**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 79 OF 2013**

**SAUDI ARABIAN AIRLINES CORPORATION…….…….PLAINTIFF/RESPONDENT**

**Versus**

**SEAN EXPRESS SERVICES LTD …….…….… DEFENDANT/APPLICANT**

**RULING**

**Two Applications: Deposit of security and striking out of defence**

[1] There are two applications which I should determine; the one made by the Defendant and is dated 26/11/2013 and the other which has been made by the Plaintiff and is dated 29/1/2014. The common things in both applications are that; the applications are made by Notice of Motion and are seeking provision of costs. I shall refer the first application as ‘’the Defendant’s application’’ while the second, ‘’the Plaintiff’s application’’. The Defendant’s application is expressed to be brought under Order 26 Rule 1 and 4 of the Civil Procedure rules, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law and is seeking for an order directing the Plaintiff to deposit in court within 30 days, the sum of Kshs. 500,000 or such security as is sufficient to cover the Defendant’s costs in the suit; and failure to deposit security in the specified period, the suit to be dismissed. The Plaintiff’s application is expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 15 and Order 51 rules 10 and 13 of the civil Procedure Rules and all other enabling provisions of the law and is seeking the orders: 1) that the Defendant’s statement of Defence, counter claim and/or set off dated 25th April, 2013 and the Reply to Defence to counterclaim dated 30th May, 2013 be struck out; and 2) judgment to be entered for the Plaintiff as prayed for in the plaint dated 27/2/2013.

**Striking out Defence; the Plaintiff requests**

[2] I wish to start with the Plaintiff’s application for obvious reasons. It is asking the Court to strike out the Defendant’s Defence and counter-claim and if it is successful, there will be not need of discussing the one for deposit of security. On the other hand, if it fails, the Court will be more reinforced to determine the application for deposit of security. The Plaintiff’s application was

supported by the affidavit of Agnes Wairimu and the following grounds which are broadly cast:-

a. That the agreement of the parties in respect of the matter is reduced in writing in an agreement dated 27th June, 2000 and the court cannot purport to re-write the Agreement of the parties except to strictly enforce and guard it.
b. That the Defendant is justly and truly indebted to the Plaintiff in the sum of US Dollars 3,050,776.74 being unaccounted sales for the months of February and March, 2012 as prayed in the plaint dated 27/2/2013.
c. That the statement of defence, counter claim and set off by the Defendants and the reply to Defence to counterclaim dated 25/4/2013 are a sham, raises no reasonable cause of action or triable issues as the dealings between the parties are evidenced in writing in an Agreement dated 27/6/2000.
d. That the statement of Defence, Counterclaim and Set off lack substance or any foundation, thus frivolous and are only calculated to delay fair trial and conceal real questions before court. It is, therefore, a waste of waste courts time.
e. That the Defendant's pleadings aforesaid are scandalous, offensive and an abusive by imputing the Plaintiff owes the Defendant the sum of US Dollars 3,262,600 clearly knowing as a matter of contract that they are not owed anything.
f. That the defence, counter claim and set off are embarrassing and vexatious only intended to annoy the Plaintiff and increase expenses for it is raising immaterial matters not supported by any contract of the parties calculated to enlarge issues, delay the case and increase expense.
g. That it is the interest of justice and to save court time that the application should be allowed.

[3] The Plaintiff amplified the above grounds in the submissions. The Plaintiff submitted that, by General Sales Agreement dated 27/6/2000 it appointed the Defendant as its General Sales Agent in Kenya for its passenger flights sales and cargo flight sales. By an email dated 30/11/2011 and a notice of non-renewal dated 25/12/2011 the Plaintiff notified the Defendant of its non-renewal of the General Service Agreement pursuant to its paragraph (A) of Article XIII – validity and Termination of the General Sales Agreement No. CSA/713/00. The Plaintiff also requested the Defendant to return to the Plaintiff all unused air waybills, stock financial documents and any other properties of the Plaintiff in its possession and the last working date was to be 31/1/2012. But due to logistical and operational needs the Plaintiff extended the term of agreement with the Defendant for two months which as to end on 31/3/2012. As at 31/3/2012 on termination of the aforesaid contract the Defendant had outstanding accounts payable to the Plaintiff in the sum of US Dollars 3,050,776.74 and 196 unreported/unused Air Waybills all the property of the Plaintiff. The Plaintiff severally through emails dated 3/7/2012, 10/7/2012 and a demand letter dated 10/7/2012 demanded for the same honestly believing the Defendant will respond to the demands but all in vain. The Plaintiff made several attempts for an amicable settlement of the matter as confirmed from its Advocates letter dated 10/1/2013 and the several emails to, but the Defendant avoided and/or refused to respond. Consequently, the failure respond to the Plaintiff's leaf of amicable settlement of the matter precipitated the filing of this suit. This application is also informed by the circumstances of this case. The Defendant's Defence, counter claim and/or set off and its Reply to Defence to counterclaim should be struck out and judgment be entered in favour of plaintiff as prayed for in plaint dated 27/2/2014.

