REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 585 OF 2006

MOHAMMAD HASSIM PANDOR (suing for and on behalf of

The International Air Transport Association **(I.A.T.A.)..... 1ST PLAINTIFF**

MERCANTILE INSURANCE COMPANY LIMITED

(formerly Mercantile Life & General Assurance

Company Limited)**……...2ND PLAINTIFF**

VERSUS

WINNIE WANJIRU KAMBORA (trading

Under the name and style of the **TRAVEL HIVE) ….…..... 1ST DEFENDANT**

RULING

In its Amended Plaint filed on 31st October, 2008 the Plaintiffs claimed that by an agreement in writing dated 22.A001.2001 between the 1st Plaintiff and the Defendant, the Defendant was appointed to carry out certain services for the 1st Plaintiff being sale of air tickets in Kenya as a travel agent. That by a Deed of indemnity between the 2nd Plaintiff and the Defendant it was agreed that in consideration of the 2nd Plaintiff effecting Policy No. MIC12/129/0000001/2002 to the Defendant, the Defendant would indemnify the 2nd Plaintiff against all claims and loss that may arise as a result of the Defendant's default. That in breach of the said agreement dated 22.A001.2001, the Defendant had failed to pay the 1st Plaintiff the sum of Kshs.2,987,513.06 and US$4,803.27 which the Plaintiffs were now claiming against the Defendant.

By an Amended Defence filed on 12th November, 2008, the Defendant admitted being appointed an agent of the 1st Plaintiff but denied the existence of a written contract as claimed in the Plaint, she admitted having executed the deed of indemnity but contended that the same was void and unenforceable for having referred to her as a director, she denied having breached any agreement as claimed. That between November, 2005 and October 2007 she had paid a total of Kshs.4,900,000/- whilst the amount demanded by the Plaintiffs as at 22/5/06 was Kshs.4,387,513/- and US$4,803/27, that although she had demanded an account from the Plaintiffs the same was not forthcoming and finally that the amounts being demanded by the airlines are amounts which the Plaintiffs ought to have paid to various airlines who are necessary parties who ought to have been joined in these proceedings. A Reply to defence joining issue with the Amended Defence was filed on 24th November, 2008.

Full discovery was done, with there being request for and particulars supplied, Notice to admit documents bundle of documents and finally a Statement of Agreed Issues was filed on 22nd January, 2009 setting out a total of 11 issues for trial. These issues were as follows:-

1) Was there a written contract between each International Air Transport Association (I.A.T.A) member (the carrier) and the Defendant whereof the former appointed the later as its travel agent?

2) If issue No. 1 above is in the affirmative, did the contract contain the particulars set out in paragraph 4(i) – 4(iv) of the Amended Plaint?

3) Are the Deeds of Indemnity dated 4th March, 2003 between the Second Plaintiff and the Defendant void and unenforceable?

4) Did the Defendant fail, neglect and refuse to pay the First Plaintiff the sum of Kshs.2,987,513.06 and US$4,803.27?

5) Did the Defendant pay a sum of Kshs.4,900,000.00 to the Plaintiffs?

6) Is the Defendant indebted to the Plaintiffs?

7) If issue number 4 above is in the affirmative, is the failure, neglect and refusal to pay in breach of the agreement dated 22.A001.2001?

8) Which airliner and tickets does the amount claimed by the Plaintiffs relate to?

9) Did the Plaintiffs formerly serve Demand Notices upon the Defendant?

10) Are the Plaintiffs entitled to the prayers sought in the Amended Plaint?

11) Who is to bear the costs of this suit?

The said issues were signed by the Advocates for both parties. I should here state that earlier, on 1st April, 2008 the Plaintiffs had filed an application for Summary Judgment. That application came up for hearing on 7th May, 2008 but the same was not prosecuted and still remains on record.

