REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCCC No. 496 of 2011

MOHAMMED HASSIM PONDOR (Suing on behalf of The International Air Transport Association – IATA) ……..…… 1st PLAINTIFF

MERCANTILE INSURANCE COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

TWIM BUFFALOS SAFARIS LIMITED ……..…….. 1ST DEFENDANT

MARGARET WAMAITHA RUITI ……..…. 2ND DEFENDANT

DAVID NJANE RUIYI ……..…….. 3RD DEFENDANT

BENSON RUIYI NJANE ……..…….. 4TH DEFENDANT

RACHEL NJANE ……..…… 5TH DEFENDANT

R U L I N G

1. This is an Application for summary judgement dated 19 June 2012. It is brought by way of Notice of Motion under the provisions (presumably) of **Order 34 Rule 5** as well as **Order 36** of the *Civil Procedure Rules, 2010*. The Orders in the heading to the Application are expressed in Roman numerals but this court is unable to interpret therefrom that the Plaintiff intends to bring this Application under the old Civil Procedure Rules. The Application seeks summary judgement to be entered for the Plaintiffs in the amount of Shs. 2,164,209/- covering remittances due for sales of the airline tickets relating to the period 1st to (presumably) 30th of November 2009 and 1st to 30 of September 2010. It also seeks summary judgement for US$72,203.15 (presumably) covering remittances due for sales of airline tickets for the period 1st to (presumably) 30th November 2009 and1st to 30th September 2010. I say "presumably" because the Application by the Plaintiff is riddled with typographical errors and mistakes. It is fortunate for the Plaintiff that the Rules Committee in the new Rules of *Civil Procedure, 2010* included **Order 51 rule 10 (2)**.

2. The Plaintiffs' Application is supported by the Affidavit of the General Manager of the second Plaintiff one **Shem Nyamai** sworn on 19 June 2011. The deponent detailed that he is duly authorised to swear the Affidavit on behalf on both the Plaintiffs. He noted in paragraph 2 that the Defendants were appointed by the first Plaintiff as travel agents for the sale of airline tickets in Kenya and signed what he

termed “a binding contract” providing for the same. According to the deponent this contract stipulated that the first Defendant would pay to the first Plaintiff in respect of a Traffic Document issued for sales of specified passenger air transport (whatever that may mean). It appears that there was executed as between the Plaintiffs an Insurance Policy under which the second Plaintiff would fully indemnify the first Plaintiff for any default in payment (presumably for airline tickets) by the second, third, fourth and fifth Defendants “in their capacity as Directors of the first Defendant”. Thereafter, it appears, the second, third, fourth and fifth Defendants signed a Deed of Indemnity with the second Plaintiff dated 29 November 2006. Those Defendants agreed to keep the second Plaintiff fully indemnified against all actions and proceedings, claims, demands, losses and default arising from and out of and as a result of the default by the first Defendant together with all costs thereon. According to Mr. Nyamai, the first Defendant wrongfully failed, neglected and/or refused to pay the first Plaintiff the Kenyan shilling and US dollar amounts as above between the period of 1st to 30th November 2009 (presumably) and 1st to 30th September 2010. Luckily for the first Plaintiff by a letter of subrogation dated 5 April 2011 as between the first and second Plaintiffs, the aforementioned sums were paid to the first Plaintiff by the second Plaintiff on account of the said Insurance Policy. If that is the case, one wonders why the first Plaintiff is a party to this suit at all. Further, this court disappointingly notes that the Supporting Affidavit did not have annexed to it copies of any of the documents referred to therein.