[4] The dispute herein is reduced in writing in the Agreement dated 27/6/2000 and hence the court should strictly enforce it. Further the statement of Defence, counterclaim and Set off and the Reply to the Defence to counterclaim are a sham raising no triable issues but only trifling with court and as a consequence scandalous, offensive and abusive, embarrassing, vexatious and an abuse of court process calculated to delay the course of justice. Article XIII, (A) of the General Sales Agency aforesaid provided that the agreement shall be valid for one year with an automatic renewal on a year to year basis with the same terms and conditions unless either party decided not to renew the Agreement by giving prior 60 days' notice. The said Agreement was subsequently continuously renewed under the said terms until a notice of non-renewal dated 25/12/2011 (annexure AW2) was issued. Efforts by the Defendant through its Director Mr. Rafiq Sumar through email communications requesting the Plaintiff to rescind its decision to terminate the

contract bore no fruits (refer to pages 23 to page 33 of the annexures to the Plaintiff's affidavit application). As a consequence the Defendant is stopped from denying the existence of the said contract. Contrary to the bare denials by the Defendant in paragraph 4, 5 and 6 of the Defence the Plaintiff submitted it gave a proper termination notice of the contract. See annexure AW2 in supporting affidavit dated 29/1/2014. The said notice was in compliance with paragraph (A) of Article XIII Validity and termination of Cargo General Sales Agreement No. CSA/713/00 dated 1/2/2000 which provides:-

> **This agreement shall be valid for one year. It will be automatically renewed thereafter one year to year basis with the same terms and conditions unless either party decided not to renew the Agreement by giving prior (60) days written notice to the other party. Termination of this agreement shall not affect the fulfillment by both parties of their respective obligations under this Agreement prior to such termination.**

[5] The Plaintiff submitted that the allegations by the Defendant that it incurred costs on behalf of the Plaintiff (read without any agreement, authority or consent) at paragraph 7, 8, 15, 16, 17, 18 and 19 of the Defence and counterclaim and set off are not in any way supported by any documentation nor even in its Replying Affidavit sworn on 27/2/2014. Those allegations are wild and unfounded only concocted to manufacture triable issues. No proof of any such payments or contract or agreement or consent of the parties has been annexed. In any case the allegations have no basis in light of the express written contract.

[6] According to the Plaintiff, each GSA shall, on or before the end of each, remit all dues for transportation sold under the contract during the previous month to SAUDIA through the bank specified by SAUDIA in writing. GSA shall be entitled to deduct from such remittance the applicable commission provided in Article IV. Remittance Article V (H). GSA shall also give SAUDIA by end of each month or before, a consolidated sales report for all sales of the previous month to which are attached auditor's copies of air waybills sold by GSA and sub-agents in the territory. Also, all monies collected by GSA for transportation sold hereunder, including the commission withheld by GSA are the sole property of SAUDIA and shall be shown in the books of GSA as current liabilities. In the premises the court cannot entertain issues outside the written contract and which issues are not supported by any evidence. The decision by **Anyara Emukule Ag. J** (as he then was) in **HCCC NO. 68 OF 2003 DUBAI BANK LTD v COME CONS AFRICA** at pages 10 addressed the issue as follows;

> **"To circumvent this fact, the Defendant has introduced matters of oral evidence. For my part, he cannot be allowed to do this or get away with this……The issue however is whether it is open to the Defendant to introduce oral evidence contesting its written contract……. so as to raise one triable issue over its liability to the Defendant.**