Thereafter, the suit was listed for hearing on 25th November, 2009 and 14th October, 2010 but the trial did not commence. Then, by a Notice of Motion dated 22nd February, 2011 filed on 4th March 2011, the Plaintiffs sought to strike out the Defendant's Amended Defence and for Judgment to be entered for the Plaintiffs as prayed for in the Amended Plaint. That is the motion that is the subject of this ruling. The grounds are set in the body of the Motion to be that the Amended Defence does not disclose any triable issue, it is an abuse of the process of court, was delaying the Defendant's day of Judgment and that it was a mere denial and was meant to embarrass and/or prejudice the fair and expeditious trial of the suit.

The Motion is expressed to be brought under Order 2 Rule 15, Order 51 Rules 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. The same is supported by the Affidavit of Mohammed Hassim Pandor and Sham Nyamai sworn on 22nd February, 2011. The Plaintiffs also filed written submissions dated 14th November, 2011, in which they applied to amend the order under which the motion was brought to be Order 2 Rule 15(1) (b) (c) and (d), which application is hereby allowed.

In both the Affidavit and the Submissions, it was contended on behalf of the Plaintiffs that the Defendant was appointed a travel agent by an agreement dated 22.A001.2001 produced as "M.H.P.2", that the Defendant had failed to remit to the 1st Plaintiff between September and October, 2005 Kshs.4,387,513/00 and US$4,803/27 being amounts received from sales of tickets to airline passengers. That the same was demanded when the Defendant failed to respond, the 1st Plaintiff

demanded payment of the same under the Agency Default Cover from the 2nd Plaintiff who settled the same and executed a subrogation form on 30th June, 2006. The suit herein was therefore filed under the doctrine of subrogation. That the Defence filed by the Defendant was a sham meant to delay the fair and expeditious disposal of the suit, that it didn't disclose any triable issues and was an abuse of the process of the court.

Counsel for the Plaintiffs submitted that the Defendant did make part payment during the pendency of the suit, a total of Kshs.1,400,000/- in terms of "SN5", that under the Deed of Indemnity produced as "SN2" executed by the Defendant, she was bound to indemnify the 2nd Plaintiff, that it is the Defendant to produce the records and accounts of the transactions she effected and not the Plaintiffs. Counsel attacked the Defendant's Replying Affidavit for failing to disclose that after the suit was filed a total sum of Kshs.1,400,000/- was paid by the Defendant. Counsel referred to the cases of **Plantation Fertilizers Ltd –vs- Rioki Coffee (1971) Co. Ltd** on the proposition that a defence should raise a reasonable plausible, arguable defence and not just a general denial or traverse of the Plaintiff's claim, **NIC Bank –vs- Banks Express & 2 others** and **KAA –vs- Queen Insurance Agency** on what is to be considered a scandalous and vexatious pleading.

On the part of the Defendant, she filed a Replying Affidavit she swore on 9th May, 2011. Therein she admitted being appointed travel agent by the 1st Plaintiff but denied the claim on the grounds of lack of particulars of the claim, that particulars of airlines and amounts owing was not sufficient, that in the absence of the particulars of the transactions, she was unable to address the Plaintiff's claim, that the alleged notice of demand was never addressed to her and she never received the same, that there was no evidence of settlement by the 2nd Plaintiff, that subrogation would only apply if indebtedness was proved, that the Amended Defence raised triable issues which does not warrant a striking out.

The Defendant's Counsel submitted that there had been unreasonable delay in bringing the application and relied on the cases of **Lake Publishers & Enterprises –vs- James Odaga & Another and Bushtock Entertainment Co. Ltd –vs- E.A Breweries Ltd.** Counsel urged the Court to dismiss the suit.

I have considered the pleadings, the Affidavits on record, the written submissions and the authorities.

The principles applicable in an application for striking out a pleading are well settled. In the case of **D.T Dobie –vs- Muchina (1982) KLR 1** the Court of Appeal held at page 6:-

Per Chitty J in Republic of Peru –vs- Peruvian Guano Company 36 Ch. Div 489 at pp 495 & 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 Lord Justice Swinfed Eady in Moore –vs- Lawson (1915) 31 TLR 418 at 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 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 ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof…. The court ought not to deal with any merits of the case for that is the function solely reserved for the judge at the trial…."

