

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

civ case 1221 of 99

KODAK LIMITED..... APPELLANTS

VERSUS

**LYNDALIAN AIRFREIGHTERS & FORWARDERS LTD & 2 OTHERS.....
RESPONDENT**

JUDGMENT.

**KODAK LIMITED V LYNDALIAN AIRFREIGHTERS
& FORWARDERS LTD & 2 OTHERS**

December 1, 2000

T Mbaluto, Judge delivered the flowing judgment.

The third defendant has brought this application under Order 6 rule 13 (1) (a) of the Civil Procedure Rules and article 26 (2) and (4) of Carriage by Air Act to strike out the plaint filed herein on September 2, 1999 by the plaintiff. The application is based on three grounds, which are stated in the body of the application as follows: -

1. THAT the suit herein filed is extinguished under the provisions of the Carriage by Air Act [Act Number 2 of 1993]; 2. THAT the plaintiff did not lodge the requisite notice of loss of cargo with the third defendant herein within fourteen [14] days from the date of loss as required under Article 26 of the Carriage by Air Act. 3. THAT the suit as filed does not lie against the defendant as the same is incompetent.

As provided under sub-rule (2) of the rule 13 no evidence is admissible in an application under sub-rule 1 of Order VI but the applicant is required to state concisely the ground on which the application is made. Since an application under that sub-rule can only be made on the ground that the pleading sought to be struck out discloses "no reasonable cause of action or defence", it follows that the grounds to be stated pursuant to sub-rule (2) must be germane to that broad ground. It is trite law, I think, that the determination of whether or not a pleading discloses a reasonable cause of action must be based on the consideration of the pleading itself and on no other matter.

That is indeed why no evidence is permitted in such an application. Consequently where in an application, such as the one before me, an allegation is made that notices required by law to be given were not given and that the suit is thereby extinguished or that the suit is incompetent, which allegation is denied by the other side, it is obvious that the dispute cannot be resolved without recourse to evidence, which in turn means that the matter cannot be the subject of an application under Order VI rule 13 (I) (a). It follows from the foregoing that this application is misconceived and must be dismissed with costs. It is so ordered.