[7] **Ringera J** (as he then was) considered a similar issue in the case of **DEPOSIT PROTECTION FUND BOARD** suing as the liquidator of **TRADE BANK LIMITED VS SUNBEAM SUPERMARKET AND 20 OTHERS** (Milimani Commercial Courts Civil Case No.3099 of 1996) and stated:-

> **''The law relating to the admissibility in evidence of separate prior agreements to contradict, add, vary or subtract from written contracts is codified in Section 98 of the Evidence Act in clear language in so far as it is material to this case, the Section provides:**
>
> **"Section 98 when the terms of any contract or grant or other deposition of property or any matter required by law to be reduced to the form of a document, have been proved according to Section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its**

**terms:-**

**PROVIDED that:-**

i. **……**
ii. **The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document.**
iii. **The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved."**

[8] In the context of this application, there no any fact in existence in relation to a separate oral agreement which is not inconsistent with the General Sales Agency Agreement; or a separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract. A court of law cannot re-write a contract for parties but should jealously protect and enforce it to the letter. They cited the case of **NAIROBI CIVIL APPEAL NO. 95 OF 1999 NATIONAL BANK OF KENYA LTD v PIPEPLASTIC SAMKOLIT (K) LTD AND PROF. SAMSON K. ONGERI**, Tunoi, Shah and Ole Keiwua JJA at page 7 held;

> **"A court of law cannot re-write a contract between the parties. The parties are bond by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. As was stated by Shah, J.A in the case of Fina Bank Limited Vs Spares Industries Limited (Civil Appeal No. 51 of 2000 (unreported)"**
>
> **"it is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from, a bad bargain."**

They also cited **ASAPH GATHUNGU MATI v KENYA FINANCE CORPORATION AND ANOTHER HCCC NO. 199 OF 2003** which cited a commentary on estoppel in the English & Empire Digest Vol.21 page 288 commentary which reads as follows;

> **"if a man either in express terms or by conduct, makes a representation to another of existence of a certain state of facts which he intends to be acted upon in that way, in the belief of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying existence of such a state of facts."**

The Plaintiff submitted that the Defendant is estopped by conduct and by record to purport to avoid the General Sales Agreement between the parties on the basis of the email communications as provided at pages 23 to 33 of the annexures to the application hereof. The total commission payable to the Defendant was all inclusive as deduced from paragraph (A) and (B) 7 in Article IV – Commission to GSA in the General Sales Agreement set out hereunder;

> **"Except as otherwise provided herein and subject to compliance by GSA of all provision of this Agreement, SAUDIA shall pay the GSA on the following terms remuneration for the sale of air cargo transportation and handling of consignments ….."**
>
> **"the commission payable under this Article will constitute as full compensation payable to GSA for the services and functions performed by GSA pursuant to this Agreement. Notwithstanding the fore going, nothing herein shall be construed to prohibit SAUDUA from reimbursing GSA for expenses incurred at SAUDIA's request. However, no commitment should be made by GSA which would cause SAUDIA to incur expenses without prior approval of SAUDIA."**

[9] The above show the Defence, counterclaim and set off are a sham, frivolous, vexatious and unsupported, hence, should be struck out and judgment entered for Plaintiff in the sum of US Dollars 3,050,776.74/- The annual automatic renewals are governed by the GSA contract and are subject to termination in accordance with the contract. They are no way meant to make the contract perpetual. Termination as per the contract is, therefore, not a breach of contract as alleged. The Defendant's position and pleadings are contradicted by the General Sales Agreement dated 27/6/2000 and hence its Defence, counter claim and set off do not raise any triable issue, or any reasonable cause of action and are completely bad in law and cannot even be cured amendment. The Defendant's claim of US Dollars 3,262,600 as owing has no chances of success and is only brought up to annoy the Plaintiff. They are not supported by the terms of the contract are intended to obscure or conceal the real questions in issue between the parties. They relied on the case of **JOSEPH OKUMU SIMIYU v STANDARD CHARTERED BANK.** The parties are bound by their written contract which the Defendant is mischievously trying to avoid. The court should uphold it by allowing the application dated 29/1/2014.

**''Sustain the defence and counter-claim'', the Defendant retorted**

[10] The Defendant opposed the Plaintiff's application dated 29th January, 2014 seeking to strike out the Defendant's Statement of Defence and Counterclaim. The Defendant is of the view that the grounds stated in support of the application are omnibus, thus, offending Order 2 Rule 15 (1) (a) of the Civil Procedure Rules which prohibits production of evidence. The Plaintiff has also stated that its application to be brought under that order which is irregular and makes the application fatally defective. However, the Defendant relied on more substantive Grounds of Opposition dated 26th February, 2014 and a replying affidavit by Dr. Supinder Singh Soin sworn on 27th February, 2014.