Thus the power to strike out a pleading being a draconian power must be exercised cautiously and only in plain and clear cases. A court of law must be very slow to unseat a litigant from the seat of justice by summarily determining a matter without the benefit of trial. The court on considering all the material before it, must feel assured and convinced that even if a trial would have been conducted, it is more likely that it would still arrive at the same decision it is arriving on in an application for striking out. Be that as it

may, in an appropriate case, the power must be exercised.

In the case before me, there is an amended Defence and a Reply thereto which joined issue on the Amended Defence. There is also a statement of agreed issues that both the parties signed and filed in court on 22nd January, 2009. The suit had even come up for hearing severally. Can that Amended Defence then beheld to disclose no triable issue, vexatious and abuse of the process of the court? The parties themselves under their hands had as early as January, 2009 drawn a list of what they considered to be issues to be tried in this matter. I have perused those issues. To me the issue Nos. 3, 4, 5, 7 and 10 of the statement of Agreed issues filed by the parties were never answered by the documents produced in the application. Those are issues that can only be answered after a trial.

On the issue of delay, I agree with the Defendant that if a Plaintiff feels that a Defence filed has no triable issue or is one properly under Order 2 or Order 36 of the Civil Procedure Rules, such a Plaintiff should not wait until issues have been framed and the matter is listed for trial to bring an application for striking out.

In my view, once a Plaintiff has participated in all those pre-trials that lead to nothing but the main trial of the suit including framing of the issues, he will be estopped from claiming that a defence or a pleading is fit for an application under order 2 of the Civil Procedure Rules. That will be taking an inconsistent position and a court of law will and should not allow that. The only time that there should be an exception to such a scenario is, where discovery beings forth new material or information hitherto not in the possession or knowledge of the party seeking to invoke either Order 2 of Order 36.

In the present case, there is nothing to show that discovery produced any new material. The issues were drawn and agreed on after the pleadings were amended, how then can the Plaintiff seek to summarily turn around and have the suit determined without a trial. The application did not address the issues filed in court on 22nd January, 2009. In my opinion once a party executes and/or puts forth issues for determination in a suit, he is bound by them unless he shows good reason why he would wish to depart from them.

In the case of **Victoria K. Wills –vs- Buckard Kokartis MSA. HCCC No. 559 of 1993 UR** Waki J (as he then was) Held, in a matter where in a suit pre-trials and discovery had been concluded, issues drawn and filed and the suit listed severally for trial, that in such a case an application under the former Order VI Rule 13 was too late and the Plaintiff was bound by the issues she had filed in court.

To my mind therefore, bringing an application to strike out a Defence six (6) years since the filing of the suit is unreasonable delay and the application itself becomes an abuse of the court process.

If I am wrong in the foregoing, I have considered the application on merit and the Affidavits filed. It is true that there seems to be an Agreement in writing between the Plaintiff and the Defendant as pleaded in the Amended Plaint. I do not agree with the Defendant that the same is null and void for the reason that it referred to her as a director. She signed the same. Accordingly, there was an agreement which was properly executed by the parties.

The Defendant has sworn that between November, 2005 and October, 2007 she had paid the Plaintiff a total of Kshs.4,900,000/-. She has sworn that what the Plaintiff had claimed between 2005 and before filing the suit was only Kshs.4,387,513/- and US$4,803,27. It is not clear the exact time the said Kshs.4.9 million was paid but it is also not clear whether the Kshs.4.9 million did wipe out the Plaintiff's claim of Ksh.4,387,513/- plus US$4,803/27. Obviously US$4,803/27 at the exchange rate added to the sum of Kshs.4,387,513/- would be close to the said Kshs.4.9million. I believe that this is why the parties put issue No. 5 in their statement of agreed issues. To me that is a triable issue. The other issue Nos. 3, 4, 7 and 10 in the statement of agreed issues do not look to me to be mere denials.

For that reason, I am not convinced on merit that the application should succeed.

For the foregoing reasons, the Notice of Motion dated 22nd February, 2011 is without merit and is hereby

dismissed with costs.

Dated and delivered at Nairobi this 9th February, 2012.

A. MABEYA

JUDGE