3. The Application is opposed and the second Defendant in her capacity as one of the directors of the first Defendant, swore a Replying Affidavit on behalf of all the Defendants, dated 8 August 2012. First of all, the deponent commented that she had been informed by the advocates on record for the Defendants, that the Plaintiff’s Application is incurably defective for once a Defence has been filed, summary judgement cannot be entered as against a defendant. Further, the deponent had been advised that as the Plaintiff’s claim was in respect of special damages, the same need to be strictly proved and cannot be done by way of striking out the Defence and entering summary judgement. Be that as it may, she maintained that the Defence on record raised serious triable issues which could only be canvassed during a full trial of the suit. Further, the deponent denied that any monies were owing by the first Defendant to the first Plaintiff for the periods detailed and she annexed copies of Applications for Funds Transfers from Equity Bank as well as statements in relation to sale of air tickets. Further, the second Defendant denied the letter of subrogation referred to in the Affidavit in support of the Application saying that such subrogation could only have been possible “after the return of unused tickets by the first Plaintiff were duly reconciled with the tickets used less the available one”, whatever that may mean.

4. The Plaintiffs’ submissions in respect of their Application were filed on 4 October 2012. After reciting the amounts for which they sought summary judgement, they submitted that the Defence raises no triable issues and that the Defendants had expressly admitted to owing the Plaintiff’s the amounts claimed. The Plaintiffs submitted that it was not in dispute that the Defendants were appointed by the first Plaintiff as travel agents for the sale of airline tickets in Kenya. It was further not in dispute as borne out in the Defence that the 2nd, 3rd, 4th and 5th Defendants signed a Deed of Indemnity which fully indemnified the second Plaintiff against claims arising from default on the part of the first Defendant. It should however be noted that the Defence made no admission as to the execution of an insurance policy as between the first and second Plaintiff. The Plaintiffs submitted that the documentation filed together with the Plaint fully supported the Plaintiffs’ claim which was unrebutted. Finally, the Plaintiffs submitted that the Defence herein was filed without any explanation as to delay, four months after it was due. The court was asked to strike out the Defence and enter judgement as prayed.

5. The written submissions of the Defendants were filed herein on 23 October 2012. After setting out the prayers as per the Application, the Defendants submitted that a Statement of Defence dated 2 March 2012 had been properly filed in court on 6 March 2012. As such, the Plaintiff’s could now not apply for Summary Judgement in their favour while the said Statement of Defence remained on record. According to the Defendants’ submission the Plaintiffs should have first applied to this court to strike out the Statement of Defence on record and should the court have allowed that application, they could have proceeded to apply for an order for Summary Judgement in their favour. The Defendants relied upon the Replying Affidavit of the second Defendant Margaret Wamaitha Ruiyi more particularly the annexures thereto which contains statements noting tickets purchased and payments made therefore. Thereafter the Defendants referred this court to the 2 cases of **Provincial Insurance Company Ltd versus Diners Club**

Africa & Peter G. Kamau (2005)eKLR and **Simon Niven Murray-Wilson versus Kenya Shell Ltd & 5 Ors.HCCC No. 4290 of 1991 (unreported)**. In the former case **Visram JA** referred extensively to the finding in a recognised authority as regards summary judgement cases being the case of **D. T. Dobie & Co (K) Ltd versus Muchina (1982) KLR 1** as per **Madan JA** (as he then was).

6. I too find support in that authority as the Court of Appeal observed at page 6 *inter alia*;

> ***'Let's understand the principles upon which the court acts when dealing with an application under Order VI rule 13*** (now **Order 2 rule 15 (1)).**
>
> ***"No exact paraphrase can be given but I think 'reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph (2) of the rule) the allegations in the plaint are considered."***

Per Lord Pearson in Drummond-Jackson versus British Medical Association (1970) 2 WLR 688 at p 696.

> ***"A cause of action is an act on the part of the defendant's that gives the plaintiff his cause of complaint."***

Words and Phrases Vol 1 p 228.

> ***"There is some difficulty in fixing a precise meaning to the term 'reasonable cause of action'…. In point of law and consequently in the view of a court of justice, every cause of action is reasonable cause but obviously some meaning must be assigned to the term 'reasonable'…. A pleading will not be struck out unless it is demurrable and something worse than demurrable."***

Per Chitty J in Republic of Peru –vs- Perurian Guano Company 36 Ch. Div 489, at pages 495 and 496.