[11] To the Defendant, it is strange the Plaintiff contends that the Statement of Defence is a mere denial. The Defendant has denied that it owes the sum claimed in the plaint and stated that it accounted for all sales undertaken on behalf of the Plaintiff and further states that the Plaintiff's claim is vague and completely surreal. The Plaint shows no clear formula and evidence of how the claim arose. The Defendant at paragraph 8 of the Defence has further averred that it was merely an invoicing agent and that the contracts were signed by the Plaintiff and benefits thereof directly paid to it. In the main, the Defendant has stated that it is the Plaintiff which breached the contract and as a result left the Defendant in liabilities and debts, particulars whereof are given under paragraphs 14-19 of the Counterclaim. The Defendant therefore seeks a set-off, in the alternative, should the Plaintiff's suit succeed but otherwise asserts a Counterclaim.

[12] The Defendant is of the view that the Plaintiff's application is laden with unnecessary documents which makes it voluminous for nothing. Only forty one (41) pages of those documents are relevant. The other documents in support of the Plaintiff's application are alien to the suit and should be expunged. The Defendant filed its Statement of Defence based on the documents provided by the Plaintiff upon institution of the suit. The Plaintiff is introducing other documents with the application which can only be to the prejudice of the Defendant. Even the heavily relied upon Agency Agreement is not in the Plaintiff's list and bundle of documents. On this score alone above, this application should fail.

[13] The Defendant cited more judicial decisions in the alternative and without prejudice to its avowed position on this matter. It reiterated that the Plaintiff's application is baseless and experimental. The **locus classicus** case of **DT DOBIE & COMPANY (KENYA) LIMITED –VS- MUCHINA [1982] KLR 1,** is useful here especially what Madan JA said on the power to strike out pleadings, that;

> i) **"…the power to strike out should be exercised only 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 opinions should be expressed as this would prejudice fair trial and would restrict the freedom**

**of the trial judge in disposing the case".**

**ii) "…the Court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as suit can be injected with life by amendment, it should not be struck out".**

Also, in the case of **VINODEEP INVESTMENTS PROPERTY LIMITED v HENKEL POLYMER CO. LTD & 2 OTHERS [2004] e KLR, J.B Ojwang J, (**as he then was), after analyzing several authorities stated as follows;

**"From the foregoing review of authorities, it is clear that only very sparingly will any application for the striking out of a Statement of Defence be entertained."**

The learned judge further stated that:

**"…the decision to strike out a Defence should not be based on the unlikely success of the Defence case".**

Similarly, in the case of **LYNETTE B. OYIER & OTHERS v SAVINGS AND LOAN KENYA LIMITED HCCC No. 891 OF 1996 (unreported)** which was quoted with approval by F. Azangalala J, (as he then was) in the case of **YOBESH AMORO –VS- THE HERITAGE INSURANCE [2007] eKLR**, it was held that;

**"…the function of the court in its jurisdiction of striking out pleadings under Order VI Rule 13 of the Civil Procedure Rules is not to determine whether the action or Defence as framed will or will not succeed all the trial. That is the function of the trial court after hearing evidence and legal submissions. The function of the court under that jurisdiction is to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated".**

[14] According to the Defendant, the many judicial decisions on the subject ordain that even where pleadings are bad but can be rejuvenated by amendment, the court ought to allow the concerned party an opportunity to amend. The merits of the case are for the trial court, what the court has to check is conformity with the rules of pleadings in such applications. The court should avoid trying the case on affidavit evidence. Thus, the court should not look at the mountain of exhibits in support of the application. See the case of **SAMUEL NDUNGU MUKUNYA –VS- NATIONAL MEDIA GROUP LIMITED & ANOTHER [2012] eKLR,** where Odunga J, while considering an application such as this, said, at page 6 thereof;

**"From the onset I am cognizance of the fact that in an application of this nature the court must avoid the temptation to try the case by way of affidavit evidence".**

[15] The Defendant concluded that the formulation of its Statement of Defence meets all criteria of pleadings as provided under our rules. The Defence raises a number of triable issues, inter alia;

i. The actual amount the Defendant owes the Plaintiff;
ii. Whether the subject contracts were signed by the Plaintiff and benefits thereof directly paid to the Plaintiff.
iii. Whether a valid notice to terminate the parties' contract was issued at all. The Defendant claims that the contract was never terminated as it had been automatically renewed.
iv. Who between the Plaintiff and the Defendant breached the contract?
v. Whether the Defendant's counterclaim is tenable.

