parties in order to obtain a decision which is the legitimate objection of the action”.**

21. I have looked at the Defence of the third and fourth Defendants dated 21st February 2013. What that Defence says is more or less exactly what the third Defendant has detailed in her Replying Affidavit as aforesaid. Her main point is that the signatures of her brother and herself on the Deeds of Indemnity allegedly executed on 10th August 2010 were forgeries and consequently they could not be held to be bound by them. I am not a handwriting expert but I have examined the third Defendant's signature on the Verifying Affidavit annexed to the said Defence, her signature on the Replying Affidavit herein as well as that on the supposed Deed of Indemnity, found at page 18 of the Plaintiffs' List and Bundle of Documents dated 18th September 2012. To my untrained eye, those signatures appear to be different and, as a result, I consider that both the third and the fourth Defendants should be given the chance to defend the Plaintiffs' allegations against them in this suit. Bearing in mind the dictum in the **D.T. Dobie** case that if there even one issue raised in a Defence, I consider that the same should go to full trial.
22. As a result, I am not prepared to strike out the Defences of the third and fourth Defendants and enter Judgement for the Plaintiff as against them. The Plaintiffs' Notice of Motion dated 30th April 2013 is hereby dismissed with costs to the third and fourth Defendants.

**DATED and delivered at Nairobi this 16<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**