



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E313 OF 2019

INTERNATIONAL AIR TRANSPORT ASSOCIATION....1ST PLAINTIFF

SAHAM ASSURANCE COMPANY KENYA LIMITED....2ND PLAINTIFF

VERSUS

GEORGE TOWN TRAVEL & TOURS LIMITED.....1ST DEFENDANT

GEORGE MWANGI.....2ND DEFENDANT

DAMARIS NJERI MWANGI.....3RD DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated 31st January 2020 in which INTERNATIONAL AIR TRANSPORT ASSOCIATION ('IATA') the 1st Plaintiff and SAHAM ASSURANCE COMPANY KENYA LIMITED the 2nd Plaintiff (hereinafter jointly referred to as 'the Plaintiffs') seek the following orders:-

“1. THAT the Defence dated 16th October 2019 and filed on 22nd October 2019 be struck out and Judgment be entered as prayed in the Plaintiff.

2. THAT the Defendant pays the costs of this application in any event.”

(2) The application which was premised upon Sections 1A & B and 3A of the Civil Procedure Act, Order 2 Rule 15(1) (b) (c) and (d) and Order 31 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law was supported by the Affidavit of even date sworn by KAREN NJAGI the Company Secretary of the 2nd Plaintiff.

(3) The Defendants GEORGE TOWN TRAVEL & TOURS LTD (1st Defendant), GEORGE MWANGI (the 2nd Defendant) and DAMARIS NJERI MWANGI (the 3rd Defendant) opposed the application through the Replying Affidavit dated 24th February 2020 sworn by GEORGE MWANGI the Managing and sole Director of the 1st Defendant. The application was canvassed by way of written submissions. The Plaintiff/Applicants filed their written submissions dated 7th May 2020 whilst the 1st Defendant / Respondent did not file any written submissions.

BACKGROUND

(4) The Plaintiffs instituted this suit vide a Plaintiff dated 28th August 2019 seeking Judgment jointly and severally against the 1st, 2nd and 3rd Defendants for:-

“(a) Kshs. 3,654,362.95 and USD 463,999.60 together with interest thereon at Court rates from 22nd November 2018 until payment in full.

(b) Costs of this suit on an Advocate Client basis and interest thereon at Court rates.”

(5) The Defendant entered appearance in the matter and filed a Defence dated 16th October 2019 in which they prayed that the Plaintiffs

suit against the Defendants be dismissed with costs. The Plaintiffs filed a Reply to the Defendants Statement of Defence dated **31st October 2019**. By the present application the Plaintiffs seek to have the said Defence dismissed and for Judgment to be entered in favour of the Plaintiffs as prayed.

(6) The facts of this dispute as derived from the Plaint dated **28th August 2019** are as follows. By an agreement dated **17th September 2003** the 1st Plaintiff (**IATA**) appointed the 1st Defendant Company as its travel agent for the sale of airline tickets in Kenya. It was agreed that all the proceeds were to be held in trust for **IATA** until satisfactorily accounted for and settlement made. The Defendant Company claimed that the Defendants breached their agreement by failing, neglecting and/or refusing to pay to **IATA** the sum of **Kshs. 3,654,362.95** and **USD 1,114,108.71** derived from the sale of airline tickets during the months of **July, August and September 2018**. That the Defendants further failed to account for and remit monies from the ticket sales.

(7) **IATA** then lodged a claim with **Saham Assurance Company Kenya Ltd** (the 2nd Plaintiff herein) who were the insurers of the specified agents of **IATA** including the 1st Defendant, seeking settlement of the amount owed to it which the 2nd Defendant was obliged to settle upto an amount of **USD 500,000**.

(8) The Plaintiff avers that vide a Deed of Indemnity dated **14th August 2017** executed between the 2nd Plaintiff on the one hand and the 2nd and 3rd Defendants on the other, the Defendants undertook to indemnify and to keep fully indemnified the 2nd Plaintiff against all actions, proceedings, claims, demands, losses and default arising from the Agreement between **IATA** and the 1st Defendant Company.