[16] Accordingly, the Defendant believes this application is incompetent and should be

dismissed with costs.

**DECISION OF COURT ON STRIKING OUT OF DEFENCE**

**Striking out done sparingly**

[17] I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous **DT DOBIE case** that **the Court should aim at sustaining rather than terminating suit**. That position applies *mutatis mutandis* to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ‘’Sword of the Damocles’’. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no *bona fide* triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the **SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.)** that**“…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication.”** Therefore, on applying the test, a defence which is a sham should be struck out straight away.

[18] I will apply this test here. I have considered the arguments by the Plaintiff that the Defendant’s defence and counter-claim are introducing new matters beyond the contract of the parties; and therefore, an embarrassment, sham and vexatious. I have also considered the argument that this case is governed by the contract entered into between the parties. I agree with the latter as well as the other argument that a court should never re-write a contract for parties. However, upon perusal of the defence and the counter-claim, against the plaint, the claims therein are based on the contract in question and I find issues such as; 1) The actual amount the Defendant owes the Plaintiff; 2) The actual amount owed to the Defendant by the Plaintiff; 3) Whether the subject contracts were signed by the Plaintiff and benefits thereof directly paid to the Plaintiff; 4) Whether a valid notice to terminate the parties’ contract was issued at all; Or whether the contract was validly terminated in accordance with the contract; 5) Who between the Plaintiff and the Defendant breached the contract; and 6) Whether the Defendant’s counterclaim is tenable; to be triable issues worth a trial by the Court. In any event, the Defendant has a suit in the counter-claim which according to Order 7 rule 3 of the Civil Procedure Rules has the same effect as a cross-suit. The cause of action therein is not frivolous and requires full investigation through a judicial inquiry; trial. At this stage I do not need to go into the merits of those issues. It suffices to state from the face of the pleadings, whether the issues are or are not triable issues in the sense of the law; and the Court is experienced at doing that exercise. I find the defence and the counter-claim raises triable issues and I hereby sustain the defence and the counter-claim. I reserve the merits for the trial. Accordingly, I dismiss the Plaintiff’s application. Costs of the application shall be in the cause. That order opens the way for my consideration of the other application on security for costs.

**APPLICATION CALLING FOR SECURITY FOR COSTS**

**Submissions by the Defendant**

[19] The application calling for deposit of Kshs. 500,000 or security of similar amount for

Defendant's costs was supported by the affidavit of the Defendant's Director Dr. Supinder Singh Soin. The major grounds advanced are that; 1) The Plaintiff is a foreign company with its headquarters at Jeddah in Saudi Arabia; and 2) The Defendant is likely to suffer total loss in costs should the Plaintiff's claim fail at the trial. The Plaintiff submitted it is crucial to note that the Plaintiff is a foreign company with no known assets in the Republic of Kenya. It is an airline company and judicial notice may be taken of the frequent business practice of airlines migrating from designated routes or ceasing operations altogether. The Plaintiff claims a whooping USD Dollars **3,050,776.74 (or the equivalent of Kshs. 266,119,255.03 at the Central Bank of Kenya mean rate of 87.23 as at 27th February, 2013).** The basis of the claim is an alleged breach of contract by the Defendant. The Defendant has not only filed a Statement of Defence denying the breach but has also filed a Counterclaim in the sum of **USD 3,262,600.** The basis of the Counterclaim, again, is an alleged breach of contract by the Plaintiff. The particulars of the claimed amount are as stated in paragraph 19 of the Statement of Defence and Counterclaim dated 25th April, 2013 and filed in court on 29th April, 2013. The application for security for costs is on the basis that the Defendant has a good defence to the Plaintiff's case, and that if it succeeds on it, it may be difficult to get the resultant costs from the Plaintiff which is not a resident company nor does it have any assets in the Republic of Kenya. And ''**…any subsequent order for payment of costs would not be enforceable without unreasonable difficulty outside this court's jurisdiction".** The Plaintiff's reply to the application that it is one of the most stable airlines with bank accounts in Nairobi is merely confidence out-bursts. It has not confirmed it has any known assets within the jurisdiction of this court. The superiority of the Plaintiff's claim is not important because "…**even if a party is insolvent or unable to pay costs or is even in liquidation is not decisive as the court still has discretion whether or not to order security of costs".**

