



REPUBLIC OF KENYA



International Air Transport Association & another v Safa Agencies Limited & 2 others (Civil Case E336 of 2019) [2024] KEHC 15658 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E336 OF 2019
JWW MONG'ARE, J
DECEMBER 6, 2024**

BETWEEN

INTERNATIONAL AIR TRANSPORT ASSOCIATION 1ST PLAINTIFF

SAHAM ASSURANCE COMPANY KENYA LIMITED 2ND PLAINTIFF

AND

SAFA AGENCIES LIMITED 1ST DEFENDANT

TAQIUDIN HASSAN AFFEY 2ND DEFENDANT

MUKTAR BILLOW SALAT 3RD DEFENDANT

RULING

1. The 3rd Defendant filed the Notice of Motion application dated 24th April 2024 under Section, 1A, 1B and 34 of the *Civil Procedure Act*, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules, seeking the striking out of his name as a party to this suit.
2. The application is supported by the annexed affidavit of the 3rd Defendant, Muktar Billow Salat and written submissions dated 26th June, 2024.
3. The grounds are that: -
 1. The Plaintiffs brought this suit against the Defendants vide a Plaint dated 30th September, 2019 alleging breach of a Passenger Sales Agency Agreement on the part of the 1st Defendant herein and sought Judgement for the sum of Kshs. 647,577.98/= and USD 210,324.95 together with interest thereon at court rates.
 2. The sales agency agreement is alleged to have been executed between the 1st Plaintiff and the 1st Defendant.



3. The 2nd and 3rd Defendants are joined in this suit based on the allegation that they executed deeds of indemnity in their capacity as directors of the Defendant committing to at all material times, keep the 2nd Plaintiff, who is the 1st Plaintiff's insurer, indemnified for all claims relating to the breach of contract by the 1st Defendant.
4. However, the 3rd Defendant resigned from being a director of the 1st Defendant on 8th November, 2015 and the same was duly communicated to the 1st Defendant.
5. Further the 1st Defendant met on 8th November, 2015 and confirmed the 3rd Defendant's resignation as a director/shareholder.
6. Subsequently, the 3rd Defendant transferred all of his shares in the 1st Defendant to the 2nd Defendant in November 2015. The 3rd defendant maintains that there is no nexus between him and the 1st Defendant or any of its business or the contracts/disagreements it has engaged in.
7. The 3rd Defendant argues that as a result therefore, the Plaintiff's suit does not disclose any cause of action against the 3rd Defendant as all his liabilities arising from his status as a director/shareholder of the 1st Defendant ceased upon his resignation.
8. The 3rd Defendant has further reiterated that It is thus in the interest of justice that the 3rd Defendant be discharged from these proceedings forthwith and his name be struck out as a party to this suit.

Response

4. The Plaintiff opposed the application through a replying affidavit sworn by the 2nd Plaintiff's former company secretary, Sarah Weru on 13th June 2024 and written submissions dated 2nd July 2024.
5. The main contentions were that the Application is defective as it does not precisely capture the correct Civil Procedure Rule upon which it is anchored; the application is vexatious and an abuse of the Court Process having been brought with unreasonable delay; the Plaintiff filed this suit on 30th September 2019. The 3rd Defendant has always participated in this suit including successfully prosecuting an application to set aside Judgment entered on 16th March 2020, therefore, the present application filed 4 years later is a delay tactic.
6. It was also deposed that the liability of the 3rd Defendant was not pegged on his directorship or shareholding in the 1st Defendant as he executed the guarantees in his capacity and that therefore, he can only be discharged upon payment of the debt due from the 1st Defendant in line with the Deeds of indemnity; the liability of the Defendants is joint and several and the 2nd Plaintiff is entitled to recover from any one of them and the 3rd Defendant in his Statement of Defence stated that he resigned as a director of the 1st Defendant and sold his shares to the company hence his indemnity ceased to operate; that is an issue which has been raised as a point of defence ought to be determined after a full hearing and not through an application.

Analysis and Determination

7. I have considered the application, the grounds, the rival affidavits and submissions. The issue for determination is whether the 3rd Defendant has made a case to be struck out as a party in this suit.
8. Before I delve into the substantive issue, I note that the Plaintiffs raised the preliminary issue of whether the application is defective for being brought under Order 2 Rule 15 instead of Order 1 Rule 10(2) of the Civil Procedure Rules. Under the Constitution, Courts are enjoined to dispense justice without



undue regard to procedural technicalities under Article 159(2) (d) thereof. To my mind, the omission of the mention of Order 1 Rule 10(2) in the application is not a ground for the outright striking out of the application.

9. I now move to the substantive issue. Order 1 Rule 10(2) of the Civil Procedure Rules provides that:-

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

10. The factors for determining whether a party is necessary are whether there a right to some relief against such a party in respect of the matter involved in the proceeding in question and whether it should not be possible to pass an effective decree in the absence of such a party. See *Shah v Shah & 2 others* (Commercial Case E105 of 2022) [2023] KEHC 23193 (KLR) (Commercial and Tax) (6 October 2023) (Ruling) 10. The 2nd and 3rd Defendants are joined in this suit on the allegation that they executed deeds of indemnity in their capacity as directors of the 1st Defendant committing to at all material times, keep the 2nd Plaintiff, the 1st Plaintiff's insurer, indemnified for all claims relating to the breach of contract by the 1st Defendant.

11. The 3rd Defendant argued that the Plaintiffs' suit does not disclose any cause of action against him as all his liabilities arising from his status as a director/shareholder of the 1st Defendant ceased upon his resignation on 8th November 2015.

12. On the other hand, the Plaintiff asserted that the liability of the 3rd Defendant was not pegged on his directorship or shareholding in the 1st Defendant but in his capacity as a guarantor. The Plaintiffs claimed that the 3rd Defendant guaranteed payment to the 2nd Plaintiff in case of default of payment by the 1st Defendant upon written notification and demand by signing a Deed of Indemnity dated 16th September 2015.

13. It is well founded that the power of the court to strike out only ought to be exercised in the clearest of cases as it is a draconian power that risks driving the respondent from the seat of justice. See *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999).

14. Upon considering the above principles and counterarguments, the issue of the 3rd Defendant's resignation from the 1st Defendant is has not been contested by the Plaintiffs. It is also noted by the Court that the Plaintiffs assert that the claim is based purely on the deed of guarantee executed. From my understanding, a guarantee issued by a director to a Company ceases to be of any effect if such guarantee was issued by the director to the Company in his capacity as such.

15. Accordingly, upon considering all the material placed before the Court, I am satisfied that the 3rd Defendant's application dated 24th April 2024 is merited and the same is allowed as prayed. The Court orders and directs each party to bear their own costs of the Application. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI VIRTUALLY this 6TH DAY of DECEMBER 2024.

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J. W. W. MONGARE



JUDGE

In the Presence of:-

1. Mr. Ongeru for the Plaintiffs.
2. Ms. Bulowa holding brief for Mr. Bryan Khaemba for the Defendant.
3. Amos - Court Assistant