> ***"It has been said more than once that the rule is only to be acted upon in plain and obvious cases and in my opinion the jurisdiction should be exercised with extreme caution."***

Per Swinfen Eady L.J in Moore –vs- Lawson and Anor (1915) 31 TLR 418 at 419

> ***"It is a very strong power indeed. It is a power which, if it is not most carefully exercised might conceivably lead a court to set aside an action in which there might really after all be a right and in which the conduct of the defendant might be very wrong and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon…. Therefore unless the case be absolutely clear, I do not think the statement of claim do be set aside as not showing a reasonable cause of action"***

per Denman J in Kellaway v Bury (1892) 66 LT 599 at pp 600 and 601. Upon appeal:

> ***"That is a very strong power and should only be exercised in cases which are clear and beyond all doubt…. The court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."***

Per Lindley J ibid p 602.

> ***"It has been said more than once that rule is only to be acted upon in plain and obvious cases and in my opinion, the jurisdiction should be exercised with extreme caution".***

Per Lord Justice Swinfen Eady in Moore v Lawson and Another (supra) at p 419 .

> ***"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved."***

The Court of Appeal in the D.T Dobie case was dealing with the issue of summary procedure and dealing with the determination of a suit without the benefit of trial. The courts have to be very cautious in exercising such jurisdiction, but may be called upon when, in very clear circumstances, the issues are an abuse of the court process or will delay and embarrass the trial process. As summed up by ***Madan JA*** in the ***D. T. Dobie case:***

> ***"it is relevant to consider all averments and prayers when assessing under Order VI rule 13 whether a pleading discloses a reasonable cause of action and also the contents of any affidavits that may be filed in support of an application……. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way.' (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed on the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.***
>
> ***If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overreact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.***
>
> ***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable 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, providing it can be injected with real-life by amendment, it ought to be allowed to go forward for a court of justice ought not act in darkness without the full facts of a case before it."***

7. Looking at the Plaintiffs' Application, I have already commented as to the lack of clarity as to under which Order of the *Civil Procedure Rules 2010* the same is brought. There is no doubt that the Summary Procedure under **Order 36** is of no assistance to the Plaintiffs as under **rule 1 (1)** of that Order, the same only applies where a Defence has not been filed. In this case a Defence has been filed by the Defendants on the 6 March 2012. Necessarily the Plaintiffs will have to turn to the second enabling Order which is **Order 34** to which the Plaintiffs have referred. **Rule 5** reads as follows:

> **"The court may, with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject matter in dispute, it seems desirable to do so, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just."**

Order 34 comes under the general heading of "Interpleader" and according to my understanding, involves claims as between similar plaintiffs, not involving any defendant at that stage. The provision in the Rules states that an application for relief under that Order shall be made by originating summons unless made in the pending suit, in which case it shall be made by summons in the suit. This is simply not

the case here and I see no relevance to the Plaintiffs' summary judgement application under this Order. It seems to me that the Defendants have a point when they detailed in their submissions that in view of the filing of the Defence herein, the Plaintiffs should probably have made an application under **Order 2 Rule 15** to strike out the Defence.

8. I have perused the Defence of the Defendants filed herein on 6 March 2012. It seems to me that the Defence details a large number of admissions in relation to various paragraphs of the Plaint, including the execution by the second, third, fourth and fifth Defendants of the Deeds of Indemnity dated 29 November 2006. What appears to be vehemently denied is that any monies are owed at all to the first Plaintiff whether such be Kenya shillings or US dollars. It seems to me that this one point raises an issue to be decided between the Plaintiffs and the Defendants. The outcome of all the above is that I dismiss the Plaintiffs' Application dated 19 June 2012 with costs to the Defendants.

DATED and delivered at Nairobi this 24th day of January 2013.

J. B. HAVELOCK

JUDGE