[20] The Defendant cited the necessary law which is Order 26 Rule 1 of the Civil Procedure Rules, 2010 that provides as follows;

> **"In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party".**

It is obviously court's absolute judicial discretion to call for security for costs. Where the Plaintiff is a foreign company, as opposed to a natural person, the courts have always insisted on security for courts as was stated by Law J.A in **SHAH v SHAH [1982] KLR 95** that;

> **"The general rule is that security is normally required from Plaintiff's resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given".**

[21] For the Plaintiff to brag that it has a good claim with high chances of success is to miss the point completely. Under Order 26, what is important is the Defendant to show that it has a bona fide Defence. The Defendant's Statement of Defence speaks for itself. It has been stated by the courts time without number that a bona fide claim or Defence is not one that must succeed at trial but rather one that raises issues which require interrogation by way of trial. The Defendant raises issues which have been set out in the Defence and also in our submissions in response to the other application by the Plaintiff to strike out the Defence and Counterclaim. As observed in the case of **Shah v Shah (Supra), "…the test is not whether the Plaintiff has established a prima facie case, but whether the Defendant has shown a bona fide defence".** The Plaintiff has not placed before court any evidence of ownership of any asset in the Republic of Kenya. As was held by Mutava J in **COSMOS HOLIDAYS PLC v DHANJAL INVESTMENTS LIMITED, HCCC** No **112 of 2012 (O.S) (unreported)** lack of evidence of ownership of assets is a crucial issue in determining whether to grant security for costs. The learned judge stated that;

> **"The next issue arising is whether Cosmos has any known assets or place of business in Kenya upon which execution for recovery of costs can be levied. From the material placed before the court, there is no evidence of ownership of assets by Cosmos Holding nor existence of a place of business in Kenya. Recovery of such costs would**

**require execution against Cosmos; a company domiciled in the United Kingdom. <u>This would be, as observed above, uneconomical, inconvenient and time consuming given the amounts entailed. Consequently, I would exercise my discretion under Order 26 Rule 4 aforesaid to order that such security of costs be provided by Cosmos herein in Kenya".</u>** (Underlining by the Defendant)

[22] For those reasons, the Defendant is convinced that it has made a case for the grant of security of costs. The quantum of such costs is squarely a matter of discretion. But the Defendant prayed for the sum of **Kshs. 5,000,000/=** in view of the complexity of the matter, the heavy documentation and the claimed amount in line with the Cosmos Case **(Supra),** that…**"the court should allow security that is reasonably commensurate with the subject matter over which the costs being secured relate"**. See also the holding of the Honourable Justice Kimondo in the case of **ABEL MURANGA ONGWACHO v JAMES PHILIP MAINA NDEGWA & 3 OTHERS [2012] eKLR.** Finally, this application was brought with expedition noting the circumstances of the case, the practice and procedure of case management at the Milimani Commercial Courts and the dictates of the Civil Procedure Rules. The application was filed before any directions were taken for the hearing of the suit. Indeed, no such directions under Order II have been taken, the parties have not agreed on the issues and neither have questionnaires been filled and filed. The suit is still at its infancy. The application should be allowed.

**Submissions by the Plaintiff**

[23] The Plaintiff resisted the call to provide security for costs and relied on the Replying Affidavit sworn by Agnes Wairimu on 29/1/2014 and filed in court on 3/2/2014. It recited that the said application is premised on the allegation that the Plaintiff being a foreign company based in Jeddah, if it succeeds in it case (which is very remote) "any subsequent order for payment of costs would not be enforceable without unreasonable difficulty outside the court's jurisdiction." The Plaintiff asserted that this suit was necessitated by the willful inaction and inability by the Defendant to respond even to request by the Plaintiff for an amicable settlement of the issue in dispute. Were it not for the negative conduct of the Defendant, this suit could have been averted. However, the Defendant does not have a case at all. In support of that point, the Plaintiff quoted the holding in the case of **DEVRAM MANJI DALTANI v DANDA (1949) 16 EACA 35** at page 36 that;

> **"….a successful Defendant who after all is brought into court against his will can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the action has led to litigation which but for his own conduct might have been averted."**

The Plaintiff then submitted that, in any event, the conduct of the Defendant will eventually disentitle it any costs. .