(9) Through a letter of subrogation dated **22nd November 2018**, the 2nd Plaintiff paid **IATA** the sums of **Kshs. 3,654,362.50** and **USD 463,999.60** to cover the default by the 1st Defendant. Following the default by the 1st Defendant and the subsequent settlement by the 2nd Plaintiff, the Plaintiffs both claim that the 2nd and 3rd Defendant's obligations under the Deed of Indemnity dated **14th August 2017** crystallized making the 2nd and 3rd Defendants liable as per the terms of the Deed of Indemnity. It is on this basis that the Plaintiffs now claim from the Defendants this amount of **Kshs. 3,654,362.95** and **USD 463,999.60**.

(10) Through their Defence the Defendants all deny owing the Plaintiffs the sums claimed in the Plaint. The Defendants further allege that the Deed of Indemnity upon which the Plaintiffs base their claim is of no legal effect due to the failure to have the same registered, sealed and stamped as required by law.

ANALYSIS AND DETERMINATION

(11) I have carefully considered this Notice of Motion, the Affidavit filed in Reply, the written submissions filed in Court and the relevant law. The Plaintiffs contend that the Defence dated **16th October 2019** ought to be dismissed for the following reasons:-

(i) It discloses no reasonable defence in law.

(ii) It is a sham as it contains mere denials.

(iii) It is vexatious, frivolous and scandalous and may delay, embarrass or prejudice the fair trial of the suit.

(iv) It is otherwise an abuse of the court process.

(v) It is in the interest of expeditious disposal of suits that the Defence be struck out and the application be allowed as prayed.

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(12) The Defendant submits that their Defence ought not be dismissed as the same raises cogent and triable issues which they ought to be allowed an opportunity to ventilate through a full hearing of the suit. That striking out of any pleading is a drastic action, which a Court should only resort to in clear cases.

(13) **Order 2 Rule 15** of the **Civil Procedure Rules, 2010** provides for the striking out of pleadings as follows:-

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds

on which it is made.

(3) So far as applicable this rule shall apply to an Originating Summons and a Petition.”

(14) It is trite law that striking out of any pleading is a decision which ought not be taken lightly as its effect is to shut out a litigant without being given the opportunity to be heard. In the celebrated case of **D.T. DOBIE & COMPANY (KENYA) LTD –VS- MUCHINA [1982]KLR** it was held:-

“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, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.” [own emphasis]

(15) In **THE CO-OPERATIVE MERCHANT BANK LTD –VS- GEORGE FREDRICK WEKESA CIVIL APPEAL NO. 54 OF 1999** the Court of Appeal also stated as follows:-

“The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court ... A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment ...” [own emphasis]

(16) Further, in **YAYA TOWERS LIMITED –VS- TRADE BANK LIMITED (In Liquidation) CIVIL APPEAL NO. 35 OF 2000** the Court of Appeal expressed itself thus:-

“A Plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, 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, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable ... No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.” [own emphasis]

(17) I have carefully perused the Notice of Motion dated **31st January 2020**. The Plaintiffs are in effect attempting to argue their suit through this application. The issues and arguments being raised in the application can only properly be considered during a full hearing of the suit **not** at the application stage.

(18) I am in agreement with the holding of **Hon. Justice Jessie Lessitt** in the case of **PIONEER HOLDINGS (AFRICA) LTD –VS- INTRA AFRICA ASSURANCE COMPANY LTD [2008]eKLR** who quoting the decision in the case of **WEST LOCK –VS- MALONEY & OTHERS (1965)WLR 1238** stated as follows:-

“... This summary jurisdiction of the Court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a Cause of Action. To do that is to usurp the position of the Trial Judge and to produce a trial of the case in Chamber ... on Affidavits, only without discovery and without evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the Court and not a proper exercise of the Courts power...”

(19) The Plaintiffs are attempting to conduct a trial through their Motion. The Defendants in my view raises pertinent and triable issues not least of which is the question of the legal effect of the Deed of Indemnity. These are issues which can only be ventilated through a trial of the suit at which parties will be at liberty to call witnesses and adduce evidence.

(20) In the premises I find no merit in this application and I decline to strike out the Statement of Defence dated **16th October 2019**. Accordingly I dismiss the Notice of Motion dated **31st January 2020** in its entirety and award costs to the Defendant/Respondents.

DATED IN NAIROBI THIS 12TH DAY OF MARCH, 2021.

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MAUREEN A. ODERO

JUDGE