[24] The Plaintiff made further submission. In **GUFF ENGINEERING (EAST AFRICA) LTD v AMRIK SINGH KALGI**, the court at page 281 quoted the dictum of **Lord Denning MR** in Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632 at page 284 quoting Maughan L J in Gill All Weather Bodies Ltd Vs All Weather Motor bodies Ltd. "The section only confers discretion on the court. There may be many cases where a company is insolvent, and yet the court would not order security to be lodged.

> **'…if there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered… Some of the matter which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whet her there is an admission by the Defendant on the pleadings or elsewhere that money is due.**

> **…the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company's wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.**

[25] The Plaintiff contends that the court in exercising its discretion in an application for security of costs has to consider whether the company's claim is bona fide and whether it has reasonably good prospects of success. The Plaintiff is one of the most stable airlines in the world and with presence in Kenya over two decades and it is unlikely it will close shop in order to defeat paying costs arising from such a case. The Defendant's application is only meant to stifle the Plaintiff's claim and should be dismissed.

**COURT'S DECISION ON CALL FOR SECURITY FOR COSTS**

[26] Yet again, the law is settled in this area that an order for security for costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused. In fact, even where a company is insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgment of security. The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff's claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain. On these things, consider the following passage in **GUFF ENGINEERING (EAST AFRICA) LTD v AMRIK SINGH KALGI**, at page 281 quoting the dictum of **Lord Denning MR** in Sir Lindsay Parkinson & Co. Ltd (1973) 2WLR 632 and at page 284 quoting Maughan L J in Gill All Weather Bodies Ltd Vs All Weather Motor bodies Ltd.

> ‘**’…if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered… Some of the matter which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whet her there is an admission by the Defendant on the pleadings or elsewhere that money is due.**
>
> **…the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company's wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.**

[27] The Plaintiff's stature as a reputable and stable airline company has not been disputed. Nothing was adduced by the Defendant to show any financial limitation on the part of the Plaintiff which would heave evidential burden on the shoulders of the Plaintiff to file affidavit of financial means. Similarly, it has not been disputed that the Plaintiff has been operating in Kenya for over two decades. From the record, the bona fides of the Plaintiff's claim is un-challenged except that the Defendant has raised a counter-claim or set-off. In all, there is no likelihood that the Plaintiff will not be able to pay costs of the suit should its claim fail. Equally, it is highly unlikely the Plaintiff will close shop in order to defeat paying costs arising from this suit. There is absolutely

nothing on record or any trait shown in the conduct of the Plaintiff that it can go to the extreme of closing shop for purposes of avoiding to pay costs herein, if any.

[28] Furthermore, the Plaintiff, by General Sales Agreement dated 27/6/2000 appointed the Defendant as its General Sales Agent in Kenya for its passenger flights sales and cargo flight sales. At least from the record and the submissions of the parties, the agency was quite lucrative and involved huge sums of money. That factor is important in an application of this nature. And absent the insolvency or other financial limitation on the part of the Plaintiff, it will be difficult to read any deficiency as to require deposit of security for costs from the Plaintiff in the circumstances. For better understanding of the propositions above, see the many cases cited by parties especially that case of; **SHAH v SHAH; ABEL MURANGA ONGWACHO v JAMES PHILIP MAINA NDEGWA & 3 OTHERS;** and **GUFF ENGINEERING (EAST AFRICA) LTD v AMRIK SINGH KALGI.**

[29] The overall impression out of the above analysis is that there is not reasonable cause why the court should exercise its discretion in favour of the Defendant. It will, therefore, not call up for any security for costs from the Plaintiff. The upshot is that the Defendant's application is dismissed. Costs of the application shall be in the cause. Parties should ensure steps are taken in order to progress the case to trial without delay. It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 25th day of September, 2014**

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**F. GIKONYO**

**JUDGE**

**In the presence of:-**

**Alex court clerk**

**M/s Adhiambo for Plaintiff**

**Nyawara for defendant**